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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:

COURT ORDERS SALE OF UNIT AFTER LENGTHY HISTORY OF PROBLEMS DUE TO OWNER'S MENTAL ILLNESS

ONTARIO CASE

Metropolitan Toronto Condominium Corporation No. 946 v. J.V.M. (Ontario Superior Court of Justice) (December 29, 2008)

The owner, J.V.M., suffered from paranoid schizophrenia. In the fifteen years that she lived in her unit, her symptoms varied in intensity, but there were numerous problems, including noise (screaming, banging, profanity), foul odours, accumulation of debris in the unit, fire hazards, insect infestations, etc. This "cycle" of problems was expected to continue despite ongoing psychiatric treatment, ongoing support from the owner's outreach worker and the owner's limited family support. The Court said that the owner's illness was a disability under the Human Rights Code. Therefore, the condominium corporation had a duty to accommodate the owner, to the point of undue hardship. The Court said that the condominium corporation had fulfilled this duty.

The Court reviewed the fifteen-year history, which included numerous complaints, unit inspections, dealings with police, dealings with doctors, paramedics and other health officials, dealings with social workers and family members, dealings with fire officials, dealings with sanitation contractors and unit clean-ups, dealings with the Office of the Public Guardian and Trustee, and Court proceedings. Again, the Court said that the condominium corporation had a duty to this disabled owner, but also had obligations to the other owners. The hardship of the accommodation was ultimately borne by the other owners and the Court was required to balance the interests of the disabled owner and all other owners.

The Court was also required to consider a previous Court Order, made in 2004. At that time, another Judge had reviewed the history up to 2004, and had made the following Orders:

- An Order for regular inspections of the unit, at times to be determined by the condominium corporation;
- An Order that, in the event of non-compliance with the requirements of the Act and the Declaration, By-laws and Rules of the corporation, "there shall be an Order requiring that the respondent vacate her unit and list the same for sale".

Although the owner had subsequently breached the Act, Declaration, By-laws and Rules, the Court, in 2008, ruled that the previous Court Order did not prevent the current Judge from exercising discretion about whether or not the unit should be sold. Nevertheless, the Court went on to decide that the condominium corporation had accommodated the owner to the point of undue hardship (since 2004) and the Court ordered that the owner vacate and sell her unit.

The Court also held that mandatory mediation and arbitration did not apply in this case.

QUEBEC CASES

9171-3792 Québec Inc. v. Appartements condominiums Trafalgar (Superior Court of Québec) (May 1, 2008)

Board's decisions not subject to Court approval

Certain owners were not happy with decisions of the Board respecting required major repairs. They sought Court intervention. Except in the cases of fraud, abusive behavior or illegality, the Court was not prepared to direct the actions of the Board. If owners believed that they suffered damages due to faulty decisions of the Board, their remedy was to consider claims for monetary compensation.

Fortier v. Syndicat des copropriétaires condominium Les Châtelets (May 27, 2008)

Co-owners not entitled to see all accounting documents of the syndicat

Owners in the syndicat sought access to all documents regarding the financial operation of the syndicat and the management of the building. The Court said that Article 1070 of the Civil Code entitles owners to see the financial statements of the syndicat, but not all of the other detailed accounting documents (which are management tools for the Board of Directors).

BC CASES

Peterson v. Proline Management Ltd. (British Columbia Court of Appeal) (December 29, 2008)

Injury to strata lot owner. No breach of fiduciary duty by condominium corporation

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. Although the Trial Judge concluded that the strata corporation was partially responsible for the plaintiff's injuries, the Trial Judge also found that the limitation period for asserting the claim had expired. [See Condo Cases Across Canada, Part 20, November 2007]

The Trial Judge also found that there was no breach of fiduciary duty (which would have been subject to a longer limitation period). The plaintiff appealed this finding. The appeal was dismissed. The Court of Appeal agreed that there was no breach of fiduciary duty because the strata corporation had not assumed any discretionary power to act in the best interests of the plaintiff owner. The corporation's relationship to the plaintiff was defined by the by-laws of the strata corporation and the corporation's control and occupation of the common property. The limitation period for the plaintiff's claim against the strata corporation with respect of these obligations had expired. The longer limitation period for a breach of a fiduciary duty did not apply.

Buchanan v. Strata Plan VR 1411 (Supreme Court of British Columbia) (July 23, 2008)

Court prepared to order winding up of strata corporation

The owners of this three-unit strata property did not agree on how to manage the property. Significant repairs were required. An administrator was appointed. One of the owners wanted to carry out the required repairs. The other two did not.

After a review of all of the circumstances, the Court said: "It is my conclusion that viewed overall, the cost of repairs in this case will likely significantly exceed the associated increase in value."… "The good intention of the *Strata Property Act* notwithstanding, this strata property is dysfunctional both on a structural and organizational level."… "I am prepared to order the winding up of this strata property but before doing so, I wish to allow counsel and the parties to contemplate the possibilities as there may be better ways to realize their respective interests."

McMillan v. Canada Mortgage and Housing Corporation (British Columbia Court of Appeal) (December 19, 2008)

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

The lower Court ruled that CMHC did not owe a duty of care to individual home owners, and accordingly could not be sued by owners of "leaky condos". [See Condo Cases Across Canada, Part 20, November 2007]

The plaintiffs appealed to the British Columbia Court of Appeal. The Appeal was dismissed. The Court of Appeal agreed that CMHC did not owe any duty of care to homeowners in the context of CMHC's role as insurer of a mortgage.

Kearsley v. Strata Plan KAS 1215 (British Columbia Supreme Court) (November 24, 2008)

Owner not entitled to keep solarium

A strata owner installed a solarium on her limited common property (the patio in front of her unit) with the consent of the strata corporation and the neighboring resident. The solarium enclosed an exterior window of the neighbour's unit.

