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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.

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

THE HOT TOPIC:

IMPORTANT REALTY ASSESSMENT DECISION IN ONTARIO: NON-COMMON ELEMENT RECREATION CENTRE ASSESSED AT NOMINAL VALUE OF $1.00

Condominium common elements are generally not subject to separate realty assessment and taxation.

But what about *assets* of the condominium corporation – not part of the common elements – such as a recreation centre owned in whole or in part by the corporation? How should these sorts of assets be treated for purposes of realty assessment and taxation? Most condominium corporations have felt that the value of these sorts of assets is included in the value of the units. [For example, in the case of a recreation centre, the purchase price for a unit normally takes into account the purchaser's right to make use of the recreation centre.] In other words, the value of the condominium corporation's assets is generally *included in the value of each of the units*. Assuming that's the case, taxation of the assets would amount to double taxation.

However, assessment authorities have often taken the position that the assets of a condominium corporation are subject to taxation, because they can be sold on the open market. And the assessment authorities have often asserted that the value of a condominium corporation's asset is not necessarily included in the values of the units.

A recent decision of Ontario's Assessment Review Board will have condominium directors nodding their heads:

Schickedanz Bros. Limited v. The Municipal Property Assessment Corporation (MPAC) Region No. 14 and the Town of Whitchurch – Stouffville (Assessment Review Board) November 5, 2010

Non-common element recreation centre assessed at nominal value of $1.00

This case dealt with the realty assessment and taxation of a recreation centre which was to be shared by five condominium corporations surrounding a golf course. [The golf course was separately owned by the developer.] The recreation centre was an asset of the condominium corporations and had been assessed at $1,460,000 for the 2005 taxation year and $1,740,000 for the 2006 and 2007 taxation years. The recreation centre contained an indoor salt water pool, whirlpool, sauna, games rooms, fitness room and party room for social activities, as well as an outside patio and tennis courts.

The Assessment Review Board (ARB) reduced the assessed value of the recreation centre to the nominal amount of $1.00, for the following reasons:

1. Each of the unit owners had an easement over the recreation centre. In other words, each unit interest included the right to use the recreation centre. The ARB's task, then, was to determine the "added value" of this right (included in the value of the residential units). Then, the assessed value of the recreation centre had to be reduced by the amount of that "added value". [The idea was to avoid double taxation.]
2. The ARB then found that the "added value" was the *full value* of the recreation centre.

In summary, the Assessment Review Board decided that the value of the recreation centre was already contained in the value of the residential units.

The ARB's decision included the following:

Some evidence that the RC value is within

the residential unit values is the simple fact that Schickedanz is transferring the RC to the five condominium corporations for zero consideration. Having no evidence that Schickedanz is a charitable corporation, the Board deduces only two possibilities. One is that the RC is being given away because it has no market value; or second that the RC has already been paid for through the sale of the residential units. Either one leads to the conclusion that the assessment of the RC should be zero.

[Editorial Note: There was no appeal. This decision is final.]

B.C. CASES

Chan v. Strata Plan VR-151 (British Columbia Supreme Court) December 3, 2010

The tree has grown too tall

Strata Plan VR-151 is a 4-storey, 40-unit strata property. The ground floor apartment includes a patio area. The upper boundary of the patio area is the extended height of the ceiling of the unit. Above this boundary is common property. A cedar tree, on the patio of the ground floor unit, had grown to the full height of the building. The strata counsel ultimately passed a by-law requiring trees to be pruned to the boundaries of an owner's strata lot. In other words, trees were not to extend beyond the boundaries of the unit. Pruning this particular tree to this level (approximately one quarter of its present height) would likely result in the tree dying. The owner of the unit (the owner of the tree) applied for a declaration that the strata corporation's actions, including the passing of the by-law, were significantly unfair, within the meaning of Section 164 of the *Strata Property Act*. The Court disagreed. The Court found that there was no significant unfairness, and that the by-law had been validly enacted and could be applied to the tree at issue.

