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Condo Cases across Canada

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I have been asked, and it is my pleasure, to provide these brief summaries of recent court decisions across Canada, respecting condominium matters. 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

HUMAN RIGHTS AND THE OBLIGATIONS OF THE DISABLED RESIDENT. A RECENT ONTARIO CASE REFERS TO WHAT I WOULD CALL "DUAL OBLIGATIONS" IN THE CASE OF A HUMAN RIGHTS COMPLAINT. THE COURT CONFIRMS THE OBLIGATIONS OF CONDOMINIUM CORPORATIONS TO ACCOMMODATE A RESIDENT'S DISABILITY, BUT THE COURT ALSO REFERS TO THE OBLIGATIONS OF THE RESIDENT WHO IS MAKING THE REQUEST. THE COURT SAYS THAT THE RESIDENT MUST NOT ONLY PROVIDE MEDICAL PROOF OF THE DISABILITY, BUT MUST ALSO PROVIDE "EVIDENCE TO ESTABLISH THAT THE ACCOMMODATION IS REQUIRED". THE COURT APPEARS TO BE SAYING THAT THE RESIDENT MUST MAKE REASONABLE EFFORTS TO EXPLORE ANY POSSIBLE ALTERNATIVES, BEFORE COMING TO THE CONCLUSION THAT THE REQUESTED ACCOMMODATION IS NECESSARY IN ORDER TO ALLOW THE RESIDENT TO LIVE IN THE UNIT. AND THE RESIDENT MUST PROVIDE SOME SUPPORTING EVIDENCE THAT THE REQUESTED ACCOMMODATION IS THE NECESSARY ALTERNATIVE. HERE'S MY SUMMARY OF THE CASE:

Peel Condominium Corporation No. 542 v. Gorgiev (Ontario Superior Court) December 7, 2011

Owner ordered to reinstate exclusive-use lawn area. Corporation not obligated, under Human Rights law, to permit extra parking space constructed by owner

The owner had two parking spaces available to him: an indoor space (in his garage) and an outdoor space (on his driveway). Without permission of the Board, he constructed a second outdoor parking space – an asphalt pad – on his exclusive-use common element yard area. The owner said that he needed the second outdoor parking space because of a disability – claustrophobia – which he said prevented him from using the garage. In support of his position, the owner provided a note from his family doctor.

The Court ordered the owner to reinstate the common elements to their original condition, because the change was made without the Board's consent required by Section 98 of the *Condominium Act, 1998* and by the Declaration. The Court said:

> *The role of the Court in such an application as this is not to substitute its own opinion for that of the Board, but to ensure the Board has acted in good faith and in compliance with the Act, declaration, by-laws and rules. In deference to the rules, the Court should not pronounce on the propriety of rule except where the rule is*

clearly unreasonable or contrary to the legislative scheme. The Court should accept the board's decision unless it has acted capriciously or unreasonably.

...

In order to find the discrimination necessary to defeat the Declaration, the provision must have the effect of preventing Mr. Gorgiev from living in his residence.

...

The person requesting accommodation must do his part as well. There is a duty to facilitate the search for such an accommodation... The request will be dismissed if the person requesting accommodation fails to take reasonable steps.

A person requesting a particular accommodation of disability must provide sufficient evidence to establish that the accommodation is required. Mr. Gorgiev has provided nothing other than a note from his general practitioner. That is not sufficient for him to uphold his end of the investigation. While Mr. Gorgiev has now agreed to provide medical information to support his claim of disability, he is too late.

B.C. CASES

Owners, Strata Plan KAS 3485 v. 0703008 B.C. Ltd. (British Columbia Supreme Court) December 2, 2011

Strata fees payable from date of deposit of phase plan

The strata plan had been developed in three phases. A dispute arose between the strata corporation and the developer respecting payment of strata fees in relation to the second and third phases. The developer took the position that the strata fees were not owing for the period from the deposit of the phase plan until the date of the first sale of a lot in the phase. The strata corporation took the position that the strata fees were owing from the date of deposit of the phase plan (for phases two and three). The Court agreed with the strata corporation. The Court said:

