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

Condo Cases across Canada

ISSUE NO. 36

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:

ESTOPPEL CERTIFICATES/STATUS CERTIFICATES. WE KNOW FROM OTHER CASES THAT CONDOMINIUM CORPORATIONS MAY NEED TO DISCLOSE UNIT DEFECTS (OF WHICH THE CORPORATION IS AWARE) IN AN ESTOPPEL CERTIFICATE/STATUS CERTIFICATE ISSUED BY THE CORPORATION. BUT A RECENT ONTARIO CASE HAS CONFIRMED THAT CONDOMINIUM CORPORATIONS ARE NOT OBLIGATED TO INSPECT THE UNIT BEFORE ISSUING A STATUS CERTIFICATE. HERE'S THE SUMMARY:

Orr / Rainville v MTCC 1056 and Gowlings (Ontario Superior Court of Justice) August 18, 2011

Common element attic improperly converted to living space by original owner. Subsequent owner (purchaser) ordered to reinstate original attic. Purchaser's lawyer liable for damages flowing from failure to discover illegal conversion of attic. Condominium corporation not liable for failure to disclose in estoppel certificate

This MTCC 1056 is a 39-unit townhouse condominium and is one of three sister corporations which share certain facilities. Richard Weldon ("Weldon") was one of the principals of the original developer of the project. Weldon had acquired one of the units and had "expanded the unit" into the common elements (namely, the third floor attic) - without approval. This work had started before, and was completed shortly after, the condominium was declared. No related amendments were made to the Declaration or Description. The registered Description (in particular the survey plans) showed the townhouse as a two-storey unit with a common element attic space above.

Weldon was on the Board of Directors (along with another representative of the developer) for the first few years after declaration of the condominium – until he sold the unit. Weldon agreed to sell the unit in 1997 and the sale closed in early 1998.

Prior to the sale, the "illegal third floor" was not brought to the attention of the other Board members or the property manager (by Weldon) and was discovered by them only after the unit was sold. The estoppel certificate issued to the purchaser (in 1997) did not include mention of the "illegal third floor".

The purchaser's lawyer did not review the survey plans with the purchaser prior to closing. The purchaser closed the transaction without knowledge of the fact that the third floor was illegal.

After the purchase, the purchaser learned of the illegal third floor and also discovered numerous other deficiencies (including water penetration and resulting damage). The purchaser carried out extensive repairs and renovations, including repairs to the common elements, even after being told by the condominium corporation that the corporation would attend to all required common element repairs and that the purchaser should not carry out any such repairs.

The purchaser sued the condominium corporation, the purchaser's lawyer (on the purchase transaction) and the property manager for (among other things):

- An order amending the Declaration and Description in order to legalize the third floor;
- Damages for all of the purchaser's repair and renovation expenditures;
- Damages for oppression.

[A separate claim by the purchaser against Weldon had previously been settled.]

The condominium corporation sued the purchaser for (among other things):

- An order directing the purchaser to cease any further work without the Board's consent;
- An order requiring the purchaser to reinstate the attic to its original condition, plus reasonable compensation for the purchaser's use of the attic space.

The condominium corporation also sued Weldon (as third party) for:

- Indemnification for any amounts found

owing by the condominium corporation to the purchaser;
- Reasonable compensation for use of the attic space (during Weldon's period of ownership of the unit).

The Court declined to order any amendment to the corporation's Declaration or Description. Instead, the Court ordered the purchaser to reinstate the attic to its original condition. Furthermore, the purchaser (and Weldon) were liable to the condominium corporation for reasonable fees for use of the common elements (during their respective periods of use of the third floor).

The Court found that the condominium corporation and property manager had no liability to the purchaser even though the problems were not mentioned in the corporation's estoppel certificate. [Note: The certificate was issued before May 5, 2001, so the former *Condominium Act* applied to the issuance of the certificate.] The Court said:

It is not the obligation of a property manager to conduct an investigation to determine if there has been duplicitous conduct on the part of a unit owner which might somehow compromise the title to a unit, prior to issuing a certificate.

