IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: VanAmburg v. Halifax County Condominium Corporation #267, 2007 NSSM 23

Date: 20070108
Claim: 270292
Registry: Halifax

Between:

Kevin VanAmburg

Claimant

v.

Halifax Condominium Corporation # 267,
Novacorp Properties Limited and Michael Iosipescu

Defendants

Adjudicator: J. Scott Barnett

Heard: October 23, 2006; last written submission received on November 7, 2006

Written Decision: January 8, 2007

Counsel: Kevin VanAmburg, Self-represented

Halifax Condominium Corporation # 267, Self-represented

Novacorp Properties Limited, Self-represented

Philip Whitehead, Counsel for the Defendant Michael Iosipescu

By the Court:

[1] **INTRODUCTION:** The Claimant, Kevin VanAmburg, sues the Defendants seeking exclusive use of a parking space identified as Parking Space Number 64 (the Parking Space) and payment of special damages in the amount of $166.75, representing the towing charge that Mr. VanAmburg incurred when his vehicle was removed from the Parking Space.

[2] At the outset of the hearing before me, the Defendants raised a jurisdictional defence. They argued that the *Condominium Act*, R.S.N.S. 1989, c. 85 provides for mandatory arbitration. Given that the Claim principally involves a dispute between a resident of a condominium (Mr. VanAmburg) and a condominium corporation (Halifax County Condominium Corporation Number 267), the Defendants suggest that this Court does not have jurisdiction to hear this Claim.

[3] Rather than proceed with a full hearing into the merits of the Claim and into the merits of the substantive defences that have been raised in connection with the Claim, I elected to consider the jurisdictional issue raised by the Defendants as well as the issue of whether or not Section 10(a) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, also applies to exclude the jurisdiction of this Court in this

Claim.

[4] I received written submissions from only one of the parties although all parties were invited to provide written submissions on these two points.

[5] **BACKGROUND:** In this case, the Claimant's pleadings were fairly extensive. In order to provide the context within which I have made my decision, the Claimant's pleadings are exactly reproduced below:

> The Claimant, Kevin VanAmburg, is the owner and resident of Unit 107, 53 Bedros Lane, Bedford, in the Halifax Regional Municipality, Province of Nova Scotia;
>
> The Defendant, Halifax County Condominium Corporation No. 267 (hereinafter referred to as "HCCC #267), is a condominium corporation with office at 900 - 5991 Spring Garden Road, Halifax, in the Halifax Regional Municipality, Province of Nova Scotia;
>
> The Defendant, Novacorp Properties Limited, is a body corporate with registered office located at 201 - 17 Prince Street, Dartmouth, in the Halifax Regional Municipality, Province of Nova Scotia;
>
> The Defendant, Michael Iosipescu, is an individual who has office in Halifax at 900 - 5991 Spring Garden Road, Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, and was at all material times an owner of a number of condominium units located at 53 Bedros Lane,

Bedford, in the Halifax Regional Municipality, Province of Nova Scotia;

The Defendant HCCC #267 was at all material times the owner of the condominium building located at 53 Bedros Lane, Bedford, in the Halifax Regional Municipality, Province of Nova Scotia;

The Claimant purchased Unit 107, 53 Bedros Lane, Bedford from Pinnacle Condominium Construction Ltd. (hereinafter referred to as "Pinnacle") on or about April 21, 2006 by Agreement of Purchase and Sale;

The Claimant states that he was assigned a parking space by the Agreement of Purchase and Sale, entered into on or about March 6, 2004 and that sometime thereafter in 2004, discussions took place between the Claimant and Pinnacle employee, Ms. Holy Myers, regarding the assignment of a parking space. Ms. Myers, on behalf of Pinnacle, and the Claimant mutually agreed to the Claimant being assigned parking space #64;

The Claimant states that on or about June 30, 2006, the Defendants, interfered with the Claimant's quiet use and enjoyment of parking space #64 by authorizing the Claimant's vehicle, a 2004 Nissan Maxima with Nova Scotia License Plate #EAF 687 to be towed from parking space #64;

