CITATION: Ottawa-Carleton Condominium Corporation No. 574 v. Ottawa-Carleton Condominium Corporation No. 573, 2023 ONSC 731
COURT FILE NOS.: CV-21-86635 and CV-23-91265
DATE: 02/02/2024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
OTTAWA-CARLETON CONDOMINIUM CORPORATION NO. 574 Applicant (CV-21-86635)/ Respondent (CV-23-91265)	Christy Allen and David Lu for Ottawa-Carleton Condominium Corporation No. 574
– and –	
OTTAWA-CARLETON CONDOMINIUM CORPORATION NO. 573 Respondent (CV-21-86635)/ Applicant (CV-23-91265)	Rodrigo Escayola and Graeme Macpherson for Ottawa-Carleton Condominium Corporation No. 573
	HEARD: June 23, 2023

JUDGMENT

Justice Sally Gomery

[1] Ottawa-Carleton Condominium Corporation No. 574 ("574") and Ottawa-Carleton Condominium Corporation No. 573 ("573") are neighbouring ten-unit condominiums in Ottawa. They each bring applications to determine their legal and financial obligations with respect to a shared timber retaining wall that now needs to be replaced.

[2] 574 contends that each condominium should be held responsible for replacement and maintenance costs in proportion to the percentage of the wall on their respective property. It accordingly seeks a declaration that 573 is responsible for 40% of all current and future costs to replace, repair, and maintain the retaining wall, while 574 would be responsible for the remaining 60% of the costs.

[3] 573 claims that the wall and the walkways built on top of it encroach illegally on its property and that it is not required to contribute to the wall's maintenance, repair, and replacement. It seeks an order requiring 574 to reconstruct the wall and walkways as they appeared on a 1995 site plan. Alternatively, it argues that its financial contribution should be limited to 8.11% of the costs of building, repairing, and maintaining the retaining wall.

[4] For the reasons that follow, I find that 574's application should be granted and that 573's cross-application should be dismissed.

Background

[5] 573 and 574 were created as part of a larger property development project undertaken by Domicile Development (Kanata Lakes) Inc. in the early 1990s. They are on neighbouring lots. 573's address is 48 Robson Court and 574's address is 50 Robson Court, Ottawa.

[6] As a result of both the natural configuration of the site and landscaping by Domicile in 1994, 574's property is on higher ground than 573's property. Domicile built various timber retaining walls throughout the development before the condominium corporations came into being. Retaining walls were built on either side of the site now owned by 573. One of these walls, built partly on 574 and partly on 573, is the subject of this litigation (the "Wall").

[7] The Wall consists of two levels. The lower section is 1.2 metres tall and is closer to the condominium building on 573. The upper section is 2.1 metres tall. It was built atop the lower section, but slightly offset. Walkways constructed over top of the retaining wall are used by some of 574's unit holders to access their units.

[8] 573 was created on September 6, 1995, Domicile being the declarant. 574 was created on September 25, 1995, again with Domicile being the declarant.

[9] The two neighbouring corporations did not enter into a shared facilities agreement with respect to the Wall. This did not pose a problem for almost twenty-five years.

[10] In 2019, 573 retained an engineering firm, Fishburn, Sheridan and Associates, to evaluate the Wall's condition and recommend any necessary repairs. 574 paid for half of the costs of this evaluation.

[11] Fishburn produced a report on December 11, 2019 report (the "Fishburn Report"). The Report advised that the upper section of the Wall was starting to tilt out. The possible causes were the original design of the Wall; drainage of the soil behind the Wall; or the impact of water flowing from a downspout extension from the roof gutters on 573's building emptying onto the lower section of the Wall. In the view of Michael Barrington, the engineer who wrote the Report, this last issue was the likely cause of the Wall's deterioration. In his view, however, the Wall was nearing the end of its useful life in any event. He recommended that the Wall should be rebuilt or, preferably, replaced with a masonry block retaining wall.

[12] When 573 received a copy of the Fishburn Report, it objected to the proposed design, which would leave the Wall roughly in place rather than relocating it to 574's property. In response, 574 commissioned and paid for a new design from Fishburn. In the revised, more expensive, design, the upper section of the new wall and the walkways would be completely within the boundaries of 574's property. The lower section of the wall would, however, remain on 573's property. According to Fishburn, the Wall could not be completely relocated to 574's property because of limited space between the buildings on either side of the property line.

