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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:

WHAT IS THE RIGHT OF ONTARIO CONDOMINIUM CORPORATIONS TO SUE ON BEHALF OF THEIR UNIT OWNERS?

A recent Ontario Superior Court decision raises serious questions about the rights of Ontario condominium corporations to sue on behalf of their unit owners. The decision is under appeal – so we will be receiving a higher ruling on the point. This issue is as follows.

Section 23 of Ontario's *Condominium Act* outlines the circumstances under which Ontario condominium corporations can sue on behalf of their owners. That section was essentially designed to give condominium corporations "class actions rights" on behalf of their owners, for various types of claims. But how far do those rights extend? The recent Court decision seems to say that these rights are seriously limited. My hope, for condominium corporations and their unit owners, is that Ontario's Court of Appeal will recognize the long-held consumer protection purposes of the *Condominium Act* and therefore will overturn the lower court decision, on appeal. Here's a summary of the lower Court decision:

ONTARIO CASE

Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc. (Ontario Supreme Court of Justice – Ontario) (December 18, 2007)

Condominium Corporation lacks the authority to assert certain claims on behalf of unit owners

The condominium corporation started a lawsuit against the condominium's developer. The lawsuit contained various claims, including claims asserted on behalf of the unit owners. One of the claims asserted on behalf of the unit owners was for a declaration that the developer had failed to comply with a ruling of the Ontario Securities Commission relating to the sales of the units (and for damages resulting from this non-compliance). The Court ruled that the condominium corporation did not have authority to assert this claim under Section 23(1) of the *Condominium Act.*

Section 23(1) states as follows:

23. (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,

(a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and

(b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.

The Court's reasoning included the following:

• Both parties appear to be agreed that the word "damage" contained in

sub-paragraph (a) of paragraph 23(1) of the *Act*, refers to physical damage,." Metropolitan Condominium Corporation No. 858 v. Tornat Construction Inc., 1994 OJ#476

• "The question then becomes whether or not the present action has been brought "with respect to a contract involving the common elements or a unit"."

• "Unquestionably for the acquisition by the owners of each unit there has been a separate contract of Purchase and Sale. However as was made clear in the Commission's Ruling, each purchaser was entitled but not required to enter into a contract to participate in the rental management pool. Each such agreement was the subject matter of a separate agreement. The only connection between it and a corresponding purchase of the related unit is that acquisition of the unit entitled the purchaser to become a participant. The two appear to me to be severable, the one for the acquisition of realty and the second to be a form of investment."

• "The pleading makes no reference to a contract but rather is based upon the directions of a government established regulatory body made to the plaintiff (sic-should read defendant). Unquestionably the plaintiff (sic-should read defendant) has an obligation to follow and implement the instructions of the Commission but that obligation is owed to the Commission and to individual unit owners. It is not, in view, owed to the corporation."

[Editorial Notes:
1. I am not sure that I agree with this decision. I don't see why the claims in question were not claims "with respect to a contract involving the units" (namely the sales contracts), as set out in Section 23. It seems to me that the ruling of the Commission was essentially a condition or added obligation relating to those sales contracts. The Commission's ruling served only to benefit or protect original purchasers of units in the condominium.

2. The decision is under appeal to Ontario's Court of Appeal.]

OTHER ONTARIO CASES

York Region Condominium Corporation No. 890 v. 1610875 Ontario Ltd. (Ontario Supreme Court of Justice) (October 25, 2007)

Disagreement respecting Declaration subject to mandatory mediation and arbitration under Section 132 of the *Act*

This case involved a dispute between the condominium corporation and a tenant respecting the tenant's use of one of the units. [The owner of the unit, the numbered company ("161") was also a party to the dispute, but took a neutral position, arguing that this was a dispute between the condominium corporation and the tenant.]

The condominium corporation asserted that the tenant was using the unit as a "restaurant", in contravention of the Declaration. The tenant asserted that the use was not prohibited by the Declaration.

161's legal counsel had suggested that the parties proceed to mediation, in accordance with Section 132 of the *Condominium Act 1998*, but the condominium corporation had instead commenced a Court proceeding, seeking a cease and desist order, under Section 134 of the *Act.*

The Court said that the disagreement was subject to mandatory mediation and arbitration under Section 132(4) of the *Act* and that the Court proceeding could only proceed if those mandatory procedures failed.

