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Condo Alert!

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Court fails to clarify the law of condominium mediation

Mark H. Arnold, B.A., M.A., LL.B., LL.M., Certified Specialist in Civil Litigation

Martin Simard is a paramedic and drives an ambulance in Muskoka. He also owns three units in a North Bay Condominium Townhouse complex which he rented to students at the local Community College.

The condominium declaration provides that "each unit shall be occupied only as a one family residence." On its face that provision discriminates against people based on their family status.

In August 2008, Mr. Simard received a demand from his Condo Board that he stop renting his units "in violation the Declaration." He came to me for legal advice. I told him that a combination of Sections 132 and 134 of the Condominium Act 1998 required Mediation and then Arbitration rather than court. I wrote to the lawyer who had sent the demand and insisted that the issues be mediated.

In November 2008, the Condo Board filed an Enforcement Application directly with the court without going to mediation/arbitration. The Board named both Mr. Simard and his tenants as respondents and based its Application on Section 119 of the Condominium Act 1998. That section of the Act requires that all parties comply with the Declaration.

Mr. Simard defended the Court Application. He argued that the court was without jurisdiction to hear the case because the Act required that all disputes over the Condominium Declaration be mediated and if not resolved, then arbitrated.

Mr. Simard then brought a preliminary dismissal motion to a Judge. The Judge disagreed. He decided that because the Act did not require mandatory mediation/arbitration with tenants and because tenants had been named in the Court Application the Court could exercise jurisdiction over the dispute and mediation/ arbitration was not mandatory.

Mr. Simard instructed an appeal to the Court of Appeal. That court was asked specifically to answer a simple question. Can a condominium avoid mandatory mediation/arbitration by basing its court application on Section 119 of the Act? If the answer was no the case had to be mediated regardless of whether other parties had been named in the case and the Decision of the lower court could not stand.

The Court of Appeal refused to answer the question. Instead, the court upheld the lower court decision and held that the Judge was entitled to exercise his discretion in a proceeding under the Condominium Act 1998, when different mediation/ arbitration rules applied to different parties.

The Court of Appeal had a golden opportunity to answer an important question about the extent to which mediation/arbitration is mandatory in condominium law. The answer would have provided guidance to all legal counsel and their clients. Instead we are left with a great deal of uncertainty which is not good for anyone. The lesson for condominium corporations appears to be that if you want court justice and your enforcement complaint involves more people then just unit owners mediation/arbitration is not mandatory and you may be able to proceed directly to court for enforcement.

Workplace Violence and Harassment

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

The government strikes again. Condominium corporations, like other business entities, are now subject to Ontario's new workplace violence and harassment obligations.

On December 15, 2009 the *Occupational Health and Safety Act* was amended by Bill 168 to introduce new definitions for "workplace harassment" and "workplace violence". Ontario employers have until June 15, 2010 to ensure that their workplace risk assessment, employee training, policies and procedures comply with the new obligations to address various workplace harassment and violence scenarios.

Other Violence/Harassment Constraints

These workplace harassment and violence concepts add to the existing arsenal of legal criteria governing violence and harassment, ranging from the *Human Rights Code*, the *Criminal Code*, the *Condominium Act*, the *Occupiers' Liability Act* and various common law remedies pertaining to wrongful dismissal, assault and various other tort claims.

Harassment/Violence Definitions

"Workplace harassment" is defined to mean engaging in a course of vexatious comment or conduct against a worker in a workplace, which is known or ought reasonably to be known to be unwelcome. "Workplace violence" means the exercise or attempt to exercise physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker. Moreover, "workplace violence" includes a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise such physical force and potential injury in a workplace.

Domestic Violence

A new provision requires employers who become aware, or who ought to be aware, that a domestic violence situation is likely to expose a worker to physical injury in the work place, to

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take all reasonable precautions to protect their workers. In condo world, a manager who encounters the bruised spouse of a live-in superintendent couple should document efforts to investigate and address any reasonable workplace precautionary measures.

