BY JAMES DAVIDSON, LL.B., ACCI, FCCI

Condo Cases across Canada

It is my pleasure to provide these brief summaries of recent condominium court decisions across Canada. 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:

SEPARATE CONSTRUCTION DEFECTS CAN GIVE RISE TO SEPARATE CAUSES OF ACTION.

A recent Ontario decision may be of interest across Canada. In the case of *Grey Condominium Corporation No. 27 v. Blue Mountain Resorts Limited,* the Court held that, in a case involving defective construction, there is a separate limitation period with respect to each independently discoverable defect, whether or not the defects were caused by a single act of negligence.

ONTARIO CASE

Grey Condominium Corporation No. 27 v. Blue Mountain Resorts Limited (Ontario Court of Appeal) (May 14, 2008)

The condominium corporation brought a claim respecting three different construction defects. One of the defects was discovered in 1993 and the other two were discovered in 1996. The trial judge held that each defect gave rise to a separate cause of action. Therefore, according to the trial judge, the limitation period had not expired in relation to the defects discovered in 1996. Only the claim respecting the defect discovered in 1993 was statute-barred.

On appeal, the Court of Appeal upheld the decision of the trial judge and confirmed that independently discoverable construction defects may give rise to separate causes of action even if they are caused by a single act of negligence. However, the Court added the following words of caution:

- *"That said, trial judges must be careful to ensure that the deficiencies in question are clearly independently discoverable. Failure to do so could undermine the need for finality in litigation."*

- *"A party should not be allowed to pursue a claim, in a separate action, for damages based on a construction defect arising from the same act of negligence, where the damages sought are simply an attempt to litigate an issue that could have been previously pursued."*

OTHER ONTARIO CASES

Toronto Standard Condominium Corporation No. 1510 v. John Wayne McCauley and Anne McCauley (Ontario Supreme Court of Justice) (June 10, 2008)

Condominium corporation's evidence insufficient

The condominium corporation sought an order requiring the respondents to comply with the *Condominium Act, 1998,* and the declaration, by-laws and rules of the condominium, and for reimbursement of costs allegedly incurred as a result of the alleged violations. The condominium corporation alleged that Ms McCauley had violated sections 27(1) and 116 of the Act by giving direction to the con-

dominium's landscaper. The condominium corporation alleged that Mr. McCauley had breached sections 116 and 117 of the Act by causing damage to the property when he allegedly dyed his hair in the second floor change room.

The Court found that the condominium corporation did not have sufficient evidence of these allegations, and dismissed the application.

Italiano vs. Toronto Standard Condominium Corporation No. 1507 (Ontario Supreme Court of Justice) (July 4, 2008)

Costs of arbitration added to unsuccessful owner's common expenses

The condominium corporation received complaints about noise coming from Mr. Italiano's unit. [The noise was the result of laminate hardwood flooring installed by Mr. Italiano with the consent of the condominium corporation.]

The condominium corporation asked that the noise dispute be referred to mediation. Mr. Italiano did not attend the mediation and the condominium corporation then submitted the matter to arbitration. The arbitrator ruled in favour of the condominium corporation. The arbitrator held that Mr. Italiano was in breach of certain rules of the corporation and certain sections of the corporation's declaration. The arbitrator also ordered Mr. Italiano to pay the condominium corporation's costs on a substantial indemnity basis including the full cost of the arbitration. The arbitrator further ordered that such costs could be collected in the same manner as common expenses (i.e., by condominium lien).

On appeal, the arbitrator's award was largely upheld. On the question of costs, the appeal Court held as follows:

- The arbitrator properly awarded substantial indemnity costs to the condominium corporation.
- Although Section 134(5) of the *Condominium Act, 1998* does not apply to arbitration awards, the condominium corporation was nevertheless entitled to have the arbitration costs collected in the same manner as common expenses, because this was supported by certain provisions in the corporation's declaration. The Court said: *"…it seems to me that a corporation can collect an arbitral costs award in the same manner as common expenses if they are so specified in the declaration. This would allow it to register a lien, pursuant to s.85(1), for unpaid common expenses."*
- The arbitrator, however, did not have authority to include, in his costs award, costs which preceded the delivery of the notice of arbitration (specifically, the costs incurred in relation to the mediation).

Mancuso vs. York Condominium Corporation No. 216 (Ontario Supreme Court of Justice) (May 5, 2008)

Charges for bulk cable television service properly added to common expenses

The corporation entered into a bulk contract with Rogers Cable Systems Limited for the supply of basic cable television services to all units. The costs were charged to each owner as a common expense. Ms. Mancuso objected to paying for that service and withheld payment of that part of her common expenses. The corporation liened her unit. The Court held that the duties of the corporation, as described in its bylaws, *"can reasonably include entering into contracts for the supply of services, such as cable TV or internet, to the unit owners".* The Court accordingly held that the amounts in question were properly added to the common expenses.

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

Appeal dismissed – Commercial owners improperly removed from Board.