The Claimant states that prior to the Claimant's vehicle being towed on or about June 30, 2006, the Defendant, Michael Iosipescu, requested and administered that the Claimant's parking space be assigned to be used by a tenant in one of Mr. Iosipescu's units in the condominium building located at 53 Bedros Lane without the consent of the Claimant and authorized his tenant to use parking space #64;

The Claimant states that he has suffered damages as a result of the Defendants malicious behaviour, trespass and failure to act in good faith;

The Claimant therefore claims against the Defendants, jointly and severally, the following:

a. General damages;

b. Specific damage in the amount of $166.75 representing the towing charge;
c. Costs;
d. Such other relief as this Honourable Court deems appropriate."

[6] The Defendant Novacorp Properties Limited ("Novacorp") has not filed a Defence. Meanwhile, the Defendant Michael Iosipescu filed a Defence in which he asserts that the parking spots are allocated by the Defendant Halifax County Condominium Corporation Number 267 ("Condo Corp.").

[7] For its part, the Condo Corp. filed an extensive Defence. This Defence provides further context and it is exactly reproduced below:

> In response to the claims of Mr. Kevin VanAmburg filed against Halifax County Condominium Corporation Number 267, and Novacorp Properties Limited, the Board of Directors of the said Corporation files the following Defence:
>
> Whereas in purchasing a unit in Halifax County Condominium Corporation Number 267 (hereinafter referred to as "HCCC #267") the Claimant, Kevin VanAmburg, has consented to abide by the Declaration and By-laws of the said Corporation; and
>
> Whereas according to the Declaration and the By-law of HCCC #267 the inside parking spaces are Common Elements of HCCC #267 and each owner is entitled only to the exclusive use of one space, which space may be

assigned by the Board of Directors from time to time (Declaration 3.02(d), and By-Laws Article 14); and

Whereas Pinnacle Condominium Construction Limited (hereinafter referred to as the "Developer") had assigned a parking space to each unit by the time of the Registration of HCCC #267; and

Whereas the Board of Directors of HCCC #267 has not reassigned any parking spaces since the date of Registration but has used exclusively the assignments made by the Developer at the time of registration because at the time of registration the building was largely occupied and most residents were using the parking spaces and the adjoining storage space assigned by the Developer; and

Whereas the Developer through their lawyers sent on May 3, 2006 to Novacorp Properties Limited (hereinafter referred to as "Novacorp"), a property management company employed by HCCC #267, a list of all the inside parking spaces that they had made. On May 24, 2006 at the Board's request the Developer confirmed that the list sent on May 3, 2006 accurately shows the assignment of parking spaces as of the date of Registration. In this list parking space #37 was assigned to the Claimant's condominium unit 107 and parking space #64 was assigned to unit 407; and

Whereas the Board of Directors of HCCC #267 on May 17, 2006 did pass a motion that all unit owners were to use only the parking spaces as assigned in the list received from the Developer; and

Whereas Novacorp, on the basis of the motion of the Board of Directors notified all unit owners on May 26, 2006 of their assigned parking spaces based on the confirmed list at Registration received from the Developer, and owners were advised of what actions they should take if they were in dispute who had been assigned a particular space by the Developer, and through this notice the Claimant was notified that his parking space was #37; and

Whereas the Claimant has never been denied the use of an indoor parking space; and

Whereas on June 3, 2006 the Claimant wrote to the President of HCCC #267, Mr. Mackenzie, that he would not accept the assigned parking space in

the notice of May 26, 2006 but rather argued that his parking spot was #64; and

Whereas the Claimant argued that he entered into a Purchase and Sales Agreement with the Developer on or about March 6, 2004, and some time after that date, but in 2004, he claims that he had a discussion with Ms. Holly Myers, an employee of the Developer, who assigned him parking space #64 and that this oral discussion completed the earlier Purchase and Sale Agreement; and

Whereas a contract with respect to property must be in writing to be enforceable, which it appears that the Claimant's assignment of a particular parking spot by the Developer is not; and

