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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:

BY-LAW INTERPRETATION. A RECENT SASKATCHEWAN CASE OFFERS SOME GENERAL PRINCIPLES ON BY-LAW INTERPRETATION THAT I THINK MAY APPLY TO CONDOMINIUMS ACROSS CANADA. IN THE SASKATCHEWAN CASE, THE COURT SAID THAT THE BOARD'S INTERPRETATION OF THE CORPORATION'S BY-LAWS WILL GOVERN, UNLESS THAT INTERPRETATION IS UNREASONABLE. THE COURT ALSO SAID THAT PRINCIPLES OF CONTRACT INTERPRETATION DO NOT APPLY TO BY-LAW INTERPRETATION. AS SUCH, THE INTENTIONS OF THE PARTIES INVOLVED IN THE PREPARATION AND CONFIRMATION OF THE BY-LAW WERE NOT RELEVANT. HERE'S THE CASE:

Tofin v. Spadina Condominium Corporation (Saskatchewan Court of Queen's Bench) June 2, 2011

Court will defer to Board's interpretation of by-law, unless the Board's interpretation is unreasonable. Also, principles of contract interpretation did not apply

This was a dispute about the election voting rights of the commercial owners in the condominium. The applicant, an owner and former Board member, asserted that the Board's interpretation of the corporation's by-law (on these matters) was wrong. According to the applicant, the by-law, when prepared and passed, was intended to achieve a different result than had been determined by the Board.

The Court supported the Board's interpretation of the by-law. In doing so, the Court said that it should defer to the Board's interpretation so long as this interpretation was reasonable. The Court said that the test is not whether the Board has properly or correctly interpreted the by-law. On that issue, the Court said:

Although the applicant argued that the appropriate standard of review is correctness, the Court is not prepared to accept that proposition. The appropriate standard of review is reasonableness.

The court also compared contract interpretation with condominium by-law interpretation:

The Court has concluded that principles of contract interpretation have no place within the scope of the within application, being the interpretation of a condominium by-law. This process is not analogous to the interpretation of a contract. The owners of condominiums within a condominium corporation are not in the same position as the parties to a specific contract.

…

As such, this Court is not prepared to consider the arguments of the applicant's counsel with regard to the intent of the applicant at the time the by-laws were enacted or apply other principles of contract interpretation in determining whether the Board's interpretation of (the by-law) was reasonable.

B.C. CASES

Dollan v. Strata Plan BCS 1589 (Supreme Court of British Columbia) May 2, 2011

Corporation's refusal to allow owner to change opaque "spandrel window" to normal vision window significantly unfair. Owner permitted to change window

This property contains 158 strata lots in two high-rise towers which are connected by townhomes. The developer's original plans called for west-facing windows in the 01 units to be normal vision windows. For a reason that was not in evidence, the developer instead installed west-facing "spandrel windows" in the 01 units. [Spandrel windows are opaque windows that do not allow vision through the windows.] The petitioner, an owner of an 01 unit, sued the developer. The developer agreed to replace the spandrel window with a normal vision window, provided the strata council approved.

The dispute arose as a result of the privacy concerns of the owners of the 02 units. The particular west-facing windows (in the 01 units) are very close to the east-facing windows of the 02 units. The Court further summarized the facts as follows:

Under the strata corporation's by-laws, any changes to common property require the written approval of the strata corporation.

…

The proposed change was discussed at a strata council meeting on April 22, 2008. Certain owners of the 02 units were opposed to the change because the spandrel windows in the 01 units act as a privacy screen for them. Replacing the spandrel with vision glass would result in their loss of privacy.

Because the proposed change was controversial, the strata council decided that the proposed change was a significant change in the use or appearance of the common property under s.71 of the (Strata Property Act) which requires a resolution passed by a three-quarters vote.

The required motion (at an owners' meeting) was defeated, with 19 owners in favour and 54 owners opposed.

