



FEATURES THIS MONTH

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1. IN THE SUPREME COURT OF CANADA: AN IMPORTANT CASE FOR STRATA COUNCILS

Perhaps you saw the news article in late June and, if so, you already have some idea what this is all about. As in most cases that reach the highest court in the land, the details are lengthy and complex. Accordingly, we make our best effort here to reduce this story to its shortest form. If, however, you are intrigued and wish to delve into it in more detail, you can go to the Supreme Court website at <http://www.lexum.umontreal.ca/csc-scc/en/index.html> and link to Syndicat Northcrest v Amselem. Alternatively, just call your strata agent and he/she can mail you a copy of a summary of the judgement (6 of 52 pages).

The background of this matter is summarized as follows in the case report published on the Supreme Court of Canada's web site cited above:

The appellants, all Orthodox Jews, are divided co-owners of units in luxury buildings in Montréal. Under the terms of the by-laws in the declaration of co-ownership, the balconies of individual units, although constituting common portions of the immovable, are nonetheless reserved for the exclusive use of the co-owners of the units to which they are attached. The appellants set up "succahs" on their balconies for the purposes of fulfilling the biblically-mandated obligation of dwelling in such small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot. The respondent (i.e., the strata corporation) requested their removal, claiming that the succahs violated the by-laws, which, inter alia, prohibited decorations, alterations and constructions on the balconies. None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units. The respondent proposed to allow the appellants to set up a communal succah in the gardens. The appellants expressed their dissatisfaction with the proposed accommodation, explaining that a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs, which, they claimed, called for the setting up of their own succahs on their balconies. The respondent refused their request and filed an application for a permanent injunction prohibiting the appellants from setting up succahs and, if necessary, permitting their demolition. The application was granted by the Quebec Superior Court and this decision was affirmed by the Quebec Court of Appeal.

However, the Supreme Court of Canada, in a very close five to four ruling, overruled the lower court decisions and held that the guarantee of freedom of religion found in the Quebec (and Canadian) *Charter* entitled the appellants to construct succahs on their balconies notwithstanding the strata bylaws. The process by which the majority reached its conclusion was summarized as follows by Iacobucci J.:

Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter. However, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

What is perhaps most important about this decision from a British Columbia strata corporation's perspective in our opinion is the definition of religion for *Charter* purposes. While the majority did conclude that the belief must have a "nexus with religion", which presumably means an organized and relatively widely (but how widely?) accepted and recognized "religion", they did allow considerable leeway for variations of personal beliefs within a broader religious framework. In other words, they specifically concluded that the belief doesn't have to be part of the accepted dogma of the mainstream of a given religion or "supported by any mandatory doctrine of faith" to entitle one to the protection afforded by the *Charter*. Or, that in this case, it wasn't necessary that the building of succahs for the purposes intended by Mr. Amselem and his co-appellants be widely accepted among Jews generally as a requirement of their faith. It was enough in this case that the belief in question was sincerely and honestly felt by the appellants personally and that that belief had a nexus with Judaism.

The next issue was to then balance the rights and interests of the individual appellants against those of the strata corporation as a whole and its other owners. The majority concluded as follows:

The alleged intrusions or deleterious effects on the co-owners' rights to peaceful enjoyment of their property and to personal security guaranteed by ss. 6 and 1 respectively of the Quebec Charter are, under the circumstances, at best minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellants' religious freedom. The respondent has not adduced enough evidence to conclude that allowing the appellants to set up such temporary succahs would cause the value of the units, or of the property, to decrease. Similarly, protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. The potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial. Finally, the appellants' offer to set up their succahs in such a way that they would not block any doors, would not obstruct fire lanes and would pose no threat to safety or security obviated any security concerns under the circumstances. In order to respect the co-owners' property interests, however, the appellants should set up their succahs in a manner that conforms, as much as possible, with the general aesthetics of the building.

This case, as with all others, was decided on its particular facts, so it can't be cited as authority for the disallowance of every type of interference by strata corporations with every type of religious belief and freedom that strata lot owners might profess and claim entitlement to. It will, however, certainly result in more litigation being commenced by individuals and special interest groups against majority and even 3/4 vote decisions of strata corporations on the basis of some alleged discrimination or other. It will also likely result in more of such cases succeeding. Even unsuccessful challenges may be somewhat hollow victories for strata corporations who nevertheless will get saddled with significant legal bills to defend their positions.

But then, no one said being on council would ever get boring did they?

2. CLOSE CALL: IN MORE WAYS THAN ONE

VCS manages over 200 strata corporations in the Lower Mainland so it is not unusual that “things can go wrong” such as fires and accidents. Whenever we catch a newscast that mentions a condominium calamity you can be sure that our hearts skip a beat and so it was recently with a noon hour newscast about some workers at a downtown condominium getting zapped by some Hydro lines adjacent to their work area. More often than not, these newscasts relate to someone else’s portfolio and we breathe easier. In this case, however, it turned out to be one of our buildings. (Please call our office for a copy of the news report.) Notwithstanding the severity of the mishap, the good news is that the workers involved survived what could have been catastrophic.

