The Ten Most Important Condominium Cases For 2015

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1. *MTCC No. 985 v. Cheney; MacKay v. Metropolitan Toronto Condominium Corp. No. 985*

Part 1

In a previous case involving the transference of cigar smoke from unit to unit, the judge held that although the condominium corporation had not breached its duty to maintain and repair the common elements, further testing should be carried out to determine whether any further reasonable remedial measures were necessary. The judge also ordered that the condominium corporation pay $32,500 in costs to the unit owners because the condominium corporation had been slow to act.

The condominium corporation sent its engineer back to do more testing and after certain repairs were made, the engineer declared that the state of repair was sufficient and acceptable, and all that remained was some minor work. Upon attending to carry out such minor work, the unit owners refused to let the condominium corporation carry out the work, claiming that they were entitled to proof that there would be no air transference whatsoever between the units, which was a standard of repair beyond what could be expected for a building of this age and design.

The court held that the standard of repair for common elements is reasonableness and not perfection, and on that basis, the court was not prepared to give the unit owners what they wanted, namely what amounted to a guarantee that there would be no reoccurrence of the problem. In this case, not only did the Court consider the legal standard of performance for a board of directors, but it also considered the age and design of the building, and the balance between the expense and disruption to other unit owners versus the likely outcome.

This case is good news for boards of directors because perfection is a very difficult standard to meet, but reasonableness can be met by following an expert's recommendation unless such recommendation is so obviously wrong.

Part 2

Initially, the judge ordered that each side bear their own costs, but this order was made without formal cost submissions having been made by the parties lawyers (at the hearing). At the request of the condominium corporation's lawyers, the judge agreed that the parties could make formal written submissions. The judge's decision as to costs has not been released as of the date of this publication.

2. *Ballingall v. Carleton Condominium Corporation No. 111*

This case involved a director who disagreed with the board's decision and went on a campaign to discredit the board and its decision. This case gives valuable insight into what is and what is not, acceptable behaviour by a director:

> [115] A reasonably prudent director of a condominium corporation, attempting to meet his responsibilities as a director, would not undermine Board decisions, mislead unit owners as to the Board's responsibilities and their efforts to meet those responsibilities, encourage unit owners to distrust the Board, undermine the legal advice from the Corporation's legal counsel, mislead unit owners as to what that advice entailed, provide his own legal advice to unit owners, and on one occasion post to his personal website legal advice received by the Board without the consent of the Board. A reasonably prudent director, acting in good faith, would not make the Board dysfunctional, would not promote antagonism and dissent on the Board, and would not threaten other Board members. A reasonably prudent director would not put his own economic interests ahead of the legitimate interests of all categories of unit owners. A reasonably prudent director would seek a compromise that respected the disparate, but legitimate, interests of all unit owners in the context of the community established by the Corporation's Declaration, By-laws, and Rules. It was not until this litigation was commenced that MacMillan started to act in the way he was required to act under s. 137 of the *Act*.

3. *Carleton Condominium Corp. No. 25 v. Eagan*

There was an ongoing bedbug problem which the condominium corporation was attempting to address. The unit owner was uncooperative and failed to cooperate in any meaningful way. The Court ordered the unit owner to prepare the unit for bedbug treatment and if the unit owner failed to comply within 30 days, the condominium corporation was granted access to do so, and the pest control costs were added to the common expenses for the unit. Of note is the Court's findings that by permitting the unit to become excessively clustered and unsanitary, the unit owner breached various sections of the *Condominium Act,* 1998, and that by failing to address the condition and prepare the unit for treatment, the unit owner breached section 117 of the *Condominium Act, 1998* because bed bug infestation can spread to other units.

4. *Hull v. Metropolitan Toronto Condominium Corporation No. 721*

The Ontario Court of Appeal allowed an appeal on the grounds that the lower Court judge's reasons for his decision were inadequate. Not only did the judge fail to appreciate properly, the issues raised on the application, he failed to set out the correct legal test for oppression remedy relief and gave no basis for his conclusions including how and on what basis he exercised his discretion.

This is an important case because it is not uncommon for judges to write short endorsements in condominium cases without going into much detail. It is important for litigants to know why a judge decided a case a certain way.

