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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 CONFIRMS MANDATE OF THE BOARD

A recent decision of the Alberta Court of Queen's Bench contains a nice statement of the mandate of a condominium's Board of Directors. In the particular case, the Board had decided to levy a special assessment, and one of the owners challenged the Board. The Court confirmed that the Board is elected to manage the condominium. As long as the Board acts in a prudent and responsible fashion, the Court will not order the Board to implement any alternatives or options (preferable or not) that might have been available to the Board. Here is the case:

ALBERTA CASE

Dykun v. Cravenbrook Condominium Corporation No. 032 1893 (Alberta Court of Queen's Bench) (February 18, 2009)

Management of a condominium's affairs rests with the Board

The Board of Directors levied a Special Assessment. The Applicant, one of the owner's, refused to pay his portion of the Special Assessment, on the grounds that the Special Assessment was not necessary and there were other alternatives that should have been pursued.

The Court said that the Board of Directors had acted in a prudent and responsible fashion. The Court went on to state as follows:

> "Even assuming that Mr. Dykun's solution was an appropriate one, he cannot force his views on the Board of Directors. Management of the affairs of (the condominium) rests with the Board and not with any single unit owner. The Board has been properly elected to oversee (the condominium's) affairs. Mr. Dykun has not. Mr. Dykun cannot dictate to the Board the course of action that they should be following. If he is interested in having a greater say in how the overall affairs of (the condominium) should be managed, he should seek election to the Board of Directors."

The owner was ordered to pay his portion of the Special Assessment.

ONTARIO CASES

PIPEDA Case Summary #342 (Privacy Commissioner of Canada) (July 21, 2006)

Owner allowed to disclose tenants' rent information

The owner of a townhouse condominium in Ontario complained about being asked to complete a "Summary of Lease or Renewal" form in accordance with Section 83 of *Ontario's Condominium Act, 1998*. The owner was concerned about disclosing the tenant's personal information without the tenant's consent, perhaps contrary to the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The Assistant Privacy Commissioner ruled that PIPEDA did not prevent disclosure of the information because the disclosure was required by law (namely, the *Condominium Act*).

York Condominium Corporation No. 633 v. 1262018 Ontario Inc. (Ontario Superior Court of Justice) (November 13, 2008)

Condominium obtained right to lien for old arrears

The Respondent condominium owner had failed to pay common expenses for approximately six years. The condominium corporation had not registered a lien against the unit. The condominium corporation made Application, under Section 134 of the *Condominium Act, 1998*, for an Order requiring the owner to pay the arrears, plus costs. The Order was obtained. The Court also ordered that these amounts were to be added to the common expenses of the unit in accordance with Section 134 (5) of the *Act* (thereby allowing the condominium corporation to register a lien for recovery of the full amount of the arrears and costs).

[Editorial note: This is a strong decision for Ontario condominium corporations. This essentially allows condominium corporations to "refresh" their lien rights even in cases where a lien has expired pursuant to Section 85(2) of the Condominium Act, 1998 (by virtue of passage of time).]

Trudell v. Sandpoint Developments Inc. (Ontario Court of Appeal) (February 24, 2009)

Condominium owner has no claim against developer's engineers

A condominium owner sued various parties – including the developer's engineers – for damages resulting from water leaks. The claim against the engineers was dismissed by the lower Court, and this was upheld on appeal. The Court of Appeal's reasons were as follows:

- The engineers had no contractual relationship with the owner.
- There was no evidence of negligence on the part of the engineers.
- The engineers were not obligated to carry out on-site tests or physical measurements during their inspections of the work.
- The *Professional Engineers Act* does not create a private law duty of care owed by engineers to members of the public.

Wentworth Condominium Corporation No. 198 v. McMahon (Ontario Superior Court of Justice) (March 10, 2009)

Hot tub not a change to the common elements

The condominium corporation applied for an Order requiring the unit owner to remove his hot tub, privacy fence, water fountain and metal trellis (in his exclusive use patio area).