And even though a principal of the developer had been on the Board, the Court said that his knowledge was not attributed to the corporation as a whole (on the facts of this case). Furthermore, the corporation was not vicariously liable for Weldon's actions (because he did not take those actions in his capacity as a director or as a directing mind of the corporation).

The Court found that the purchaser's lawyer was liable to the purchaser for damages specifically relating to the illegal third floor. The Court said that this discrepancy should have been detected by the lawyer.

Finally, the Court agreed that the purchaser had no right to carry out common element repairs without authorization from the Board. [The Court also held that the corporation had met its repair obligations, by repairing the roof above the unit, rather than replacing the roof as demanded by the purchaser.] Nevertheless, the Court held that the purchaser should be paid ½ of her costs incurred for common element repairs up to the time she received written notice from the corporation to stop such work.

Some of the Courts specific rulings were as follows:

- There was no error or inconsistency which justified an amendment to the Declaration under Section 109 of the *Condominium Act, 1998* ("the Act").
- "Nor do I agree that because the third floor of (the townhouse) was constructed prior to the registration of the Declaration, it was an oversight which ought to be remedied by the Court."
- There was no basis for an oppression claim against the condominium corporation.
- "A condominium corporation must consider the rights of *all* of its unit owners and not prefer the position of one over another." In this case, the condominium corporation had initially considered the possibility of "legalizing" the third floor permanently, and then had considered the possibility of permitting the purchaser to continue using the third floor only until the purchaser sold the unit. The corporation concluded that it is not reasonably possible to permanently legalize the third floor for two reasons: (1) Other owners could not be refused the same opportunity (to convert their third floors), and (2) Ultimately, the third floor conversions could cause the two sister corporations to seek adjustments to the cost-sharing agreement between the three corporations.
- The Court said: "It is not simply the issue of what is fair or unfair to the (purchaser) that I must consider; I must consider what is fair or unfair to all of the unit owners. In my view, legalizing the (purchaser's) third floor at this time would have consequences that would be unfair to other unit owners in MTCC No. 1056."
- "As a general rule, the Court will favour enforcement to preserve the integrity of the Declaration."
- "The failure of (the purchaser's lawyer) to go over with (the purchaser) the plans showing her unit prior to closing the deal, in my opinion, was a breach of the standard required of a solicitor in similar circumstances acting on a condominium transaction in 1998."
- In addition to all other orders, the condominium corporation was entitled to $50,000 of punitive damages against Weldon.

[Editorial Note: This decision is under appeal.]

B.C. CASES

Arndt v. Strata Plan LMS 1416 (British Columbia Human Rights Tribunal) August 10, 2011

Human Rights Tribunal refuses to dismiss complaint of discrimination against strata corporation in relation to second-hand smoke

One of the residents in the strata corporation suffered from chronic asthma. She complained that she was suffering harm due to second-hand smoke from another resident. The smoker lived in the townhouse below the complainant and was allegedly smoking in the garage, patio and other areas of the strata complex. The strata corporation determined that the smoker was in contravention of the strata corporation's by-laws which prohibited activities causing nuisance or hazard to others. The strata corporation wrote to the smoker, demanding that she comply with the corporation's by-laws (as well as the city of Surrey smoking by-law). The strata corporation also levied a fine of $25.00 against the smoker, for violation of the corporation's by-laws.

The smoking continued and the complainant started a proceeding before the BC Human Rights Tribunal against the smoker and the strata corporation.

The complainant said that the smoker had refused to comply with the strata corporation's by-laws and that the strata corporation had failed to take effective steps to restrain the smoking. The smoker and the strata corporation each moved for dismissal of the complaint in advance of the hearing.

In her response to the human rights complaint, the smoker asserted that the by-laws did not specifically prohibit smoking on the strata lots, balconies or decks. She said: "I will not be harassed or be a prisoner in my home". The tribunal dismissed the complaint against the smoker on the grounds that a resident in the strata corporation has no human rights obligation to another resident (because a resident does not provide any "accommodation, service or facility" to another resident).

