Shared Facilities Case Law Update: Do Good Retaining Walls Make Good Neighbours?

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Introduction

Who is responsible for the cost to repair a retaining wall between two neighbouring condominium properties if there is no shared facilities agreement between them?

In this article, we review, in part, the case of *Ottawa-Carleton Condominium Corporation No. 574 (OCC 574) v. Ottawa-Carleton Condominium Corporation No. 573 (OCC 573)*, 2024 ONSC 731. We will also conclude with key takeaways and tips for condominium managers and boards of directors dealing with shared facilities disputes in the Ontario condominium context.

Case Summary

Our case takes place in Ottawa between two 10-unit condominium buildings (OCC 574 and OCC 573).

The neighbouring properties are separated by a two-level timber retaining wall that is more than 10 feet high. On top of the retaining wall, on OCC 574's property, there is a walkway and a railing.

Approximately 60% of the retaining wall is situated on OCC 574's property (the upper tier), with the remaining 40% on OCC 573's property (the lower tier).

There was no dispute that the retaining wall was in disrepair and needed to be replaced. Unfortunately, the developer of both condominiums did not establish a shared facilities agreement between them.

A dispute then arose about who should be responsible for the cost to replace the retaining wall. OCC 574 took the position that the cost should be shared 60/40, in accordance with the proportion of the wall within each corporation's common elements.

OCC 573 argued that since the retaining wall mostly benefitted and provided support to OCC 574 (the higher up building with the walkway on top), OCC 573 should not have to contribute, or in the alternative, its contribution should be minimal.

After negotiations between the parties failed, OCC 574 commenced a court application in which OCC 574 was completely successful. Notably, with respect to the cost to repair the walkway and railing on top of the retaining wall, both of which fell within OCC 574's property boundary, OCC 574 did not seek any contribution from OCC 573.

The court agreed that dividing the cost according to the proportionate share of ownership (based on location) was the fairest outcome. The court also determined OCC 573's proposed method of allocating cost based on relative "benefit" or "enjoyment" received from the wall was too subjective, impractical, and unsupported by relevant case law.

There were numerous other issues and counterclaims raised by OCC 573 during the court proceeding, which go beyond the scope of this article. None of OCC 573's claims were successful. In the end, not only did the court rule in favour of OCC 574, ordering OCC 573 to pay 40% of the cost to replace the retaining wall, it also ordered OCC 573 to reimburse nearly 90% of OCC 574's legal costs.

The legal costs that OCC 573 was required to pay (both its own costs, and OCC 574's costs) far surpassed its share of the cost to replace the retaining wall.

Key Takeaways and Tips for Addressing Shared Facilities Disputes

The first important takeaway is that neighbouring condominiums should proactively negotiate and implement written cost sharing agreements if they do not already have them. Unfortunately, these agreements are not yet mandatory in Ontario. In 2015, the Ontario government passed an amendment to the *Condominium Act, 1998* (s. 21.1) that was intended to make these agreements mandatory, but the amendment is not yet in force.

Second, condominium corporations that already have shared facilities agreements in place should periodically examine their existing agreements to determine if any shared components are missing from the agreement. In this regard, many of these agreements are written before the properties are constructed and include clauses acknowledging that future amendments may be required.

The agreement may also have other deficiencies that can be corrected, such as an outdated or inconvenient form of governance. For example, an agreement might require a unanimous vote of the member corporations, but a majority vote might be the more practical option for most decisions.

Our third takeaway is that, in the absence of a written cost sharing agreement, having the shared use of an amenity does not automatically result in a legal obligation to share costs.

In a precedent case (which was relied on in the *OCC 574 v. OCC 573* decision) two condominium corporations shared a laneway, which was located entirely within one of the corporations' common elements. The second corporation had an easement over the laneway, and there was no cost sharing agreement.

The corporation that owned the laneway commenced legal proceedings seeking to require the second corporation that had an easement over the laneway to contribute to the cost of

maintenance and repair. The court confirmed that each condominium corporation was required to maintain and repair its own common elements at its own cost, and that the condominium with the easement had no obligation to pay maintenance and repair costs to the owner of the laneway.

This principle was then applied in the *OCC 574 v. OCC 573* case, with the result being that OCC 573 was required to contribute 40% of the cost of the shared retaining wall.

Similarly, if a fence or party wall is situated directly on a property boundary, then the cost of maintenance and repair is typically shared 50/50 by the neighbouring property owners.

Final Remarks

In the writer's experience, many shared facilities disputes arise because of inadequate communication, or because the parties do not have a clear understanding of their respective rights and obligations to each other. Disputes may also arise if the pre-existing agreement between the parties is inherently unfair, or unworkable.

Condominium managers and boards of directors should strive to resolve shared facilities disputes through informed, good faith negotiation.

About the author: *Bradley Chaplick is a condominium lawyer and mediator practising throughout Ontario. Bradley frequently provides guidance and legal representation on shared facilities issues for his condominium clients, including interpreting, drafting, and amending cost sharing agreements, as well as negotiating, mediating, and litigating disputes. He can be reached at: bchaplick@lddclawyers.com.*