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Condo Alert!

Volume 1, Issue 4 Summer 2009

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Modifying exclusive use common elements to accommodate disabilities: Who pays?

Christopher J. Jaglowitz, B.A., LL.B., ACCI

A June 2009 decision of the Ontario Human Rights Tribunal offers useful guidance about who is responsible for the cost of making exclusive use common elements accessible for persons with physical disabilities.

In *McMillan v. Bruce Condominium Corp. No. 6*, the condo complex consisted of 32 one-story detached townhouses. The balconies, yards and entrances to the units were designated in the declaration as exclusive use common elements, which is typical of such communities.

The entrances to the units were built with two exterior wooden steps extending from the landings at the front and rear of each townhouse. The landings were built with railings but the steps were not.

Over time, a unit owner developed mobility problems and became unable to enter the unit safely without assistance. The owner consequently asked the Board to install hand railings on the steps at both entrances to the unit.

The Board responded by giving the owner permission to install the railings at her cost. The owner took the position that the corporation was responsible for the cost and was obliged to accommodate her physical disability by installing the railing itself. The owner then complained to the Ontario Human Rights Tribunal that the corporation had contravened the Human Rights Code by failing to install the requested railings.

The Tribunal heard evidence that similar requests to install railings had been made and granted to owners in the past on the basis that the cost of the work be paid by those owners. The evidence also showed that the owner in question had previously asked for and received permission to install a shed and a hot tub on her exclusive use common elements and that she had paid the cost of those items.

The Tribunal noted that the condominium declaration contained the following typical clause:

"No alteration, work, repairs, decoration, painting, maintenance, structure, fence, screen, hedge or erection of any kind whatsoever (the work) shall be performed, done, erected or planted within or in relation to the common elements (including any part thereof over which any owner has the exclusive use) except by the corporation or with its prior written consent or as permitted by the by-laws or rules."

The Tribunal also considered section 98(2) of the *Condominium Act, 1998*, pertaining to changes made by owners where the change or alteration relates to a common element over which the owner has exclusive use. That section permits such changes if the Board is satisfied that the proposed additional, alteration or improvement:

a) will not have an adverse effect on units owned by other owners;
b) will not give rise to any expense of the corporation;
c) will not detract from the appearance of buildings on the property;
d) will not affect the structural integrity of buildings on the property; and
e) will not contravene the declaration or any prescribed requirements.

After considering the evidence and the interplay between the declaration and section 98 of the Condo Act, the Tribunal dismissed the complaint on the basis that:

"the [unit owner] has not experienced discrimination on the basis of disability and that [the Corporation] did not contravene the Code when the Board refused to pay for the installation of hand railings on the front and back steps of the Unit. The circumstances of this case are distinct from a condominium corporation's obligation to make common areas accessible. [The Corporation] approved the request to install hand railings within its authority but it is not responsible for areas defined as common elements that fall within a unit owner's exclusive use."

The Tribunal also correctly observed that a change made to the common elements to accommodate a disability is no different than, for example, the installation of a shed or a hot tub. The fact that a change is necessary to accommodate a disability does not change the obligations set out in the declaration or the Condo Act.

Condo Law in an International Humanitarian Law Context

Gardiner Miller Arnold's Senior Litigation Partner, Mark Arnold, is Counsel to the Village of Bil'in situated on the West Bank in the Occupied Palestinian Territories. On behalf of the Village, legal proceedings have been brought before the Québec Superior Court against two Canadian construction companies who are alleged to be building condominium complexes on the lands of the Village allegedly in violation of International Humanitarian and Canadian Domestic Law. The defendant Canadian companies have brought dismissal motions before the court on legally technical issues. The motions were heard in Montréal during the latter part of June 2009 with reasons reserved. A court decision is imminent and will determine whether or not this case will be permitted to proceed to trial on its merits.

The case has been described by Deborah Guterman in her article *"Canadian Corporations Cash-In on Occupation: The Case of Bil'in v. Green Mount/Green Park International*." A brief excerpt of the article is reproduced below:

"Bil'in is located four kilometers east of the Green Line and is adjacent to Modi'in Illit, a large settlement bloc that sits on territory confiscated from Bil'in and the neighbouring Palestinian villages of Ni'lin, Kharbata, Dier Quadis and Saffa. Since 2005, the residents of this agricultural community have led a struggle against the construction of Israel's Wall on village land.

