



Condo Cases across Canada



ISSUE NO. 32

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.

Note to readers: In B.C., condominium corporations are "strata corporations" and in Quebec, condominium corporations are "syndicats".

THE HOT TOPIC: EVICTION OF CONDO OWNER

It is only in rare cases that Courts are asked to consider eviction of a condominium owner. Over the past few months, this remedy has been considered by two Canadian Courts: One in Alberta and one in Ontario.

Here are the summaries:

Condominium Corporation 811024 v. Farkus (Alberta Court of Appeal) October 13, 2010

Court has power to order eviction of owner, but declines to do so in this case

On appeal, the Alberta Court of Appeal held that the condominium corporation could properly seek an order for eviction of a noisy owner, even though this remedy was not specifically included in the corporation's by-laws. The Court of Appeal said: *The chambers judge erred in concluding that eviction is not available under ss. 67(2)(f) (of the Condominium Property Act).*

The Court of Appeal also said:

The power of eviction against an owner is an extraordinary one, and one which undoubtedly should only be exercised in exceptional cases, and when other incremental remedies have failed.

The Court of Appeal concluded that "the record does not justify the remedy of eviction" in this case. The owner was ordered to stop making noise which unreasonably interferes with other residents, and the Court said: *In the event that there is any breach of that order, the condominium corporation may apply on notice to the Court of Queen's Bench to determine what further procedures or remedies are appropriate.*

Metropolitan Toronto Condominium Corporation No.747 v. Korolekh (Ontario Superior Court of Justice) August 17, 2010

Court orders eviction of owner due to threatening behavior

The Court found that the respondent owner had repeatedly engaged in "extreme" behavior, including the following:

- Physical violence;
- Use of a large aggressive dog to

- frighten and intimidate;
- Extraordinary verbal abuse of other residents;
- Interference with enjoyment of property as well as actual damage to property.

The Court said that this behavior contravened section 117 of the *Condominium Act, 1998*.

The Court said:

In short, this case is a "perfect storm" where the misconduct is serious and persistent, where its impact on a small community has been exceptional and where the respondent appears to be incorrigible or unmanageable.

In all these circumstances, it would be unwise to try to re-integrate Ms. Korolekh into a community that fears her and that she has persistently tried to intimidate.

The Court ordered the owner to list and sell her unit within three months of service of the order. The Court also ordered that the owner permanently remove her dog from her unit within 10 days of service of the order.

[Editorial notes: The Court held that mandatory mediation and arbitration, under section 132 of the Condominium Act, 1998, did not apply because the application substantially concerned alleged breaches of section 117 of the Act, and disagreements with respect to the Act are not subject to mandatory mediation and arbitration. The Court also said that the owner had in any event lost the right to request mediation by raising the issue too late in the process. Furthermore, the Court declined to order a trial, choosing instead to decide the matter on the basis of the affidavit evidence.]

B.C. CASES

Owners of Strata Plan NW 391 v. Forsberg (Supreme Court of British Columbia) September 16, 2010

Owner's rental of unit contravened corporation's by-laws

The strata corporation's by-laws permitted only three rentals throughout the strata property. The Court found that the owner in this case had rented the unit in contravention of this by-law. The fines imposed by the corporation were also largely confirmed by the Court.

Jiwan Dhillon and Co. Inc. v. Gosal (Court of Appeal for British Columbia) June 18, 2010

Court of Appeal strikes down order prohibiting owner from standing for election

The lower Court had made several orders respecting the administration of the strata corporation, including an order that the petitioner not be permitted to stand for election for two years. The petitioner appealed this one order (respecting his right to stand for election). He argued that the Court did not have jurisdiction to make such an order under section 165 of the *Strata Property Act*. The Court of Appeal agreed and set aside that one order of the lower Court.

OTHER ALBERTA CASES

Lee v. Point of View Developments (Encore) Inc. (Court of Queen's Bench of Alberta) September 2, 2010

Builder not permitted to assign purchase agreements

Purchasers entered into agreements with a vendor/builder, for the purchase of units in a proposed condominium. The vendor/builder went into receivership. Under Court order, the project was sold to a new developer, and the purchasers were told that their purchase contracts had been assumed by the new developer. The agreements were silent as to the vendor's right of assignment. The Court said:

I agree with the Applicant's position that contracts of the nature of those at issue in this case are entered into by purchasers who rely upon the skill, reputation and the ability of the builder to deliver a suitable product. The case law is clear that these contracts are not assignable without the purchaser's consent.