However, the Court added that the enforcement of the by-law *might* involve significant unfairness. In that regard, the Court said:

Having said that, any specific steps the strata corporation may take to enforce its by-law will still be subject to review under s. 164. In that regard, I note again that this tree was permitted to grow far beyond the boundaries of the petitioner's strata lot long before the present by-law was enacted and, indeed, long before the petitioner acquired her unit. Trimming such a large tree to the extent now required by the bylaw, or removing it entirely, is likely to be an expensive undertaking. It may be significantly unfair for the strata corporation to impose that cost, or the cost of suitable replacement planting, entirely on the petitioner. In the absence of evidence of the specific costs and options involved, I express no conclusion on that point, but mention it for the guidance of the parties in their future dealings.

[Editorial Note: The Court seems to be saying, in the above paragraph, that although the tree must be trimmed back to the boundaries of the strata lot (or removed), the strata corporation should perhaps cover the cost.]

If a meeting is adjourned to an unspecified date and time, full notice of the new date and time (once they are chosen) is of course required.

Strata Plan NW 971 v. Daniels (British Columbia Court of Appeal) December 20, 2010

Special resolution properly passed at adjourned meeting

The plaintiff strata lot owner challenged the procedures followed by the strata council to pass a special resolution authorizing a special assessment. A special general meeting had been properly called, with notice, for this purpose. A quorum of eligible voters (in person and by proxy) was present at the meeting. However, the special resolution failed to obtain the requisite three-quarters majority vote. A resolution was then passed to adjourn the meeting for one week (ie. to reconvene one week later at the same time and place). The special resolution was passed at the "continuation of the first meeting". No fresh notice of meeting (14 days in advance of the meeting, per Section 45 of the *Strata Property Act*) was provided in relation to the continuation meeting.

The Court held that the continuation meeting was proper and the special resolution was valid and effective. The Court said that a continuation of an original meeting does not require any further notice provided no new business is transacted at the adjourned/continuation meeting.

[Editorial Note: If a meeting is adjourned to an unspecified date and time, full notice of the new date and time (once they are chosen) is of course required. No fresh notice of a continuation meeting is required provided:

a) The original meeting is properly called and properly convened (with required quorum); and

b) A motion is passed, at the original meeting, to adjourn the meeting to a fixed date and time.]

Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428 (British Columbia Court of Appeal) October 28, 2010

Residential and non-residential lots to vote separately under Section 128 of *Strata Property Act*

This strata property contained 491 residential strata lots and 4 non-residential strata lots. According to Section 128 of the *Strata Property Act*, a by-law would require separate resolutions, one passed by a ¾ vote of the residential strata lots, and one passed by a 3/4 vote of the non-residential strata lots. This would effectively give the owners of the 4 non-residential strata lots voting entitlement (in relation to by-laws) which was equal to the voting entitlement of the owners of the 491 strata lots. The chambers judge felt that this created the potential for significantly unfair or oppressive voting and therefore ordered, under Section 164 of the *Strata Property Act*, that the residential and non-residential lot owners vote together as a single group.

On appeal, the order of the chamber's judge was reversed. The Court of Appeal said that the *potential* for oppression was not sufficient to overcome the voting mechanism set forth in the *Strata Property Act*.

ALBERTA CASES

Condominium Corporation No. 0321365 v. 970365 Alberta Ltd. et al (Court of Queen's Bench of Alberta) September 09, 2010

Developer's lender has no duty of care to purchasers or condominium corporation

The condominium corporation and unit purchasers asserted claims for alleged faulty construction against a large number of defendants, including MCAP Financial Corporation. MCAP provided interim mortgage financing to the developer of the project.

The Court found that MCAP owed no duty of care to the plaintiffs and the plaintiffs accordingly had no basis for claim against MCAP.

The Owners Condominium Corporation No. 0825873 v. 1246153 Alberta Ltd. (Alberta Court of Queen's Bench) November 18, 2010

Developer not exempt from paying condominium fees

The condominium corporation brought an action for recovery of arrears of condominium fees in relation to the developer's unsold units. The developer said that there was a special reduced fee arrangement for the developer's units. The developer also claimed various set-offs for amounts allegedly paid by the developer on behalf of the condominium corporation.

The Court held that the condominium corporation was entitled to be paid the full amount claimed. Any alleged fee arrangement (for reduction of the developer's condominium fees) was void. The claims for set-off were also dismissed.

