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Condo Alert!

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COVID policy validated

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

For the most part, policies passed by the board of directors are intended to govern the affairs and activities of the board itself, rather than owners. However, in the case of *TSCC 1704 v. Fraser*, the court upheld the board's COVID policy which stated that "Contractors are not allowed to work in-suite unless it is considered an emergency or essential service."

When a unit suffered water damage in a bedroom and ensuite bathroom, the board prohibited entry by a plumbing repair person. Even though no rule had been passed, the policy was implemented in support of the Corporation's duties to enforce s. 117 of the Condo Act. That section prohibits a person to permit a condition to exist or to carry on an activity in a unit or common elements which is likely to damage the property or cause injury to an individual.

The court found that the board was entitled to reasonably enforce s. 117 of the Condo Act, having regard to its concern for the safety of residents, by prohibiting additional unnecessary persons from entering the building (and respecting the quiet enjoyment by other residents of their property, recognizing many people are required to work from home these days).

Even though the board had not processed the policy as a rule, it fulfilled the Corporation's duty to reasonably uphold s. 117 of the Condo Act. The court analogized treatment of the policy in these circumstances as if it were a rule which the court would uphold unless it was clearly unreasonable or contrary to the legislative scheme of the Condo Act.

The court recognized the unprecedented societal response to a contagious and potentially fatal virus consistent with government restrictions, affecting many aspects of daily living in Toronto and Ontario during the preceding four months. That public response was intended to preclude spreading of the virus in the community. Even though the province had lifted some restrictions on certain types of business and services more recently, a condo is not obligated to comply with the government's easing of restrictions at this time.

The judge noted that the policy would be subservient to other emergency matters or health risks and it would not be expected to be in place for a period longer than necessary – a stage not yet reached.

We would also point out that a COVID policy could qualify as a regulation intended to govern and enforce the detailed implications of the pandemic in the context of a condominium's typical nuisance rule and the common law of nuisance (which would prevent behaviour harmful to a neighbour's health).

For a number of months, GMA has recommended that our condo clients should pass a board resolution adopting its COVID Protective Policy, including requirements to wear masks upon the common elements, to restrict the number of persons entering elevators, to close and only careful re-open amenities after a risk assessment, subject to stated COVID protections – along with other usual types of COVID hazard reduction criteria.

This precedent now upholds the applicability of a well-drafted and carefully imposed COVID Protective Policy, which is enforceable even though not passed according to the criteria applicable to a rule in accordance with s. 58 of the Condo Act.

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Key take-aways from the CAT's record request decisions

Alex Young, H.B.A., J.D.

On October 1, 2020, the Condo Authority Tribunal ("CAT")'s jurisdiction will expand beyond condo record requests, giving the CAT authority to deal with disputes regarding pets, parking, vehicles and storage, as well chargebacks related to such issues. To honour new beginnings, and commemorate the year that was, the following is Part One (January 2020 – May 2020) of our two-part series summarizing the key take-aways from the CAT's records-only decisions in 2020. For Part Two, follow GMA's blog at www.ontariocondolaw.com.

Tait v WSCC 553

Where a corporation does not provide records to an Applicant due to the inaction of management, the corporation must still provide those records to which the Applicant is entitled.

Shakyaver v MTCC 971

A corporation can only accept or refuse (with a reasonable explanation to avoid penalty) a record request. There is no third option that would permit a corporation to require conditions before providing records. Imposing conditions on a record request is tantamount to a refusal. The CAT has the jurisdiction to determine if a record refusal "excuse" is reasonable but should only permit the "reasonable excuse" exception in very narrow circumstances. It is not appropriate for a board to seek to interfere with an owner's entitlements under the Condo Act in retaliation for conduct the board does not like.

Moloney v DCC 124

The CAT may order a penalty for delay even where such delay was due solely to the inadvertence of management. An Applicant is not entitled to a letter from the corporation acknowledging the corporation's failure to provide the requested records.

Bukhari v WCC 10

For the CAT to order a penalty against a corporation, the corporation's delay in fulfilling the record request would have to be tantamount to a refusal (which was not the case here because the delay was short). The non-existence of requested documents is not *prima facie* evidence of the corporation attempting to subvert its obligation to provide records as set out in the Condo Act.

Zahedi v TSCC 2503

A corporation may face cost consequences where the parties could have resolved their issues but for the corporation failing to participate in a stage of the CAT's dispute resolution process.

Barreto-Rivera v MTCC 704

The CAT does not have jurisdiction to determine whether a corporation's policy not to have a board resolution (in this case, for expenses under $1,000) is appropriate and properly established. The corporation was not obligated to produce a non-existent resolution.

Pedneault v CCC 27

The $5,000 maximum penalty is reserved for wilful misconduct or behaviour that is highhanded, intransigent or egregious. The CAT will consider mitigating factors (in this case, the death of a property manager) in determining what level of penalty is justified.