Furthermore, this is not a case where one party to the contract is delegating performance of the contract to some-

Condominium corporation not liable for damage due to leaky roof

The plaintiff owner sued the condominium corporation for damages to her unit resulting from a leaky roof. The court dismissed the claim because the damage was not due to negligence on the part of the condominium corporation. The Court said that condominium corporations are not insurers or guarantors of the common elements.

The Court also considered a "forbearance arrangement" under which the owners in this condominium had allegedly agreed not to assert certain claims against the condominium corporation. The Court held that the "forbearance arrangement" was not enforceable and did not prevent this particular claim. Again, however, the claim was dismissed because of the absence of negligence on the part of the condominium corporation.

[Editorial note: In the course of the decision, the Court said "the mere fact that the roof in this case leaked is not conclusive proof of a breach of the duty to maintain; but it does shift the onus to the condominium corporation to demonstrate due diligence." I thought this was an interesting feature of the decision. The Court ultimately concluded that the

**Here, the builder has gone into receivership
and no longer has any possession
or control over the project.**

one else and remaining liable to the purchaser. Here, the builder has gone into receivership and no longer has any possession or control over the project. In no meaningful way is it in a position to either ensure performance or be responsible for performance of its obligations

The Court declared that the contracts were at an end and ordered the return of the purchasers' deposits (with interest).

Phillips v. Condominium Plan 9512639 (Provincial Court of Alberta) January 29, 2010

condominium corporation's due diligence had indeed been demonstrated, but it appears that the existence of the leak may have been sufficient to allow the Court to find negligence, in the absence of evidence of the condominium corporation's due diligence. The Court specifically referred to the "onus on the condominium corporation to adduce evidence of such due diligence" – which is something that I haven't seen mentioned in similar cases of this sort.]

Condominium Plan 7621828 v. Marusyn (Court of Queen's Bench of Alberta) August 12, 2010



Condominium corporation granted access to unit to carry out common element repairs

The condominium corporation sought an order for access to the unit in order to repair or replace the overhead garage door, exterior garage person door and front door. The order was granted.

The Court said that the intention of section 9(2) of the *Condominium Property Act* (which was amended in the year 2000) "is to eliminate exterior doors and windows from the responsibility of individual owners and to place the responsibility for the care, maintenance and replacement of such items onto the shoulders of condominium corporations" – unless there is a specific contrary statement on the condominium plans.

[Editorial Note: The Court also made note of the fact that a regulation under the Condominium Property Act permitted certain condominiums to pass a special resolution to have the doors and windows "revert back to the unit" before September 1, 2002. No such resolution had been passed in this case.]

SASKATCHEWAN CASE

Park Place Condominium Corporation v. Klarissa Komarnicki (Provincial Court of Saskatchewan)

Civil Division) July 21, 2010

Owner responsible for corporation's deductible in relation to insured loss

At the owner's request, her father replaced a bathroom sink in her unit. The water shut-off valve under the sink did not work properly. Water escaped, causing damage to the owner's unit and to the unit below. The damage was covered by the corporation's insurance, subject to a \$5,000 deductible.

The Court held that the owner was responsible for the entire deductible. The Court's reasoning included the following:

1. The owner was responsible under section 65 of the *Condominium Property Act, 1993*, for the portion of the deductible relating to the damage to her own unit, because that damage resulted from the owner's act or omission. An "act or omission" does not necessarily require negligence. The Court said: *Whether an owner ought to be legally responsible for damage caused by their act or omission depends upon the facts of each case.*

Furthermore, an owner's "act or omission" can include an act or omission of someone other than the owner (in this case, the owner's father) who was acting with authority from the owner.

2. The owner was responsible, under the corporation's by-laws, for the portion of the deductible relating to the damage outside the owner's unit.

