Canadian Condominium Institute | Institut canadien des condominiums

Eastern Ontario Chapter

LAWYERS, GUNS AND MONEY

January 21, 2021

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CASE SUMMARIES

JAMES DAVIDSON

1. Zaman v. Toronto Standard Condominium Corporation No. 1643 (Ontario Superior Court) February 27, 2020

No oppression in relation to condominium corporation's response to noise complaints

The owner claimed that the condominium corporation's failure to respond adequately to her complaints about noise from her neighbour constituted oppression (namely, disregard for her interests). The Court dismissed the claim, but also noted that the condominium corporation could have done more in this case. The Court said:

> *The respondent's position has been clear since 2012. While it will enforce the rules in response to a verified complaint, and says it has done so, it will not prohibit an owner from having a conversation in normal voices on a balcony at any time. While at times the respondent may have also taken the position that it could not restrict how people use their balconies at all, this is clearly not correct – there are rules regarding storage on balconies, and the corporation can impose restrictions to ensure compliance with the general rules of the condominium.*
> *…*
> *…in my view, prior to 2018, the respondent ought to have done more to escalate matters, such as putting economic pressure on the neighbour for her to behave more appropriately late at night, such as by charging her for the condominium's legal fees associated with the complaints. However, the respondent did respond to the complaints promptly and given the long gaps in time during which there were no complaints, I am not prepared to say that the respondent, up to 2018, unfairly disregarded the interests of the applicant, or has acted in bad faith.*
>
> *Similarly, I cannot conclude that the respondent's position that it cannot tell people how to live in their units, and therefore that it will not prohibit conversations in normal voices on balconies late at night, to be unreasonable. It is not my role to second-guess an approach to the application of the condominium's rules that is within a range of reasonable options.*
> *…*
> *Where I do find fault with the respondent, however, is in their failure to disclose the settlement with the neighbour to Ms. Zaman. This settlement achieves much of what Ms. Zaman seeks – no walking in hard or high heels in the unit, and no loud conversations on the balcony after 11 p.m.. While she would like to have a complete ban on conversations on the balcony after 11 p.m., the respondent has, not unreasonably, rejected imposing a rule of that kind.*
> *…*

Although this application is dismissed, I have stated my concern that the respondent ought to have done more in earlier years. In addition, had the terms of the settlement agreement been disclosed by the respondent in July 2019 and the parties then focused on its enforcement, this application might have been avoided.

JAMES DAVIDSON

2. Metropolitan Toronto Condominium Corporation No. 933 v. Lyn (Ontario Superior Court) January 13, 2020

Court finds that tenant violated corporation's noise Rule

The Court held that the owner's tenant had caused excessive noise and ordered that the tenant comply with the corporation's noise Rule.

Metropolitan Toronto Condominium Corporation No. 933 v. Lyn (Ontario Superior Court) June 22, 2020

Landlord (owner) not liable for costs caused by tenant. Owner had acted reasonably in attempting to address the noise complaints

The tenant had violated the condominium corporation's Rules prohibiting excessive noise. Costs were awarded against the tenant (including "additional actual costs" under Section 134 (5) of the *Condominium Act*), but not against the landlord. The Court said:

> *933's repeated failure to inform the Owner of the ongoing problems and its unreasonable demands to the Owner to terminate the tenancy while providing no evidentiary assistance for the Owner to obtain such relief, as well as the Owner's willingness to consent to the relief obtained, all persuade me that this is a situation in which no order as to costs should be made as against the Owner, either under the* Courts of Justice Act *or the* Condominium Act*.*

JAMES DAVIDSON

3. Mohamoud v. Carleton Condominium Corporation No. 25 (Ontario Superior Court) December 9, 2019

Condominium corporation acted reasonably to address owner's concerns about roof-top noise

The owner complained about noise which she believed was coming from mechanical equipment located on the roof above her penthouse unit. Despite numerous attempts (including multiple inspections by different sound experts), the exact source of the noise could not be easily determined. Nevertheless, the condominium took several measures to try to address the complained-of noise, including maintaining and ultimately replacing certain roof-top exhaust fans. In the end, the owner said that these steps had reduced the noise to a tolerable level. However, the owner sought to recover her legal costs incurred throughout the matter.