The Court said:
In these circumstances, I am satisfied that Sections 132 and 134 of the *Condominium Act* apply…. Section 132(4) incorporates in the Declaration a provision that the plaintiff and the owners agree to submit to mediation and arbitration "a disagreement between the parties" with respect to the Declaration. I believe there is sufficient "disagreement" between the plaintiff and 161 for the purposes of section 132(4). The latter does not now concede that the interpretation advanced on behalf of the Plaintiff is correct…

[Editorial Comment: Previous cases have confirmed that the mandatory mediation and arbitration provisions of Section 132(4) of the Act do NOT apply to disagreements or disputes between a condominium corporation and a tenant. It seems to me, then, that the corporation's dispute against the tenant, in this case, should have been permitted to proceed by way of Court process.]

Niagara North Condominium Corporation No. 125 v. Joanne Kinslow (Superior Court of Justice – Ontario) (November 6, 2007)

Court upholds "no pets" provision in Declaration, and also finds no discrimination.

This case involved a dispute between the condominium corporation and a tenant respecting the tenant's use of The condominium corporation made application for removal of the owner's two cats. The condominium corporation relied on "no pets" provisions contained in both the declaration and the rules of the condominium.

A "No Pets" rule is not enforceable. Rules must be "reasonable". Complete prohibition of all pets is not reasonable.

The Court held as follows:
• A "no pets" rule is not enforceable, because condominium rules must be "reasonable" and a complete prohibition of all pets is not reasonable.

• However, a condominium declaration is not subject to the requirement that it be reasonable, and the "no pets" provision in the declaration was accordingly enforceable. The Court said:

Thus, a declaration that is unreasonable can still be valid – as long as it is not unfair in the circumstances (with unfairness being gauged in accor-

dance with the law and not the sensibilities of a particular respondent).

• Requiring the removal of the cats would not amount to discrimination under the *Human Rights Code*, in this case. The Court said:

However, for me to find the discrimination necessary to defeat the Declaration, the no-pets provision must have the effect of preventing the respondent from living in her unit (as in Waterloo North Condominium Corporation No. 198 v. Donner, supra, where it was held that barring an occupant's "hearing-ear dog" from being kept in a condominium unit would prohibit the occupant from residing in her unit, because the dog was necessary for her to function independently). That is not the situation here. There is no evidence that the respondent is unable to live without her cats. Certainly, they are a comfort to her and, no doubt, her preference is to live with them rather than without them, but the evidence does not support a finding that she is so physically, emotionally or otherwise medically dependent upon them that she cannot live without them.

• The Court noted that applying the Declaration is always within the Court's discretion, but said:

Because the respondent has not shown that her cats are a necessity, there is no legitimate basis upon which to decline the exercise of my discretion in favour of the Corporation.

Note that this was the SAME Judge who had allowed two other cats to stay in the SAME condominium. [See previous decisions involving the same condominium and another resident, Waddington, in *Condo Cases Across Canada*, parts 10 (May 2005), 13 (February 2006), 14 (May 2006) and 18 (May 2007).] In this case, the resident, Joanne Kinslow, referred to that previous decision and asserted that, in light of that decision, the condominium corporation's proceeding against her constituted an "abuse of process".

To this, the Court said:
There are important factual distinctions between Waddington and the application now before the court. They are found in paragraph 2 of the respondent's affidavit. Paragraph 2 contains material facts that were not present in Waddington, thereby rendering inapplicable the doctrine of abuse of process. …..in her affidavit, at paragraph 2 set out above, she deposes that, before she moved into the condominium complex, she "got rid of" the one cat she had then, because she was made aware that pets were not allowed. In other words, at that time she was both willing and able to occupy her unit without a pet; today she may be unwilling, but she still is able, to do so.

The Court accordingly ordered that the two cats be removed.

[Editorial Notes: 1. To begin, I note that there was no suggestion of mandatory mediation and arbitration in this case. The Court apparently accepted that the Corporation had the right to proceed by way of Court application under Section 134 of the Act…perhaps because there was no disagreement about the presence of the cats or about the fact that the Declaration indeed contained a "no pets" provision. In other words, there arguably was no "disagreement respecting the Declaration".

2. I'm not sure how to interpret the Court's discussion about "fairness" in the context of the Declaration. I believe that the Courts have previously been very clear in stating that there is no requirement that a condominium Declaration be "fair". The requirement is that the application of the Declaration not result in discrimination within the meaning of the Human Rights Code – but fairness is otherwise not an issue. Having said the foregoing, as I read the Court's conclusions in this case, perhaps the Court is really not saying anything different. In other words, the Court seems to equate "fairness" with the human rights issues.