Known Violent Offenders

Employers must also inform their workers about a person who has a history of violent behaviour, even if that involves disclosing personal and private information. Such disclosure is required if a worker is likely to encounter that person in the course of his or her work, and if the risk of workplace violence is likely to expose the worker to physical injury. Disclosure of such personal information must be limited so as only to be reasonably necessary to protect the worker from physical injury. This new obligation calls for an appropriate adjustment to the condominium corporation's Privacy Policy. At the same time, an employer has to be careful to avoid discrimination with respect to hiring and employment of a known violent offender pursuant to the *Ontario Human Rights Code* on the basis of a "record of offences". For instance, an employer should not disclose an employee's criminal conviction relating to physical violence for which a pardon has been granted.

Conduct Risk Assessment

Employers (such as a condominium corporation) which have a workplace must conduct a risk assessment to determine if any part of the employer's operation is vulnerable to acts of violence. Consider how your condominium operates. Evaluate perceptible risks of violence or harassment to employees and any past incidents. The risk assessment must take into account circumstances that would be common to similar workplaces, as well as those specific to the workplace. Once complete, the employer must advise the Health and Safety Committee or (if there are less than 20 workers in the workplace), the Health and Safety Representative of the results of the assessment and provide a written copy of the assessment.

Make Necessary Changes

Vulnerabilities evaluated by the risk assessment must be addressed by necessary changes to reduce exposure to violence in the workplace. For example, it has been suggested that emergency security buttons be installed in places where employees in the retail, bar and restaurant industry might be susceptible to client outbursts, so that employees can call security and/or the police when they experience suspicious, escalating or illegal behaviour. If dangers are perceived, consider whether it is appropriate to increase security on a nighttime shift, install panic buttons or improved lighting in an underground garage or parking lot.

Establish Policies

Where more than five workers are regularly employed at a workplace, Ontario employers will now be required to prepare and post a Workplace Violence and Harassment Policy. Many condominiums regularly employ more than five workers, such as a manager, administrator, superintendent, cleaner(s), security guard(s), concierge(s), landscaper, snow remover, window cleaner, elevator maintainer and any other contractors and their employees, each of whom constitute a "worker". Employers must adopt workplace violence and harassment policies which address the concerns raised by the risk assessment. Such policies may give employees guidance as to the appropriate protocol to follow when faced with unruly or violent unit owners, visitors, contractors or fellow employees. The policy must address the procedures used to report and investigate a workplace harassment complaint. Policies are required to be reviewed as often as is necessary; that might occur when significant changes in the workplace take effect, or when violent or harassing behaviour is encountered. Policies must be reviewed at least annually. Failure to develop a policy can result in a penalty from the Ministry of Labour. The policy must contain a reporting and complaint investigation mechanism. The policy must be posted in a conspicuous location within the workplace. Condo boards would be well advised to involve the corporation's Health and Safety Representative or Committee and any relevant employees in conducting the risk assessment and developing and reviewing policies.

Related Policies

When developing a precedent condominium Workplace Violence and Harassment Policy, our firm simply used our existing precedent condominium Harassment and Sexual Harassment Policy to implement the specific Workplace Violence and Harassment criteria, cross-referenced into our precedent condominium Occupational Health and Safety Policy, coordinated with our precedent condominium Privacy Policy.

Maintain Programs to Implement Policies

Employers are obligated to establish programs containing measures and procedures to implement the Workplace Violence and Harassment Policy. The program must control the risks identified in the risk assessment. Employees must be able to summon immediate assistance when or if workplace violence is likely to occur. Workers must be required to report incidents of workplace violence or harassment. The program must state how the employer will investigate and deal with workplace violence or harassment incidents or complaints.