The Court held that the condominium corporation had taken reasonable steps to address the owner's complaints and dismissed the claim. The Court said:

> *The standard to be met by a condominium corporation when repairing and maintaining its common elements is one of reasonableness. (*Weir v. Peel Condominium Corporation No. 482*, 2017 ONSC 6265 at para. 112.) In this case: (1) the two fans had been inspected and maintained by a contractor on a routine basis; (2) the two fans were examined on several occasions in a targeted manner to determine if they were causing the noise Ms. Mohamoud was hearing; and (3) although Ms. Mohamoud argues that a failure to repair and maintain the fans caused the offending noise, in October 2018, she reported that the noise did not go away after the maintenance recommended by a mechanical engineer had been carried out.*
>
> *I find that the noise Ms. Mohamoud complained of was not caused by any failure on the part of CCC25 to repair or maintain its common elements as alleged by Ms. Mohamoud.*

RICHARD ELIA

4. Toronto Standard Condominium Corporation No. 1704 v. Fraser (Ontario Superior Court) September 8, 2020

COVID Policy exceeds City requirements - Enforceable

Pre-COVID-19 Pandemic: Owner's unit damaged by flooding during plumbing repairs. Permission to carry out repairs were initially delayed due to lack of documentation concerning level of soundproofing relating to floor covering.

In March and April 2020, members of the Board attended information sessions concerning COVID-19 and condominium safety, and in May 2020, the Corporation sent notice to Owners of Policy requiring that in-suite repairs be postponed due to COVID-19: "*contractors are not allowed to work in-suite unless it is considered emergency or essential services*." A second notice was sent in July 2020 restating the initial notice and adding "*With the COVID-19 Pandemic, there is concern for the safety and security of our residents to permit additional unnecessary people in the building as well as the reasonable expectation of residents for quiet enjoyment of their property with so many people being required to work from home these days."*

The Owner did not establish that her work was an emergency and was refused permission. She started work regardless, requiring the condominium corporation to begin legal proceedings to have it stopped.

The Court considered section 58 of the Condominium Act which allows a condominium board to make rules to promote the safety, security and welfare of owners and residents. The Court also considered section 117 of the Condominium Act prohibits any activity that is likely to damage the property or cause injury to an individual.

The Court said:

> *"...the Policy was well within the range of reasonable responses to the global pandemic…The threshold for overturning a board's rules reasonably made in the interests of unit owners is a high one."*
>
> *"The Board implemented the Policy after educating itself on health and safety responses in condominiums and reviewing public health information. The Policy was repeated and explained in greater detail in July to all residents. The context for the Policy is the unprecedented societal response to a virus which is contagious and fatal particularly to those in high-risk categories. Although the Province of Ontario has authorized re-opening of certain types of services during the spring and summer of 2020, these does not suggest that all places of living or working are obligated to follow these guidelines."*
>
> *"A reasonable Policy may become unreasonable if it is in place longer than is necessary. However, in this case, the evidence does not support a finding that this stage has been reached yet."*
>
> *"I have found the Policy to be a reasonable exercise of its rule-making powers."*

RICHARD ELIA

5. York Condominium Corporation No. 266 v. Linhart (Ontario Superior Court) October 9, 2020

No Smoking Rule Enforced – Grandfathering revoked

The condominium corporation passed a Rule that prohibited smoking in the Units and on the Common Elements – including on balconies and terrasses. The condominium corporation also established a procedure to follow if/when complaints were received.

The Owner was elderly and a lifelong smoker who had purchased and moved into her unit before the Rule was enacted. Owner applied for and was granted a Grandfathering Exemption to the Rule. The Rule provided that the Grandfathering Exemption could be revoked if the condominium corporation received complaints of smoke odour entering other units.