The Court concluded that this decision of the strata corporation (to refuse the requested window change) was significantly unfair to the petitioner, within the meaning of s.164 of the *Strata Property Act.* The Court felt that the owners of the 01 units should not have been denied their expected westward view in order to give the 02 units unexpected extra privacy. (And of course the 02 owners could still look out their own windows.) The Court said:

Allowing the petitioners to change the spandrel window to vision glass would allow the 01 unit and the 02 unit occupants to a view outside the window, and privacy by closing blinds or coverings when the occupants want privacy. This would in my view accomplish the greatest good for the greatest number.

The 01 owner was permitted to change the window (with the work to be carried out at the developer's expense).

Basic v. Strata Plan LMS 0304 (Court of Appeal for British Columbia) May 5, 2011

Strata corporation dealt reasonably with water problems. [Corporation not negligent.] Therefore, corporation not liable for owner's alleged damages

The owner experienced sneezing and cold-like symptoms allegedly due to mould resulting from repeated sewer back-ups and other water problems which affected his locker and its contents. The owner claimed that the strata corporation had not reasonably responded to the water problems and accordingly should be held liable for his damages.

The trial Court held that the strata corporation had acted reasonably, and dismissed the owner's claim. The owner appealed. The Appeal Court upheld the trial Court's decision.

Editorial Comment: This is another in a growing list of cases that have confirmed the principle that condominium corporations are not guarantors of the common elements. In considering a corporation's fulfillment of its obligations, the test is reasonableness. [IE. The question is whether or not the corporation has acted reasonably in all of the circumstances.]

Imbeau v. Strata Plan NW971 (British Columbia Supreme Court) June 21, 2011

Corporation failed to properly hold a secret-ballot vote. Special levy not properly passed

The Court said that a secret ballot vote requires that there be a private area or space (such as a booth) to allow owners to mark and deposit their ballots in private. Otherwise, other owners and persons collecting the ballots can possibly see an owner's vote, which can defeat the secrecy of the vote.

The Court said that the secret ballot vote, held in this case to approve a special levy pursuant to the corporation's by-laws, was not properly held and was accordingly void.

[Editorial Note: Thousands of secret-ballot votes are held every month in condominiums across Canada, and I don't believe that I have ever heard of a "voting booth" at a condominium meeting. In my experience, owners can normally achieve secrecy by using a hand (to hide their ballot), or by marking their ballot in a quiet corner, and then folding the ballot before providing it to one of the scrutineers. Any owners requiring a private room or space (to mark their ballots) can request such. (In light of this decision, I think that corporations should be ready to accommodate any such requests.) But I'm surprised that a Court would declare a vote void where no owner had made such a request.]

Ulansky v. Waterscape Homes Ltd. Partnership (British Columbia Supreme Court) January 26, 2011

Purchase agreements declared unenforceable due to developer's failure to disclose all material facts

The developer failed to disclose to purchasers the fact that units in the Strata Plan could be used for short-term rentals. The Court held that this was a failure to disclose a "material fact" as required by Section 14 of the *Real Estate Development Marketing Act*, and accordingly found that the plaintiffs' purchase agreements were unenforceable. The Court held that the developer was obligated to disclose all permitted uses (primary and secondary). The Court said:

…the test to be applied is whether a reasonable person would conclude that the fact in issue would affect "the value, price, or use of the development unit". In my opinion, a reasonable person would consider the fact that some units can be used as short-term rentals a material fact, since it affects the "use" of the development unit.

Watson v. Havaday Developments Inc. (Supreme Court of British Columbia) April 21, 2011

Purchase agreements declared unenforceable due to developer's

failure to disclose material amendments

The Court allowed the applications of two purchasers for return of their purchase deposits. The Court held that their agreements (for the purchase of strata lots) were unenforceable due to the developer's failure to give them details of material amendments (ie. amendments to the disclosure statement) as required by the *Real Estate Development Marketing Act*.