Whereas, Registration of HCCC #267 took place on February 13, 2006 with the Developer as the Declarant; and

Where the Board of Directors is not able to act as a court or as an arbitrator to resolve what may, or may not, have transpired between a purchaser and a developer in 2004; and

Whereas on June 13, 2006 Novacorp wrote again to the Claimant that his assigned space was #37; and he was advised that if he has issues with what the Developer has confirmed was done prior to Registration then his issue was with the Developer and not HCCC #267 or the Board of Directors; and he was further advised that if he chose to contest the issue with the Developer he was to use only parking space #37 until the issue was resolved; and further he was advised that if he did not remove his vehicle from space #64 that his vehicle would be ticketed and/or towed; and

Whereas on June 13, 2006 the Claimant answered the letter from Novacorp by writing once again that he would not vacate spot #64; and

Whereas the Claimant continued to park his vehicle in space #64; and

Whereas according to the By-Laws vehicles shall be parked in their assigned spaces only (Schedule "A" of the By-Laws entitled "Parking and Automobiles"); and

Whereas HCCC #267 through its Board of Directors is required to effect compliance of owners with the By-Laws; and

Whereas on or about June 14, 2006 and again on or about June 19, 2006 the Claimant's vehicle parked in spot #64 was ticketed. The tickets advised the vehicle's owner that if the vehicle was not removed within one hour the vehicle may be towed; and

Whereas on or about June 28, 2006, in accordance with the above notices and warnings, the Claimant's vehicle was ticketed again and after more than a one-hour wait it was arranged to have the vehicle towed from parking spot #64 by the HRM Parking Enforcement Officer who tried unsuccessfully to reach Mr. VanAmburg by phone prior to towing.

Therefore the Board of HCCC #267 requests this Honourable Court to dismiss the claims of the Claimant against HCCC #267 and its management company Novacorp as without reasonable foundation or merit.

[8] There is little dispute about the parameters of the Claimant's complaints regarding the Parking Spot or about the parties involved who are:

a. The Claimant, who is the owner of a condominium unit;

b. The Defendant Condo Corp., the owner of the building where the Claimant's condominium unit is located;

c. The Defendant Novacorp, the Condo Corp.'s property manager with respect to the building where the Claimant's condominium unit is located; and

d. The Defendant Michael Iosipescu, the owner of another condominium unit in the building owned by the Condo Corp.

[9] **ISSUES:** Does this Court have jurisdiction to address the within Claim in light of:

a. the arbitration provisions contained in the *Condominium Act*;

b. Section 10(a) of the *Small Claims Court Act*?

[10] **ARBITRATION OF CONDOMINIUM DISPUTES**: Justice Cromwell explained the basic meaning of the term "condominium" as follows in the unanimous Nova Scotia Court of Appeal decision in *2475813 Nova Scotia Limited v. Rodgers*, [2001] N.S.J. No. 21 (C.A.) at paragraph 3:

> The term "condominium" refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established. [cite omitted]

[11] Justice Cromwell also confirmed (at paragraph 4) the need to balance the needs and desires of each owner of a unit in one condominium with the needs and desires of other owners of units in that same condominium:

> As Osterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests. [cite omitted]

[12] I take note of Section 2 of the *Condominium Act* of Nova Scotia which states that the purpose of the statute is, among other things, to "provide for the use and management of [condominium] properties and to expedite dealings therewith…" The Section goes on to state that the statute "shall be construed in a manner to give the greatest effect to these objects."

[13] Section 33 of the *Condominium Act* provides as follows:

> **Arbitration**

33(1) Except as provided by this Section, the *Commercial Arbitration Act* applies to every arbitration carried out pursuant to this Section.