[13] In a June 18, 2020, email, Barrington declined to weigh in on the legal question of how the financial burden of rebuilding the Wall should be shared. He expressed the view, however, that the upper and lower sections of the Wall constitute a single retaining structure that benefits both parties, and that its failure would likely affect both properties:

> In my view from a technical perspective, the two sections are one retaining structure broken into two sections to avoid the requirement to have the wall engineered by the developer. The retaining wall itself is of benefit to both buildings. Were the wall to fail it would likely undermine the foundation of OCCC#574 resulting in movement of the foundation which would damage the structure. The failure of the wall would also likely damage OCCC#573 as it impart lateral loads to the side of the building. The extent of the damage would depend on the type of wall failure.

[14] In June 2020, Fishburn estimated that the new Wall would cost $72,520. The parties agree that the total cost of the work is likely to be significantly more now, given increases in prices for labour and materials in the last few years.

[15] In July 2022, having failed to reach an agreement with 573 on the cost of the new Wall,

> It is our opinion that, from a structural point of view, the upper and lower retaining walls act 574 retained another engineering firm, IRC Building Sciences Group, to perform a cost sharing evaluation. In its report, IRC rejected the idea that 574 should pay costs on the basis that it benefits more from the Wall than 573. They shared Barrington's view that the Wall is functionally a single structure that benefits both parties together to support the change in grade from the lower to the higher elevation. The retaining walls benefit both properties since failure of either or both retaining walls would be likely to damage the residential structures on both properties.

[16] In IRC's view, the share of costs for repair and replacement should be based on the respective percentage of the Wall on either property.

[17] In December 2022, 574 obtained surveyed drawings of the Wall. It showed that 60.41% of the total area of the current Wall is on its property and 39.59% is on 573's property. Based on this calculation, 574 proposed that it would pay for 60% of the costs of a new Wall and 573 would pay for 40%.

[18] 573 rejected IRC's cost-sharing proposal. It relies on a December 2022 report it obtained from LRL Engineering ("LRL").

[19] LRL states that the residential building on 573 was constructed prior to the building on 574. The grade along the property line sloped down from north to south prior to the construction of either property. In developing the site, however, Domicile further raised the elevation of the land on which 574 was built, increasing the height differential. It also chose to build walkways atop the retaining wall to give access to some of the units on 574's building.

[20] In its report, LRL concedes that both properties benefit from a structurally sound retaining wall. Both properties would likely be damaged if the current Wall fails, due to earth moving away from 574 towards or impacting the building on 573. LRL also concedes that the entire Wall, and

not just the part on 574's property, must be replaced. In its view, however, 573 should not have to pay the costs associated with this work because, had "the original grade of the properties [] been generally conserved, and no retaining wall or a wall of much lesser height have been constructed, the risk of wall failure would have been dramatically reduced or eliminated completely". Furthermore, 574 derives far greater benefit from the Wall than 573, because "it serves primarily to facilitate the level walkways providing access to units of 574".

[21] LRL concedes that a retaining wall — albeit a much smaller one— is required on 573's property. In LRL's estimation, however, the minimum size retaining wall on 573's property would represent just over 10% of the surface area of the existing Wall. Based on this calculation, it estimates that 573's share of the costs of rebuilding the Wall based on Fishburn's original cost proposal of $72,520 should be $5,879.21.

[22] 574 began its application in 2021. 573 began its cross-application in 2023.

Issues

[23] There are three questions that I must resolve on the two applications:

(1) Do the Wall and walkways encroach on 573's property such that the court should order them to be relocated?

(2) If the Wall remains in its current position, is 573 required to contribute to the costs of replacing, repairing, and maintaining it?

(3) What proportion of the costs to replace and maintain the Wall should each condominium corporation pay?

[24] Having determined each of these questions, I must also decide which party is responsible for the costs of these proceedings.

Do the Wall and walkways encroach on 573's property?

[25] 573 contends that the Wall and walkways encroach on its property. According to *Black's Law Dictionary*, 8th ed., an encroachment is:

a. An infringement of another's rights; or

b. An interference with or intrusion into another's property.

[26] 573 relies on the terms of a March 2, 1995 Site Plan Agreement between Domicile and the Corporation of the City of Kanata.[1] The Agreement was required to obtain municipal approval for the development. Domicile is defined as the "Owner". At paragraph B20, the Agreement provides that:

> [T]he owner agrees to construct and maintain, to the satisfaction of the City, fences, hedges, parking, accesses, aisles, landscaping … in conformity with and in the locations shown on the attached approved plan(s) which forms part of the Site Plan Agreement.

