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Condo Cases across Canada

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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:

ALBERTA COURT ORDERS THAT TENANTS BE SUBJECT TO CONDOMINIUM CORPORATION APPROVAL.

A Court in Alberta has imposed special restrictions upon a landlord who has had a history of selecting "bad" tenants. Henceforth, that landlord's chosen tenants must be approved by the condominium Board.

To my knowledge, this is a first in Canada – but I'm guessing that it may not be the last time we see such an order.

On many occasions, I've been asked about the idea of adding such a "tenant screening" provision to a condominium's Declaration, By-laws or Rules. There is room for debate about the validity of such a provision. But, leaving that issue aside, I've also felt that such a provision could be "dangerous" because of the risks of a claim against the condominium corporation in the event that a tenant is in fact rejected by the Board. [One can imagine claims for lost rent and perhaps claims of Human Rights violations.] Screening tenants could be a risky business.

But I wonder: Are these risks reduced if the screening is authorized, in relation to a specific landlord, by a Court order?

ALBERTA CASE

The Owners: Condominium Plan No. 822 2909 v. Li (Court of Queen's Bench of Alberta) (November 14, 2007)

Owner not responsible for deductible relating to water escape damage. However, special conditions imposed respecting owner's selection of tenants.

Damage was caused to a number of units and to common property when water escaped from a waterline. The water line had been punctured by a bullet. The water line was located in a unit adjacent to Unit 205. Unit 205 was owned by the defendant, and occupied by the defendant's tenants. The condominium corporation believed that the bullet came from Unit 205.

The damage was covered by the corporation's property insurance, subject to a deductible of $5,000. The condominium corporation sought to recover the deductible from the owner of Unit 205.

The Court said:
"There are several theories advanced as to the source of the bullet that caused the damage, but in my opinion none is more preferable than the other."

The Court could not say who was to "blame" for the bullet or the resulting damage. The Court accordingly said that "there would have to be either legislation or condominium by-laws that would impose strict liability in circumstances like this" in order to hold the owner responsible for the deductible. The Court said that there was no such legislation or by-law in this case, and accordingly held that the unit owner was not liable for the $5,000 deductible.

In its application, the condominium corporation also requested restrictions or conditions upon the owner's selection of tenants. The Court

agreed to grant such an order. The Court said:

"I am satisfied from the evidence as a whole that the respondent has not exercised due diligence in his selection of tenants. The incidence of notice violations and smoke violations and police intervention with occupants of the respondent's premises far exceeds the average of such incidents with other unit holders that are tenant-occupied."

The Court granted an order, which included the following:

• Tenant applications received by the owner must be forwarded to the condominium Board for approval or rejection within the Board's reasonable discretion;

The owner must immediately evict any tenant upon written request from the Board

• The owner must provide copies of the condominium's By-laws to all approved tenants;

• The owner must immediately evict any tenant upon written request from the Board (where the Board concludes that there has been a violation of the condominium's By-laws).

ONTARIO CASES

Metropolitan Toronto Condominium Corporation No. 1143 v. Li Peng (Ontario Superior Court of Justice) (January 22, 2008)

Condominium corporation obligated to resolve disagreement through arbitration

The condominium corporation commenced a court application (pursuant to Section 134 of the *Condominium Act, 1998*). The corporation alleged that the owner and other occupants of the unit had conducted themselves in a loud and disturbing manner in contravention of the corporation's Declaration, and had brought a dog into the building in contravention of one of the corporation's rules. The owner denied that there had been any loud or disturbing behaviour. The owner admitted to having a dog in the unit, but stated that the dog remained in the unit only for a week and was removed immediately following the corporation's initial warning letter.

The key question for the court was as follows:

Does the dispute between the parties constitute a "disagreement" within the meaning of Section 132(4) of the Condominium Act, 1998, thus triggering mandatory mediation and arbitration contemplated by that section?

The Court's answer was "yes". The Court said that mandatory mediation and arbitration applies to "disagreements about the validity, interpretation, application, or non-application of the Declaration, By-laws and Rules". The Court said that the issues raised in this case are "issues involving the interpretation and application of the corporation's Declaration and Rules", and accordingly constitute a "disagreement" within the meaning of Section 132(4) of the Act.