(2) Notwithstanding the *Commercial Arbitration Act*, where

(a) the corporation and an owner of a unit that is part of the property managed by the corporation;
(b) the corporation and any person who has agreed with the corporation to manage the property;
(c) the corporation and any other corporation created pursuant to this Act;
(d) the corporation and the occupier of a unit that is part of the property managed by the corporation;
(e) an owner of a unit and the occupier of any other unit that is part of the same property that includes the unit of the owner; or
(f) two or more owners of units that are part of the property managed by the corporation,

are parties to a dispute on any matter to which this Act applies, other than termination of the property, but also including a dispute between a board of directors of a corporation and an owner of a unit that is part of the property managed by the corporation, as to whether or not a decision or any proposed action by the board of directors is prejudicial to the property or the corporation, any of the parties may give to the other party or parties and to the Registrar notice that the party giving the notice intends to have the dispute arbitrated by a single arbitrator appointed by the Registrar and, when the notice is given, the parties are deemed, for the purpose of the *Commercial Arbitration Act*, to have entered into a written agreement to submit the differences between or among them arising from the dispute to arbitration by a single arbitrator appointed by the Registrar pursuant to this Act. [emphasis added]

[14] The current wording of Section 33 replaced prior wording that was repealed:

see S.N.S. 1998, c. 28, s. 21. The prior wording of this section provided for arbitration only where all of the parties to a dispute consented to arbitration.

[15] Section 9 of the *Commercial Arbitration Act*, S.N.S. 1999, c. 5 requires a "court" (as that term is defined in the statute) to stay a proceeding in court where the parties have agreed to proceed to arbitration pursuant to an "arbitration agreement" except in certain circumstances.

[16] The term "arbitration agreement" is defined in Section 3(1)(a) of the *Commercial Arbitration Act* and special note must be taken of Section 3(3) which states that:

> Where a matter is authorized or required pursuant to an enactment to be submitted to arbitration, a reference in this Act to an arbitration agreement is a reference to the enactment, unless the context otherwise requires.

[17] The definition of "court" in the *Commercial Arbitration Act* does not include the Small Claims Court.

[18] In any event, the jurisdiction of a "court" is carefully circumscribed by the *Commercial Arbitration Act*.

[19] Indeed, the stated purpose of this statute is to "encourage and promote the use of arbitration as an alternative to court proceedings in resolving disputes….": Section 2 of the *Commercial Arbitration Act*.

[20] In interpreting the *Condominium Act* and the *Commercial Arbitration Act*, I am mindful of Section 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, whereby every enactment is deemed to be remedial and every enactment must be interpreted to insure the attainment of its objects in consideration of the various enumerated factors including, among others, the object to be attained by the enactment and the consequences of a particular interpretation.

[21] It comes as no surprise that Nova Scotia is not alone in permitting the establishment of condominium corporations or in providing for arbitration of disputes between condominium corporations (and their agents) and unit holders.

[22] In *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2004] O.J. No. 3360 (S.C.J.), overturned on another point [2005] O.J. No. 1604 (C.A.), Justice Lax observed at para. 18 that the vast majority of disputes within condominium corporations are about "people, pets and parking." She held that the Ontario Legislature had wisely decided that such disputes were better resolved through arbitration rather than resorting to court action.

[23] Further, in *McKinley v. York Condominium Corp. No. 472*, [2003] O.J. No. 5006 (S.C.J.), Jurianz, J. (as he then was), applied a broad interpretation to the arbitration provisions in Ontario's *Condominium Act* and held that duplication between an arbitration and a court action was to be avoided and that the provisions were aimed at having disputes resolved quickly and efficiently.

[24] Similarly, in *Strata Plan No. NW 498 v. McNeilly*, [1989] B.C.J. No. 859 (S.C.), Boyle L.J.S.C. held that "arbitration is a better course between neighbours where the fundamental problem is not legal and particularly where the courts have regularly observed that they intervene only with reluctance on issues of

condominium government."

[25] Numerous courts have cited the "modern principle of statutory interpretation" set out by E.A. Driedger in *Construction of Statutes* (2nd ed., 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at 41, *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.R. 559 and the cases cited at para. 26; *Antigonish (Town) v. Antigonish (County)*, [2006] N.S.J. No. 85 (C.A.) at para. 24; *Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2006] N.S.J. No. 297 (C.A.) at para. 39.