Mehta v PCC 389 (#1)

Failing to keep a record required by the Condo Act is not a reasonable excuse for refusing to provide the record. The responsibility to keep adequate records under the Act applies to all corporations. One of the records required to satisfy this minimum standard is minutes of board meetings. A board's displeasure with an owner does not change the owner's entitlement to the records.

Mehta v PCC 389 (#2)

The CAT cannot order access to records that do not exist, nor can the CAT order that a record be created by a corporation. The CAT will not order that the corporation provide a non-existent record.

Naqvi v PCC 389

Where the Condo Act sets out a clear entitlement to a record, the requester is not required to provide reasons for their request. The consent provisions of the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) do not apply to such a request (in this case, the Record of Owners and Mortgagees).

Yeung v TSCC 1136

A Settlement Agreement is an agreement between the Applicant and Respondent. It can only include things to which the Applicant and Respondent are willing and able to agree. No party can require the CAT (or any other non-party) to do something simply by including it in a Settlement Agreement.

MacDonald v WCC 96

The CAT will not determine whether a record (in this case, meeting minutes) is as fulsome as the Applicant believes it ought to be. Lateness in providing a record is not necessarily a refusal.

Pullan v LCC 18

It is not a *prima facie* abuse of the record request process for an owner to submit multiple, separate requests for different records. Multiple requests may be inconvenient for the corporation, but that alone is not sufficient evidence to demonstrate an abuse of the CAT process.

Costs and Penalties

There are many recurring themes in the CAT's treatment of penalties and costs, so it is worth summarizing the key points separately from the decisions:

- The CAT will consider mitigating circumstances (e.g. the credibility of the board's complaints) when determining what level of penalty is warranted.
- The CAT may order a penalty for delay in providing the records without reasonable excuse (e.g. $250 penalty for a 2-month delay due solely to the property manager's inadvertence).
- To award a penalty, the delay in fulfilling the record request would have to be tantamount to a refusal.
- The $5,000 maximum penalty is reserved for wilful misconduct or behaviour that is highhanded, intransigent or egregious.
- The CAT has ordered the $5,000 maximum penalty where large numbers of foundational records, spanning many years, were not kept as per the Act.
- The CAT will consider factors such as the type of records refused and the number of records refused to determine a penalty amount.
- Part of the purpose of the penalty is to impress upon corporations the need to take their record keeping responsibilities under the Act and to encourage corporations to change their practices to meet these responsibilities.
- The CAT often awards costs to the winning party.
- Costs typically represent the filing fees incurred in initiating the CAT proceedings.
- The CAT can require a reasonable labour fee ($/hour) for the preparation of a record (e.g. board minutes).
- The CAT can order costs where the parties may have resolved the issues but for the corporation failing to attend one of the stages in the dispute resolution process.

We look forward to seeing what the CAT has in the bag once its expanded jurisdiction kicks in! Remember to check our blog for Part Two of this series.

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GMA is pleased to announce Alex Young's return, as of September 1, 2020. Alex looks forward to assisting GMA's clients with their condo and business-related needs.

Oppression remedy – leveling the playing field

An Nguyen, B.A. (Hons), J.D.

A recent Court of Appeal decision, *Siemon v. Perth Standard Condominium Corporation*, highlighted important principles relating to section 135 of the Condo Act.

This case arose out of a dispute between a group of owners at the condo (the "Respondents"), which operates as a retirement home and related corporations (the "Appellants") that own, manage and rent out 91% of the units in the building. The Respondents alleged that the Appellants failed to comply with the declaration and bylaws to require its tenants to sign a standard services operation agreement. The practice provided the Appellants with an advantage in renting out their units because they could offer discounts on services that the Respondents could not.

The Respondents succeeded on a summary judgment motion and the Appellants were declared to have acted oppressively under section 135 of the Act. The motion judge granted judgment requiring all occupants of the condo to enter into the required agreement.

In reviewing the lower court's decision, the Court of Appeal reiterated important principles with respect to section 135 of the Condo Act:

- Section 135 need not be specifically pleaded in the originating claim for the court to grant relief under this section. Where oppression is at the heart of the proceeding, the court may grant a remedy for the oppressive conduct;
- Section 135 grants the court broad remedial powers to make *any* order the judge deems proper, including a remedy that is less than what was requested or "least intrusive";
- There is no requirement that damages be awarded if the court concludes there has been oppressive conduct. A failure to comply with the condo's governing documents resulted in the unfairness and the court may decline to award any damages in fashioning an appropriate remedy that addresses the unfairness.

The Court of Appeal ultimately dismissed the appeal (but varied the judgment to apply to future occupants) and awarded costs to the Respondents.

This case demonstrates that a court may grant a wide range of remedies in oppression cases. A remedy that addresses the unfairness or levels the playing field between parties will not be undermined.

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