Complainant was also elderly, was a long-time resident, had a severed allergy to smoke, and had never made a smoking related complaint before the Owner moved in. The condominium corporation received complaints before and after the Rule came into effect.

The condominium corporation attempted but could not address smoke migration through sealing and insulating of vents. The Owner attempted (including the purchase of an air purifier) to stop the migration of smoke but could not prevent smoke migration to the Complainants unit.

The Court said:

> *"Unfortunately for Ms. Linhart, the location of her condo unit is such that her smoking is causing injury to the Complainant in the unit above her, contrary to section 117 of the Condo Act…, in my view the circumstances are such that I should grant the relief sought by YCC"*
>
> *"…I recognize that this is affecting Ms. Linhart's ability to smoke cigarettes in her personal residence. However, as noted above, when a person decides to live in a multi-unit dwelling, such as a condominium, they are obligated to comply with the Rules and the governing statute.*

Grandfathering Exemption was revoked as a result of the continued complaints and transmission of smoke. Without the benefit of the Grandfathering Exemption, the Owner is in breach of the Rules if she continued to smoke.

RICHARD ELIA

6. Lozano v. TSCC 1765 (Ontario Superior Court) July 28, 2020

Act or Omission vs. Negligence

Damage from toilet leak was the result of the owner's act or omission

Damage was caused to the building when the owners' toilet overflowed. The owners were out of the country at the time.

The condominium corporation's by-laws included a provision holding the owner responsible for the deductible on the corporation's insurance policy in cases of damage resulting from the owners' "acts or omissions".

The Court held that the damage in question resulted from the owners' "act or omission", even though the owner was not necessarily negligent. The Court said:

> *Here, the Lozanos were aware that the toilet had previously malfunctioned and chose not to employ a plumber to address the problem or to maintain the plumbing subsequently. In Breakwell, the unit owner had no notice that the internal wiring of the unit furnace was in jeopardy. Even still, the Breakwell Court determined that the unit owner's act or omission did not have to be negligent - and the damage did not have to be foreseeable – in order to make them liable for the cost of repair.*
>
> *…*
>
> *Indeed, in this case, the Lozanos appear to be advocating for a system based on proving negligent act or omission; absent which, no unit owner could be held financially responsible for the cost of repairs. However, the case law definitively indicates that the negligence standard is not to be applied in condominium disputes of this kind; rather, the standard is between negligence and strict liability and is perhaps closer to the latter.*
>
> *…*
>
> *This is not a case where the unit owners were negligent in their care and upkeep of the Unit. Rather, this is a case where the failure to retain a plumber who could make thorough repairs constitutes an omission for which the Lozanos must be held responsible. Further, while the Lozanos were conscientious in arranging family and friends to check on the Unit during their prolonged absence, it would have been additionally prudent to have shut off the water to the Unit during their trip. Doing so would presumably have mitigated against any damage of the kind suffered here and is reflective of the level of care and diligence that is expected of condominium owners.*

JAMES DAVIDSON

7. C.M. Callow Inc. v. Zollinger (Supreme Court of Canada) December 18, 2020

Condominium corporations were liable for breach of contract for having knowingly misled contractor

The plaintiff contractor had entered into two-year snow removal contracts with the defendant condominium corporations. The contracts included a term permitting the condominium corporations to terminate the contracts, for any reason, upon 10 days' notice. The condominium corporations decided that they would give the contractor 10 days' notice of termination (per the contracts) prior to the second winter under the contracts…. but they had not told the contractor of this intention. The condominium corporations' communications with the contractor also led him to believe that the contracts would continue through the second winter.

The contractor took steps in reliance upon his expectation that the snow removal contracts would continue through the second year. In particular, he performed some summer maintenance services at no charge and also decided not to look for a replacement snow removal contract from other potential clients.