[26] The inescapable conclusion to which I am drawn is that the Nova Scotia Legislature has determined that, where at least one of the parties wants to proceed in such a fashion, arbitration shall be used in place of any other method of dispute resolution (including court litigation) to resolve disputes such as the one presented to this Court.

[27] Section 33 of the *Condominium Act* very broadly states that where a class or certain classes of individuals are involved in a dispute "on any matter" to which the *Condominium Act* applies, and one of those parties gtves appropriate notice of a desire to arbitrate the dispute, all parties are deemed to have entered into a written agreement to arbitrate the dispute.

[28] The current Section 33 can be contrasted with its predecessor whereby arbitration was not mandatory when requested by one of the parties; all parties had to agree to proceed to arbitration. In attempting to ascertain the intent of the Nova Scotia Legislature, the use of legislative history is an important tool: *Rizzo Shoes, supra*, at para. 31.

[29] The dispute in the case presented to this Court involves a complaint by the Claimant with respect to the management of the parking facilities allocated by the Condo Corp.'s Board of Directors to the various unit owners and the possible application of the declaration and by-laws of the Condo Corp. to that complaint. This subject matter of the Claim clearly falls within the scope of the *Condominium Act*. The Claim relates to the management and use of a condominium property.

[30] In my view, the question of reimbursement for the towing charge claimed by Mr. VanAmburg is purely incidental to his complaint regarding the allocation of parking spaces. If this matter does proceed to arbitration, the arbitrator should be able to grant recourse to the Claimant with respect to the towing charge that he incurred, if appropriate: see Section 34 of the *Commercial Arbitration Act*. Further, if this matter proceeds to arbitration, the arbitral award can ultimately be enforced like any other judgment of the Supreme Court of Nova Scotia. The award could include a money judgment if the Claimant is successful at an arbitration.

[31] There may be implicit assumptions in connection with the two statutes under consideration here that arbitration is (1) more expeditious and (2) cheaper than court proceedings, assumptions that may or may not be true. I note that the *Condominium Act* specifically mentions expeditiousness in dealing with issues of use and management of condominiums as one of the statute's purposes.

[32] The timelines set out in the *Commercial Arbitration Act* are indeed fairly short, particularly with respect to the expedited arbitration procedure contained in

Schedule B to the *Commercial Arbitration Act*. Further, Section 82 of the *Condominium Regulations*, O.I.C. 71-1173, N.S. Reg. 60/71, as amended, limits the fee that can be charged by an arbitrator.

[33] On the other hand, the purpose of the *Small Claims Court Act* is to constitute a court where claims are adjudicated informally and inexpensively (see Section 2 of the *Small Claims Court Act*). There are some unquestionable parallels between arbitration and this Court. However, there is something to be said for a mandatory arbitration process in condominium disputes.

[34] Section 82 of the *Condominium Regulations*, in addition to limiting what can be charged as a fee by an arbitrator, also requires that the Registrar of Condominiums prepare and maintain a list of persons qualified to be arbitrators, all of whom must possess certain qualifications which include, among other things, demonstrated arbitration or condominium experience to the satisfaction of the Registrar. Arbitrators who are appointed to arbitrate condominium disputes are selected from this list.

[35] In other words, there can be an expectation on the part of all parties to potential arbitrations of condominium disputes that the available arbitrators are properly versed in the types of matters with which they will be dealing as arbitrators.

[36] Furthermore, while I might not go so far as to say, as did Justice Lax, that the arbitration process is necessarily better for resolving condominium disputes compared to court action, particularly a Small Claims Court Claim, arbitration does have certain stated benefits not found in the court system. For example, arbitrations can be less adversarial and more informal than litigation through the courts. It is also sometimes said that parties are more likely able to continue pre-existing business relationships following arbitration as opposed to the lingering bitterness and disappointment that can remain after contested court proceedings are concluded.