> *The end result is an interim budget for the first phase after sale of the first lot. It will have the expenses estimated for that phase and it may have estimates for the yet to be created phases. In addition to the estimated operating expenses, it will set the required lump-sum contribution to the contingency reserve fund on the part of the owner-developer. The members of the strata are required to contribute monthly to the operating fund and the contingency reserve fund according to their unit entitlements. When the next phase is deposited, the owner-developer must prepare another interim budget dealing with the same matters, except the estimates will be different in that they will be for all phases of the development deposited to that point. If the second or any subsequent phase is deposited after the strata corporation has held its first annual general meeting, the (*Strata Property Act*) attempts to respect the budget adopted at the annual general meeting by requiring that the new interim budget, which the owner/developer must prepare, be based on the budget adopted at that annual general meeting.*

The parties had also entered into a settlement agreement, but the Court held that the agreement was not lawful or binding because it derogated from the strata fee contribution formula set out in Section 99 of the *Strata Property Act* (without the required unanimous approval, for an alternative formula, having been obtained pursuant to Section 100 of the *Act*).

Elahi v. Strata Plan VR 1023 (British Columbia Supreme Court) December 5, 2011

Court determines maintenance obligations in relation to modifications to limited common property

In 1981, the strata corporation had passed a unanimous resolution which had designated an area of the property as "limited common property for the exclusive-use and enjoyment of the owners of strata lot 4" and had granted the owners the right to install and maintain a solarium on that limited common property. The solarium (supported by a deck) had been installed by a previous owner of the strata lot. At the same time, that previous owner may have installed an exterior door, and may also have modified windows, adjacent to the solarium. The windows and door were part of the common property abutting the owner's strata lot.

The solarium was ultimately declared structurally unsound and was ordered removed by the City. The current owner removed the solarium, but repair and maintenance were also required to the deck, the door and windows. The owner said that maintenance and repair of the deck, door and windows should be the responsibility of the strata corporation. The Court said:

- The deck was an essential part of the solarium installed pursuant to the unanimous resolution, and the deck was accordingly not part of the limited common property. The owners were therefore responsible for the repair and maintenance of the deck.
- The owners were also responsible for the repair and maintenance of the door and windows fronting onto the limited common property "to the extent those repairs and maintenance are attributable to the solarium structure; other ordinary repairs and maintenance are the responsibility of the strata corporation".

Lee v. Strata Plan 4082 Strata Corp. (British Columbia Human Rights Tribunal) January 12, 2012

Employee's termination by strata council constituted violation of Human Rights

Strata Plan 4082 is a shopping mall. The strata corporation employed a mall manager, Vincent Lee. Mr. Lee's employment was terminated and he filed a complaint with the B.C. Human Rights Tribunal against the strata council members. Mr. Lee claimed that his employment had been terminated due to his disability (hypertension). The Tribunal found that the strata council had contravened Section 13 of the *Human Rights Code*. The Tribunal said:

> *"I conclude that Mr. Lee's disability and its relationship to his emergency response duties was at least a factor in his termination..."*

The Tribunal made the following awards in favour of Mr. Lee:

- $6,500.00 for injury to dignity, feelings and self-respect;
- Compensation for loss of earnings.

Buttnor v. Strata Plan VIS 5339 (British Columbia Human Rights Tribunal) October 27, 2011

Human Rights Tribunal refuses to dismiss complaint respecting second-hand smoke

The owner suffers from a chronic disability and secondary health issues, as well as multiple allergies and asthma. She asserted that these conditions had been exacerbated by smoke entering her unit from an adjacent unit. She also asserted that the strata corporation had not taken proper steps to prevent the transfer of smoke.

The strata corporation applied for early dismissal of the complaint on the ground that its investigations had revealed that nothing could be done to stop transfer of smoke.

The Tribunal refused to dismiss the complaint (and the complaint was accordingly permitted to continue). The Tribunal said:

> *On the basis of the material filed, it is not clear that (the strata corporation) dealt with Ms. Buttnor's complaint in a thorough, responsible, effective, proportionate or timely manner upon being notified of her concerns and considering that it acknowledges her disability. (The strata corporation) has essentially indicated that it cannot, and does not, intend to take further steps to respond to Ms. Buttnor's concerns. Although the offending unit has been vacated, Ms. Buttnor fears that she may find herself in a similar position in future.*
>
> *In this case, if Ms. Buttnor proves her allegations at a hearing, she may be in a position to establish a* prima facie *case of discrimination.*
>
> *If Ms. Buttnor's complaint prevails at an evidentiary hearing, s. 37 of the* Code *may provide a remedy which has the potential to offer her some form of relief.*

The Tribunal urged the parties to engage in settlement discussions.