The Court also noted that the above conclusions appeared to be supported by the fact that the corporation's legal counsel, in its initial letters to the owner, made reference to mediation and arbitration. The owner did not respond to those initial letters, and the Court agreed that mediation accordingly was "not available". But this did not entitle the corporation to commence a Court application, because arbitration was nevertheless available. The Court noted that the corporation could pursue arbitration even if the owner failed to participate in the arbitration process.

The Court application was accordingly dismissed and costs were awarded to the owner.

Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc. (Ontario Superior Court of Justice) (April 3, 2008)

Additional discovery and production rights arise when condominium corporation sues on behalf of owners

The condominium corporation asserted a claim on its own behalf and on behalf of the owners, seeking damages of $20 million for alleged deficiencies in both the common elements and the individual units. The Court said that, in cases where a nominal party (in this case the condominium corporation) asserts a claim on behalf of a beneficiary (in this case the unit owners), the Rules of Court [Rule 31.03(8)] give the defendants a right to examine the beneficiaries for discovery. Furthermore, the Rules of Court place an obligation upon the nominal party to produce relevant documents which are in the possession, control or power of the beneficiary [even if those documents are not in the possession, control or power of the nominal party].

The Court accordingly ordered the condominium corporation to produce agreements, completion certificates, and negotiation correspondence from each unit owner relating to the alleged deficiencies. The Court said that those documents "are relevant, and the request for those documents is not abusive, onerous, or otherwise improper." The Court did not order the condominium corporation to produce various other documents sought in the notice of motion (but said that the defendants might have the right to make a further request for production of those other documents based upon additional evidence that may be revealed during the Court process).

York Region Condominium Corporation No. 772 v. Lombard Canada Ltd. (Ontario Court of Appeal) (April 14, 2008)

Insurer unsuccessful on appeal

The condominium corporation obtained judgment against a contractor for damages resulting from

the contractor's defective work. Lombard was the contractor's insurer, under a comprehensive liability insurance policy. At the lower Court, Lombard was found to be liable under its insurance policy. [See Condo Cases Across Canada, Part 18, May 2007.]

Lombard appealed to the Ontario Court of Appeal. The Appeal was dismissed. The Court of Appeal held that the foundation damage was damage to "third party property", rather than damage to the contractor's "own work". The Court of Appeal also concluded that the damage resulted from an "occurrence" under the terms of the policy. The Court of Appeal accordingly held that the damage was covered by Lombard's policy.

MANITOBA CASE

Winnipeg Condominium No. 30 v. The Conserver Group Inc. (Manitoba Court of Appeal) (February 15, 2008)

Limitation period extended

The condominium corporation's application for leave to commence an action after the expiry of a limitation period was dismissed by the lower Court. The condominium corporation appealed to the Manitoba Court of Appeal, and was successful on appeal.

The condominium corporation sought leave to commence a Court Claim in relation to damages to its heating and cooling system. The condominium corporation alleged that the damages were the result of mistakes made by the engineering firm that provided mechanical design services and by the contracting firm that performed the actual remedial work to the heating and cooling system. The Manitoba Court of Appeal agreed that the condominium corporation did not have "knowledge of material facts of a decisive character" upon which to base the action until less than twelve months prior to the condominium corporation's application. The corporation was accordingly granted leave to commence the claim.

The east side of the condominium building is subject to excessive heat generated by sunlight.

OTHER ALBERTA CASES

Condominium Plan 7722911 v. Marnel (Alberta Court of Queen's Bench) (March 25, 2008)

Owner ordered to remove window tinting

The east side of the condominium building is subject to excessive heat generated by sunlight. The respondent owner accordingly suggested that the Board consider coating the windows of the condominium with a film as a solution to this problem. The Board did not decide to coat all windows, but decided to allow the respondent to install a clear film on the east windows of her unit, at her expense. The respondent then asked that the Board approve a "Solar Bronze film", which is slightly darker and bronze-coloured, because "the heat generated by the sun would be cut by a much greater degree" by such tinted film (as opposed to clear film). The Board refused the request for bronze-tinted film on the grounds that the tinted film would compromise the external visual integrity of the building. The respondent nevertheless arranged for the installation of the Solar Bronze film, because the installation firm told her that the film could be removed if necessary.

The Court said that the respondent's actions contravened the corporation's By-laws, which prohibited any alterations to the exterior appearance of the building. The respondent was ordered to remove the bronze-tinted film.