The Court's decision included the following:

1. *A substantial delay of many months in a completion date is, in British Columbia, material;*
2. *A change in a project from a single phase to two phases is material;*
3. *A change in ownership, or control, or of the directors of the developer does not ordinarily mean that the identity of the developer has changed;*
4. *A change in the developer's financing may or may not be material; and*
5. *A developer is obliged to provide each purchaser with all amendments to its disclosure statement until closing.*

…

I find, as well, that the changes noted in the amendment of January 20, 2009, respecting the change from a one phase to a two phase development, and the extension of the outside completion date, were, in all the circumstances, material. They were changes that could well have affected the price, value and use of the plaintiffs' units.

ALBERTA CASES

Condominium Plan No. 772 1806 v. Gobeil (Alberta Court of Queen's Bench) May 10, 2011

Court orders condominium corporation to reconsider its decision requiring that the owners relocate their shed

The owners had erected a shed in their exclusive-use yard area. Under the corporation's by-laws, the shed required the consent of the Board; and the owners had not received the Board's consent.

The Board had prepared guidelines / specifications for sheds. The shed in question met all of the Board's guidelines, including guidelines respecting size, design and colour. [The guidelines did not include any requirements respecting location of a shed in the yard area, except to say that a shed must be "a minimum of 1 foot away from the Unit or the fence". The shed in question also met this requirement.] The Board nevertheless required that the shed be moved to a different location in the yard, in order to avoid blocking the sun to the neighbour's yard. The owner refused to move the shed.

The Court held that the Board's decision unfairly disregarded the interests of the owners of the shed, in contravention of s.67 of the *Condominium Property Act*. The Court felt that, given the position of the shed, it would only block the sun of the neighbour's yard "in a trifling way". The Court then said:

The board has established guidelines, and although they are not binding, having established guidelines, owners should quite reasonably expect their compliant applications would ordinarily be approved. There may well be valid reasons to vary from the guidelines but in those circumstances an owner is entitled to receive from the Board, at the very least, a rational explanation for the variation… Nothing indicates that there was any attempt to weigh the consequences to the two parties directly affected…

I emphasize that I am cognizant that I should give considerable deference to the Board's decision and that the guidelines do not bind them. However, based on the material before me, I nonetheless conclude that the Board's decision and the exercise of its power appears to have unfairly disregarded the interests of the Gobeils. On that basis, I set aside the decision of the Board. Resisting the temptation to substitute my decision, I direct that the board reconsider the Gobeils' application and provide their decision after given (sic) the matter proper consideration including the opportunity for the Gobeils to respond to other interested parties' submissions.

Bank of Montreal and CIBC v. 7177232 Canada Incorporated et al (Court of Queen's Bench of Alberta) April 15, 2011

Condominium status terminated and property ordered sold as a single parcel

The condominium building was declared uninhabitable by the province of Alberta, and had sat empty for almost two years. It was subject to water leaks and mould. Repairing the building would involve substantial expense and the evidence was that most of the owners were not prepared to invest further in the building.

On the application of two of the unit mortgagees, the Court ordered that the condominium status of the property be terminated in order to permit the property to be dealt with as one parcel, and sold.

The Court said:

The facts clearly indicate that it is in the best interest of the owners to have the building marketed as one parcel. The Court recognizes that this result does not align with the wishes of two owners. The Court also acknowledges the long-standing principle found in our judicial system and in our decisions that the rights to property of owners are to be protected. However, when buying a condominium, an owner must recognize that his or her wishes or desires may ultimately be subjugated to the interest of the majority. This is just an extreme and unusual example of that principle of condominium ownership.

In the Matter of a Plan of Compromise or Arrangement of Medican Holdings Ltd., Axxess (Grande Prairie) Developments Ltd., et al (Court of Queen's Bench of Alberta) June 10, 2011

Condominium was "substantially complete" despite construction deficiencies. Proceeds of remaining sales not to be held in trust

