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Eastern Ontario Chapter

LAWYERS, GUNS AND MONEY

January 26, 2022

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CASE SUMMARIES

WINDOWS:

1. JAMES DAVIDSON

Berman v. YCC No. 99 (Ontario Superior Court) October 1, 2021

No oppression in relation to window issues

The owner claimed that the condominium corporation had not taken reasonable steps to address his complaints about his window. He sued the condominium corporation, and the condominium's directors, for oppression. The Court dismissed the claims. The Court said:

> *The condominium corporation has an economically responsible and sensible window replacement policy. It inspected Mr. Berman's window multiple times over the years. It did not ignore him or his unit.*
>
> *…*
>
> *The Supreme Court of Canada made it clear that to support an oppression claim against a director personally, there generally must be something like personal benefit obtained by the director or bad faith. Neither is even claimed here.*

HOARDING:

1. JAMES DAVIDSON

Peel Condominium Corporation No. 12 v. Gill (Ontario Superior Court)
October 7, 2021

Court makes orders to remedy hoarding in unit

The condominium corporation applied to Court because of the owners' *"hoarding an excessive and dangerous amount of clutter in their condominium unit"*. The unsafe condition of the unit was initially noted in inspections of the unit carried out by the condominium corporation, and subsequently confirmed through inspection and reporting by a fire safety consultant. Despite requests from the condominium corporation, the owners had failed to carry out the necessary clean-up of the unit; and the owners ultimately even installed additional locks to prevent the condominium corporation from carrying out further inspections or from attending to the required clean-up.

The Court said:

> *The Applicant provided several opportunities for the Respondents to remedy the condition of their unit. The Respondents did not take any steps to remove the clutter from their unit. Rather than work with the Applicant, the Respondents refused to allow the Applicant to inspect the unit and changed the locks on the door to the unit. I am satisfied that the Respondents will not voluntarily clean the unit.*

The Court ordered the owners to promptly attend to the necessary clean-up and, failing such, that the clean-up could be carried out by the condominium corporation at the owners' expense. The Court also confirmed the right of the condominium corporation to undertake regular inspections in order to monitor the ongoing condition of the unit. Finally, the Court ordered that the owners pay costs to the condominium corporation.

HARASSMENT/OCCUPANT:

1. RICHARD ELIA

Carleton Condominium Corporation No. 15 v. Poirier (Ontario Superior Court) May 25, 2021

Court orders termination of tenancy effective September 30, 2021. Court also orders owner and tenant to cooperate in relation to corporation's rights to enter unit

The owner's tenant had, in various ways, contravened the *Condominium Act* and the condominium's governing documents. Among other things, the tenant had confronted and threatened other residents, contravened the corporation's pool Rules, made various unauthorized modifications to the common elements, improperly stored items on the balcony and in the parking space, and refused to allow the condominium corporation to enter the unit (as required to fulfill the corporation's objects and duties).

The Court ordered that the tenancy be terminated on a specified date (September 30, 2021). The Court also ordered that the owner and tenant comply, in the meantime, with the corporation's governing documents. Among other things, they were ordered to permit the corporation to access the unit for the objects and duties of the corporation.

The condominium corporation also requested an order that – in the event of a cost award in favour of the condominium corporation – the corporation would be permitted to add such costs to the owner's common expenses (and therefore recover them by way of lien against the owner's unit). The Court said that such an order is unnecessary because of Sections 85(1) and 134 (5) of the *Condominium Act*, but nevertheless agreed to grant the order.

2. RICHARD ELIA

York Region Condominium Corporation No. 794 v. Watson (Ontario Superior Court) October 4, 2021

Behavior of occupants constituted criminal harassment. Court orders that occupants vacate unit

The occupants of the unit had caused various disturbances and had sent numerous threatening communications that constituted criminal harassment. The Court ordered that the occupants vacate the unit within 30 days and, in the meantime, that the violations cease. The Court also placed restrictions upon the rights of the occupants to communicate with representatives of the condominium corporation pending their departure from the unit. All of the condominium corporation's costs in the matter were to be added to the owner's common expenses.

MINUTES/RECORDS:

1. RICHARD ELIA

Wei v. Toronto Standard Condominium Corporation No. 2297 (Condominium Authority Tribunal) January 29, 2021

CAT determines owner's rights to records related to leases, litigation and reserve fund

Among other things, CAT held as follows:

- An owner is entitled to a record of the units that are leased or rented (under Section 83 of the *Condominium Act, 1998*), but is not entitled to access information about the name of the renter or the leases themselves, or the owner's address.