934859 Alberta Inc. v. Condominium Corporation No. 0312180 (Court of Queen's Bench of Alberta) (October 24, 2007)

Condominium corporation had not acted unfairly. Condominium corporation successful on appeal

The lower Court (Master) had determined that the condominium corporation had failed to allocate expenses fairly [see Condo Cases Across Canada, Part 16, November 2006]. The condominium corporation appealed the Master's order, and was successful on appeal. The appeal judge concluded as follows:

• *"I note that the hearing before me is a de novo hearing. The evidence on which the learned Master relied for his decision was, in my view, incomplete and in respect of some material and important aspects incorrect. Substantially more information and evidence has been placed before me. As well, the submissions of Condo Corp. were more expansive and not substantially limited to a jurisdictional question."*

• *"A review of the cases submitted indicates that a Court should defer to elected boards as a matter of general application… a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction, and substitute its opinion about the propriety of the board of director's opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation."*

• *"… the evidence does not establish or demonstrate that there has been any improper conduct on the part of Condo Corp. or the board of directors. In my view neither the Condo Corp. nor the board of directors have unfairly disregarded the interests of 934859. Nor have they conducted the business affairs or exercised powers in a manner that was oppressive or unfairly prejudicial to 934859 or to the other first floor owners. In the result, the application of Condo Corp. is granted and the order of the learned Master is set aside."*

B.C. CASES

Sidhu v. Owners Strata Plan VR1886 (Supreme Court of British Columbia) (January 24, 2008)

Modifications not approved by strata corporation

The plaintiff operated a dry-cleaning business out of three of the strata lots. He had made various renovations (including modifications to common property) which he said had been authorized by the strata council. The strata corporation said that it had never given more than agreement in principle and that final agreement was subject to review of all drawings and permits for the proposed work.

The plaintiff sued for an injunction to prevent the strata corporation from withdrawing its approval, or alternatively for damages resulting from such withdrawal.

The Court found in favour of the strata corporation. The Court agreed that the modifications were never finally approved. The Court also noted that some of the modifications violated the by-laws of the strata corporation and the standard by-laws of the *Strata Property Act.*

The Court accordingly made various orders for a detailed disclosure and review of the modifications and for approval and/or reversal of the modifications. The Court also made orders for recovery of costs incurred by the strata corporation, but did order a reduction of fines imposed by the strata corporation.

Shaw Cablesystems Limited v. Concord Pacific Group Inc. and Novus Entertainment Inc. (Supreme Court of British Columbia) (August 9, 2007)

Statutory easements in favour of strata lot owners do not entitle owners to install new services

Shaw challenged Concord's policy of refusing to allow Shaw to install telecommunications infrastructure in strata properties developed by Concord. Shaw relied upon the statutory easements "through the common property" in favour of each strata lot owner contained in Section 69(1)(b) of the *Strata Property Act.*

The Court said that Section 69(1)(b) simply confirms that each strata lot has a right to benefit from the services selected by the strata corporation, but not a right to arrange for installation of new facilities through the common property.

Smith v. The Owners, Strata Plan VIS4673

Court considers validity of By-law reducing assessment for unimproved strata lots

While the developer owned the bulk of the strata lots, the strata corporation passed a By-law which purported to grant a 50% reduction of the semi-annual assessment to any owner, including the developer, "that is the registered owner of three (3) or more strata lots that have unimproved private yard areas." This By-law remained in effect for several years, resulting in estimated reductions of strata fees (for certain owners – including the developer) totaling approximately $60,000.

The petitioners, being the owners of some of the strata lots, sought an order that the By-law be declared invalid and that the strata council be directed to collect the "lost" fees.

About two weeks following the filing of the petition, at the corporation's 8th Annual General Meeting, a motion rescinding the By-law was carried. But, at the same meeting, a motion "that council be directed to pursue the alleged issue of underpaid strata fees" was defeated.

The Court offered the non-binding opinion that the By-law was void because it contravened both the former *Condominium Act and the Strata Property Act.* The Court said, however, that the issue of the validity of the By-law should not be decided by the Court, because the issue is moot. The By-law had been rescinded. Furthermore, the owners in a general meeting had voted not to seek recovery of the lost strata fees, and "no evidence was presented to show that the attitude of the majority of the owners has changed since that meeting". The Court accordingly held that "the decision of the Court will not have the effect of resolving some controversy which affects or may affect the rights of the parties".

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