Axxess (Grande Prairie) Developments Ltd. ("Axxess") was insolvent and was in *Companies' Creditors Arrangement Act* stay, by previous order. Axxess was the developer and builder of a 177-unit condominium in Grande Prairie Alberta. Seven units remained unsold and comprised all of the assets of Axxess. Those units were to be sold for the benefit of Axxess' creditors. The condominium corporation, Corporation No. 0627724, claimed that there were serious deficiencies in the construction of the condominium. The corporation asserted that the units were not "substantially complete" and that the proceeds of sale of the remaining units had to be held in trust pursuant to s.14 of the *Condominium Property Act* – so that those funds could be used to complete the construction (by remedying the deficiencies). The Court refused the condo-

minium corporation's application. The Court said:

In my view, the claim by the condominium corporation here is nothing more than an attempt to leverage its position as a plaintiff in a breach of contract and tort action into that of a trust beneficiary entitling it to what amounts to a pre-judgment attachment order. Deficiencies do not change a substantially completed project into one that is not substantially completed.

On the evidence before me, I am satisfied that s.14 of the Condominium Property Act does not apply as the Axxess development is substantially complete and has been since at least late March 2008 when the occupancy permits were issued by the City of Grande Prairie.

ONTARIO CASES:

MTCC No. 856 v. All Unit Owners and Mortgagees of MTCC No. 856 (Ontario Superior Court of Justice) May 12, 2011

Court agrees to appoint administrator, but prefers to appoint administrator suggested by group of owners rather than re-appointing interim administrator

The condominium corporation applied for the continuation of the appointment of the administrator that had been appointed by interim order.

The Court agreed to the appointment of an administrator, for the following reasons:

(a) There's a strong, even sometimes bordering on violent, struggle within the corporation among competing groups such as to impede or prevent the proper governance of the corporation.

(b) In my view, only the appointment of an independent Administrator has any reasonable prospect of bringing the affairs of the corporation to order.

However, the Court decided to appoint a new administrator requested by a group of responding owners. The Court felt that "re-appointing (the interim administrator) in this highly divisive atmosphere would be counter-productive, and thus not in the best interests of the owners".

Courthouse Block Inc. v. Middlesex Condominium Corporation No. 173 (Ontario Superior Court of Justice) July 5, 2011

Owners' oppression claim dismissed. Condominium corporation attended to required work in a reasonably prompt and professional way

The applicant owned 35 of the 38 commercial units in the condominium, which also contains 255 residential units in 2 towers. The applicant experienced repeated water leakage, primarily due to failing heat pumps.The applicant claimed that the condominium corporation did not quickly and properly address the problems, favouring the residential interests over the commercial. The applicant claimed that it lost tenants as a result; and claimed damages for oppression pursuant to S. 135 of the *Condominium Act, 1998*.

The Court dismissed the claim. In doing so, the Court said:

I am persuaded that the respondent (condominium corporation) has not, until recently, given priority to the replacement of the heat pumps in the commercial space. However, I am not prepared to second guess the Board of Directors on this issue. It is a volunteer Board, reliant on the advice of its professional advisors. The building is dated and presents a number of challenges requiring a sensitive balancing of various competing interests.

…

In sum, I am simply unable to conclude on the evidence and in the circumstances that the applicant's reasonable expectations have been breached. The respondent has undoubtedly not acted with the dispatch the applicant would have liked and one can certainly understand its frustration and annoyance. Nevertheless, assessed contextually and objectively, one cannot say that there has been a breach.

…

The respondent responded to the complaints of water leaks in a reasonably prompt and professional way. It did not, however, replace the heat pumps. I am unable to conclude that this was unjust and without cause given the Board's responsibility to the residential and commercial interests and the need to balance them in a fiscally sound and judicious way.

The Court noted that the condominium corporation had a concrete plan in place to resolve the problems. The Court said that the applicant would have basis for complaint if the corporation "failed to follow through".

York Condominium Corporation No. 42 v . Hashmi (Ontario Superior Court of Justice) May 3, 2011

When the powers of the Board have been transferred to an Administrator, there can be no Board elections without Court approval

The Court provided direction on various matters related to the appointment of an Administrator. The directions included the following:

- When the Board's power and authority have been transferred (by Court order) to an administrator, there should be no elections held without Court approval;
- At the same time, the Court welcomes feedback from the owners about whether or not they would like to see the administration terminated. Still, the views of the owners are not determinative because their interests are not the only interests at stake.