The lower Court judge found that commercial unit owners had been unfairly removed from the Board. [See Condo Cases Across Canada – Part 20, November 2007.]

On appeal, the decision was upheld. However, the Court of Appeal did make the following change to the decision of the lower Court: The Court of Appeal said that the corporation's by-law (respecting composition of the Board) could not be enforced. Instead, the Court of Appeal ordered that the by-law be amended to provide for a five-member Board, comprised of the following: two residential unit owners, two commercial unit owners (all four elected by majority vote of all unit owners) and a fifth member elected in the manner set out in the by-law.

ALBERTA CASE

Maverick Equities Inc. v. The Owners Condominium Plan 9422336 (Alberta Court of Appeal) (June 11, 2008)

Dispute relating to a proposed mezzanine

This is a commercial condominium. Maverick owns 1 of the 132 units in the condominium. A number of the owners had constructed mezzanine floors within their units, and Maverick wanted to do the same.

The by-laws of the condominium corporation required the Board's consent for certain changes (including the installation of a mezzanine floor). The condominium corporation had also adopted rules which included various terms for the approval of renovations, including mezzanines. The rules were adopted by a simple majority of the members. However, they were not enacted by special resolution (a 75% majority) or registered at the land titles office in accordance with section 32 (3) of the *Condominium Property Act* [as is required for amendments to by-laws].

The Chambers Judge held that the rules were not enforceable and that Maverick was accordingly entitled to proceed with the installation of the mezzanine provided it complied with the condominium's registered by-law and the development requirements

of the City of Edmonton. *[See Condo Cases Across Canada, Part 19, September 2007]*

The Court of Appeal set aside the ruling of the Chambers Judge. The Court of Appeal said that the rules, if reasonable, were properly enforceable as policies of the Board (relating to the granting of the Board's consent). The Court of Appeal said:

> ***"The Board is entitled to some considerable scope as to how it will exercise his (sic) discretion in granting or withholding consent, and there is nothing objectionable to the Board setting down rules and regulations as to how its discretion will be exercised in the normal course. Writing down the rules and regulations has many advantages. It gives unit owners a clear idea of what will be expected of them. Having the rules approved by the unit owners gives them added legitimacy. It brings greater transparency and equality to the process, because the provision of consent on the basis of the established rules will have a known source."***

The Court of Appeal said that the only question was whether or not the policies listed in the rules were reasonable. The Court of Appeal accordingly returned the matter to another judge of the Court of Queens Bench "for an adjudication of the allegation that the Board has unreasonably withheld its consent".

NOVA SCOTIA CASE

McDonald vs. Halifax County Condominium Corporation No. 9 (Nova Scotia Small Claims Court) (April 24, 2008)

Owner responsible to repair and to insure unit

This was a claim by a condominium unit owner against her condominium corporation for the cost of repairs to the interior of her unit, caused when her hot water tank leaked. The owner argued that, because the condominium corporation had insurance against this type of damage, the corporation should be required to pay for the damage.

The Court dismissed the claim. The Court's reasons were as follows:

- The corporation's declaration stated that the owners were responsible to repair their units after damage.
- Under the terms of the declaration, the corporation was obligated to obtain unit insurance. However, this obligation did not apply in this case because the duty to repair the unit had been *"transferred via the declaration to the owner".* The Court said: *"In my opinion the obligation imposed on the corporation by Article 4.18 (3)(A)(b) of the declaration to insure the cost of repairing the unit has to be read in the context of who has the primary duty to repair that unit."*
- The owner was obligated to arrange insurance for the unit because the owner was obligated to repair the unit.

B.C. CASES

Peter Kane v. The Owners Strata Plan LMS 2373 (Supreme Court of British Columbia) (July 26, 2008)

Strata corporation met its obligations respecting records

The petitioner, an owner in the strata corporation, asserted that the corporation had failed to produce all documents that it was required to keep and to make available pursuant to the *Strata Property Act.* The owner also asserted that the corporation had failed to make reasonable efforts to recover documents in electronic form that had apparently been lost or deleted.

In particular, the owner asserted that the strata corporation had failed to produce minutes of certain meetings as well as certain email correspondence that took place between strata Council members.

The Court said that the strata corporation had met its obligations, and dismissed the application. The Courts reasons included the following:

- The *Strata Property Act* does not require that the corporation keep all correspondence between individual members of Council that may or may not relate to the business of the corporation.
- The *Act* requires that the corporation keep minutes of meetings at which decisions are taken. There is no need to keep minutes of informal meetings or discussions at which no decisions are taken.

Dorman v. Owners Strata Plan LMS 784 (British Columbia Court of Appeal) (October 18, 2007)

Secret ballot vote to remain secret

A decision about how certain repairs were to be carried out was taken by secret ballot at a meeting of the strata corporation. An application was made to have the secret ballot opened up to determine how the votes were cast. The application was dismissed, and the dismissal was upheld on appeal.