Bosworth v. Jurock (British Columbia Supreme Court) November 24, 2011

Strata lot purchaser granted certification for class proceeding against developer (and related parties)

The Plaintiff was an original purchaser and brought a claim on behalf of all original purchasers. The claim was based primarily upon an alleged false statement, in the vendor's disclosure statement, that the buildings were "free from material defect". The Plaintiff alleged that significant deficiencies had been discovered in the common property or common assets of the strata property. The Court certified the claim as a class proceeding under the *Class Proceedings Act*. The Court said:

- The Plaintiff was himself not able to bring the action in a representative capacity under any other statute, including the *Strata Property Act.* So, no alternative class proceeding was available directly to the Plaintiff.
- A representative action brought by the strata corporation under the *Strata Property Act* was also not a preferable procedure.

The Owners, Strata Plan LMS 3883 v. De Vuyst (British Columbia Supreme Court) July 13, 2011

Arbitrator declared moving fee unreasonable. Appeal from arbitrator's decision dismissed

The by-laws of the strata corporation had established a non-refundable fee of $200 for each move (in or out of the building). An arbitrator determined that this user fee was unreasonable (pursuant to Section 6.9 of the Strata Property Regulation) because it was too high.

The strata corporation appealed the arbitrator's decision and the Appeal Court dismissed the appeal because the arbitrator had not made a mistake of law.

ALBERTA CASES

Condominium Corporation No. 0321365 v. MCAP Financial Corporation (Alberta Court of Appeal) January 27, 2012

Appeal allowed in part. There were genuine issues for trial respecting claims against the developer's lender

The condominium corporation and unit purchasers had asserted claims for alleged faulty construction against a large number of defendants, including the developer's lender, MCAP Financial Corporation (MCAP).

The chambers judge had summarily dismissed the claims against MCAP. [See Condo Cases across Canada Part 33 – February 2011]

The Court of Appeal reversed the ruling of the chambers judge, in part. The Court of Appeal held that the chambers judge was correct in dismissing the claims against MCAP in negligence. However, the Court of Appeal said that the following claims against MCAP should not have been summarily dismissed: claims for negligent misrepresentation, knowing assistance, knowing receipt, unjust enrichment and claims based on the allegation that MCAP was a "developer" within the meaning of s. 14 of the *Condominium Property Act*.

Condominium Plan No. 762 1828 v. Marusyn (Alberta Court of Appeal) December 2, 2011

Appeal dismissed. Condominium corporation granted access to unit to carry out common element repairs (to exterior doors)

The chambers judge ordered that the condominium corporation be permitted to access the unit in order to repair or replace certain exterior doors. [See Condo Cases Across Canada, Part 32 – November 2010.] The decision was upheld on appeal.

The Court of Appeal said that, according to s.9 of the Condominium Property Act, exterior doors and windows are part of the common property unless "otherwise stipulated in the condominium plan". In this case, the reference on the condominium plan to the boundary being at "outside face of the outside walls" was not sufficient to take the doors and windows outside of the statutory presumption (that they were common property).

OTHER ONTARIO CASES

York Condominium Corporation No. 26 v. Ramadani (Ontario Superior Court) November 15, 2011

Court orders removal of "nuisance dog"

The condominium corporation had received complaints about the owner's dog barking and urinating on the balcony. [The urine had dripped onto the terrace of the unit below.] The owner failed to respond properly to the corporation's requests that she address the complaints. In accordance with the rules, the corporation then asked that the owner remove the dog, but she refused. The corporation ultimately applied to Court for an order removing the dog and the Court granted the Order. The Court also ordered that the corporation's cleaning costs, as well as legal costs related to failed mediation and arbitration efforts, be added to the owner's common expenses.