The Court expressed its intention to provide direction for the holding of a referendum to obtain the views of the owners on possible termination of the Administrator's appointment. But the Court requested certain submissions from the parties before the Court would provide those directions.

Pantoliano v. MTCC No. 570 and YCC No. 531 (Human Rights Tribunal of Ontario) April 15, 2011

Pool rules contravened *Human Rights Code*

These two condominiums share common recreational facilities, including an indoor swimming pool and an outdoor swimming pool. The rules of the complex prohibited children under two years of age, and persons in diapers, from entering either of the two pools. The rules also prohibited children under the age of 16 from using the pools except during specified hours. [Amendments to these rules were considered but rejected by the owners of the condominiums.]

The Tribunal held that these rules contravened the *Human Rights Code*'s pro-

vision against discrimination on the basis of family status, and ordered the condominium corporations to repeal or revise the rules. The Tribunal said:

- *The respondents (the condominium corporations) bear the burden of that (sic) these prohibitions and/or restrictions are reasonable and bona fide and lifting them would impose an undue hardship on them. The evidence they marshal to address this burden must not be "impressionistic" or "speculative". Hardship is measured only after the respondents have made efforts to minimize the risk to health and safety.*
- *While the respondents do not explicitly acknowledge it, their overall goal with respect to their pools appears to be reasonable health and safety. That is, they operate on the principle that some risk is acceptable. As noted above, the risk caused by allowing children in diapers to use the pools is extremely low and, therefore, well within the range of acceptable risk.*

The concern about children under 16 being allowed to use the pool at all times was that their boisterous play might disrupt other activities such as aquatics classes or lane swimming. The Tribunal said:

At any rate, it is not clear why the pools could not be restricted to these activities at certain hours without restricting the use by age. A child under the age of 16, for example, may be interested in participating in lane swimming.

As it stands now, the outdoor pool can only be used by children between the hours of 12 – 4 on weekdays. Children's hours for the indoor pool are 1 - 5 on weekdays. A parent who worked during these hours would not be able to swim with their child because of this restriction. Similarly, a child in school would not be able to use the pool for most or all of these hours. Indeed, these hours seemed designed to minimize access to the pools by children.

In the absence of any evidence of undue hardship, I find that the rules concerning children's hours are not reasonable and bona fide.

The decision also included the following general words of guidance:

By way of guidance, the respondents can, in good faith, create rules restricting persons with communicable diseases from entering the pools. If necessary, they can also, in good faith, restrict pool use by activity where such restrictions are reasonable and bona fide. However, requirements on the basis of age… are inherently problematic.

The applicant was the mother of a 10-month old daughter. The Tribunal awarded her compensation of $10,000, payable by the condominium corporations.

Wellington Standard Condominium Corporation No. 103 v. Wyndham Place Holdings Inc. (Ontario Superior Court of Justice) March 28, 2011

Foreclosure is one of the possible avenues of lien enforcement

This residential condominium had registered liens (for unpaid common expenses) against the developer's unsold parking units. The value of the parking units was unknown and power of sale was therefore not considered the best enforcement remedy under the liens. Instead, the condominium corporation sued successfully for foreclosure – resulting in the corporation becoming the owner of the units.

[Editorial Note: Ontario's Condominium Act, 1998 *says that condominium liens can be enforced in the same manner as a mortgage. This case confirms that lien enforcement can include foreclosure. Note that the foreclosure process is a Court-controlled process that includes opportunities for the mortgagor to redeem the debt or to request a sale of the secured property – subject to contrary Court order.]*

Clark v. 1650336 Ontario Limited (Mclelwain Construction), Tarion Warranty Corporation et al (Ontario Superior Court of Justice) November 8, 2010

Tarion warranties run with the land. Also, a claimant's only remedy against Tarion (for breach of the statutory warranties) is to pursue the statutory claims and appeal process