OTHER ONTARIO CASES:

Chan v. Toronto Standard Condominium Corporation No. 1834 (Ontario Superior Court of Justice) January 6, 2011

Rules required that units be used only as single family residences Owner also responsible for all of the damage resulting from water escape. Corporation could lien for recovery of these amounts

The condominium corporation's rules required that each unit be occupied and used only as a private single family residence. The Court noted that the meaning of the term "family" had been decided in the case of *Nipissing Condominium Corporation No. 4 vs. Kilfoyl*. [See Condo Cases Across Canada - Part 28, November 2009, and Part 30, May 2010.] Therefore, the occupants of each unit had to be related. Furthermore, because of provisions in the corporation's declaration and rules, the owner was not permitted to place any additional locks on any doors (to or within the unit) without first obtaining the written approval of the Board. And if approval was given, the owner had to then provide the corporation with a key to the changed or additional lock.

Water had also escaped from the unit (from the water valve servicing the toilet), causing damage to the unit below. The damage to the unit below totaled approximately $8,500, including about $3,600 damage to improvements. The deductible on the corporation's insurance policy was $5,000, which exceeded the amount of damage to the standard unit. The Court held that the owner of the unit with the leaky toilet valve was responsible for all of the damage by virtue of provisions of the corporation's declaration and Section 92 of the Act. The corporation's lien for such amounts was valid and proper.

[Editorial Note #1: The corporation's governing documents did not contain any definition of family. Even so, the Court was prepared to apply the definition of family from the Nipissing Condominium Corporation No. 4 v. Kilfoyl case.]

[Editorial Note#2: The decision contains no mention of an insurance deductibles by-law, pursuant to Section 105 of the Condominium Act, 1998. Again, the Court seemed to rely upon a provision in the declaration, as well as Section 92 of the Act. It seems to me that this aspect of the decision (relating to responsibility for the deductible) may be questionable.]

Durham Condominium Corporation No. 63 v. On-Site Solutions Ltd. (Ontario Superior Court of Justice) December 2, 2010

Status certificate failed to disclose unit defect

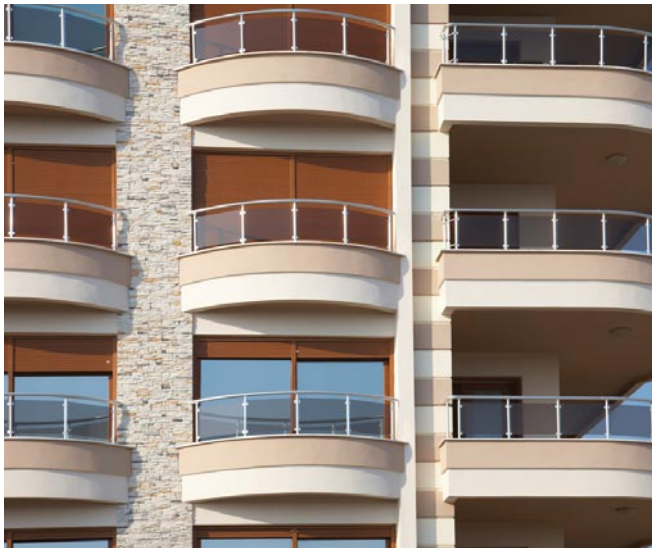
Durham Condominium No. 36 contains 35 industrial use units. The particular unit contained an interior concrete block wall which served to support the roof trusses. Originally, this partition wall contained a doorway about 36 inches wide. At some undetermined point in the past, the doorway had been widened to 10 feet, without the knowledge or consent of the condominium corporation. According to the corporation's declaration, this modification required the consent of the Board.

The unit was sold and the purchaser requested a status certificate. The status certificate did not disclose the problem.

In accordance with recommendations of an engineer, the purchaser reinforced the 10-foot opening by installing a steel lintel across the top of the opening. However, the condominium corporation wanted the wall to be returned to its original condition. The Court said that the status certificate prevented the condominium corporation from making this demand.

The timing of the corporation's awareness or knowledge of the modification was considered by the Court. In that regard, the decision included the following key passage:

"Richard Duval, the President of the corporation, attended at the unit "for a routine inspection" on or about October 24, 2008. The common assumption during the argument was that he had inspected the unit before he signed the status certificate on October 22, 2008 on behalf of the corporation, but nothing turns on the discrepancy in the dates since the corporation had time to correct it. Relying on the status certificate, the respondent (purchaser) closed the transaction and took possession of the unit on October 31, 2008."



Despite the repair efforts, leaks continued and the condominium corporation ultimately agreed in 1998 to replace the roof in accordance with the engineering firm's recommendations.