[27] The Agreement further provides at paragraph B23 that:

> [T]he owner agrees that the proposed building and all other works including landscaping detail specified in the plan described herein shall be erected in conformity with the said plans to the satisfaction of the City […] and subsequently shall be maintained in conformity with the said plan described in Schedules to the Site Plan Agreement hereto to the satisfaction of the City. No building or other works shall be erected on the said lands other than those erected in conformity with the said plan described in Schedules to the Site Plan Agreement hereto.

[28] Pursuant to paragraph B3, the obligations set out in the Site Plan Agreement bind any party to whom Domicile sells or transfers the property:

> The Owner covenants and agrees with the City that if the Owner sells or conveys the lands herein described as the "Site" or any part thereof that each deed of grant shall contain a covenant on the part of the grantee in such deed binding himself, his heirs, executors, administrators, successors and assigns to the terms of this Agreement and to the carrying out of the work and obligations of the owner under this Agreement and a covenant to include a similar covenant in all subsequent deeds of grant of the said lands until the work and obligations of the Owner under this Agreement have been fully performed. All covenants and agreements herein contained, assumed by, or imposed upon the Owner are

[1] The City of Kanata has since been amalgamated in the City of Ottawa. I will refer to them both as the City.

> deemed to be covenants which run with and bind the lands herein described and every part thereof.

[29] Paragraph B8 likewise states that the Site Plan Agreement "shall enure to the benefit of and be binding upon the Parties hereto and their respective heirs, executors, administrators, successors and assigns of the Parties hereto respectively, and all covenants and agreements herein contained assumed by or imposed upon the owner are deemed to be a covenant and run with and bind the lands herein described… ."

[30] The Agreement was registered on title in May 1995. Although a site plan is supposed to be attached as part of Schedule B, no Schedule B is appended to the version produced on the application record. 573 relies on a 1995 site plan on file with the City (the "Site Plan"). Although it is entitled "Draft Plan", I accept that this is the plan to which the Agreement likely refers. A stamp on the Plan says it was received by the City's Planning Office on February 20, 1999. Another stamp, dated July 11, 1995, says that the Plan was approved under s. 50 of the *Condominium Act* and s. 50 of the *Planning Act*. When 574 asked the City for a copy of the site plan, it was provided with this Site Plan. There is another site plan that was apparently submitted by Domicile to the City for the purpose of obtaining a building permit. It shows the Wall in the same position as the January 1995 Site Plan. No other 1995 plan has been produced that shows the Wall in a different position.

[31] On the Site Plan, the upper section of the Wall and most of the lower section of the Wall, along with the walkways atop it, were to be built on 574's property. Only a small portion of the Wall was to be on 573's property or on the property line with 574. For reasons lost to history, at some point before the Wall was built, Domicile decided to redesign it and move it to its current position. All of this was done before either of the parties were incorporated.

[32] Based on the Site Plan, 573 contends that the Wall and the walkways atop it are an encroachment. Since 574 is the successor in title to Domicile, 573 contends that 574 must demolish the existing Wall and walkways and rebuild them as shown on the Site Plan.

[33] I find that the Wall and walkways do not constitute an encroachment on 573's land and that it is not entitled to the order it seeks.

[34] The Site Plan Agreement creates obligations that Domicile, and its successors in title, owe to the City, primarily in its capacity as a developer and constructor. This is implicit in the language of conditions requiring Domicile to construct and maintain "to the satisfaction of the City". There is no indication that the Agreement creates obligations that one successor in title can enforce against another successor in title. 573 has not provided any caselaw or authority that suggests it could.

[35] Based on the Site Plan Agreement, the City could have required 574 move the Wall and walkways to match the configuration on the Site Plan. Theoretically it could still do so. But the Site Plan Agreement does not give 573 the ability to enforce the City's rights against 574.

[36] There is a further conceptual problem with 573's argument. It contends that 574 is bound, as successor in title to Domicile, to comply with Domicile's obligations under the Site Plan Agreement. But 573 is also Domicile's successor in title. It is therefore bound by decisions that Domicile made on its behalf prior to 573's creation. Domicile elected to place the Wall and walkways in their current configuration. 573 must live with the consequences of that decision.

[37] Absent any right entitling 573 to an order compelling 574 to relocate the Wall, I conclude that it cannot argue that the existing Wall or walkways intrude on or interfere with its property.

If the Wall remains in its current position, is 573 required to contribute to the costs of replacing, repairing, and maintaining it?