The strata corporation said that the complaint against the strata corporation should be dismissed because it had fulfilled its duty by first warning and then fining the smoker. The corporation asserted that "the extent of its duty under the Code is to enforce its bylaws". The tribunal disagreed and refused to dismiss the complaint against the strata corporation. The tribunal said:

In my view, the timing, extent and effectiveness of the strata's chosen means of enforcing its by-laws are matters to be considered on evidence and argument at a hearing, if and when Ms. Arndt establishes a prima facie case of discrimination based on her physical disability.

The Owners, Strata Plan NES 97 v. Timberline Developments Ltd. (Court of Appeal for British Columbia) October 26, 2011

Trial decision upheld on appeal. Hot tubs were common facilities

The trial Court had found that the developer of this phased strata development was obligated to share in the cost of repair, maintenance and operation of six hot tubs, because they qualified as "common facilities" for purposes of Sections 217 and 227 of the *Strata Property Act*. [See Condo Cases Across Canada, Part 34, May 2011].

The lower Court decision was upheld on appeal.

Armanowski v. Strata Corporation, Strata Plan LMS 2151 (British Columbia Provincial Court) October 14, 2011

Owners claims could not be asserted in Provincial (Small Claims) Court

One of the strata lot owners sued the strata corporation for return of a portion of a special levy which he said was paid "for a service which was never provided".

The Provincial Court declined to decide the matter, holding that the claim could only be decided by the Supreme Court of British Columbia, because many of the allegations dealt with strata corporation "governance matters" in that the plaintiff was seeking to challenge decisions taken by the strata council. Therefore, even though the plaintiff's claim was a monetary claim falling within the monetary jurisdiction of the Small Claims Court, the issues to be determined fell exclusively within the jurisdiction of the Supreme Court of British Columbia under Sections 164 and 165 of the *Strata Property Act*.

Schoal Point Strata Council (Office of the Information & Privacy Commissioner for British Columbia) December 2, 2009

Video surveillance of common elements only permitted for certain purposes and under certain conditions

Residents of the strata corporation complained about excessive video surveillance in the building. The adjudicator said that, under BC's Personal Information Protection Act ("PIPA"),

- Video surveillance was only permitted based upon a "reasonable person standard" (ie "for purposes that a reasonable person would consider appropriate"). So, video surveillance could be collected and used only for such reasonable purposes;
- Video surveillance was only permitted as necessary to address clear or demonstrated problems; and
- Video surveillance was only permitted with proper disclosure of the surveillance and its purposes.

The adjudicator therefore held as follows:

1. Video surveillance on the exterior doors and parkade was acceptable (for purposes of preventing unauthorized entry, theft or the threat to personal safety or damage to property).
2. Video surveillance in the pool area and outside the fitness room had not been demonstrated to be necessary. Therefore, those cameras had to be disabled. However, video surveillance in those areas could be restored "in the event that there was sufficient new evidence of threats of unauthorized entry, theft or the threat to personal safety or damage to property or other cases that would meet the reasonable person test outlined in this order".
3. Video surveillance could not be used for strata council by-law enforcement.
4. Video surveillance could not be used to provide access to residential units via their television cable system.
5. The video recordings were to be reviewed only in the event of a complaint or evidence of unauthorized entry, theft or threat of personal safety or damage to property. Also, access to the recordings was to be restricted to security staff and a few designated strata council officials.
6. The strata council was ordered to provide (to the adjudicator) a description of the location, prominence and wording of its signs posted to notify individuals of video surveillance.
7. The strata council was ordered to provide (to the adjudicator) a list of the employees and strata council officials, by title, who have access to the video surveillance system.

The adjudicator also recommended that the strata council consider passing a by-law to authorize the collection of personal information by video surveillance (in accordance with Section 12(1)(h) of PIPA). In addition to signs, such a by-law would serve to confirm that the strata council had obtained the explicit or implicit consent of individuals whose images were being collected on the video surveillance system.