5. *Middlesex Condominium Corporation 229 v. WMJO Limited*

The condominium corporation sued the defendants for contribution to a private sewage system. A predecessor of the condominium corporation entered into a cost-sharing agreement with a predecessor of the defendants which obligated the defendants' predecessor to contribute to such sewage system. The obligation to contribute was stated to run with the lands and to be binding on all future owners of the lands. The problem for the condominium corporation was that as a result of a case called *Amberwood*, positive obligations, such as the obligation to contribute to a private sewage system, don't run with the land and are not binding on future owners unless such owners have specifically agreed to be bound.

The Court saw the unfairness in such a rule of law in these circumstances and held that the joint use of the sewage system was "something akin to a common venture", and that in those circumstances, it was appropriate that all those that benefited from the sewage system pay a *pro rata* share of the operational expenses thereof.

This case was properly decided, but is just another example of the principle of law that a party benefitting from a service should pay for it.

6. *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*

This case demonstrates the huge mess that can result from a negligently prepared status (estoppel) certificate. In this case, the estoppel certificate provided that there were "*no continuing violations of the declaration"*, however, the third floor of the townhouse unit in question, was actually part of the common elements and had been illegally converted to living space.

Not only was the estoppel certificate negligently prepared, the negligent statement was unnecessary because it was not a requirement of the *Condominium Act, 1998*. Nonetheless, the Ontario Court of Appeal (OCA) held that the fact that this statement "*went beyond the minimum statutory requirements does not mean that MTCC 1056 had no duty to make an effort to verify its accuracy*."

The resulting litigation went on for over a decade, the trial took 43 days over a three month period, resulting in legal costs awarded at the trial to exceed $1,000,000, not to mention the appeal which took another two days. The OCA held that the condominium corporation was liable for negligence, but that the manager had to indemnify the condominium corporation because the manger had prepared the estoppel certificate and was contractually bound to indemnify the condominium corporation.

7. *Simcoe Condominium Corporation No. 89 v. Dominelli*

In this case, the condominium corporation had a 25-pound weight restriction on pets. Ms. Labranche first tried to have the dog remain as a therapy dog for her work with autistic children, and then, when she was advised that the dog had to be a service dog for a resident of the unit, she obtained letters from her doctor that supported her notion that the dog was a therapy dog *for her*.

The issue in the case was whether Ms. Labranche had a "disability" within the meaning of the *Human Rights Code* that required a service dog. In order to establish a disability, one has to have a diagnosis of some recognized mental disability, or at least a working diagnosis of clinically significant

symptoms. Offering general reasons such as anxiety, mental health, well-being or having a strong bond with the dog, are insufficient.

Also, it helps if the judge believes you, and in this case, he did not believe Ms. Labranche. Furthermore, the judge found that the doctor's evidence was not objective or impartial.

Ms. Labranche had to remove the dog and pay $47,000 costs.

The lesson – pick up after your dog and keep it in the plastic bag– don't dump it on the Court.

8. ***Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd.***

In this case, the disclosure statement provided that a community clubhouse would be conveyed to the condominium corporations within 120 after the developer had sold all lands in the project. The central issue in the case was whether the condominium corporations had an "equitable interest" in the clubhouse, even though it didn't have registered title yet. A key factor was that the clubhouse was fully paid for and the only trigger for the conveyance to the condominium corporations was the sale of all lands by the developer.

The result of this case was disappointing for condominium purchasers and condominium corporations for a number of reasons, perhaps the most important of which, was that despite having been fully paid in advance for the Clubhouse, the OCA permitted the developer to mortgage it simply because it had yet to transfer title to the condominium corporations.

9. ***Toronto Standard Condominium Corporation No. 1487 v. Market Lofts Inc.***

In this case, the condominium corporation failed to request payment pursuant to a Shared Services Agreement for about 11 years. This case in important because it held that the limitation period for any action to collect charges imposed by the Shared Services Agreement (i.e. Reciprocal Agreement, etc.), was 10 years. The usual limitation period is two years.

10. ***Wu v. Peel Condominium Corporation No. 245***

In this case, the court found a condominium corporation liable for oppression and awarded $30,000 damages and $20,000 costs because of the conduct of the condominium corporation over a five-year period, during which it alleges it took 33 identifiable steps to investigate and repair the sources of the noise and vibration. The judge held however, that the condominium corporation had done a lot of investigation, but little or no work to solve the problem. This case was not a case of "good, better or best" solution, but rather a case of no solution at all.