[38] I conclude that 573 is required to contribute to the costs of replacing, repairing, and maintaining the Wall. I need not concern myself with the costs associated with the walkways as 574 does not take the position that 573 is required to contribute to the costs of their upkeep.

[39] I begin by observing that, when 573 and 574 each acquired the lots they occupy, they also acquired the structures and fixtures that were there at the time. These fixtures include the portion of the Wall that sits within their respective lots.

[40] The portion of the Wall that sits within each party's property meets the definition of a common element under the *Condominium Act, 1998*, S.O.1998, c.19 (the "Act"). Under s. 1(1) of the Act, common elements are "all the property except the units".

[41] Under s. 90 of the Act, a condominium corporation is required to maintain its own common elements. A corporation is required to maintain reserve funds for this purpose; s. 93.

[42] For at least twenty years, 573 has recognized that retaining walls are a common element that it was legally obliged to maintain. Beginning in 2003, Ontario condominium corporations were required to complete reserve fund studies periodically. These reports assess future costs to be incurred with respect to common elements. The executive summary at the beginning of 573's reserve fund study in 2003 stated that the property was in a satisfactory condition, but that some common elements would require repair or replacement over the next 30 years. Subsection 6.5 advised that retaining walls would need to be replaced at the end of their life cycle. Another reserve fund study, by a different engineering firm, was performed for 573 in 2008. It also identified timber tie retaining walls as an item for which the corporation should reserve funds. Retaining walls were also identified as common elements in studies completed in 2011 and 2014.

[43] 573's reserve fund studies in 2003, 2008, 2011 and 2014 repeatedly refer to "timber tie retaining walls" in the plural. Since there are only two retaining walls on 573's property, this implies that the studies refer to the Wall shared with 574 as well as the retaining wall on the other side of 573's property. 573 contends that the reference to "walls" is meaningless and that the studies were only ever intended to reference the wall on the other side of its property. It points out that its 2017 and 2021 studies refer only to a single timber tie retaining wall that was replaced in 2016. I find it difficult to believe that successive engineering firms were careless in their language used in successive reserve fund studies. In any event, it does not really matter whether the studies mentioned the Wall specifically. What matters is that 573 has consistently recognized, through the reserve fund studies, that retaining walls on its property are a common element.

[44] Based on this acknowledgement, and the reality that the Wall is a structure that meets the definition of a common element in the Act, 573 is statutorily responsible for the costs of repairing

and maintaining the portion of the Wall on its property, whether or not it set aside money for it in its reserve fund.

[45] Despite this, 573 contends that it should not be required to contribute to the cost of maintaining the Wall, based on the doctrine of lateral support. Further to this doctrine, a landowner is entitled to have its soil supported, and an adjacent landowner cannot damage this support by taking away soil or excavating on its own property, or otherwise interfering with support in a way that would interfere with or damage the first landowner's property. This duty of lateral support only applies, however, to soil in its "natural state", not to soil or structures that the first landowner has added to its property: *Welsh et al. v. Marantette et al. Allsop et al. v. Marantette et al.*, 44 O.R. (2d) 147 (H.C.), aff'd (1985), 52 O.R. (2d) 37 (C.A.), and caselaw cited therein, including *Nolan v. Winchester*, [1983] N.B.J. No. 428 (Q.B.).

[46] 573 further argues that the duty of lateral support does not impose a positive duty on the adjacent landowner to maintain support or to pay for it. Furthermore, the owner of a servient land has no obligation to repair or maintain an easement: *TSCC No. 1633 v. TSCC No. 1809 and Baghai Development Ltd.*, 2017 ONSC 1372. As a result, 573 is required at most to give 574 access to 573's property so that 574 can make its own repairs to the Wall, at its own expense.

[47] I am not persuaded that the duty of lateral support is relevant to a determination of the parties' rights in this case.

[48] The duty of lateral support is typically invoked in cases where a plaintiff sues an adjoining landowner in negligence or nuisance for damages caused to their property or person as a result of the defendant's actions on their own property. In *Reid v. Linnell*, [1923] S.C.R. 594, for example, the defendants were liable in negligence for injuries suffered by a neighbour who fell into an unmarked excavation dug alongside the property line. In *Desjardins v. Blick*, 2009 CanLII 13026 (Ont. S.C.), the defendant deliberately removed soil along the property line as part of a campaign of harassment against a neighbouring landowner, causing damage to the foundation and walls of the neighbour's garage. In *Ardavicius v. Kairys*, 2009 CanLII 29485 (Ont. Div.Ct.), the defendant neighbour removed soil from their property, causing soil erosion and a sunken fence on the plaintiff's adjacent property.