- An owner is entitled to request the corporation's plan for funding of the reserve fund (prepared pursuant to Section 94 (8) of the *Act*) as well as the summary of the plan (prepared pursuant to Section 94 (9) of the *Act*).

- Section 55 (4) of the Act includes the "exception" stating that owners are not entitled to see records relating to actual or contemplated litigation. HOWEVER: Owners **can** see records relating to litigation unless there is some reason (such as solicitor-client privilege, settlement privilege or a confidentiality undertaking) that prevents this. Section 55(4) of the *Act* requires a consideration of the status of the records in dispute and the status of any litigation that the records related to.

2. RICHARD ELIA

Mawji v. York Condominium Corporation No. 415 (Condominium Authority Tribunal) July 29, 2021

CAT gives direction about proper preparation of Board Minutes

The CAT determined that the condominium corporation's Board Minutes were not "adequate". The CAT said:

> *… an adequate record of a board meeting is a document with sufficient detail to allow the owners to understand what is going on in their corporation, how decisions are being made, when the decisions are made and what the financial basis is for the decisions.*

The CAT held that the Board minutes must contain proper detail of the transactions and decisions taken by the Board (whether or not the Board had purported to make decisions outside of Board meetings). [The CAT made no finding as to whether or not decisions could be made outside of Board Meetings. But any such decisions nevertheless had to be *recorded* in the Minutes.]

In terms of the approval of previous minutes, the CAT said that the Minutes must, for sake of certainty, provide the date of the previous minutes.

In terms of a remedy, the CAT decided "to leave it to the corporation to determine how best to ensure that it records all business transactions and decisions in its minute book".

3. JAMES DAVIDSON

Bashir v. Toronto Standard Condominium Corporation No. 1821 (Condominium Authority Tribunal) October 14, 2021

Draft minutes are not records

The CAT held that Board minutes do not become records of the condominium corporation until they are approved by the Board. The CAT said:

> *The minutes were not a record of the Respondent before they were approved and certified as stated in the by-law.*

4. JAMES DAVIDSON

Comtois v. Ottawa-Carleton Standard Condominium Corporation No. 783 (Condominium Authority Tribunal) October 28, 2021

Condominium corporations must keep Board minutes

The CAT held that email messages (setting out Board decisions) do not satisfy the requirement to keep "Minutes" and that Board decisions must be made (or at least confirmed) at Board Meetings and then recorded in Minutes of those meetings. The CAT said:

> *Based on OCSCC783's submissions, it is conducting the business of the corporation without holding meetings and without creating minutes of its decisions. This is clearly contrary to the requirements of the Act.*

WATER DAMAGE/CHARGEBACKS:

1. RICHARD ELIA

O'Regan v. Carleton Condominium Corporation 169 (Ontario Superior Court) January 28, 2021

Owner held responsible for deductible under corporation's insurance. Corporation's lien not out of time

Smoke damage was caused to the owner's unit when the owner left the unit with eggs cooking on the stove. The Court held that the owner was responsible for the $5000 deductible under the corporation's insurance, in relation to the damage.

The Court said that the $5000 was properly added to the owner's common expenses under the terms of the "indemnification" provision contained in the corporation's declaration. The Court said that this did not require a Court application under Section 134 of the *Condominium Act*.

The Court also said that the corporation's lien was registered in time, because it was registered within three months following the owner's "default", which occurred only when the owner failed to pay by a deadline (for payment) set out in the corporation's demand for payment. The Court said:

> *The three-month period begins to run when the unit owner fails to pay the obligation relied upon to invoke the lien. Until the Corporation charged Mr. O'Regan for these remediation costs, he had no obligation to pay. Mr. O'Regan can only be said to be in default as of March 1, 2020, when the deadline to pay for the remediation costs expired.*

2. JAMES DAVIDSON

Lozano v. TSCC 1765 (Ontario Divisional Court) February 8, 2021

Appeal Dismissed. Damage from toilet leak was the result of the owners' act or omission

Damage was caused to the building when the owners' toilet overflowed. The lower Court held that the damage in question resulted from the owners' "act or omission", even though the owners were not necessarily negligent. The owners were therefore liable for the resulting damage (falling within the corporation's deductible) under an applicable by-law of the condominium corporation.