OTHER ONTARIO CASES

Durham Condominium Corporation No. 90 v. Carol Moore and Keith Wallace (Ontario Superior Court) September 30, 2010

Court orders owners to modify deck

The respondent owners had installed a deck which was not in keeping with the Board's policy respecting decks or with drawings which had been approved by the Board. The Court said:

Despite knowing that the Board's approval was necessary for the deck, submitting two sets of plans that were approved by the Board, and being sent correspondence stating that the deck had to comply with the plans, the respondents built a deck that did not comply with the final approved plan.

The Court ordered that the owners modify the deck, to bring it into conformity with the Board's policy and approval. The Court's decision included the following:

1. The Board's approval was clearly

required under section 98 of the *Condominium Act, 1998*, and under the corporation's Declaration.

2. The owners were not treated unfairly. Furthermore, the Court was not prepared to find that the Board's policy was unreasonable. The Court said: *The remedy for unit holders who oppose a policy or rule is to run for office and, once elected, to enact rules and policies that reflect the views of the majority of unit holders.*
3. There was no oppression.
4. A condominium corporation can properly take steps to change its policies (with the appropriate grandfathering of prior conditions). Furthermore, a policy change does not necessarily need to be passed as a rule.

Arnoldo v. Halton Condominium Corporation No. 74 (Superior Court of Justice/Oakville Small Claims Court c/o Burlington Small Claims Court) September 16, 2010

Condominium corporation not liable for damage to vehicle

The plaintiff brought a claim against the condominium corporation for damages to his car, caused when the garage door fell off its track and landed on the car.

The plaintiff brought a claim against the condominium corporation for damages to his car, caused when the garage door fell off its track and landed on the car. The Court held that foreseeability (and therefore negligence) were not proven. The Court therefore found that the condominium corporation was not liable under the *Occupier's Liability Act*, and the claim was dismissed. The court said: *...while the occupier of the condo must take reasonable care in all circumstances, it does not mean that it is an insurer of all risks. The standard is not perfection but reasonableness.*

Mitchell v. Halton Condominium Corporation No. 499 (Ontario

Human Rights Tribunal) July 9, 2010

Human Rights process stayed in favour of Condominium Act dispute-resolution process

The owner alleged discrimination (on the basis of disability) because of the condominium corporation's interpretation of the boundaries of her parking unit. The condominium corporation commenced proceedings under section 132 of the *Condominium Act, 1998* (for mediation and, if necessary, arbitration of the dispute). The applicant did not agree to the appointment of a mediator and filed an application with the Human Rights Tribunal.

The Human Rights Tribunal ordered that the application to the tribunal be deferred. The tribunal said:

Human Rights Tribunals, therefore, are not the only decision-makers that can decide Human Rights Claims, including in the condominium context. Where the parties are already engaged in a concurrent legal proceeding in which they are raising the same Human Rights issues before a decision-making body with the authority to make determinations about those is-

sues, the orderly administration of justice favours deferral to the other proceedings. In such a scenario, the tribunal's normal approach is to defer.

I find that the application should be deferred. The mediation and arbitration process has the power to deal with all issues in this application, including the alleged violation of the [Human Rights Code] by the [condominium corporation] and the alleged contravention of the rules and declaration by the [owner]. At the time this application was commenced, the Condominium Act process was already underway. The arbitrator has the full power to determine whether the [Human Rights

Code] has been violated, including to order an interim injunction.

SUPREME COURT OF CANADA

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada (Supreme Court of Canada) (2010)

Insurer 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 British Columbia Court of Appeal upheld the lower Court ruling that there was no coverage under the particular policies and no duty to defend. [See *Condo Cases Across Canada Part 26 – May 2009*]

Progressive appealed to the Supreme Court of Canada. The Supreme Court reversed the previous rulings and ordered Lombard to defend the actions. The Supreme Court's decision included the following:

- Under the insurance policy, the term "property damage" did not necessarily mean property damage to third party property. It could include damage to the same property.
- An "accident" can include defective workmanship, and can also include "continuous or repeated exposure to conditions".
- The "work performed" exclusion also did not necessarily apply.
- Since there was a possibility of coverage under the policy, the insurer had the duty to defend.

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