BY JAMES DAVIDSON, LL.B., ACCI, FCCI

Condo Cases across Canada

ISSUE NO. 34

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:

MISAPPROPRIATION OF CONDOMINIUM FUNDS. A RECENT ONTARIO DECISION HIGHLIGHTS SOME OF THE FINANCIAL RISKS THAT NEED TO BE CONSIDERED BY ALL CONDOMINIUM CORPORATIONS. HERE'S MY SUMMARY OF THE DECISION:

York Region Condominium No. 890 v. RPS Resource Property Services Limited (Ontario Superior Court of Justice) January 19, 2011

Manager misappropriated funds of condominium corporation. However, corporation's bank was not liable

The corporation's manager, RPS, misappropriated approximately $370,000 of the corporation's funds, for the manager's own purposes. The Court awarded judgment against RPS for breach of contract, conversion and breach of trust. The Court also awarded judgment against the principal of the management firm (William Garland). The Court held that Mr. Garland was a "constructive trustee". However, the Court dismissed the corporation's claim against its bank, the Royal Bank of Canada (RBC).

The bank account in question was opened in the name of the manager, as a trust account. The funds were misappropriated by way of internet banking transfers (not by way of cheques). Even though the amounts involved exceeded the manager's $100.00 authority for cheque-signing (on the account), the Court held that the bank could have no reason to question the authority for the internet transfers. The Court's decision included the following:

"RPS had opened current accounts both for its own business and for its clients' business in its name at RBC. Some of those accounts involved trust funds. There was therefore nothing unusual in the manner in which RPS opened the account from RBC's prospective or that, even though it was for the plaintiff's business, it was in RPS' name and had access to internet banking."

"Further, there is no evidence that at any time during the operation of the account, RBC had notice of any issues or concerns in respect of its operation or the operation of any other RPS' bank account that may have given rise to a suspicion by RBC of breach of trust by RPS."

"There is no evidence that any of the cheques written on the account were not signed in accordance with the signing authority provided to RBC. While there were clearly internet transfers from time to time, no signatures where required to carry them out. From RBC's viewpoint, the transfers could have been carried out by the (condominium corporation) or by RPS with authority. In the absence of a duty to inquire, RBC has no obligation to monitor the Account."

[Editorial Notes:

- *This case shows the potential danger posed by internet banking. If internet banking is contemplated, authority to access the account must be carefully considered. And there is a further question: Does the manager have exclusive authority to set up the internet banking arrangements in the first place?*
- *There was no discussion, in the case, of Section 115(2) of the Condominium Act 1998. That section states that a condominium corporation must maintain accounts "in its name". But does Section 115(1) also permit trust accounts for the corporation (for example, in the name of the corporation's manager)? This case says that trust accounts (in the manager's name) are*

perfectly acceptable. But, again, the Court did not specifically address Section 115(2).

- *Fidelity bonding (for persons handling corporation funds) can provide valuable protection against these sorts of losses.*
- *Misappropriation will of course normally be detected by the corporation's auditors; but the audits are generally only once a year. Misappropriation "between audits" obviously won't be detected (until the next audit).]*

B.C. CASES

Martin v. Lavigne (British Columbia Court of Appeal) March 8, 2011

President's newsletter protected by qualified privilege. No claim for defamation

The Martins were the owners of a ground floor residential strata lot. They had made various complaints about the financial management of the strata council. Subsequently, they alleged that one of the council members, Mr. Lavigne, while travelling on a public walkway outside their window, had stared at them through their window in an intimidating manner. They complained to the Strata council about Mr. Lavigne's conduct.

The council's President then sent a newsletter to all owners in which he described the dispute between the Martins and Mr. Lavigne, and said that it was necessary to file a police complaint against the Martins.