The contractor claimed that the failure of the condominium corporations to disclose their intention to terminate the contracts amounted to deliberate deceit and constituted breach of contract. He sued for resulting damages.

The trial Court agreed with the contractor. The condominium corporations appealed, and the Court of Appeal overturned the trial decision. The contractor appealed to the Supreme Court of Canada. The Supreme Court agreed with the trial judge and restored the trial decision.

The Supreme Court said that the condominium corporations had the full right to terminate the contracts; but once they had decided to do so, they couldn't knowingly mislead the contractor into thinking that the contracts would continue. This was a breach of the contractual duty of good faith between contracting parties. The Supreme Court said:

> *At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances.*

In this case, the condominium corporations had engaged in "active communications" which had deceived Callow into thinking that the contracts would continue. The condominium corporations were also aware that Callow was under the impression that the contracts would continue and took no steps to correct that misunderstanding.

The Supreme Court said that when the condominium corporations became aware that the contractor had falsely assumed that the contracts would continue, the condominium corporations had a duty to correct this misunderstanding. The failure to do so amounted to an improper use of the termination rights under the contract, and accordingly constituted a breach of contract on their part.

Had the condominium corporations met their contractual duties to Callow, this would have given Callow the opportunity to secure another contract for the second winter. Callow was accordingly entitled to lost profit under the contracts as well as recovery for added expenses incurred (to lease equipment) in anticipation of the continuation of the contracts through the second winter.

JAMES DAVIDSON

8. TSCC No. 1724 v. Evdassin (Ontario Superior Court) March 10, 2020

Owner ordered not to interfere with corporation's contractors. Owner not guilty of workplace harassment.

The condominium corporation was attending to replacement of Kitec plumbing (on behalf of the owner), but the owner had unreasonably interfered with the corporation's contractors, who were trying to perform the work. The Court ordered the owner not to further interfere with the contractors. The Court said:

> *In all the circumstances, I am satisfied that Mr. Evdassin interfered with the ability of the Condominium to replace the Kitec pipes in his unit, contrary to s. 19 of the Act. The question is whether a compliance order is necessary to ensure the Condominium is able to complete the work in future. The authority to make a compliance order under the Act is discretionary. Given the persistent difficulties encountered by the Condominium over the course of several months and given that the work has still not been completed in Mr. Evasion's unit, I am satisfied that a compliance order is appropriate in relation to the Kitec replacement project. Mr. Evdassin is ordered not to interfere with the contractors hired by the Condominium to complete that work in his unit.*

At the same time, the Court concluded that the owner had not been guilty of workplace harassment in relation to his treatment of the corporation's staff.

RICHARD ELIA

9. Amlani v. YCC 473 (Ontario Superior Court) January 13, 2020

Reasonableness and Indemnities

Condominium corporation unreasonably refused to grandfather owner in relation to new "no smoking" rule

Condominium corporation also not able to add corporation's legal costs to owner's common expenses

Initially, the condominium corporation did not have a "no smoking" Rule. One of the owners (Mr. Amlani) was a smoker – and neighboring residents complained about second-hand smoke reaching their units. The condominium corporation took some steps (sealing joints and penetrations between units) which seemed to considerably improve the situation. Mr. Amlani also took various steps to minimize the problems, including smoking only in a particular room and using air filters. However, there were further complaints.

Mr. Amlani expressed a willingness to meet to discuss the problems and possible solutions (with engineering assistance), and to bear the engineering costs. However, the corporation was not very receptive to these requests (and essentially took the position that it was not technically possible to completely stop the smoke transfer). The corporation therefore demanded that the smoking stop (based upon the argument that the smoking constituted a nuisance, in contravention of the corporation's general Rules). Ultimately the Amlanis temporarily moved out.

The corporation then passed a "no smoking" Rule – subject to grandfathering of smokers currently residing in the building. However, the corporation refused to grandfather Mr. Amlani (because he was not a resident of the building at that time…. having moved out as noted above).