Ostensibly built to protect the existing residents of the settlement bloc, the route of the Wall was drawn to incorporate the future construction of the settlement neighbourhood Matityahu East, located just east of Modi'in Illit. The Wall appropriates an additional 450 acres, which accounts for sixty percent of Bil'in's land.

In 2007, the Israeli Supreme Court deemed the route of the Wall illegal. Whereas the judicial authority ordered the Wall to be moved closer to the edge of the existing settlement boundary, it also approved plans for the construction of a part of Matityahu East, to be located just west of the reconstructed barrier. However, the military has yet to implement the Supreme Court's decision and relocate the Wall. Green Park International and Green Mount International were, along with two Israeli developers, awarded the contract to construct condominiums in Matityahu East. The suit against Green Park companies, filed by Canadian attorney Mark Arnold in 2008, accuses Israel of "Severing" village land from Palestinian control, and transferring territorial control to the Israeli planning councils. The rights to develop the territory, explains Emily Schaeffer, Israeli attorney for the village, were then sold to the Green Park companies.

Legally, the Bil'in case appears sound. The two Canadian corporations stand in violation of not only international law, but Canadian Federal Law and Quebec Provincial Law as well. The Fourth Geneva Convention prohibits an occupying power from relocating part of its civilian population to the territory it has occupied. A violation of this principle is defined as a crime of war under the Rome Statute of the International Criminal Court. Insofar as Green Park International and Green Mount International constructed the buildings meant to house Israelis within the occupied West Bank, the corporations are considered complicit in the commission of this war crime.

According to Ms. Schaeffer both the articles of the Geneva Convention and the Rome Statute have been incorporated into Canadian Federal Law under the Canadian Crimes Against Humanity and War Crimes Act of 2000. This means that not only did Canada ratify these two important international conventions, but also endowed its national courts with the ability to prosecute Canadian citizens and corporations for war crimes, as defined under international law. Canadian courts are thus able to not only comply in the letter of the law with its international obligations, but actively enforce international norms in its own courts.

The existence of this piece of Canadian legislation is noteworthy. Canada was the first nation to transform the dictums of the Rome Statute into national law. Countries like New Zealand, Austria, Belgium, South Africa and the United Kingdom have followed suit However, both the United States and Israel have suspended their signatures on the Statute. As a result, neither country is bound by an obligation to the convention. Green Park International and Green Mount International, however, are registered in Quebec. The two companies are thus directly subject to Quebec and Canadian law, including the War Crimes Act."

News and Professional Development

- GMA welcomes our new articling student, Syed Ahmed!
- GMA is helping to update the text used in the ACMO condo law course for RCM candidates. Bob Gardiner designed the existing law course and wrote "Beyond the Condo Act" as an RCM text. He also recommended the structure and design of an expanded RCM course. Mark Arnold is updating the chapter on litigating construction deficiency cases and Chris Jaglowitz is writing a new chapter on part 1 of the *Condominium Act*. The new text should be ready for use in early 2010.
- Chris Jaglowitz to speak at 13th Annual ACMO/CCI Condominium Conference on the topic of "Aging in Place." The conference takes place November 6 & 7, 2009, at the Hilton Suites Toronto/Markham Conference Centre and Spa. See you there!

Court finds that different limitation periods apply to different construction defects

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

In the 2008 Ontario Court of Appeal decision, *Grey Condominium Corporation No. 27 v. Town of the Blue Mountains et. al.,* the Court was asked by the Town of Blue Mountains to review a finding of the lower court. The lower court held that independently discoverable construction defects caused by a single act of negligence gave rise to separate causes of action (the set of facts sufficient to justify a right to sue).

The building permit for the condo was issued by the Town in April, 1988 and the Town was responsible for inspecting, reviewing and approving the construction. Construction of the condo, GCC 2, was completed in December 1989.