The Martins asserted two claims: A claim against Mr. Lavigne for nuisance (in relation to the alleged staring incident); and a claim against the strata corporation President for defamation (in relation to the publication of the newsletter). The lower Court dismissed both claims and the decision was upheld on appeal. The Courts' reasons were as follows:

1. The alleged staring did not fall within the law of nuisance and also was too minor to justify any order of the court.
2. The President of the strata council had a duty to inform owners about the Martins' complaints and the strata council's actions in attempting to resolve those complaints. There was no evidence of malice and the President did not exceed the boundaries of his duty. Therefore, although the newsletter did contain some false and defamatory statements, the defense of qualified privilege applied (to prevent any judgment in favour of the Martins).

Geunther v. Strata Plan KAS431 (British Columbia Supreme Court) February 1, 2011

Strata corporation obligated to repair and maintain balcony enclosures

In this 42-unit strata corporation, all but one of the strata lot owners had installed balcony enclosures in the mid-1980's. Some of the balcony enclosures were leaking.

The petitioner, Geunther, is one of the strata lot owners. He asserted that the strata corporation had failed to fulfill its obligation to properly repair and maintain the balcony enclosures and the building's envelope. He sought the appointment of an administrator and various ancillary relief.

The Court found that the balcony enclosures are "limited common property", but nevertheless agreed with Mr. Geunther that the strata corporation was obligated, under the corporation's by-laws, to repair and maintain the balcony enclosures. (The Court said that the strata corporation was in breach of this duty, at least in relation to some of the balcony enclosures). However, the Court declined to appoint an administrator, because the Court felt that it was "appropriate to give the strata corporation an opportunity to address the question of balcony repairs in light of this decision".

The Court held that the strata corporation was not in breach of its duty to repair or further investigate the building envelope. [Expert investigation had revealed no problems with the building's envelope.]

Clarke v. Strata Plan VIS770 (British Columbia Supreme Court) (February 28, 2011)

Administrator's appointment extended. Strata corporation does not have authority to seek re-zoning without unanimous consent of owners

An administrator had previously been appointed because of required building envelope repairs and the inability of the owners to agree on the required work (by way of necessary supporting votes). [See Condo Cases Across Canada, Part 23, September 2008] The Court extended the administrator's appointment. The Court said:

"I am persuaded that the complexity of the problems that continue to plague this building and the inability of the owners to work in any cohesive way towards solutions that are consistent with the duties and best interests of the strata corporation require the continuing appointment of an administrator."

The Court also addressed the demands, from some of the owners, that the administrator seek a re-zoning of the property to permit six balcony enclosures (which had been installed some time after original construction). The Court said:

"I conclude that, absent the unanimous consent of all strata property owners, neither a strata corporation, nor a strata council on its behalf, nor a Court appointed administrator, is entitled to seek any re-zoning change for the simple reason that re-zoning directly affects the property rights of each individual owner."

Stettner v. Strata Plan PG 56 (British Columbia Provincial Court) April 7, 2011

Small Claims Court does not have jurisdiction to decide a claim based upon an alleged breach of Section 71 of the *Strata Property Act*

The claimant strata lot owner sued the strata corporation for costs incurred in removing his shed. He had removed the shed after the strata corporation had demanded that he sign an "exclusive use agreement" respecting his shed. The owner said that the corporation's demand violated Section 71 of the *Strata Property Act*.

The Small Claims Court regretfully concluded that it did not have jurisdiction to decide the matter. According to the *Strata Property Act*, only the Supreme Court could decide the matter.

The Owners, Strata Plan NES 97 v. Timberline Developments Ltd. (Supreme Court of British Columbia) December 16, 2010

Developer must share costs attributable to common facilities

The Timberline Lodges complex consists of 175 strata lots in six buildings, developed in 11 phases. The complex includes six hot tubs, each associated with a particular lodge, elevators in four of the lodges and a common laundry room in each of 3 of the lodges.

The strata corporation claimed that the developer was obligated to share in certain costs relating to the hot tubs, elevators and laundry rooms. The strata corporation relied on Section 227 of the *Strata Property Act* which states that, in the case of a phased development, the developer must share expenses attributable to "common facilities". At any given time, expenses are allocated as if the development is complete, and the developer pays the portion (for common facilities) attributable to the undeveloped part of the property.