The Court's decision included the following:

> *I accept the general proposition, set out earlier, that on an application of this kind, a Court can and should consider whether the Board has acted capriciously and unreasonably. Where that discretion has been properly exercised, however, the Court should not substitute its discretion for the discretion of those charged with the management of the corporation.*

Mediation had failed because the owner had refused to participate in mediation. In the circumstances, the Court was not prepared to order the parties to arbitrate the dispute. The Court said:

> *No useful purpose would be served by directing the parties to arbitration. The (owner) has already refused to participate in the dispute resolution process under the* Condominium Act. *Mediation has been attempted and failed... There has been a full airing of the evidence and the law. Very significant costs have been incurred. Arbitration will only add a further level of costs and further delay.*

Durham Condominium Corp. No. 187 v. Morton (Ontario Superior Court) January 5, 2012

Court orders removal of dogs. Selective enforcement was justified

The Court ordered removal of the owner's two dogs for the following reasons:

- The condominium by-laws said that residents could have only one pet.
- The dogs in question each weighed more than 20 kilograms, which also contravened the condominium's by-laws.
- The owner had allowed the dogs to run off-leash and at times the dogs had jumped up at people, thereby frightening them.
- The dogs posed a risk of harm to persons, and accordingly contravened Section 117 of the *Condominium Act, 1998*. The Court said: "Concern about potential injury to others exists."
- Mandatory mediation and arbitration did not apply because "the issues here involved the *Act*".

Although there had been some selective enforcement on the part of the condominium corporation, the Court did not feel that the corporation had "conducted itself either in a vendetta towards Mr. Morton or selectively against him without cause". The corporation had properly responded to complaints about Mr. Morton's dogs. Similar complaints had not been received about other violations.

L.I.U.N.A., Local 183 v. York Condominium Corporation No. 365 (Ontario Labour Relations Board) December 2, 2011

Union certified for condominium employees

The Labourors' International Union of North America Local 183 was granted certification to act as collective bargaining agent for "all employees of York Condominium Corporation No. 365 (The Hyland) employed at 4062 Lawrence Avenue East, Scarborough, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff".

[Editorial Comment: As far as I know, this is the first union of condominium employees.]

Hakim v. Toronto Standard Condominium Corporation No. 1737 (Ontario Superior Court) January 18, 2012

No oppression of owners. Parking provisions reasonably enforced

The owners claimed that the condominium corporation had engaged in a long-standing course of conduct that was oppressive towards them (while they were occupants, and after they had vacated and leased their unit). The dominant issue related to the enforcement of provisions contained in the corporation's Declaration respecting the use of parking units (including height restrictions for vehicles).

The Court found that there had been no oppression. The Court said:

> *The Court in exercising its discretion must balance the reasonable expectations of an owner with the duties of the Board to the ownership at large.*
>
> *...*
>
> *The "best interests" of the (owners) is not the test for assessing the (condominium corporation's) conduct and intention. The Board of this cooperative condominium is not some faceless corporate entity. Rather, they were elected members from among the fellow residents who were charged to carry out the statutory and internal rules of the corporation. The (owners) viewed any decision other than what they wanted as unfair or oppressive. The circumstances of this case, unfortunately, came to resemble the breakdown of a marriage, with litigation inevitable and unhappiness all round. At virtually every instance the (owners) adopted a very adversarial stance toward the corporation.*

Toronto Standard Condominium Corporation No. 1549 v. Chan (Ontario Superior Court) September 22, 2011

Owner ordered to reinstate subdivided unit

The owner had divided her "live/work" unit into two areas - one area being a "work" sub-unit, the other a "live" sub-unit. The owner leased the sub-units to different tenants.

The owner had not obtained the Board's consent to these changes, as required by the Declaration. The owner refused the corporation's requests that she remove the subdividing wall, and instead sought retroactive approval for the changes. The Board refused consent because of concerns about setting a precedent, and because of concerns for life-safety. There were no separate life-safety systems (smoke detector and heat detector) in the "live" sub-unit. Meeting these life-safety requirements would also require common element changes (needing the corporation's consent) and the Board was not prepared to give its consent to those changes.

The Court ordered the owner to reinstate the unit. The Court said:

> *The purpose and effect of the construction work done by Ms. Chan in her unit was to create a distinct commercial unit, separate from the residential portion of the unit. This is contrary to the provisions of the Declaration. In the process of dividing her unit, Ms. Chan has created a situation that represents a potential danger to all residents, as the life-safety equipment remains inadequate. This inadequacy continues to represent an underwriting risk with respect to insurance coverage for the building. These, too, are contrary to the Declaration.*
>
> *The board acted reasonably in interpreting s. 30 and 34(c) of its Declaration as having been breached by Ms. Chan's acts. Further, its decision to require Ms. Chan to return her unit to its original state does not amount to an inappropriate favouring of the condominium corporation interests over those of Ms. Chan when viewed in the context of the Board's statutory obligations and responsibilities to the owners as a whole.*