[Editorial Note: This case stands for the proposition that condominium corporations must disclose unit problems in any status certificate for the unit. But surely the condominium corporation is only obligated to disclose unit problems of which the corporation is aware at the time the status certificate is issued. This decision seems to suggest that the condominium corporation must issue a revised status certificate if it gains relevant information before the purchase transaction is completed. I don't agree. In my view, a status certificate must reflect the corporation's knowledge at the time the status certificate is issued and the corporation has no obligation to issue a revised status certificate if new information comes to the corporation's attention after issuance of the status certificate. It's up to the purchaser to request a new status certificate, if he or she wishes. I suppose a condominium corporation can always decide to issue a revised status certificate, if it wishes to do so, but this could also create problems (for example if purchase conditions have been waived based upon the previous certificate).]

Corchis v. Essex Condominium Corporation No. 28 (Ontario Court of Appeal) November 22, 2010

Condominium corporation primarily liable for damage caused by roof leak

In 1994, the condominium's roof was leaking. Based upon advice from architects and engineers, the condominium's roofing committee recommended that the roof be replaced. The Board decided instead to arrange for minor repairs to the roof, based upon recommendations of the developer, one of the owners (who was a retired engineer), and the third party, London Caulking and Installations Limited.

Despite the repair efforts, leaks continued and the condominium corporation ultimately agreed in 1998 to replace the roof in accordance with the engineering firm's recommendations. In the meantime, the leakage had caused significant damage to the plaintiff unit owner. The Courts had previously concluded that the condominium corporation's decision to delay replacement of the roof was negligent – so that the condominium corporation was liable to the plaintiff owner. The Court then had to deal with the third party action: namely, the condominium corporation's "claim over" against London Caulking. The Court of appeal held that London Caulking was indeed *partially* liable for the plaintiff's loss, but the condominium corporation was primarily liable. The Court of appeal said: "We consider it reasonable to fix London Caulking with responsibility for about 3 months out of the total 60 months of delay". As a result, London Caulking was found responsible for 1/20th of the damages.

Lahrkamp v. Metropolitan Condominium Corporation No. 932 (Toronto Small Clams Court) October 29, 2010

Court determines owner's right to examine records. Owner receives judgment for $500 plus costs

The owner sued under Section 55 of the *Condominium Act*, 1998 for an order entitling the owner to examine various records of the corporation, and for a $500 penalty pursuant to Section 55. The Court ordered the condominium corporation to produce for examination some of the requested records and also awarded the owner $500. The Court's decision included the following:

- Section 55(3) of the Act states that an owner can examine records of the corporation for purposes "reasonably related to the purposes of the Act". However, not every request for documents must be accompanied by reasons for the request. In some cases, a reason (falling within the purposes of the Act) may be self evident from the surrounding facts, or may be reasonably inferred from the nature of the record requested. The Court said: "It is necessary to look at the facts surrounding each request to determine whether the condominium corporation had a reasonable excuse in not providing the records for examination."
- The owner's request for historical accounting records respecting certain lobby expenditures was refused because the owner was on a pure "fishing expedition" without any evidence to support his suspicion of impropriety. Given the weak basis for the request, and the extensive effort that would be required to assemble those records, the Court felt that it was reasonable to refuse this request.
- The Court also refused to grant the owner's request to see records relating to his own unit, dating back to 2003. The Court said that the condominium corporation had a reasonable excuse to deny these records "on the basis that a general search would have been expensive and too time consuming" and the owner had not given reasons to counter the condominium corporation's position in denying the records.
- The owner was not entitled to the corporation's list of owners' names and addresses because Section 55(4)(c) of the Act generally exempts the right to examine records relating to specific units or owners. "The plaintiff's reason for wanting the list was described as a need to communicate with others" and this reason was "clearly too vague and infringes on the privacy rights of the communal owners".
- The owner was entitled to see the proxies and ballots for the 2009 and 2010 AGMs. The owner was also entitled to see minutes of the Board meetings and to see notices of the corporation's rules.

1420041 Ontario Inc. v. 1 King West Inc. (Ontario Superior Court of Justice – Divisional Court) December 9, 2010

Condominium owner has no legal capacity to assert claims respecting the common elements. Owner's claim respecting unit damage stayed unless or until owner elects to opt out of overlapping action by condo corporation.