3. The distinction drawn between this case and the Waddington case is most interesting. I wonder: Is the Court saying that Waddington was decided differently simply because, in the Waddington case, the cats

really were "necessary" to the resident? If so, that would seem to me to be important new information about the Waddington case.]

Brooker v. Independence Way Inc. (Superior Court of Justice - Divisional Court - Ontario) (November 16, 2007)

Change in location of furnace constituted a fundamental change to the agreement of purchase and sale

The plaintiff, Brooker, had agreed to purchase a condominium unit from the defendant, Independence Way Inc. The defendant changed the location of the furnace as compared to plans which were shown to the plaintiff at the time of the purchase. The Small Claims Court held that the change was not fundamental.

On appeal, the Divisional Court overturned the decision of the Small Claims Court and held that the change was fundamental, thereby entitling the plaintiff to cancel the agreement.

The Divisional Court's decision included the following:

• If the plaintiff had known of the change of the location of the furnace, he would not have entered into the agreement of purchase and sale. The Court said: "This evidence goes to the question of whether the change was a fundamental change."

• According to the evidence, prospective purchasers (introduced to the unit by the plaintiff in the course of attempting to solve the problem) lost interest in purchasing the unit when they found that the furnace had been located in the front hall closet. The Court said, "This objective evidence goes to the question of the nature of the change."

• "Schedule 'B' to the agreement of purchase and sale, which contains an acknowledgement by the Brookers that the location of the furnace is to be determined by the architect, may not be located as shown on the brochure and they shall be deemed to accept any such change, cannot be construed as unlimited and does not apply to fundamental changes.

Middlesex Condominium Corporation No. 185 v. Roney Construction Limited (Ontario Supreme Court of Justice – Divisional Court (November 16, 2007)

Court refuses to entertain judicial review of Arbitration decision

The parties to a construction arbitration had agreed that the arbitrator's decision would be "final and binding and that there shall be no appeal either on matters of fact or law".

The *Arbitration Act* contains statutory rights of appeal, but Section 3 of the *Act* permits the parties to an arbitration agreement to vary or exclude any provision of the *Act* by express or implied agreement. [So, for example, the parties can agree to forego the rights of appeal that can be found in the *Arbitration Act*.] However, the parties cannot contract out of certain provisions of the *Act*, including Section 46, which contains limited provisions for setting aside an arbitration award, even in the absence of an appeal right. The Court said: "The threshold issue before this Court today is whether the Court can, or should, entertain an application for judicial review given the alternative procedure available to the applicant under Section 46." The Court's answer was "No." The Court said, "In the circumstances before us, Section 46 of the *Arbitration Act* provides an adequate alternative remedy." The Court then granted an extension of the time for bringing an application under *Section 46* of the *Arbitration Act*, assuming the condominium corporation would wish to do so.

Jaworoski v. Peel Condominium Corporation No. 452 (Ontario Superior Court of Justice) (December 18, 2007)

Court upholds validity of lien

The owner challenged the validity of a lien registered by the condominium corporation. After receiving confirming evidence as to the common expense arrears, the Court upheld the lien and the associated legal fees. The Court said that the legal fees "do not appear to be out of line and were not incurred (as pleaded by the plaintiff) as 'unnecessary'".

Bahadoor v. York Condominium Corporation No. 82 (Ontario Superior Court of Justice) (November 22, 2007)

Administrator discharged and legal costs approved

The Court approved the administrator's final report and granted an Order releasing any claims against the administrator and authorizing payment of the administrator's fees. The administrator's legal costs were also approved, with a slight reduction. The condominium corporation was of course required to pay all of the approved fees.

ALBERTA CASE

Kolias v. Owners Condominium Plan 309 CDC (Alberta Court of Queen's Bench) (November 29, 2007)

Restrictive covenant upheld

A restrictive covenant was registered in 1971 against a lot adjacent to the condominium property. Among other things, the restrictive covenant prohibited construction of structures beyond certain heights upon certain areas of the effected neighbouring lot.

The neighbour challenged the validity of the restrictive covenant.

The Court held that the restrictive covenant was valid and could properly "run with the land", so as to be binding upon all owners, from time to time, of the neighbouring property.

One of the arguments advanced by the neighbouring owner was that the restrictive covenant was not valid because the land registrar failed to arrange for registration of a memorandum reflecting the restrictive covenant upon both the dominant and servient lands. The Court rejected this argument.

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