Shaw v. The Owners Strata Plan LMS 3972 et al (Supreme Court of British Columbia) (April 16, 2008)

Court agrees to reallocate water and sewer expenses

This is a mixed-use condominium, consisting of 16 commercial strata lots and 7 seven residential strata lots. There was a dispute between the commercial and residential owners respecting allocation of common expenses.

> The Court declined to reallocate other common expenses.

The Court agreed that water and sewer expenses should be reallocated to redress significant unfairness within the meaning of Section 164 of the *Strata Property Act.* The Court held that the commercial owners had

acted in a significantly unfair manner in voting down a resolution which would have achieved a fair reallocation of those expenses. The Court declined to reallocate other common expenses. Although other common expenses had been proven to be unfairly allocated, the Court said that *"there is no evidence before this Court which would allow the Court to conclude that any disproportionate use of these expenses results in significant unfairness".* In the absence of "significant unfairness", the Court would not order any reallocation of those other expenses.

The Owners, Strata Plan NW 499 v. Kirk (Supreme Court of British Columbia) (June 13, 2008)

Age restriction in strata corporation by-law valid and enforceable

The strata corporation's by-laws included the requirement that "all residents must be the age of 55+ over, except as a casual visitor". The Court confirmed that, subject to Section 123(2) of the *Strata Property Act,* such age restrictions are valid and binding in British Columbia (provided the by-law has been properly passed). [Section 123(2) of the *Strata Property Act* states that such by-laws do not apply to a person who resides in a strata lot at the time the by-law is passed and who continues to reside there after the by-law is passed.]

Shaw Cablesystems Limited v. Concorde Pacific Group Inc. (British Columbia Court of Appeal) (June 5, 2008)

Appeal dismissed – statutory easements do not give owners absolute rights to install services or facilities in the common property

The lower Court held that statutory easements contained in Section 69(1)(b) of the *Strata Property Act* did not entitle owners to install new services through the common property. [See Condo Cases Across Canada – Part 22, May 2008.]

This decision was upheld by the British Columbia Court of Appeal. The Court of Appeal said, however, that any owner could seek to enforce the owner's right to make reasonable use of the common property by applying to the strata Council for whatever service the owner might desire. The owner's rights could only be determined in the context of any such request.

Clarke v. The Owners Strata Plan VIS770 (Supreme Court of British Columbia) (March 20, 2008)

Court declines to declare election invalid, but agrees to appoint administrator

There were various disagreements between the owners of this eight-unit strata corporation. The petitioners sought to invalidate a contested strata Council election because of denial of proxy votes of two owners. The petitioners also sought the appointment of an administrator to manage the strata corporation.

Although the Court agreed that the strata Council's actions were significantly unfair (in refusing to accept the particular proxy votes), the Court declined to invalidate the election for the following reasons:

- There was no bad faith;
- The proxy votes would not have changed the results of the election; and
- Over one year had passed between the date of the disputed election and the commencement of the petition.

The Court did, however, agree to appoint an administrator because of the "highly dysfunctional state of affairs".

Oldaker v. Strata Plan VR 1008 (Supreme Court of British Columbia) (March 20, 2008)

Strata corporation did not act with sufficient haste

This is a dispute between the petitioner and the strata corporation about whether or not the corporation has properly fulfilled its repair and maintenance responsibilities.

At the initial hearing, the Court held that the strata corporation had generally fulfilled its repair and maintenance responsibilities. [See Condo Cases Across Canada, Part 19, September 2007] The petitioner was subsequently successful on an application to have the matter re-opened in order to allow the petitioner an opportunity to adduce further evidence of the corporation's failure to properly maintain and repair the building.

At a further hearing, the Court agreed that the strata corporation had failed to arrange for required work with sufficient haste. The Court also agreed that water damage may have been caused to the petitioner's strata lot as a result. However, before making any specific orders, the Court said that it required *"evidence of what work is reasonable and necessary, what is required for that work and the commitment of the petitioner not to interfere with the work".* The Court said that the *"petitioner will have liberty to apply for such further orders or directions as may be reasonable to necessary to cause the respondent to comply with its statutory duties".*

B.P.Y.A. 1163 Holdings Ltd. V. The Owners, Strata Plan VR 2192 (Supreme Court of British Columbia) June 2, 2008

Parking stalls not properly allocated by strata corporation Excess user charges not lawful

The Court ordered that additional parking spaces be allocated to the petitioner, for its exclusive use. The Court said that the strata corporation had not allocated parking spaces in accordance with its own by-laws or the zoning by-laws of the City of North Vancouver.

The by-laws of the strata corporation purported to allow the corporation to charge "excess user charges" to any owner if the corporation incurred increased or disproportionate expenses as a result of that owner's activities. The Court held that this provision was not permitted by the previous *Condominium Act* or by the current *Strata Property Act*.

James Davidson, LL.B., ACCI, FCCI,
Nelligan O'Brien Payne LLP,
Ottawa, ON