Train Employees

Employers are also obligated to provide information and instruction to their employees on the contents of the policies and programs. Employees should be instructed as to what they must do to minimize risk of workplace violence and harassment situations and they should be informed of their obligations and consequences for non-compliance. It is suggested that employers demonstrate to employees how the policy and program relates to such situations. An employer-appointed supervisor has a duty to advise workers of any potential hazard (including risks of workplace violence from a person with a history of violent behaviour).

Workplace Refusal

A worker has the right to refuse work if workplace violence is likely to endanger the worker. There is no requirement for an employee to prove that workplace harassment or violence created a harmful workplace environment, nor is the employee obligated to prove that the employee's dignity or her psychological or physical integrity was damaged. A refusing worker must remain in a safe place that is as near as is reasonably possible to his or her work station and must remain available to the employer or supervisor for the purpose of a workplace investigation.

Workplace Investigation

Where a worker reports unsafe working conditions to the employer, an investigation must immediately be conducted. If the worker has reasonable grounds to believe that the work conditions remain unsafe, the employer or the worker must cause an inspector from the Ministry of Labour to attend at the workplace to conduct an investigation. Now, s. 52 of the *Occupational Health and Safety Act* also requires an employer to prepare a notice to the Ministry of Labour in the event that a worker is disabled from her regular duties, or requires medical attention, or has suffered workplace violence.

Occupational Health and Safety Act

Pursuant to s. 32 of Ontario's *Occupational Health and Safety Act,* condo directors and officers (and other businesses) are personally liable to take all reasonable care to ensure that the corporation has undertaken every measure reasonable in the circumstances to protect the health and safety of workers working in the condominium's workplace. Generally speaking, that duty applies to all "workers" (whether it is the President of an engineering company or a sub-contractor working on scaffolding, or a superintendent undertaking a required semi-annual inspection of smoke detectors within units as required by the *City of Toronto v. YCC 60* case). A panel of safety experts is currently engaged in a four-year plan designed to research best-in-class approaches to improving workplace safety. Shockingly, many condominium corporations still do not have a Health and Safety Representative or Committee, or even an Occupational Health and Safety Policy; as a result, many volunteer directors are personally in breach of their obligations, despite

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Top 10 condo law cases of 2009

Christopher J. Jaglowitz, B.A., LL.B., ACCI

As 2009 drifts into the history books, we look back at some of the notable condo law decisions made by Ontario courts and tribunals in the year gone by.

Here are ten of them, in no particular order. Full text decisions can be retrieved at the Canadian Legal Information Institute ("CanLII") at www.canlii.org.

#1 - **Nipissing Condominium Corporation No. 4 v. Kilfoyl**, 2009 CanLII 46654 (ON S.C.)
The corporation obtains a compliance order against owners operating a boarding house in violation of the "single family residence" provision in the declaration. The owners unsuccessfully claim that the case must first be mediated/arbitrated (as per *Condominium Act, 1998,* s. 134(2)), and that the single family use provision violates the *Human Rights Code*. The case is now under appeal.

#2 - **Metropolitan Toronto Condominium Corporation No. 1250 v. Mastercraft Group Inc**, 2009 ONCA 584 (CanLII)
The Court of Appeal makes important rulings on the following interesting issues in this nightmare case over a conversion building:

- When does a subsequent landowner become a "declarant"
- Whether fixtures can be separated from common elements by the declarant and then leased to the condo corporation
- What factors must be considered in determining whether a construction warranty is breached.
- Whether the right to rent a parking spot is an easement appurtenant to each residential unit

Application for leave to appeal this case has been made to the Supreme Court of Canada (and dismissed).

#3 - **Carleton Condominium Corporation No. 26 v. Unit Owners**, 2009 CanLII 22548 (ON S.C.)
The condo successfully applies to amend its declaration in order to fix inconsistencies over the maintenance/repair obligations and boundaries of the units. The case contains a good discussion of sections 107 and 109 of the *Condominium Act, 1998* and of how to properly set the stage for bringing such an application.