[Editorial Comment: The decision does not contain any discussion of the mandatory mediation and arbitration provisions contained in s. 132 of the Condominium Act, 1998. *But given the Court's clear concerns about life-safety, the Court presumably concluded that mandatory mediation and arbitration did not apply because the dispute concerned a breach of the* Condominium Act, 1998 *(s. 117).]*

Channa v. Carleton Condominium Corporation No. 429 (Ontario Superior Court) December 14, 2011

Court deals with condominium corporation's collection rights. Owner also ordered to enter into agreement respecting unauthorized modification to common elements

The condominium corporation had incurred costs (including legal costs) as a result of the owner's acts or omissions, including an unauthorized modification to the common elements. The Court said:

- "A corporation is entitled to apply the costs of remedying breaches by an owner of a unit to the common expenses payable for the unit." (including legal costs)
- Furthermore, the corporation is entitled to apply the owner's payments to the earliest indebtedness, unless the owner has "specified that that the payments are to be credited differently".
- However, in order to properly secure common expenses by lien against the unit, the lien must be registered within 3 months of the default, in accordance with s. 85(2) of the *Condominium Act, 1998*. Furthermore, a claim with respect to any unsecured arrears (ie. amounts not secured by lien) will be lost if Court process is not started within the normal two-year limitation period.
- Respecting the unauthorized modification, the corporation was not demanding that the modification be reversed, but rather sought an order that the owner be required to enter into an agreement with the corporation (in relation to the modification) in accordance with s. 98 of the *Condominium Act, 1998*. The Court agreed, and granted the order.
- Mandatory mediation and arbitration did not apply because the dispute related to a direct breach of the *Act*. Therefore, the corporation's application to Court was the proper procedure.

QUEBEC CASES

Boivin v. Syndicat des coproprietaires Terrasse Le jardin Durocher inc. (Quebec Superior Court) November 8, 2011

Court permits surveillance cameras

In a residential condominium building that had experienced several security incidents, there was a major break-in that occurred in the garage. After this incident, there were discussions about installing security cameras and a plan to install cameras was eventually approved by a large majority (35 of 37) of the owners. There would be two cameras at the building entrance and four in the garage. Only two people would have access to the tapes, which would be kept for one month and given to the police only in cases of vandalism, theft, threats, attacks, etc.

One owner opposed the installation, claiming that it infringed his privacy rights under the *Quebec Charter of Human Rights and Freedoms*. He also asserted that Article 26 of the *Quebec Civil Code* considers surveillance of a person's private life to be a violation of privacy. He also claimed that installing the cameras changed the destination of the building and thus required unanimous approval of the owners.

The court considered the need to balance the rights of an individual against the other owners' rights to security and peaceful enjoyment of their property. The Court said that cameras must serve a sufficiently important objective to justify an infringement of privacy rights, and the use of the cameras must therefore be limited so as to strike the appropriate balance between the competing interests. This balance had been properly struck in this case. When there is a pattern of security threats in a residential condominium, the strictly controlled use of surveillance cameras proposed here was acceptable.

The Court also concluded that the installation of cameras was not such a fundamental change as to constitute a change to the destination of the building.

Bedard v. Bourbonnais (Quebec Superior Court) December 8, 2011

Court declines to alter common expense contributions in Declaration

Co-Toit is a syndicat comprised of two types of dwellings: single-family houses and low-rise apartment buildings. The declaration of co-ownership established an equal relative value (and equal voting rights) for each unit. It also differentiated the two types of buildings so that owners of each type of unit only paid for services (such as snow removal or lobby maintenance) that benefitted their units.

Some owners challenged these provisions in the declaration. There were differences between the units in terms of size, location and market value and the Plaintiffs sought an order altering the common expense contributions (relying upon Articles 1041 and 1053 of the *Quebec Civil Code*). The Court did not grant the order.

The Court referred to the many factors that can be used to set the common expense contributions. The court declined to substitute its opinion for that of the drafters of the declaration.

Finally, the court noted that the action was statute barred because the impugned provisions would have become illegal in January 1994 at the latest, when the new Civil Code came into effect. The maximum available limitation period was ten years and the action was brought in 2007. The fact that owners had recently purchased units did not extend the limitation period.