The condominium corporation had asserted claims with respect to alleged common element deficiencies and alleged unit deficiencies. An owner commenced its own claims with respect to alleged common element deficiencies and with respect to alleged deficiencies in the owner's unit. The defendant developer sought an order striking or staying the owner's claims. The lower Court refused to grant such an order. [See Condo Cases Across Canada, Part 30, February 2010] On appeal, the Divisional Court held as follows:

1. A condominium unit owner has no legal capacity to assert claims in relation to the common elements.
2. The owner's claims with respect to the unit were also stayed, but with leave to lift the stay if the owner elected to opt out of the condominium corporation's action.

The decision included the following paragraph:

In agreeing with the conclusion that the condominium corporation is the only appropriate plaintiff in relation to an action concerning the common elements, it is important to remember that an individual unit owner is not without a remedy if the corporation refuses to bring such an action. He or she has a claim against the condominium corporation, the entity charged under the Act with the responsibility for maintaining and repairing the common elements.

[Editorial note: The Divisional Court didn't elaborate on what sort of claim might be asserted by the owner against the condominium corporation, as described in the above paragraph. Is the owner's right simply to insist that the condominium corporation fulfill its maintenance and repair obligations? Or can a condominium owner take the position that the condominium corporation has a duty to assert claims in certain circumstances? Again, the Court did not elaborate.]

Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp. (Ontario Superior Court of Justice) November 16, 2010

Absence of cost-sharing agreement did not constitute oppression

This development comprised four condominiums as well as separate free-hold commercial/retail property. There were shared services and easements between the different properties. However, cost-sharing agreements had not been prepared and registered (except for a "limited cost-sharing agreement" in the case of one of the condominiums).

The condominium corporations argued that the developer (who owns the free-hold commercial/retail space) unfairly benefits from the lack of a cost-sharing agreement because the developer has the benefit of the shared services and yet has no responsibility to contribute towards the operating and maintenance costs. The Court disagreed. The Court said that the developer "may be responsible at common law for some portion of certain costs" related to shared services. The scope, amount and allocation of those costs would be open to debate, but would be subject to common law principles of negligence, nuisance, restitution and unjust enrichment. In any event, the Court said:

While I can acknowledge that a cost sharing agreement might have been a prudent, and even preferred, way to achieve a fair allocation, the applicants are not without their remedies at common law in the absence of such an agreement. The imputation of an agreement is not necessary to protect their legitimate interests.

Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No. 1930 (Ontario Court of Appeal) November 9, 2010

Provision in declaration not an "agreement" for purposes of Section 112 of the *Condominium* Act

The condominium corporation's declaration required that the condominium corporation purchase a unit for a resident manager, at a cost of $240,000. The lower Court held that this was an agreement that could be cancelled pursuant to Section 112 of the *Condominium Act* [see Condo Cases Across Canada, Part 28, November 2009.] The lower Court decision was overturned on appeal. The Court of appeal said that legal obligations arising from a condominium declaration are not "agreements" for purposes of Section 112.

Swan v. Goan (Ontario Superior Court of Justice, Small Claims Court – Oshawa, Ontario) November 25, 2010

Former director's claims for defamation dismissed

The plaintiff brought claims against the condominium corporation and various other parties for defamation as a result of the publication and republication of a notice of requisition for a condominium owner's meeting which sought to remove the plaintiff as a director of the condominium corporation. [The plaintiff was removed by a vote of the majority of the owners, at the requisitioned meeting.]

All claims were dismissed. Among other things, the Court said that the defendants were entitled to rely upon the defences of fair comment and/or qualified privilege.

NEWFOUNDLAND AND LABRADOR CASE:

Neil's Pond (Phase III) Condominium Corp. v. J.M.J. Holdings Ltd. (Newfoundland and Labrador Supreme Court, Trial Division – General Division) December 16, 2010

Common expenses payable by developer in relation to unsold units

A number of units were unsold and accordingly were still owned by the developer. The developer asserted that common expenses were not payable with respect to units owned by the developer until those units were ready for occupancy. The Court disagreed and ordered the developer to pay common expenses, in accordance with the terms of the corporation's declaration, in relation to all unsold units, commencing upon the date of registration of the declaration. The Court also confirmed that interest had accumulated on the unpaid amounts, at the rate indicated in the corporation's declaration.

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