ALBERTA CASES

The Owners: Condominium Plan No. 872287 v. Callaghan (Court of Queen's Bench of Alberta – Master in Chambers) October 19, 2011

Condominium corporation has no right to lien for recovery of "individual obligation"

The condominium corporation dealt with a bed bug infestation which it said originated in the defendant's unit. The condominium corporation claimed that the defendant owner was responsible for extermination costs of $8,420.64 plus legal costs and interest of $27,091.10 – and liened the defendant's unit for recovery of these amounts.

The Court held that the lien was not valid, and ordered its removal. The Court said that these sorts of "individual claims" (against one owner) cannot be recovered by lien, but instead can be recovered only as a personal, unsecured debt. The Court said that the *Condominium Property Act* "supports a distinction between obligations that are fundamentally common, or 'collective', and those that are individual. The collective obligations achieve an *in rem* quality and are sometimes thought to have a 'super priority'" … "Individual duties remain *in personam* and are enforced with the usual range of personal remedies."

In short, the Court said that a lien can be registered only in relation to collective common expenses, which are shared by all owners.

Hillview Park Condominium Corporation 8120257 v. Exit Realty Fort McMurray (Alberta Provincial Court) September 13, 2011

Manager entitled to compensation in lieu of proper notice of termination

The management contract between the parties was terminated by notice delivered by the condominium corporation. The Court determined that the notice was not sufficient (ie. not as required by the terms of the contract) and awarded the manager damages in the amount of the lost management fees during a proper notice period.

The Court also considered the manager's obligation to return items belonging to the condominium corporation. In that regard, the Court held as follows:

- The manager was obligated to return a filing cabinet belonging to the condominium corporation.
- The contract did not specifically say that the manager had to return the digital electronic database. The database information was otherwise available in the hard files which had been turned over by the manager. Therefore, the condominium corporation was not entitled to recover the cost that it had incurred to re-create the electronic database.
- Other items claimed by the corporation were not proven to be in the manager's possession. [The manager's evidence was that it had turned over everything else related to the corporation.] Therefore, the Court declined to make any or-

ders respecting other items demanded by the condominium corporation.

Condominium Corporation No. 0425177 v. Jessamine (Court of Queen's Bench of Alberta – Master in Chambers) October 21, 2011

Legal costs related to common expense collections cannot be added to lien. They can only be the subject of an unsecured claim against the owner

This case concerned collection of common expense arrears. Amongst other things, the court held as follows:

- The corporation's lien did not include the corporation's legal costs related to the collection. Those amounts could be claimed personally against the owner, but not under the lien.
- The Board of Directors had not passed any resolution to establish any interest rate (on the arrears) pursuant to the *Condominium Property Act* or the corporation's by-laws. As such, interest was only recoverable at the rate for pre-judgment interest under the *Judgment Interest Act*.
- The corporation was not required to provide notice (to the owners) of an increase in common expenses. A Board resolution was sufficient to levy the increase. The Court said: "By-laws setting out the procedure for proper service of other notices are of no moment."

However, interest was not recoverable "on the increased amount of the regular assessment and on the amounts of the special assessment from October 6, 2008 to December 10, 2010 being a period when documents where requested and undelivered by the condominium corp."

- Resolutions passed and recorded in the minutes of Board meetings "are adequate memorializations of Board decisions". No more formal resolution document was required (beyond the minutes).

ONTARIO CASES:

Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp. (Ontario Court of Appeal) October 24, 2011

Appeal dismissed. Absence of cost-sharing agreement did not constitute oppression

The lower Court had held that the developer's failure to provide a cost-sharing agreement in relation to shared facilities did not constitute oppression or a breach of fiduciary duty. [See Condo Cases Across Canada, Part 33, February 2011]

The condominium corporation appealed. The Court of Appeal dismissed the appeal and upheld the lower Court decision. The Court of Appeal said:

"The statutorily mandated proposed condominiums' governing documents, which are designed to detail what condominium purchasers should reasonably expect, make no reference to any cost-sharing agreement…"

"As well, in our view, the application judge properly rejected the appellants' contention that commercial practice was such that buyers of condominium units would reasonably expect that there would be a reciprocal agreement."