The Court ordered the removal of the privacy fence, water fountain and metal trellis, but did not order removal of the hot tub.

Hot tub
The Court said that the hot tub did not contravene any Rule of the corporation and also did not qualify as "an addition, alteration or improvement" for the purpose of Section 98 of the *Condominium Act, 1998*. The Court said:

> "The hot tub is not an addition as it is not something that sensibly can be seen as being joined to or connected to the structure. It is connected by an electrical cable, but the purpose of the electrical cable is to supply power to the hot tub, not to affix the hot tub to the structure. Furthermore, even though it may take a half-hour and two men to move, the hot tub is still designed to be removed from the property. It is not a permanent fixture on the property."

"I also note that several other owners at WCC have gas barbecues that are connected to their units by a gas line. The WCC has not required any of those owners to seek the approval of the Board. In my view McMahon's hot tub is very similar to a gas barbecue that is connected to the unit by a gas line. The purpose of the gas line is to supply power, not to affix the barbecue to the property."

The condominium corporation applied for an Order requiring the unit owner to remove his hot tub, privacy fence, water fountain and metal trellis (in his exclusive use patio area).

Other Items
The parties agreed that the Board's approval was required in relation to the fence, the fountain and the trellis. However, the owner argued that the Board had accepted many other fences and landscaping items in other locations and therefore should similarly allow the owner's changes. The Court said that it was impossible to show that the Board

had treated the owner differently from other unit owners (by asking for removal of the fence, fountain and trellis) because each rear-yard situation was unique.

Carleton Condominium Corporation No. 26 v. Nicholson (Ontario Superior Court of Justice) (May 5, 2009)

Court orders amendments to Declaration

The condominium corporation brought an Application under Section 109 of the *Condominium Act, 1998*, for an Order to amend certain alleged errors or inconsistencies in the Declaration. One of the owners opposed the Application. The Court granted the condominium corporation's request to amend the Declaration. The Court agreed that there were errors or inconsistencies requiring amendment. The Court also found that the condominium corporation was not barred from making application under Section 109 of the *Act* even though a previous attempt to amend the Declaration with consent of the owners (under Section 107 of the *Act*) had failed.

Di Nardo v. Simcoe Condominium Corporation No. 92 (Ontario Superior Court of Justice) (April 16, 2009)

Board's decision to install new walkway not oppressive

The Board of Directors installed a new walkway to service a parking area on the property. The new walkway traversed a grassy area in front of certain units. The grassy area was part of the common elements. The owners of two units adjacent to the grassy area claimed that the installation of the walkway was oppressive to their privacy interests. They said that the Board's unilateral decision to install the walkway was for "vindictive purposes and not for legitimate safety reasons".

The Court found that there was no oppression. The Court said:

> "The ultimate determination to install a walkway across the common area in front of the Applicants' units may not have been the only solution to the problem, but it was, in my view, a reasonable solution, made *bona fide* by the Board in the discharge of its duty to manage the common elements of the corporation for the benefit of all owners and occupiers."

Nipissing Condominium Corporation No. 4 v. Simard (Ontario Superior Court of Justice) (April 8, 2009)

Mandatory mediation and arbitration do not apply to this dispute respecting the validity of tenancies

This is a dispute about the validity of certain tenancies of units in the condominium. The question is whether the tenants together form a "family" and therefore whether the tenancies comply with the provision in the declaration that each unit be used only as a "one-family residence". The respondent owner/landlord moved for dismissal of the condominium corporation's Court application on the grounds that mandatory mediation and arbitration apply to the dispute in accordance with Section 132(4) of the *Condominium Act, 1998*.

The Court held that mandatory mediation and arbitration do not apply to this dispute. The Court's reasons were as follows:

- "This case involves intertwined issues under the *Condominium Act* and the condominium declaration that go beyond the owners of the units and the corporation, who are the only parties referred to in the requirement of mediation-arbitration in Section 132(4) and (1)".
- "There are no significant factual disputes or behavioral issues in this case. The key issue in this case is "validity in law of the family provision in the declaration as well as whether reasonable steps have been taken by the respondent unit owner".