The owners appealed. The Divisional Court dismissed the appeal. The Divisional Court said:

> *The reasonableness of the owner's act or omission is not part of the analysis under s. 105 at all; it is sufficient, to invoke liability, that the damage be "caused" by the owner's "act or omission".*
> *…*

The uncontroverted facts are that: the Appellants left their unit uninhabited for five months; had someone look in only once every two weeks; the water was not turned off; and, if the water had been turned off, the failure of the ballcock mechanism would not have caused a leak. This evidence clearly establishes that the omission (failure to turn off the water) "caused" the leak; but for the omission, the damage would not have occurred. The application judge correctly assessed this evidence, making no error of fact of any kind.

DOGS/PETS:

1. JAMES DAVIDSON

Peel Condominium Corporation No. 96 v. Psofimis (Condominium Authority Tribunal) May 20, 2021

CAT orders removal of dog and payment of enforcement costs

CAT ordered the owner to remove a dog that did not comply with the condominium corporation's Rule restricting the weight of household pets to 40 pounds.

The Tribunal went on to order the owner to pay the following:

- $536 for delivery of a "legal letter" to the owner;
- $200 for Tribunal fees; and
- $3926.75 for legal fees for the CAT hearing itself (hearing costs).

CAT agreed with previous Court decisions which have stated that *"it is not fair that other owners be required to pay for another unit owner's unwarranted conduct"***;** and also noted as follows:

> *It was only after multiple, cost free, attempts to enforce compliance that PCC 96 was required to take steps that led to PCC 96 incurring costs.*

In relation to the legal letter: CAT said that it could award such costs as "compensation", up to a limit of $25,000, pursuant to Section 1.44(1)3 of the *Condominium Act, 1998*. The decision also includes reference to an indemnification provision contained in the Rules of the condominium… which stated that owners would be held responsible for costs incurred by the corporation as a result of a violation of the Rules. But the decision (to award the compensation) does not appear to depend upon that provision.

In terms of the "hearing costs": CAT said that (according to CAT's Rules) such costs will only be awarded in exceptional circumstances. But CAT went on to say that exceptional circumstances existed in this case because the owner had

> *deliberately and repeatedly ignored the condominium's numerous attempts to request his voluntary compliance"*… and had done so *"without apparent concern for the clear provision of PCC 96's rules that would make him personally responsible for the condominium's costs arising from his non-compliance*.

2. JAMES DAVIDSON

Martis v. Peel Condominium Corporation No. 253 (Condominium Authority Tribunal) July 7, 2021

CAT has jurisdiction to decide whether a dog must be permitted as a service animal

The condominium corporation had passed a Rule to prohibit dogs. The corporation had also prepared an "ESA policy" dealing with residents' rights to have Emotional Support Animals (as exceptions to the Rule). The policy included restrictions on the size (weight) of permitted Emotional Support Animals. The owner applied for an order permitting her son to keep a larger dog (on the grounds that this was a required reasonable accommodation under Human Rights law). The condominium corporation then applied to dismiss the application on the grounds that the Tribunal does not have authority to decide a matter relating entirely to Human Rights law. The corporation argued that the owner's application could be decided without reference to the corporation's Declaration, By-laws, Rules or policies, and accordingly fell outside the CAT's jurisdiction.

The CAT dismissed the corporation's motion and allowed the owner's application to proceed. The CAT said:

> *The request for an accommodation is being made in the context of the Pet Rule and the ESA Policy. I conclude that given the issues surrounding both the Pet Rule and the ESA Policy, this matter is properly within the jurisdiction of the CAT.*

3. JAMES DAVIDSON

Martis v. Peel Condominium Corporation No. 253 (Condominium Authority Tribunal) November 23, 2021

CAT upholds weight limit for service animals (emotional support animals)

PCC 253 had passed a "No Pets" Rule. As confirmed by a doctor's note, one of the residents in the condominium needed an ESA (an emotional support animal). PCC 253 was prepared to permit an ESA, so long as the animal did not exceed 25 pounds. The CAT decided that this was a reasonable condition for the condominium corporation to impose, particularly in light of evidence that other residents in the condominium had a fear of dogs (and a resulting need to avoid large dogs). The CAT said:

> *I accept the testimony of the PCC253 witnesses that there are those in the PCC253 who have a Code-related need to avoid dogs. I find that Mr. Martis has not demonstrated that he needs a dog which weighs more than 25 pounds. I understand that he has a strong preference for the dog he has chosen but as the OHRC Ableism Policy makes clear, PCC253 is obliged to*

accommodate his need; they are not obliged to accommodate his preference. In the circumstances of this case, I find that PCC253 has offered a reasonable accommodation in setting a weight limit of 25 pounds on an ESA for Mr. Martis.