"This is not a case of an oppressor utilizing a superior bargaining position to coerce unfavourable terms from a weaker party or acting behind the weaker parties' (sic) back. Rather, it is a case in which the appellants voluntarily purchased their condominium units in the full knowledge and disclosure of the rights and obligations associated with their transaction."

The Court of Appeal recognized the fact that, in the absence of an agreement, litigation might well be required to determine the rights and obligations of the parties in relation to the shared facilities. However, the Court of Appeal said that the risk of costly disputes was not, in and of itself, oppressive.

Carleton Condominium Corporation No. 396 v. Burdet etal (Ontario Superior Court of Justice) September 30, 2011

Dispute relating to arrears of common expenses and related lien rights

The defendants were the owners of many units in the condominium. The condominium corporation claimed for arrears of common expenses and sought possession of the units in order to proceed with powers of sale under liens registered by the condominium corporation. The condominium corporation also sought an order for release (to the corporation) of the sum of $104,185.16 paid into trust by the defendants.

The Court found that substantial arrears were owed and granted partial judgment in the amount of $109,440.52, (which was apportioned between the defendants' units in accordance with their percentage contributions). The Court accordingly ordered release of the trust funds to the condominium corporation.

However, the Court was not able to determine the total amount owing by the defendants and ordered a trial to determine this amount and to determine the related rights of the condominium corporation under its liens. Pending the trial, the defendants were ordered to pay ongoing monthly common expenses.

Lahrkamp v. Metropolitan Condominium Corporation No. 932 (Toronto Small Claims Court) March 22, 2011

Plaintiff not entitled to see owners' names and signatures on proxies

In a previous decision, the Court had ruled that the plaintiff owner was entitled to examine certain records of the corporation, including proxies. [See Condo Cases Across Canada, Part 33, February, 2011]. The condominium corporation brought a motion for clarification of the plaintiff's rights to see proxies. The condominium corporation asserted that, for protection of privacy, the plaintiff should not be permitted to see the names and signatures of the owners who had signed the proxies. The Court agreed. The Court said that the plaintiff should be given photocopies of the proxies, with the names and signatures removed.

In considering the proxies, the Court also said that the names of the chosen election candidates (which according to the Act had to be included in the proxy instrument) did not have to be in the appointer's hand. The rest of the proxy could be completed by someone else, provided it was then signed by the owner (when complete).

The Court's decision also included the following:

1. The parties had agreed that specific references to unit numbers and names of owners should be redacted from the minutes of Board meetings.
2. The plaintiff would pay all reasonable photocopying charges in advance (before receiving copies of documents). However, such charges would not include labour for the redacting of the records.

Simcoe Condominium Corporation No. 60 v. Skeaff (Ontario Superior Court of Justice) August 2, 2011

In appropriate circumstances, a condominium corporation can be awarded punitive damages on a compliance application

The defendant was the former manager and president of the corporation. He refused to deliver records and funds to the corporation pursuant to a previous Court order. The condominium corporation was

required to apply again to Court for enforcement of the previous order.

The Court awarded the condominium corporation judgment of $30,506.33, being general damages of $20,506.33 plus punitive damages of $10,000. The Court also awarded full costs "so that no innocent party shall bear the burden of this proceeding".

Suttie v. MTCC No. 683 (Toronto Small Claims Court) January 14, 2011

Owner responsible for damage to unit improvement. Owner's insurer could not assert subrogated claim against corporation

The plaintiff owned a unit in this high-rise condominium. A pipe inside the plaintiff's dishwasher broke, causing water damage to the owner's hardwood floor. The owner's insurer repaired the damage, and then sought to recover the costs from the condominium corporation.

The Court dismissed the claim for the following reasons:

1. The Declaration said that the owner's insurance had to include a waiver of subrogation against the corporation. This prevented the owner's insurer from asserting the subrogated claim (based on alleged rights of the owner).
2. According to the Declaration, the owner was obligated to repair the unit. Therefore, Section 89(5) of the *Condominium Act* did not apply and the owner was obligated to repair the unit including all improvements.

Note that the Court also said that the hardwood floor could be considered to be an improvement even in the absence of a by-law establishing standard unit descriptions.