#4 - **Ottawa-Carleton Standard Condominium Corporation No. 650 v. Claridge Homes Corporation**, 2009 CanLII 25983 (ON S.C.)
The Court rules that a condo corporation can sue Tarion for payment out of the guarantee fund for construction deficiencies, and that the claim against Tarion can be made with or without the declarant. Filing the performance audit under the *Condominium Act, 1998*, s. 44 is the only prerequisite.

#5 - **1240233 Ontario Inc. v. York Region Condominium Corporation No. 852**, 2009 CanLII 1 (ON S.C.)
In this case about a shopping mall converted to a commercial condominium corporation, a unit owner applied unsuccessfully for an oppression remedy when asked to contribute to the mall's promotional fund. The court found that the corporation can spend money from the common expenses fund on promotions and marketing. Such expenditures are consistent with the duty to manage and administer the corporation.

#6 - **Wentworth Condominium Corporation No. 198 v. McMahon**, 2009 ONCA 870 (CanLII)
The central issue was the meaning of the words "addition," "alteration" and "improvement" as in the *Condominium Act, 1998*, s. 98. The Court of Appeal upheld the trial judge's ruling that installing a hot tub is not an addition, alteration or improvement to the common elements. The court pointed out that some cases may require a different approach and that each case must be considered individually.

#7 - **McMillan v. Bruce Condominium Corporation No. 6**, 2009 HRTO 878 (CanLII)
The Human Rights Tribunal dismissed an owner's complaint that the corporation violated the *Human Rights Code* by requiring the owner to pay the cost of modifying the common element stairway to his townhouse in order to accommodate his disability.

#8 - **DiSalvo v. Halton Condominium Corporation No. 186**, 2009 HRTO 2120 (CanLII)
The Human Rights Tribunal ordered a condo corporation to install and pay for a modification to an owner's exclusive use common elements in order to accommodate that owner's disability, quite contrary to the ruling in McMillan v. BCC 6, above. The tribunal also fined the corporation $12,000 on the basis that the corporation violated the owner's human rights in poorly handling the owner's request for accommodation.

#9 - **Metropolitan Toronto Condominium Corporation 626 v. Bloor/Avenue Road Investment Inc.**, 2009 CanLII 44718 (ON S.C.)
An interesting municipal law case about a mixed-use complex with shared parking and an odd site plan agreement and zoning by-law. When the parking lot owner increased the parking rates, the residential condo owners sued for a declaration that a certain number of the spots are allocated to them. The court disagreed.

#10 - **Metropolitan Toronto Condominium Corporation No. 932 v. Lahrkamp**, 2009 ONCA 362 (CanLII)
A unit owner who made incessant requests for records and harassed board and management staff was ordered by the Superior Court to stay away from the management office and to follow a special procedure for requesting records. On appeal, the Court of Appeal set aside the restraining order as being too extreme for these circumstances but affirmed the rest of the order.

One decision from late December 2008 also deserves mention.

Metropolitan Toronto Condominium Corporation No. 946 v. J.V.M., 2008 CanLII 69581 (ON S.C.)
The condo corporation obtains a court order to sell a unit owned and occupied by a person with mental health issues who had breached previous court orders requiring the owner to rectify unsafe and unsanitary conditions. The Court found that the corporation had done its best to accommodate the owner's disability.

The Responsible Condo

Warren D. Ragoonanan, Hon. B. Comm., LL.B.
Syed A. Ahmed, B.Math., B.A., J.D., Student-at-Law

Community! That is an important word in the condominium world. It is an invisible but noticeable sense that the people who reside in your high-rise or townhouse are more than just condominium owners, they are real neighbours. And not just to one another. A condo community includes the people who live, work and play in the surrounding area of the condo—be they employees of the condo or the condo, neighbourhood or shopping mall across the street.