The Court held that the condominium corporation had improperly refused to grandfather Mr. Amlani. The Court therefore set aside the condominium corporation's refusal; and the Court accordingly held that Mr. Amlani was entitled to be grandfathered "provided that the dissipation of the smell of smoke from the unit can be reduced to a level at which it does not disturb other residents of the Corporation".

The Court also held that the condominium corporation's treatment of Mr. Almani was oppressive (particularly the corporation's lack of cooperation in terms of exploring possible solutions to the smoke transfer problems). The Court rejected the argument that no solution was possible. The Court said:

> *"Once more I underscore that this is not intended to tie the hands of condominium boards when faced with recalcitrant unitholders. It is simply to say that where a unitholder is willing to discuss a practical solution and practical solutions appear evident, boards have an obligation to explore those solutions in good faith."*

ALSO: In the various dealings with the Amlanis (before the commencement of the Court process), the condominium corporation had incurred legal costs of roughly $25,000. The corporation treated these amounts as being added to the common expenses of the Amlanis, and liened their unit (to recover those costs).

The Court declared the lien invalid and ordered that it be discharged.

The Court carefully examined the indemnification provision in the YCC 473 Declaration and noted the words "to or with respect to the common elements and/or all other units" (which can be found in many such provisions). The Court said that ***"There was no act of Mr. Amlani to the common elements or to all other units."*** In other words, the Court held that the wording of the indemnification provision did not apply to the particular enforcement costs incurred in that case. This was in addition to the Court's concerns about the unreasonableness of the corporation's conduct.

Amlani v. YCC 473 (Ontario Divisional Court) August 28, 2020

Condominium corporation unreasonably refused to grandfather owner in relation to new "no smoking" rule. **Condominium corporation also not able to add corporation's legal costs to owner's common expenses**

The lower Court held that Mr. Amlani was entitled to be grandfathered from the corporation's "no smoking" Rule *"provided that the dissipation of the smell of smoke from the unit can be reduced to a level at which it does not disturb other residents of the Corporation"*. The lower Court also held that the condominium corporation could not collect enforcement costs by adding those amounts to the Mr. Amlani's common expenses. [See Superior Court decision.]

The condominium corporation appealed to the Divisional Court. The Divisional Court agreed with the lower Court and dismissed the appeal. The Divisional Court said:

> *Section 7(5) of the* (Condominium Act, 1998) *provides that a declaration cannot be inconsistent with the Act. The application judge found, the interpretation of Article XI* (namely the indemnification provision in the Declaration) *advanced by the Corporation contravenes s. 134 (5) of the Act because the costs it claimed related to compliance and enforcement costs and were not embodied in a court order. An interpretation that contravenes a statutory provision, he found, is, by definition, unreasonable. The legal accounts for which the corporation claimed indemnity described the services as relating to the "enforcement of the Corporation's Declaration and Rules" and not as relating to the protection of any common elements.*
>
> *In the circumstances, there are no palpable and overriding errors to justify overturning the finding that the appellant could not rely upon its indemnity provision to charge Mr. Amlani with the legal fees it was seeking.*

RICHARD ELIA

10. Mei Ki Ching v. Carleton Condominium Corporation No. 203 (Ontario Superior Court) September 10, 2019

Respect the Collection Process

Condominium corporation failed to give notice of lien to owner's spouse

The owner of the unit was separated from his spouse. The spouse (the Applicant in this proceeding) had registered a "Designation of Matrimonial Home" (DMH) on title to the unit. The owner then defaulted on his common expense payments, and the condominium corporation registered a lien against the unit, but without providing notice to the spouse. The corporation ultimately pursued power of sale process, and the spouse received notice of the process at that stage. The spouse subsequently obtained an order under family law, granting her exclusive possession of the unit and title to the unit.