[49] The right to lateral support is an incident of property, but the cause of action arises only if and when the removal of support gives rise to damages. In *Mascioli v. Betteridge-Smith Construction Co. Ltd.*, [1965] 1 O.R. 627 (H.C.), the court cited the following passage from *Bower v. Peate* (1876), 1 Q.B.D. 321 at 325:

> According to the doctrine in *Bonomi v. Backliouse*, 9 HLC;. 503; 34 L.J. (Q.B.) 181. the taking away the soil, to the support of which an adjoining owner is entitled, is not in itself wrongful. It only becomes so when followed by injurious consequences to the neighbor. And if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful.

[50] In *Barber v. Leo Contracting Co.*, [1970] 2 O.R. 197 (C.A.), the defendants excavated soil on their property to install a sewer pipe. The plaintiffs later built a house on an adjoining property, but the walls began to crack as a result of the settlement of the soil around the excavation site. The Ontario Court of Appeal held that the defendants had breached the duty of lateral support and so were liable for the cost to the plaintiffs to repair the damage. The Court held that the plaintiffs had a cause of action even though they did not own their property when the excavation took place, because their right was breached only when the damage to their house occurred:

> The plaintiffs' cause of action was against both defendants for interference with a right which was naturally inherent in their ownership of the land in question. As was pointed out by Lord Macnaghten in *West Leigh Colliery Co., Ltd. v. Tunnicliffe & Hampson, Ltd.* [1908] A.C. 27 at p. 29: "The damage, not the withdrawal of support, is the cause of action." Thus a cause of action as a result of such interference does not arise until damage occurs, and the person who owns the property at the time of its occurrence has a cause of action against the person whose actions resulted in the withdrawal of support which led to the subsidence causing those damages. The plaintiffs' right, as owner of the land, to vertical support of his land is a right of natural support which runs with the land, and when damage is caused through interference with that right he has a cause of action against the person whose acts brought about the damage… .

[51] A property owner accordingly cannot sue for a breach of the duty of lateral support unless and until it has suffered damages due to its neighbour’s breach of that duty. Neither 573 nor 574 have suffered any damages to date as a result of a breach of the duty of lateral support by the other. In particular, 573 has not suffered any damages as a result of Domicile’s landscaping of the

property prior to the creation of the condominium corporations or as a result of the Wall's construction or its current condition. 574 has suffered some damages to its walkways as a result of the Wall's deterioration, but it is not asking 573 to contribute to the cost of these repairs.

[52] 573 argues that it has the right to alter and even remove its own common elements. Based on the Fishburn Report, however, it would be impossible for 573 to remove the portion of the Wall on its property without causing the entire Wall to collapse, damaging its own property as well as that of 574. 573 has furthermore not established that it would not have had to build a retaining wall on its property even if the current Wall had not been built by Domicile. LRL does not unequivocally express the view that the current Wall, or something like it, would have been unnecessary had Domicile not re-graded the property and constructed the walkways as it did. LRL merely states that a single wooden wall located at the upper wall as-built location "may have been possible", the lower part of the Wall on 573's property "may not have been necessary", and it is "possible" that "access could have been provided at alternate locations or that these walkways could have been constructed through alternate means".

[53] 573 would have had to replace whatever retaining wall was built. LRL notes that the Wall is over 25 years old and wooden retaining walls generally have a useful life of 20 to 30 years. This is the same life span for timber tied retaining walls cited in the Fishburn Report and in 573's reserve fund studies. Later in its report, LRL expresses the view that, if 573 had a much smaller retaining wall, the risk of its failure would have been "dramatically lower or eliminated completely". This is inconsistent with its acknowledgement that every wooden retaining wall has a lifespan of no more than 30 years.

[54] None of the Canadian or American authorities presented by 573 deals with a situation like this one. This is not a case where a party is being asked to bear the cost of maintaining a structure that functions solely for its neighbour's benefit. It is about two adjacent properties that share a retaining structure that benefits both of them. Based on the Fishburn Report and the IRC Report, the Wall is a single, integrated structure that cannot be replaced or remediated in a piecemeal way. 573's own expert agrees that, if it fails, this will likely damage both properties. The dispute is simply about how the costs of its maintenance and replacement of the Wall should be allocated.

[55] I conclude that, in the circumstances of this case, 573's rights with respect to this common element on its property are constrained by the practical reality that the Wall must be replaced as a single structure. The question is not whether 573 must participate in the replacement of the Wall and the maintenance of its replacement going forward, but rather what part of the cost it should fairly bear.