Seasoned managers are quick to realize that creating a sense of community is easier said than done. Oddly enough, understanding one's role in the community has been something that the business world has been struggling with for decades. And, as with many other things, condominiums can look to business for some guidance on this subject. It can be summed up in three words: Corporate Social Responsibility.

What is Corporate Social Responsibility (or CSR)? It can be broadly described as the steps a business takes to account for the interests of the people and groups affected by its activities. Or in simpler terms, how that business affects its community. Although there is some debate about this, CSR is, by its very nature, voluntary. For an organization to credibly call itself socially responsible, it must voluntarily decide to go beyond the minimum standards of conduct found in the law. In the corporate world, this means accounting for more than just the interests of shareholders. Corporations must also consider the impact of their operations on employees, suppliers, customers, and even communities where the corporation does business. This requires special regard for issues like the environment, human rights and consumer protection. Now, this doesn't mean that the business stops paying attention to profit; indeed, profit is still very important. It is just that when looking at profit, the socially responsible corporation also looks at people and the planet at the same time.

For a condominium struggling to create a sense of community both within and outside its building, CSR practices can be valuable tools. Taking on CSR means that Condo Boards, as a first step, need to examine who the condominium corporation's stakeholders – the groups and individuals it impacts – are. These may be employees, suppliers, independent contractors, neighbouring residents, sister condominiums, community associations, as well as those indirectly impacted through the condo corporation's environmental footprint. You can't build a community until you know the people who are all a part of it. CSR also forces Boards to consider what its minimum legal obligations are to each of these people and how the condominium can go beyond this.

For example, Boards can start with small environmentally-friendly CSR initiatives: energy-efficient lighting, green roofs, or a bicycle service for residents and staff members travelling short distances. And it doesn't need to stop there. The Board can initiate a socially responsible purchasing policy. This means preferring those suppliers and contractors who themselves demonstrably practise CSR in their own business. The Board can initiate a program to get Leadership in Energy and Environmental Design (LEED) certification. Want to go further? How about creating special services for the elderly or residents with disabilities? This means going beyond the access ramp at the building entrance. It can include nursing services, meal delivery and special events with non-resident family members.

How far you go is ultimately up to you. And don't be surprised if you find that your CSR efforts are not only yielding a better sense of community but also some hard (i.e. quantifiable) benefits as well. Environmental initiatives that promote efficient use of energy can reduce your utility bill. When dealing with socially responsible suppliers, you will often find better quality products and more efficient service. Services for elderly residents can result in higher turn outs at AGMs and condominium functions. Initiatives to account for the interests of employees can result in better productivity and lower turn-over. And CSR-based overall improvement in running your condo can improve your building's reputation leading to increased property values. You may set out to create some community spirit and find yourself with lower costs and a better financial outlook.

CSR is not a silver bullet; it will not cure all condo governance problems. Nor is it easy to implement. It takes time to sit down, think about your stakeholders, create CSR initiatives and then execute them. Change is hard and CSR-based change is no exception. But for a shot at creating a real and responsible community in and outside your building, it may just be worth it.

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our efforts during the past 15 years to encourage them to comply with their legal obligations.

OHSA Penalties

A successful prosecution could result in a fine of up to $25,000 for an individual person and/or up to 12 months imprisonment, or a fine of up to $500,000 for a corporation for each conviction.

Ironic Failures to Comply

It seems ironic that condo directors and managers work hard to protect the condominium corporation and its unit owners' interests, but often fail to take the basic steps to protect themselves from personal liability. Ask your condo's lawyer to advise the board with respect to other facets of violence and harassment, as well as directors' liabilities pursuant to the *Occupational Health and Safety Act*, the *Environmental Protection Act*, the *Criminal Code*, and the *Human Rights Code*. Condos which lack an Occupational Health and Safety Policy, a Human Rights Policy, a Non-Harassment Policy, a Sexual Harassment Policy and a Privacy Policy prepared by the corporation's lawyer are sitting ducks.

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