In 1993, the property manager of GCC 2 - concerned by reports that other condos built at the same time, by the same builder, contained several deficiencies – wrote a letter to the Board generally warning of potential fire separation deficiencies. No action was taken by the condo at this time. In 1996, two more letters were provided to the condo about potential deficiencies and in 1998 GCC 2 retained a consulting firm to undertake an investigation. The report, which was completed in 1999, disclosed three serious construction deficiencies with the fire barrier. The condo paid to rectify the deficiencies but did not immediately start legal proceedings. In 2001, GCC 2 commenced an action to seek reimbursement for the costs of remedying the three defects.

The Town admitted liability for failing to identify the potential deficiencies. All of the deficiencies were a breach of the Ontario Building Code and the Town admitted that it should have found these defects during its inspection and review of the project. However, the Town maintained in the appeal that the condo was barred from bringing an action against it because it missed the limitation period for doing so.

At trial the judge found that the first defect described above was discovered by GCC 2 in 1993 and the latter two were discovered in about 1996. At the time of trial, the limitation period to commence a claim was 6 years from the date of discovery. Therefore the Town argued that all three defects gave rise to only one cause of action – negligence – and that that cause of action should have been known to the condo in 1993. The Town argued that the claim was statute barred in 2001. However, the trial judge found that each deficiency gave rise to a separate cause of action and therefore GCC 2's costs of repairing the two latter deficiencies discovered in 1996 were not barred by the limitation period. GCC 2 was awarded $298,707.32 from the Town.

The Town's position on appeal was the same as at trial. It submitted that a cause of action has only one limitation period and the trial judge was wrong when he split the claim arising out of one act of negligence into two separate limitation periods. The condo's position was that discoverability is different in construction cases and that negligent conduct that causes defects in different parts of a building may give rise to multiple claims. The condo relied on the fact that the trial judge found that the latter two, interior deficiencies could not have been discovered before August of 1995.

The Court of Appeal held that in construction deficiency cases, allowing multiple claims that arise out of one act of negligence is not without precedent, and several instances are listed. The reasons further state:

"…In my view therefore, given the inherently latent nature of construction defects, and given that they will often be discovered over a period of time, it is neither logical nor fair to deny innocent victims an opportunity to seek redress for the wrongs done to them, based solely on the single cause of action paradigm.

That said, trial judges must be careful to ensure that the deficiencies in question are clearly independently discoverable. Failure to do so could undermine the need for finality in litigation. …

… The Town's position would deny Grey Condo any access to justice in relation to its claim for reimbursement for the costs of addressing the interior defects, defects that were serious and for which the Town admitted liability. In light of the trial judge's findings of fact and the foregoing reasoning, there are no circumstances in this case that would support a conclusion to this effect. …"

Note that the successor *Limitations Act* to that in the GCC 2 case has, in many instances, decreased the limitation period in which to bring a claim from 6 years to 2 years, subject to a 15 year cap with respect to latent (hidden) defects. Discovery is measured from the date an individual knew, or ought to have known, that the damage occurred, was caused by or contributed to by an act or omission of an identifiable person against whom the claim can be made, and that, having regard to the nature of damage, that a proceeding would be an appropriate means to seek to remedy it.

With respect to a construction deficiency claim, also remember that limitation periods vary for claims in new condos against ONHWP and as against an engineer under the *Professional Engineers Act*. It is always best to contact a lawyer and engineer at the first sign that a condo may be experiencing a construction deficiency.

In Brief...

Condo Was Not the "Occupier" of Sidewalk

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

A lady injured her right shoulder when she slipped and fell on the public sidewalk in front of a condominium building. She sued the condominium corporation, but her action was dismissed. The judge held that the condominium corporation was not the occupier of a municipal sidewalk. The condominium corporation had no control or ownership over the sidewalk. There was no evidence that any water had flowed from the condominium's property onto the adjoining municipal sidewalk. Mere assumption by the condominium corporation of the duty to clear snow from the municipal sidewalk was not enough to hold it liable in a December 9, 2008 Ontario Superior Court slip and fall case.

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This newsletter is provided as an information service to our clients and colleagues. The information contained herein is not meant to replace a legal opinion and readers are cautioned not to act upon the information provided without first seeking legal advice with respect to the unique facts and circumstances of their situation.

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