The Court held:

1. The hot tubs are common facilities and the developer accordingly had to share in the costs to replace two of the hot tubs (due to wear and tear over time).
2. The laundry facilities are common facilities. However, the cost to replace the washers and dryers was not "attributable to the common facilities" because they were removed by a departing property manager, and their removal was accordingly "attributable to a business dispute between the plaintiff and its property manager".
3. The elevators are not common facilities. Therefore, the developer was not obligated to share in expenses attributable to the elevators.

ALBERTA CASES

Condominium Corporation No. 0825873 v. 1246153 Alberta Ltd. (Alberta Court of Queen's Bench) March 17, 2011

Corporation's claim for common expense arrears is a "continuing claim"

The question in this case was whether or not the condominium corporation's claim for common expense arrears qualified as a "continuing claim". If so, the Court can determine the damages amount up to the time the Court makes its determination (pursuant to Rule 9.9 of the Alberta Rules of Court).

The Court held that the claim for common expense arrears was a continuing cause of action. Accordingly, the Court properly included, in its damage award, arrears up to the date of the order.

Albrecht v. Condominium Corporation No. 0411156 (Alberta Court of Queen's Bench) January 31, 2011

Use as a resort club violates corporation's by-laws

This case concerned a 40-unit condominium, consisting of two buildings, each having 20 units. Each building was a separate phase of the development.

The developer's original plan was that all 40 units would be single family dwellings. However, when the second phase did not sell, the developer sought to develop the second building as a resort club. The owners in Phase I objected.

The Court held that the proposed resort club violated the rules (contained in a schedule to the by-laws) of the condominium corporation. In particular, the Court said that the proposed resort club would violate the rule prohibiting use of the units for any purpose other than a single family dwelling. Furthermore, the proposed resort club would violate the rule prohibiting use of the units for commercial purposes. The Court said:

"The activities involved in a resort club as proposed such as on-going marketing, key pick-up, some sort of reservation and accounting system to keep track of time periods and units, trading of units as well as cleaning services for the units, together with possible collection and remittance of GST payments, all bring an air of commercialism to the use of these units…"

OTHER ONTARIO CASES:

Peel Condominium Corporation No. 108 v. Young (Ontario Superior Court of Justice) March 21, 2011

Despite corporation's "selective enforcement", owner ordered to reverse common element modification

The owner had made a change to the common elements, namely the installation of a vent through the outside wall for a tankless gas water heater. This was done without the consent of the condominium corporation as required by the declaration (and the Act).

The owner argued that the corporation had been selectively enforcing the declaration, and it would therefore be unfair to enforce it against her. The Court agreed that there had been selective enforcement on the part of the corporation (some violations had gone unchallenged), but nevertheless granted the corporation's application for an order requiring the owner to reverse the change. The Court said:

"The argument regarding selective enforcement raises issues of fairness on both sides. On the one hand, unit owners as a group, and their representatives, the Board of Directors, have an interest, and indeed a duty, to enforce the Declaration. On the other hand, the individual unit holder who violates the Declaration has a legitimate cause for complaint where the Board of Directors have permitted other violations to occur without consequence. The task of the Court is to balance these competing interests in a specific case. "

"In my view, there has been a degree of selective enforcement by the applicant sufficient to give rise to a concern. However, it does not approach the rampant non-enforcement that has arisen in some cases, particularly those involving in keeping of pets."

"Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the Declaration enforced must prevail over the private interest of the respondent. The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets."

Although the Court therefore granted the order requested by the corporation, the Court said that the "selective enforcement is relevant to the issue of costs". The Court invited submissions with respect to costs, and we don't yet have the Court's ruling on costs. However, the

Court's decision clearly indicates that the cost award will be affected by the fact that there was selective enforcement on the part of the condominium corporation.

In the course of the judgment, the Court also rejected the owner's claim of "promissory estoppel". (The owner argued that she had been led to believe, through the Board's inaction, that she was permitted to make the particular change.) On this issue, the Court said "the evidence falls far short of demonstrating that the (condominium corporation) made a representation on which the (owner) relied to her detriment".