The solarium was constructed without a building permit. After construction of the solarium, the municipality advised that a retroactive building permit could be issued provided the particular window (partly common property and partly a portion of the neighbour's unit) was replaced with a fire retardant window. The neighbour refused to allow the window to be replaced. The owner of the solarium argued that the window replacement could not be refused (by the neighbour or the corporation) because the solarium had previously been approved.

The Court said that the strata corporation and the neighbour had mistakenly assumed that the solarium was permitted without any change to the neighbour's unit (i.e. the window). They were not obligated to consent to the window change. The principle of estoppel did not apply.

OTHER ONTARIO CASES

Associated Mechanical Trades Inc. v. Kurzbauer (Ontario Superior Court of Justice) (November 14, 2008)

Condominium-wide construction lien can be vacated against one unit

A construction lien was registered against all of the units in the condominium (for work done on the common elements). One of the owners wanted to vacate the construction lien only as against the owner's unit. The Court said that the construction lien could be vacated against a particular unit by posting a portion of the construction lien attributable to the owner's common interest as specified in the condominium Declaration (plus a similar proportion of the 25% security for costs).

1240233 Ontario Inc. v. York Condominium Corporation No. 852 (Ontario Superior Court of Justice) (January 2, 2009)

Condominium corporation's promotional fund within corporation's objects and duties. No oppression

This commercial condominium – a retail mall – established a promotional fund for marketing and promoting the mall for the benefit of the unit holders. For many years, owners were not forced to pay into the fund. In 2005, the condominium board began to treat the promotion fund as a common expense, applying to all unit owners in accordance with their proportionate shares. The applicant unit owner (having a proportionate share of approximately 26%) argued that this was oppressive and unfairly prejudicial.

The Court held that the promotional fund was a proper common expense. There was nothing in the condominium corporation's governing documents that would prevent the condominium corporation from incurring expenses for promotion and marketing. The Court said: "Such expenditures are consistent with its duties to manage and administer the corporation."

NEWFOUNDLAND AND LABRADOR CASE

Tremblay v. Campbell (Newfoundland and Labrador Supreme Court) (December 15, 2008)

President of condominium corporation sued personally for defamation

The President of a condominium corporation sent a defamatory letter to one of the owners of the condominium. The letter was distributed to all of the occupants of the condominium (some being tenants). A copy of the letter was also received by the condominium's banking institution and the owner's employer.

The Court held that the defendant was liable to the plaintiff for defamation and that the defences of fair comment, qualified privilege and justification were not established in this case. The Court also held that the defendant's written apology was "equivocal" and accordingly did not justify any reduction in the amount of damages awarded.

The condominium corporation was not a party to the lawsuit.

ALBERTA CASES

1016637 Alberta Ltd. v. Condominium Corporation No. 891 0469 (Alberta Court of Queen's Bench) (November 27, 2008)

Court approves special resolution amending condominium plan

The condominium corporation adopted a special resolution authorizing an amendment to the condominium plan (whereby the windows and doors would be made part of the common property). The condominium corporation applied for Court approval of the special resolution in accordance with Regulation 71 under the *Condominium Property Act.* Approval was granted by a Master of the Court. Some of the owners appealed. Their primary concern was that notice of the application had not been given to all owners and mortgagees.

The Appeal was dismissed and the Master's Order affirmed. The Master had considered the prejudice to owners and mortgagees and had implicitly granted a waiver of the notice requirement.

Lightner v. Condominium Plan No. 772 3097 (Alberta Court of Queen's Bench) (January 6, 2009)

Leases of parking stalls not binding upon condominium corporation

The condominium corporation leased to the builder, for a term of 101 years, certain portions of the common property which were designated for use as parking stalls. It was a term of the agreement that the builder could then further assign the leases of stalls to subsequent purchasers of the condominium units. The plaintiff was one of the purchasers who had received an assignment of one of these parking stalls. The Court determined that the leases were not in compliance with the *Condominium Property Act*, because the parking stalls were not sufficiently delineated on the condominium plan. The Court said that the corporation had also given the plaintiff owner adequate warning of the problem (at the time of the plaintiff's purchase) and the plaintiff therefore was not entitled to continue using the stall.

[At the Hearing, the condominium corporation said that it was prepared to allow the plaintiff to use the particular parking stall until the plaintiff sells the unit. This was accepted by the Court.]

McKenzie v. Condominium First Management Services Ltd. (Alberta Provincial Court) (October 10, 2008)

Unit owner can sue condominium manager for negligence

One of the unit owners in the condominium sued the condominium corporation's management company for damage caused to two vehicles when one of the vehicles slid due to snow and ice on one of the condominium roadways. The Court expressed doubt about the right of the unit owner to sue the manager for breach of contract, but concluded that the unit owner could assert a claim against the manager in tort (i.e. for negligence). The Court found that the manager was negligent and awarded damages to the owner.

SASKATCHEWAN CASE

Condominium Plan No. 81R14133 (c.o.b. Sierra Village Condominium Assn.) v. Muxlow Development Corp. (Saskatchewan Court of Queen's Bench) (November 13, 2008)

Condominium corporation's claims barred by limitation period

On October 9, 2001, the condominium corporation commenced a Court action, in negligence, against the defendant municipality. The Court held that the action was not commenced within the applicable one-year limitation period and accordingly was out of time. According to the Court, the limitation period had started on November 10, 1999, when the condominium corporation received its first engineering report respecting the problem. The Court rejected the argument that the limitation period did not begin to run until the condominium corporation had obtained a "reasonable assurance of success" (from a second engineering opinion and a legal opinion).

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