4. JAMES DAVIDSON

Middlesex Vacant Land Condominium Corporation No. 605 v. Cui (Condominium Authority Tribunal) October 1, 2021

CAT orders removal of nuisance dogs

The condominium corporation applied to the CAT for relief in relation to two alleged nuisance dogs. The evidence revealed that:

- the Respondent had allowed her Shepherd dogs to run off-leash on the common elements;
- she had lost control of the dogs and had to chase them when they ran away from her;
- the dogs had charged towards other dogs on more than one occasion;
- the dogs had been kept in the Respondent's garage (attached to her unit) where they barked and howled loudly, excessively and continuously for extended periods of time, for several hours at a time and for as long as 12 hours on occasion;
- the barking had caused disturbance to the Respondent's neighbours, which was described by one neighbour as offensive and which negatively affected another neighbour's ability to sleep, work, have solitude, and spend time with friends in his home; and
- complaints had been received about the Respondent not cleaning up after her dogs when they defecate on the common elements.

The CAT concluded that the above circumstances violated provisions in the condominium corporation's Declaration and Rules because the dogs had caused disturbance or nuisance to other residents, because the dogs had been allowed to run loose (not on a leash), because the dogs had been allowed to threaten the safety of others, and because the Respondent had not cleaned up after the dogs.

The corporation's Rules also included provisions allowing the corporation to demand permanent removal of the dogs on two weeks' notice. The CAT said:

I find that the Rules allow the Applicant to take action to have the Respondent's dogs permanently removed from her unit, and that the Applicant has followed the process set out in the Rules to do so.

However, the CAT did not precisely enforce those provisions. Instead, the CAT ordered that the dogs be permanently removed within 30 days. This order was made under Section 1.44(1)2 of the *Condominium Act, 1998*.

5. JAMES DAVIDSON

Toronto Standard Condominium Corporation No. 2370 v. Chong (Condominium Authority Tribunal) November 15, 2021

CAT orders removal of nuisance dogs and also orders tenant to pay 50% of condominium corporation's legal costs for CAT proceeding

The CAT held that a tenant's dogs were a nuisance, because of excessive barking and also because of aggressive behaviour. The dogs therefore contravened the condominium corporation's Declaration and Rules and the CAT ordered that they be removed in seven days.

The CAT also ordered the tenant to pay 50% of the condominium corporation's legal costs incurred for the CAT proceeding, because of the tenant's failure to address repeated requests for compliance made by the condominium corporation. The CAT said:

> *I find that Mr. Gopalakrishnan's persistent breach of TSCC 2370's pet rule O. 11 for a period extending over six months, his denial that his dogs' barking was an issue and his blatant refusal to comply with TSCC 2370's escalating efforts to obtain his compliance with the rule comprises an exceptional reason to award legal fees in this case.*

6. RICHARD ELIA

Halton Standard Condominium Corporation No. 490 v. Paikin (Condominium Authority Tribunal) October 15, 2021

CAT makes orders in relation to nuisance dog

The CAT determined that the Respondent's dog was a nuisance (in contravention of the corporation's Declaration and Rules) because the dog was being allowed to urinate and defecate on the balcony (with resulting disturbance to the resident below).

The CAT said:

> *All that is clear is that the Respondent has allowed her dog to defecate and urinate on her balcony, that she has not cleaned up the resulting mess, and that this has a significant impact on the neighbour below. This is unacceptable and must be remedied.*

The evidence included some documentation indicating that the dog in question might be a service animal or support animal. The CAT nevertheless ordered the condominium corporation to first try to resolve the dispute through communications with the Respondent owner. But the CAT went on to say as follows:

> *If the Board determines that further communication with the Respondent is not appropriate, or if after such communication it is still satisfied that the dog is a nuisance and must be removed, it may give notice in writing to the Respondent giving her at least 30 days to make arrangements to remove the dog from the condominium.*

In terms of costs:

The CAT ordered the Respondent to cover ***part*** of the corporation's pre-CAT costs (for two lawyer's letters sent to the Respondent), based upon an indemnification provision in the corporation's Declaration. The CAT only ordered the Respondent to pay for the ***second*** lawyer's letter. The CAT did not order the Respondent to pay for the first letter because the condominium corporation had not made previous efforts to communicate with the Respondent (before engaging a lawyer). The CAT said:

> *As a general rule, a condominium should make good faith attempts to resolve a dispute with an owner before involving counsel with associated legal costs**.***

7. RICHARD ELIA

Metropolitan Toronto Condominium Corporation No. 736 v. Verstova (Condominium Authority Tribunal) January 4, 2022

Cost recovery reduced as condominium corporation is not aggressive enough

The condominium corporation brough a CAT application against the owner regarding her cat that was urinating on the exclusive-use common element balcony. The urine was causing damage to the wood balcony and was dripping onto the balcony below.

The owner did not take part in any of the proceedings.

The condominium corporation had sent 2 warning letters before passing the file on to its legal counsel. The condominium corporation's legal counsel sent 2 more compliance letters before starting the CAT application. During this time, the owner below used foam insulation to stop the urine from coming through.

The condominium corporation's Declaration contained the correct language to allow it to recover legal compliance costs.

The CAT ordered:

1. that the owner permanently remove her cat and to refrain from bringing any pets into her unit;

2. that the owner indemnify the condominium corporation for the repair of damage to the common element balconies; however, contractor costs were to be reduced by 50% because the actions of the owner below in applying the foam insulation added to the damage;

3. that the owner shall pay in-CAT costs, which were to be reduced from $14,551.04 to $8,815.52. Legal costs were found excessive as the owner did not participate and the condominium corporation "*was required only to make one submission*" which should have been "*relatively short and straightforward*"; and

4. that the owner shall pay pre-CAT costs, which were to be reduced from $5,735.52 to $4,716.20 as the condominium corporation could have mitigated its costs by proceeding sooner to the Tribunal instead of sending a 2nd compliance letter.

> ***"MTCC 736 delayed filing an application with the Tribunal until June, 2021, more than a year after the first legal demand letter was sent. This delay resulted not only in additional legal costs associated with the November 2020 letter but also in continued inconvenience to the owners affected by Ms. Verstova's violation of the pet rules."***

Comment: At the time the compliance letters were issued, the caselaw emanating from the CAT appeared to indicate that due to the CAT's default presumption against awarding legal costs, a condominium corporation was not likely to recover its legal costs incurred in pursuing a CAT Application.

ADVOCACY:

1. RICHARD ELIA

Taylor v. Toronto Standard Condominium Corporation No. 2689 (Condominium Authority Tribunal) August 11, 2021

Property Manager as advocate – condemnation of behavior and practices

The condominium corporation made a decision to change management companies and sent out notice to that effect. The owner started to ask for information from the board about the decision. When they did not receive a response, they submitted a formal Request for Records.

The condominium corporation directed the President/CEO of the "new" property manager to act as its advocate. The condominium corporation initially did not respond or provide records. When the condominium corporation jointed the CAT case, it did not participate in any meaningful way during Negotiation or Mediation.

The CAT found the condominium corporation's advocate to be "*rude and dismissive…" a*nd *"… laboured under the misapprehension that he and his condominium management firm were the respondents in this case.*" The CAT went on to find that the condominium corporation's advocate blamed the previous manager for not providing records and suggested that if a penalty were to be awarded, it should be against the previous manager. The condominium corporation's advocate failed to understand that the corporation remains the party responsible for maintaining records.

The CAT found that there was "*a clear refusal to provide records and a failure to follow the records request process*" and that "*the evidence also shows that the Respondent did not take sufficient care to understand the Applicant's request.*"

> ***"The CAT has the authority to award penalties, but it can also be an educational process. Although I decline to award a penalty, this decision should be taken as a strong condemnation of the Respondent's practices, and the Respondent representative's behaviour throughout this process."***

Comment: In 2007, the Law Society of Ontario began licensing paralegals as independent representatives with a view to ensuring that candidates demonstrated certain required entry level competencies in order to provide services effectively and to serve the public interest. However, within the CAT process, property managers, often without skills or education relating to advocacy or evidence, and often pushed to take on the role of advocate for condominium corporations. Property managers are central to the day-to-day operation of a condominium corporation, so it is not a stretch to find them vested, personally and professionally, in the outcome of a dispute. **Abraham Lincoln** is known to have said: "*A man who represents himself, has a fool for a client*."