[Editorial Note: In my respectful view, there is an important omission in the Court's reasoning. The applicable section of the Condominium Act, 1998 is Section 99 (not section 89). Under Section 99, the condominium corporation is obligated to arrange insurance covering the common elements and the units (not including unit improvements). According to Section 99(5), the question of what constitutes an improvement to a unit shall be determined by reference to the standard unit description. In this case, there was no standard unit description. Therefore, the unit insurer's argument would be that the condominium corporation was obligated to arrange insurance covering the damage (quite separate and apart from questions about responsibility for the repair). In other words, the owner may have been responsible for the repair, but the owner was entitled to have the corporation's insurer cover the repair on the owner's behalf (subject to any deductible on the corporation's insurance). Responsibility for the deductible portion of the loss would then require separate consideration.

Unfortunately, there was no consideration of section 99 in the decision.]

Metropolitan Standard Condominium Corporation No. 1352 v. Newport Beach Development Inc. (Ontario Superior Court of Justice) September 16, 2011

Condominium corporation could pursue ordinary Court claims (in relation to building deficiencies) despite decisions by Tarion. Condominium corporation could also assert ordinary Court claim against Tarion

The condominium corporation alleged certain original building deficiencies. Claims had been made to Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act* in relation to the deficiencies. Tarion had issued decisions and the condominium corporation had appealed those decisions to the License Appeal Tribunal ("LAT"). Before the appeals were heard by LAT, the condominium corporation commenced this Court claim against the developer, Tarion and others involved in the original construction. The developer and other defendants (not including Tarion) moved for dismissal of the claim, based (among other things) upon the following:

a) The Court claim constituted an abuse of process, given the decisions by Tarion;

b) The Court claim was not available because of provisions in the Agreement of Purchase and Sale.

The Court did not agree. The Court said that the Court claim could continue. The Court's reasons included the following:

- A decision of Tarion is not a final decision or a judicial decision and therefore does not create any issue estoppel. Issue estoppel could apply to an LAT decision but not to a decision of Tarion.
- The Tarion claims process is not exclusive and is therefore not a bar to Court claims.
- The corporation could assert an ordinary Court claim against Tarion. Furthermore, the provision in the purchase agreements purporting to prevent claims against third parties was ambiguous and the ambiguity was to be resolved in favour of the purchasers/condominium corporation.
- The provisions of the purchase agreements did not prevent claims for breach of contract, negligence or breach of fiduciary duty. Those provisions only limited warranty claims to those expressed in the *Ontario New Home Warranties Plan Act* (ie, the Tarion warranties).
- Although the definition of "major structural defect" (in the regulations under the *Ontario New Home Warranties Plan Act*) excludes "any defect attributable in whole or in part to damage to drains or services", this does not include alleged defects in the installation of the sanitary sewers.

Nipissing Condominium Corporation No. 24 v. Smrke (Ontario Superior Court of Justice) August 19, 2011

Corporation granted temporary possession of unit in order to remedy unsafe conditions

The unit was unsafe in that it contained excess materials. The Court agreed that the unsafe condition contravened the *Condominium Act* and granted the corporation temporary possession of the unit in order to attend to the required clean up. After the clean-up was complete, the owner was permitted to re-occupy the unit, but was required to pay the corporation's clean-up and legal costs.

The Court also ordered that the corporation thereafter be permitted to carry out regular inspections of the unit.

QUEBEC CASE

Turbis v. Syndicat des copropriétaires les Dauphins sur le parc (Cour Du Québec- Quebec Small Claims Court) September 19, 2011

The syndicat's insurance does not cover loss of rental income

The defendant Mirlaw Ltée owned a unit and operated it as a rental property. The tenant left an air conditioner in the window over the winter. The consequent freezing of the interior of the unit caused damage to a radiator that in turn caused water damage in the plaintiff's unit below. The plaintiff's tenants were forced to move out for three months while the unit was repaired.

Article 1073 of the Quebec Civil Code obligated the syndicat to insure the entire property, but this did not include insurance for the rental losses suffered by the plaintiff. The Court held that Mirlaw Ltée was responsible for those rental losses.

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