[37] In any event, it is clear to me that the Nova Scotia Legislature has determined that arbitration of condominium disputes (with certain exceptions) is mandatory so long as at least one of the parties to the dispute wants to proceed to

arbitration. Interpreting Section 33 of the *Condominium Act* in this manner is not only clearly consistent with the grammatical and ordinary sense of the words used by the Legislature but also with the scheme and purpose of both the *Condominium Act* and the *Commercial Arbitration Act*.

[38] Further, the consequences of this interpretation are far from being absurd and the Claimant's complaint can be dealt with in an alternate venue that can provide him with adequate relief. Indeed, as will be discussed below in greater detail below, the Claimant may be limited to seeking relief in respect of only one aspect of his Claim should this matter proceed in this Court, in contrast to his ability to seek relief at an arbitration with respect to all of the matters about which he complains.

[39] That being said, there is no evidence before me that any of the parties has formally completed and filed Form 23 (Notice of Intention to Submit Dispute to Arbitration) with the Registrar of Condominiums requesting arbitration in this case (as required by Section 33 of the *Condominium Act* and the *Condominium Regulations*). Of course, the Defendants did indicate a desire that the dispute be arbitrated but there is no evidence that they have taken any steps to pursue that

option.

[40] In my view, the parties should be put to an election that should be made within a reasonable period of time.

[41] Accordingly, I shall allow any one of the parties until Monday, February 5, 2007 to give formal notice to the Registrar of Condominiums and to the other parties of an intention to submit this dispute to arbitration.

[42] If confirmation of such notice is not received by the Court from any one of the parties by the end of business hours on February 5, 2007, then this matter shall be returned to the docket of the Small Claims Court for the resumption of the hearing on Monday, February 5, 2007 at 6 p.m. at the Courthouse on Spring Garden Road in Halifax, Nova Scotia.

[43] If confirmation of such notice is received by the end of business hours on February 5, 2007, then the within Claim shall be dismissed on the procedural point

determined herein, without prejudice to the Claimant's ability to proceed with his case at an arbitration and to seek such relief as he may desire and as permitted by the *Commercial Arbitration Act*. There ought to be no need for any party to apply for a stay pursuant to Section 9 of the *Commercial Arbitration Act*.

[44] CLAIM FOR THE RECOVERY OF LAND: In light of my determination with respect to the issue of arbitration, it is not absolutely necessary to determine whether or not the Claimant's Claim is beyond the jurisdiction of this Court pursuant to Section 10(a) of the *Small Claims Court Act*. However, I believe that it would be worthwhile to make the following comments.

[45] As set out in Section 10(a) of the *Small Claims Court Act*, the jurisdiction of this Court expressly excludes claims "for the recovery of land or an estate or interest therein."

[46] The only case binding on this Court of which I am aware that even touches upon the meaning of this particular subsection is the decision of Saunders, J. (as he

then was) in *Cox Downie v. Patterson (Bankrupt)* (1992), 112 N.S.R. (2d) 148 (T.D.). In that case, a lawyer applied under Civil Procedure Rule 63.26 for a charge in the amount of an outstanding legal account against the real and personal property of a bankrupt client. Justice Saunders stated, at paragraph 9, that the application sought an interest in land by way of a solicitor's lien charged upon it and that the claim fell within the exclusion of this Court's jurisdiction as set out in Section 10(a) of the *Small Claims Court Act*.

[47] A review of the statutes pertaining to small claims courts across Canada reveals that such courts' jurisdiction is usually excluded where title to land is brought into question or where there is likely to be a requirement that questions relating to ownership of real property or an interest in real property be determined. The terminology used in the statutes of other provinces on this aspect of a small claims court's jurisdiction is not exactly the same as that found in the Nova Scotia statute.

[48] The Manitoba Law Reform Commission observed at page 35 in Report No. 99 entitled "Review of the Small Claims Court" that, in reference to claims where

title to land is brought into question, such:

> … claims that fall into that category are in truth not for 'money judgments' which are essentially what the court was established to deal with, but rather involve the assertion of rights in rem which the court is ill-equipped to value.