[Editorial notes:

1. *The owner has appealed this Decision.*
2. *In the context of interpretation of municipal zoning provision, I believe that the Courts decided long ago that a "family" could include any number of unrelated persons.*
3. *The Court in this case made reference to the recent decision in MTCC #1143 v. Li Peng. The Court gave reasons for distinguishing this case from the Li Peng case, noting that the Li Peng case involved "issues of conduct and use and gradations thereof", as opposed to questions of legal validity or interpretation. Still, it seems to me that we don't yet have any clear answer to the question: When does mandatory mediation apply to a dispute between a condominium corporation and an owner?]*

QUEBEC CASE

Syndicat de Copropriété le Northcrest c. Batah (Cour supérieure du Québec) (March 20, 2009)

Owners required to reverse modifications made in order to join adjacent units as well as portions of a common corridor

The owners of two adjacent condominium units had made changes to the common property in order to unite the units and also to integrate a portion of the common corridor. A third owner had also taken steps to integrate part of the corridor into that owner's unit. These changes were made without any consultation or vote or amendment to the declaration.

The Court ordered the reversal of all of the changes. The Court said, however, that Syndicat de coprorpriété le Northcrest was required to cover the costs to reverse the changes made by one of the owners, because the Board had incorrectly given approval for those changes.

BC CASES

Matthews v. Strata Plan NW1874 (British Columbia Provincial Court) (March 3, 2009)

Small Claims Court lacks jurisdiction to order compliance with by-laws

An owner in the strata corporation sued (in Small Claims Court) for an Order requiring that the corporation follow its by-laws and repair the owners' windows. The Small Claims Court refused to decide the matter. The Court said that only the Supreme Court can make such an Order (under Section 165 of the *Strata Property Act*).

The Court went on to offer a "non-binding opinion" that the owner was obligated to repair the windows under Section 9 of the corporation's by-laws.

Strata Plan NW499 v. Louis Estate (British Columbia Court of Appeal) (February 12, 2009)

Age-restriction by-law did not apply to prior resident

The strata corporation passed an age-restriction by-law in 2002. The lower Court found that the by-law prevented the Defendant from living in the unit because the Defendant was not residing in the unit at the time the by-law was passed (as required by Section 123(2) of the *Strata Property Act*). [See Condo Cases Across Canada, Part 23, September 2008]

On appeal, the BC Court of Appeal held that, at the time the by-law was passed, the suite was being used by the Defendant as a "permanent second residence". Therefore, he should have been considered to have been a resident when the by-law was passed, for purposes of Section 123(2) of the *Strata Property Act*. Accordingly, the Defendant was entitled to the benefit of the exemption from the by-law and was entitled to live in the unit.

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada (British Columbia Court of Appeal) (March 26, 2009)

Insurer not having duty to defend under commercial general liability policies

Four separate actions were brought against Progressive Homes Ltd. by the B.C. Housing Management Commission, concerning separate condominium projects built by Progressive. The actions alleged significant damage due to water penetration resulting from defects in the buildings' envelopes.

Progressive argued that Lombard had a duty to defend the actions (on Progressive's behalf) under various commercial general liability policies. The lower Court held that there was no coverage under the particular policies and no duty to defend. The lower Court decision was upheld on appeal.

Strata Plan VIS2968 v. K.R.C. Enterprises Inc. (British Columbia Court of Appeal) (February 4, 2009)

Options to purchase portions of common property invalid

The developer of a strata plan granted options to acquire portions of the common property of the strata corporation. The lower Court held that the options were valid, because they were conditional upon compliance with subdivision approval.

The decision was overturned on appeal. The Court of Appeal held that the options were invalid because they constituted subdivisions of land for which approval was required at the time the option was granted.

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ACCI

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