The spouse acknowledged that the condominium corporation was entitled to recover the arrears, interest and a late fee under the lien, but argued that all of the corporation's costs were not recoverable (due to the corporation's failure to provide notice to the spouse). The Court agreed. The Court said:

1. A condominium corporation was obligated to make reasonable enquiries to determine if the unit was a matrimonial home and the address of any untitled spouse.

2. In this case, where a DMH had been registered against the unit, the condominium corporation should have made note of the DMH when doing the normal title searches before providing notice of the lien to the owner and any mortgagee.

3. Because of the failure to meet this obligation to provide notice to the spouse, the lien was invalid as against the spouse, and the legal and other collection costs were not recoverable as against the spouse.

Possible Additional Cases (if time permits):

Unit Renovations during the pandemic

York Condominium Corp. No. 419 v. Black (Ontario Superior Court)
April 3, 2020

Owners ordered to stop non-urgent unit renovations during pandemic

One of the units had been undergoing renovations and the condominium corporation learned that the owners had allowed painters to enter their unit despite physical distancing protocols established in the province (as a result of the coronavirus pandemic). This was particularly concerning for the condominium corporation given that the majority of its residents were seniors.

The condominium corporation sought an urgent injunction to prevent the owners from having third party contractors enter the condominium building on an interim basis during the pandemic.

The Court agreed to hear the matter on an urgent basis and granted the requested injunction.

Meetings during the pandemic

Shen v. The Owners, Strata Plan EPS3177 (BC Civil Resolution Tribunal)
October 14, 2020

Strata corporation's special meeting not validly held

During the pandemic emergency, the strata corporation had held a special meeting of the owners at which a three-quarter (3/4) resolution had been passed to authorize termination of the corporation's management agreement. The Tribunal found that the meeting had not been validly called or held. The Tribunal's reasons included the following:

- The corporation had failed to give all owners a proper opportunity to attend the meeting. Section 56 of the *Strata Property Act* means that all owners and proxies ***"must have the opportunity to vote in person at an SGM if they decide to do so".*** A provincial order (during the Covid-19 emergency) limited in-person gatherings to 50 persons. A provincial order also permitted owners to attend electronically. The corporation had only allowed owners to otherwise attend by written proxy (but, again, the appointed proxies were not necessarily able to attend the meeting). The Tribunal said:

  *However, the strata did not provide an alternative method of attendance, such as by telephone or computer, that would allow all eligible voters and proxies to attend and participate "in person". I find the evidence does not support the strata's argument that not all strata lot owners would be capable of attending by telephone or electronic means, and in any event this does not affect the SPA (*Strata Property Act's) *SGM requirements. Also, I acknowledge that only 16 strata lot owners attended the SGM in person after the strata announced the 50-person limit, but again, this does not change the SPA's SGM requirements.*

- The strata corporation had treated some of the proxy votes as “advance ballot votes”, and the Tribunal said that ***“there is no explicit provision for advance ballot voting, before an SGM”***.

- Persons attending by proxy were instructed to choose only a specified person as proxy. They were not permitted to freely choose someone to serve as proxy.

- The corporation had accordingly failed to hold the meeting in compliance with Section 56 of the *Strata Property Act*.

- In addition, the Notice of Meeting appeared to be inadequate. In particular, notices by email (the only compliant method chosen by the Board) were only provided to ***some*** (not all) of the owners.

- Furthermore, the resolution purportedly voted upon at the meeting had been amended without following proper procedures to do so. The Tribunal also said:

  I find it significant that many strata lot owners cast advance “proxy votes” based on the proposed wording in the April 28, 2020 SGM notice, and that these votes were counted as approving different, amended wording at the SGM, without first approving those amendments.

The Tribunal ordered the corporation not to act on or rely on the meeting results. [The corporation was however free to call and hold a fresh meeting for the same business.]

At the same time, the Tribunal dismissed the owner’s claim against one of the Board members, in which the owner alleged that the Board member had improperly solicited proxy votes. The Tribunal held that there was no conflict of interest that prevented the actions of the Board member.