[49] It will be noted that the Nova Scotia Law Reform Commission's Final Report (dated July 2003) entitled "Builders' Liens in Nova Scotia: Reform of the *Mechanics' Lien Act*" recommended that the Small Claims Court of Nova Scotia be granted non-exclusive jurisdiction over builders' liens within the monetary jurisdiction of the Court. However, this recommendation was not incorporated into the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, that has now come into effect, thereby keeping this Court focused on claims in personam, taxations and appeals from the Director of Residential Tenancies.

[50] Ascertaining the meaning of the words in Section 10(a) of the *Small Claims Court Act* is assisted by reference to a helpful article by G.W. Collins-Williams, Q.C., entitled "The Recovery of Land" published in the Special Lectures of the Law Society of Upper Canada (Richard De Boo Ltd., 1961). In that article, the

author traces the history of the common law remedies for the recovery of land from the writs of right, the possessory assizes and the writs of entry through to the remedy of trespass in ejectment and beyond.

[51] Reference can also be made to the decision of Chief Justice MacKeigan for a five member panel of the Nova Scotia Supreme Court Appeal Division in *Nova Scotia (Attorney General) v. Gillis*, [1980] N.S.J. No. 401 (S.C.A.D.) in which he stated at para. 19:

> Here there is not the slightest doubt that the Supreme Court has since the founding of the colony enjoyed and exercised power to determine title as between subject and subject and as between subject and the Crown. Clothed in what are to us the mysteries of ancient forms of actions and rules of real property law, actions of possession, trespass and ejectment and suits in equity for injunctions or declaration were available for adjudication of most title disputes. The Revised Statutes of 1864 provide procedural and substantive support for such proceedings: for example, c. 134, "Of Pleading and Practice" esp. ss. 139-173 re ejectment; c. 124 "Of Proceedings in Equity"; c. 154, "Of Limitations", etc.

[52] Chief Justice MacKeigan continued at para. 21 as follows:

> The old writs and remedies are still available although in new dress and

> form, and were supplemented in 1961 by the *Quieting Titles Act, supra*. They are indeed still available for Supreme and County Court determinations of title to "ungranted Crown lands," as they were in the pre-Confederation cases cited above.

[53] In the circumstances of this case, whereby the Claimant seeks exclusive possession of a portion of the common elements of the condominium where he resides (which constitutes real property), I am inclined to say that this Court does not have jurisdiction because the Claimant is seeking the recovery of the Parking Space or, put another way, he is seeking the recovery of land or at least an interest therein.

[54] As noted, the Claimant was prepared to forego this portion of the Claim so that he could at least seek to recover reimbursement for the towing charge of $166.75.

[55] This portion of the Claim would not necessarily be excluded from the jurisdiction of this Court as there is at least one obvious tortious cause of action (if not more) that could be available to the Claimant (e.g. trespass to a chattel - Mr.

VanAmburg's vehicle). The Court is permitted to address claims seeking awards within the monetary limit of the Court "in respect of a matter or thing arising under a contract or a tort….": Section 9(a) of the *Small Claims Court*.

[56] In such a case, it is interesting to note that, while there would be no actual claim for the recovery of land, the Defendants might well raise the defence that the Claimant was himself a trespasser in his own right and argue *ex turpi causa non oritur actio* (i.e. no one can bring an action if his cause of action arises out of circumstances that prove his own illegality or wrongful conduct). Similar evidence as to possession or ownership of the Parking Space would probably be led as would be led in connection with a claim for exclusive use of the Parking Space, even though such evidence would not actually be received with respect to a claim for recovery of land or an estate or interest in land, per se.

[57] Be that as it may, I do not believe that the claim for reimbursement of the towing charge is outside of the jurisdiction of this Court and I would be prepared to hear it but for the arbitration issue.

[58] Of course, should the parties not proceed to arbitration, this matter will come back to me for a final determination on the merits of that portion of the Claim falling within the jurisdiction of this Court.

[59] **CONCLUSION**: In the result, I await receipt of confirmation from the parties as to whether this matter will be the subject of arbitration or whether the case will proceed before me on February 5, 2007. An appropriate Order will be issued.

Small Claims Court Adjudicator