What portion of the costs to replace and maintain the wall should each party pay?

[56] 574 proposes that each of the parties should contribute to the Wall's costs in proportion to the percentage of the Wall on each of their respective properties. This would imply a 60/40 split. 573 proposes that it contribute only 8.11% of the cost of a new wall. It advances two arguments.

[57] First, 573 contends that its share of the cost should be limited to costs it would have incurred had Domicile built the Wall as shown on the 1995 Site Plan. LRL estimates that this would amount to 8.11% of Fishburn's cost estimate to replace the Wall as built. This argument fails because I have already found that 573 has no right to require 574 to move the Wall to the position it would have occupied based on the Site Plan. 573 is accordingly not entitled to limit its contribution to cost-sharing based on this hypothetical.

[58] Second, 573 argues that the costs should be allocated based on the benefit that each party derives from the Wall. In its view, the Wall primarily benefits 574 because it supports the walkways on its property, which give some of 574's unit holders access to their residences. The portion of the Wall on 573's property does not provide similar access to its unit holders nor does it fulfill any aesthetic purpose for 573.

[59] As 573 concedes, the Wall does provide it with some benefit. The Wall is in fact necessary: its failure would likely damage 573's property. In my view, it is not helpful to try to allocate cost-sharing based on the enjoyment that the parties' respective unit holders may or may not have with the design of their buildings or landscaping choices. Such an approach would be inherently subjective. It would invite uncertainty and further disputes. It would also unfairly shift the burden of design choices made by their joint predecessor in title, Domicile, onto 574 alone.

[60] 574 owns roughly 60% of the Wall. 573 owns roughly 40%. This suggests the obvious starting point to allocate the costs of repairing and maintaining the Wall. There is no cogent evidence that suggests a fairer way to allocate costs.

[61] I accordingly find that the costs associated with the Wall should be based on the portion of it on each of the party's property. Since 573's expert has expressed concerns about the impact of a design that would move the Wall, I assume that the Wall will be rebuilt roughly in its current location. To avoid further dispute, I direct that the allocation for the costs of replacing the current Wall shall be 60/40, with 574 paying the greater share, even if a slightly greater portion of the rebuilt Wall is on 573's property. The costs to be shared are confined to those required to replace the Wall itself, and not the walkways or handrails over top of it.

Costs

[62] Although substantial indemnity costs are exceptional, I find that they are merited here, taking into account the following factors at r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194:

- 574 was entirely successful on both applications.
- On July 14, 2021, 574's lawyer sent a written offer of settlement to 573's counsel, proposing the same 60/40 cost allocation that I have ordered. Although this was not a formal r. 49 offer, I find it relevant to the exercise of my discretion on costs.
- 574 proposed at various times to submit the parties' dispute to binding arbitration, or to an independent engineer. It also commissioned a new design for the Wall from Fishburn, at its own expense, in an attempt to address 573's concerns. 573 rejected all these overtures.
- As a result of 573's refusal to accept any of 574's proposals, the parties have incurred legal costs disproportionately high to the total costs in dispute. The parties have together paid legal fees and disbursements of around $111,000. This significantly exceeds Fishburn's projected cost to replace the entire Wall in 2020. Construction costs have since increased and the parties' unit holders, who must ultimately pay for all of this, will now collectively

face a total price tag for this project (including legal costs) around three times as high as Fishburn's original estimate.

- The delay in resolving the dispute also increased the risk of the imminent collapse of the Wall, which everyone agreed some time ago has reached the end of its useful life.

[63] The rates charged by 574's counsel, the allocation of work within its legal team, and the time recorded are all reasonable. 574's actual costs are $36,240, including $35,137 in fees and $1,103 in disbursements. This is less than half of 573's costs.

[64] I accordingly order 573 to pay substantial indemnity legal costs of $32,616 to 574.

Disposition

[65] 574's application in CV-21-86635 is granted. 573's application in CV-23-91265 is dismissed. 573 is required to contribute 40% of the cost of replacing the Wall (exclusive of the walkways and handrails) based on Fishburn's original design, unless the parties can agree on another design within the next 60 days. Once the new wall is built, 573 is required to maintain the portion of it on its property in good repair. 573 shall pay costs to 574 in the amount of $32,616 within 30 days.

JCS

Justice Sally Gomery

Released: February 2, 2024

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JUDGMENT

Sally Gomery J.

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