Tsang v. Wong (Ontario Superior Court of Justice) March 21, 2011

Tenant responsible for costs payable to condominium corporation (by landlord) due to tenant's breach of "no pets" provision in declaration

The defendant (tenant) leased a unit owned by the plaintiff (landlord). The condominium's declaration contained a "no pets" provision. The tenant's lease also said that the tenant agreed not to keep any pets in the unit and to abide by the rules and regulations of the condominium corporation. The tenant brought a pet into the unit, and relied upon Section 14 of the Residential Tenancies Act, 2006 which states as follows:

"A provision in a tenancy agreement prohibiting the presence of animals in or about a residential complex is void."

The condominium corporation sought the assistance of its legal counsel, in order to enforce the "no pets" provision in the corporation's declaration. Ultimately, the tenant agreed to move out of the unit. However, in the interim the condominium corporation had incurred considerable legal costs, which were claimed from the landlord. The landlord sought to recover those amounts from the tenant. The Court said that the tenant was obligated to pay any amounts owed by the landlord to the condominium corporation. [The Court did not determine the amount owed, in case either party wished to assess the accounts of the condominium's lawyers.]

The Court said that the tenant's actions "triggered the events that generated the legal fees incurred by the condominium corporation, which in turn were charged to the (landlord)".

Waterloo North Condominium Corporation No. 168 v. Webb (Ontario Superior Court of Justice) April 14, 2011

Court orders owner to vacate and sell his unit

The facts of this case were summarized by the Court as follows:

"The evidence before me is that for years the (owner) has engaged in significantly aggressive behavior toward other unit owners, their guests, and management personnel of the building. He has been convicted of, and has served jail time for, criminal offences relating to the serious vandalism of one such owner's vehicle and to his having become involved in a knife fight in the foyer of the building with yet another owner. He was observed kicking a dog belonging to the guest of an owner, as well as swearing at and throwing beer at the dog's owner. He has been verbally abusive towards staff and others."

"In a more recent incident, the owner yelled at another dog owner and said 'if this shit keeps on, someone is going to get hurt and if I have to go back to jail, someone is going to die'."

Condominium owners and staff were afraid of the respondent owner.

The owner did not deny his conduct. His only "explanation" was that he had various complaints of financial mismanagement against the condominium corporation. The Court said that those complaints did not justify the owner's behaviour. The Court also addressed an apparent disability of the owner. The Court said:

"The respondent says, and I accept as true, that he has suffered brain injury and that he had a difficult childhood. Neither of these facts, however unfortunate and deserving of sympathy as they may be, can justify his conduct."

The Court ordered the owner to vacate and sell his unit, such sale to close no more than 90 days from the Court's order. In the interim, the owner was restrained from entering upon the common elements and from having any oral or physical contact or communication with any resident or employee of the condominium.

QUEBEC CASE

Syndicat des copropriétaires du 2010 de la Montagne v. 9103-9909 Québec inc. (Quebec Superior Court) February 24, 2011

Developer not obligated to upgrade car elevator

Five of the co-owners gained access to their parking spaces by using a car elevator. The elevator was inconvenient and antiquated in its operation. There were also some minor deficiencies in its operation. On behalf of the five co-owners, the syndicate claimed that the developer was obligated to upgrade or replace the elevator with a modern, convenient elevator, commensurate with the overall quality of the building.

The Court said that the developer was obligated to repair the deficiencies but not to upgrade or replace the elevator. The developer had made no representation about the elevator and its inconveniences were available to be seen by the purchasers at the time of purchase.

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

VOLUNTEER OPPORTUNITY!

CCI-National is looking for Sponsor/Trade members to join the Sponsor Task Force.

This is a great chance to get involved on the National Level as we look to maximize the benefit of CCI to this category of members. Task Force Members will meet monthly via conference call, and we encourage members from all areas of the country.

Those interested are asked to contact, Stephen Cassady, Task Force Chair at stephen.cassady@247condo.com by July 15, 2011.