We use this incident to illustrate the need to be constantly vigilant when it comes to worker safety. Just imagine if someone got hurt or killed. There would be investigations and lawsuits and the emotional trauma for all concerned. A few years ago at one of our strata properties, a council member/janitor was working on the garage gate at his building with his arms stretched through the bars of the gate (which slides horizontally rather than vertically). He accidentally shorted two wires on the motor while adjusting the timer and the gate slid open. He was crushed and died instantly. A simple task yet with enormous consequences.

These are important lessons for all of us. As strata agents it is vital that we always insist on WCB coverage from contractors, fall protection plans for workers who scale buildings, annual safety tests for roof anchor systems and so on. Councils sometimes become irritated because these steps are costly or delay the start dates of important projects, and that is understandable. The problem, of course, is that once out of a thousand times something will go wrong and then we all have a much bigger problem to deal with.

For those councils that employ resident caretakers or managers, remember that, for the most part, their duties are custodial and/or administrative in nature. They should never be asked to do anything beyond such responsibilities because it will save money by avoiding the need to hire expensive contractors. As a council member you should minimize your physical involvement at your property. Yes, you do have an obligation and duty to be involved and be on top of issues, but if something physical has to be done, use qualified contractors.

Close calls are scary enough. Let us hope and pray we never have to go beyond that stage. Prevention is invaluable.

3. ALTERATIONS TO COMMON PROPERTY

When a strata council is asked by an owner to approve alterations to a strata lot that will also entail alterations being made to common property, council should consider the following as potential prerequisites to approval:

1. That the owner must enter into a written agreement with the Strata Corporation, in form and contents satisfactory to Council, wherein the owner agrees (a) to pay all costs of the alterations proposed, (b) to be responsible and pay for all maintenance and repairs required in the future, (c) to reimburse the Strata Corporation for any resulting increased insurance or other costs incurred by it, (d) to indemnify the Strata Corporation and any owner or resident for any injury or loss suffered as a result of the modifications or the owner's failure to live up to the terms of the agreement, (e) to take out and maintain insurance that will cover any damages or injury suffered by the Strata Corporation or any owner or resident resulting directly or indirectly from the subject alterations, such insurance to be with insurers and on such terms and conditions as the Strata Corporation reasonably requests and approves in advance, (f) to ensure that upon the sale of the owner's strata lot, the purchaser will assume the owner's obligations under the agreement, and (g) to such other terms and conditions as council may consider appropriate in the circumstances on advice of legal counsel or otherwise;
2. That all required municipal licenses and permits must be obtained, and copies provided to council, before any work begins;
3. That detailed plans and drawings must be prepared to the standards and specifications requested by council and copies provided before any work begins;

4. That the modifications must be carried out in a professional manner by reputable contractors and tradespeople who have proper insurance and WCB coverage in place, proof of which must be produced before any work begins;
5. That the modifications must be made and maintained to the same or better standards than those that presently exist;
6. That the work must be carried out and completed in strict compliance with all permits, plans and approvals given;
7. That the owner must reimburse the Strata Corporation for all costs incurred by it as a result of this matter.
8. That if the change proposed will, in the opinion of council, make a significant change in the use or appearance of common property, it must also be approved by a 3/4 vote at an annual or special general meeting.

If limited common property is involved, a bylaw amendment should also be considered that will make the owner responsible for repair and maintenance. This will be much easier to enforce, against the current and any future owner, than the agreement contemplated by paragraph 1 above.

4. REMINDERS

Levying Fines: Sorry, we are repeating ourselves on this one but most councils are still levying fines in contravention of Section 135 of the *Strata Property Act*. It reads, in part, as follows:

- (1) The strata corporation must not
 - (a) impose a fine against a person ... for a contravention of a bylaw or rule unless the strata corporation has ...
 - (c) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant ...

Councils continue to instruct the property manager to “levy a fine” without consideration of these provisions. Levying fines cannot be done except in compliance with the above-noted provisions of the *Act*.

Insurance Deductibles: Ah those pesky insurance deductibles - they just don't go away. In fact, with water loss deductibles going up and up, more strata corporations are having to deal with these deductibles in relation to Section 158(1) of the *Strata Property Act* which reads in part:

“... the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense ...”

For each situation below, assume that the deductible is \$5,000. Which of the losses can the strata council charge the \$5,000 deductible to the owner's account?

- (a) The roof leaks in a thunderstorm and damages the ceiling of a penthouse strata lot.
- (b) A hot water tank in a townhouse unit breaks and floods the unit, damaging the carpet.
- (c) An elderly, and sometimes forgetful, homeowner goes out for three hours but leaves the kitchen sink tap running, with the drain closed. There is a huge flood.



- (d) A tenant is operating a marijuana grow-op. He is out and a fire starts as a result of the illegal and improper electric wiring changes done by the tenant.

- (e) A visitor of an owner drops a cup of tea on the living room carpet. The stain will not come out of the carpet; it has to be replaced.

Answers: None. Deductibles must be paid by the strata corporation. If you want to recover the cost (the deductible) you can sue in Small Claims Court or B.C. Supreme Court.