The plaintiffs had sued various parties (including Tarion Warranty Corporation) for alleged deficiencies in the construction of their home. On a motion for summary judgment, the claim against Tarion Warranty Corporation was dismissed for the following reasons:

1. The home had been sold by a mortgagee under Power of Sale. Therefore, the plaintiffs were no longer the owners of the home. The Court said that the Tarion warranties and related rights run with the land and are accordingly available only to the current owner of the home from time to time.
2. At a time when the plaintiffs still owned the home, Tarion Warranty Corporation had issued a decision denying the plaintiffs' claim under the Tarion statutory warranties. The plaintiffs had failed to appeal that decision in accordance with the procedures contained in the Tarion Warranty legislation (the *Ontario New Home Warranties Plan Act*). The court said:

Where consumer protection legislation such as the (Ontario New Home Warranties Plan Act) *creates a remedy which did not exist before, it is not open to a claimant to choose his or her forum to make a claim. The procedures set out in the* (Ontario New Home Warranties Plan Act) *for claims and appeals from a refusal thereof must be followed.*

3. In the specific circumstances of this case, the Court also found that there was no claim against Tarion for damages based on delay.

TSCC 1633 v. Baghai Development Limited and Rabba Fine Foods Inc. (Ontario Superior Court of Justice) June 10, 2010 and May 13, 2011

No agreement for retail tenant to use part of common elements (namely, a sidewalk)

The respondent Rabba Fine Foods Inc. (Rabba) was the tenant of certain retail units owned by the declarant, Baghai Development Limited (Baghai). Rabba was using part of the common elements (a sidewalk) to display its merchandise. The condominium corporation sought an order requiring that Rabba cease its use of the sidewalk. Rabba claimed that there was an agreement between the condominium corporation and Rabba, giving Rabba the right to use the sidewalk.

The Court held in favour of the condominium corporation and ordered Rabba to cease its use of the sidewalk. The Court's reasons included the following:

- Even if there had been an agreement between the corporation and Rabba, it could not be binding and enforce-

able without the requisite involvement of all owners pursuant to s. 98 of the *Condominium Act, 1998* (respecting common element modifications) or s. 21 of the *Condominium Act, 1998* (respecting leases or licenses of the common elements).

- In addition, the purported agreement was not in compliance with the corporation's Declaration, By-laws and Rules. Therefore, amendments to those documents would also be required.
- In any event, there was no permanent or continuing agreement between the corporation and Rabba. Any agreements or accommodations were only temporary in nature. Furthermore, Rabba had not fully complied with these temporary agreements. Therefore, the corporation was not under any obligation to seek the requisite approvals (from owners) or the requisite amendments to its governing documents, as described above. The corporation's failure to take such steps did not amount to oppression under s. 135 of the *Act*.
- The terms of the lease between Baghai and Rabba did purport to give Rabba the right to use the sidewalk. However: "Private arrangements between a declarant and an owner or tenant which are not reflected in the declaration, are not binding on a condominium corporation or its unit holders."
- The limitation period (for the corporation's application) had not expired, because Rabba's contravention was "not an isolated act but a series of different and separate uses of the sidewalk for the purposes of displaying its merchandise in various ways, each of which constitutes fresh breaches of the rules, thus giving rise to separate causes of action by the condominium corporation".

QUEBEC CASE

Syndicat des copropriétaires de Mont St. Louis v. Grochowska (Cour supérieure du Québec) 8 juin2011

Owner's violations could ultimately lead to a forced sale of the unit

A previous order was in place requiring the defendant owner to

- respect the Declaration of co-ownership;
- cease and desist from contravening the Declaration; and
- cease and desist from bringing her bicycle into the hall or entrance of the building.

The Court found that, despite this previous order, the defendant regularly breached the Declaration and harassed the other residents.

A further injunction was ordered against the defendant, requiring her to obey the Declaration, to stop bringing her bicycle into the hall, to stop harassing the concierge, to take out her air-conditioning system, to stop vandalizing the building, and several other orders. In addition, the syndicat was given the right to demand the sale of the unit if the defendant failed to obey this further injunction.

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