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Condo Alert!

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Top 10 condo cases of 2020

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2020 saw a shift in how we access the courts, condos and each other. The top condo law decisions from the Ontario courts reflect the mixed year. Some were expected, some helped clarify application and interpretation of the *Condominium Act, 1998* (the "Act") and some were…headscratchers.

10. TSCC 2510 v. Unit Owners TSCC 2510

Owners submitted a requisition to replace the board, contest a short-term rental rule and raised other complaints. The corporation did not call the meeting. The court held that the notice of meeting for the requisition violated the Act and was void.

The requisitionist failed to provide notice to all owners, use the required form, and include the subject matter of the requisition in the notice (and a copy of the requisition). The Act sets out specific notice requirements to protect owners' interests collectively. These requirements ensure that no one, whether management or a group of owners, can call a meeting without providing full and fair opportunity to the community of owners to know what is at stake, consider their positions and vote in person or by proxy. The alternative would be to let people foist substantial or prejudicial changes on owners by hijacking meetings that are poorly attended due to insufficient notice.

The court commented that the condominium field is complicated to navigate and that owners trying to go it alone should seriously consider hiring a lawyer with experience in the industry.

9. CCC 476 v. Wong

The condo registered a lien against an owner, the owner sought the lien declared invalid for failure to give 10 days' notice via notice of lien (Form 14). In upholding the lien and notice given, the Court of Appeal confirmed the counting of "10 days" excludes the date the notice of lien is given but includes the date the certificate of lien is registered (in accordance with section 89(3) of the *Legislation Act, 2006*).

8. MTCC 933 v. Lyn

The condo received and verified noise complaints against a tenant of a unit. The condo wrote to the tenant twice, but didn't notify the owner about the complaints until it sent the tenant a third and final demand letter. The owner reached out to the condo to address the noise complaints but did not hear back for months, when she received another letter from the corporation. After this letter, the owner asked the tenant to move, but told the condo she needed the condo's evidence to bring an eviction application.

The condo did not respond to the owner's request for evidence. Instead, the condo started a court application for compliance against the tenant and the owner. Before the application hearing, the condo asked the owner and tenant to consent to an order requiring the tenant comply with the corporation's noise provisions - the owner was prepared to consent except on the issue of costs.

The tenant was found liable for the condo's costs. However, the court did not order costs against the owner - the court considered the owner's willingness to consent to the compliance order and, more importantly, that the condo repeatedly failed to inform her of the noise complaints and made unreasonable demands of her without providing any evidence to assist her in dealing with the tenant.

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7. MTCC 590 v. Unit Owners MTCC 590

The condo in this case was built in the 1980s. About 20% of the units have fireplaces, which vent through the building roof.

In 2013 fireplace chimney flues had deteriorated and where no longer operative - they needed to be replaced or removed from service. In 2016 the condo determined that it would cost $1.5M to remove and replace the chimney flues and $13,000 to cap and decommission them. The owners with fireplaces believed that the removal and replacement of the chimney flues at the end of their life was the condo's responsibility. The condo did not want to incur that cost and said the fireplace owners should.

The condo brought application to amend declaration for 2 items: add a Schedule F that specified the chimney flue serving each individual unit fireplace was an exclusive use common element and; change the maintenance and repair sections of the declaration to clarify that owners of units with fireplaces, and not the condo, were responsible for maintenance and repair of all exclusive use common elements after damage.

The lower court determined that it was clear from the declaration that there was an intention to distinguish between the common elements enjoyed by all owners and those enjoyed exclusively by others. The Act required such areas to be explicitly set out in a declaration, and they were not. It made sense to correct that "error or inconsistency" in the declaration by adding a Schedule F.

The lower court did not order an amendment to the declaration's maintenance and repair section. It determined there was no error or inconsistency that would give it jurisdiction under the Act to amend the declaration. The maintenance and repair section, as written, created a mutual obligation to maintain the exclusive use common elements as between the condo and the owners: the owner had a duty to maintain the exclusive use common elements and the condo had a corresponding duty to maintain and repair them after damage. This was not ambiguous, nor was the creation of such a mutual obligation an "error or inconsistency" that the court had jurisdiction to interfere with.

The condo appealed the lower court's decision and the Court of Appeal granted the appeal.

The Court of Appeal called a condo declaration "a special kind of contract". It interpreted the maintenance and repair sections to be that the owner maintained and repaired the unit and the exclusive use common elements after normal wear and tear and after damage (or failure) at the owner's expense. After rendering that interpretation, the Court of Appeal asked the parties to go back and redraft the declaration's maintenance and repair section. If the parties could not agree on wording, the Court of Appeal would amend the declaration using its own wording and interpretation. The parties did not agree on the wording and therefore the Court of Appeal re-wrote the declaration, imposing the obligation to repair the chimneys after damage on the fireplace unit owners.

6. Estanol v. YCC 299

An owner brought an application against the condo for, among other issues, failing to meet the Act's maintenance and repair obligations.

In the Spring of 2018, the owner reported moisture problems to the property manager, who inspected the unit but couldn't determine the source of the problem. The same problems were reported to the property manager after a significant rainfall, when the roof and basement leaked.

The owner believed the roof leaked because roof vents were removed or closed by the corporation's contractors; the property manager did not acknowledge this potential cause. The owner repaired the roof herself, only for the corporation to criticize her for making unauthorized repairs and threaten her with legal action. The corporation later acknowledged that it took no issue with the owner's repair.

The property manager inspected the basement but did not investigate a reported foundation leak nor conduct water penetration tests. The owner provided her contractor's report attributing the leaks to cracks in the concrete slab and suggesting permanent repairs. The corporation's engineers recommended repairs but the property manager continued to insist that the leaks were the owner's responsibility.

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The property manager made temporary repairs throughout 2019 to limited success while continuing to advance his own theories and explanations for the leak. Almost a year later and after another significant leak, the corporation's engineers prepared a report echoing the recommendations in the owner's report.

The court found the corporation's response to the roof and basement leaks was unreasonable and not timely - the issue should have been addressed after the corporation received the owner's October 2018 report. Temporary repairs were only made in December 2018. The corporation did not consider permanent repairs until after a Summer 2019 leak.

The court said that the standard for such maintenance and repair is reasonableness, not perfection, but water penetration is a matter which requires months, not years, to investigate and address. The owner was awarded lost rental income, out-of-pocket repair costs/disbursements and partial legal fees. The court gave the condo a 5 month "buffer" in damages, commenting that that would have been a reasonable time in which the leak could have been more thoroughly addressed.

5. TSCC 1742 v. Evdassin

The condo brought a compliance application requiring an owner to replace Kitec pipes or, alternatively, to pay the condo to replace them when the owner barred access to the condo's contractors.

The court found that the owner breached the Act and the condo's governing documents and ordered him to allow the corporation's contractors to enter the unit to complete the plumbing replacement, not interfere with the work, and pay for all costs to complete the work.

However, the court dismissed part of the corporation's application seeking to prohibit the owner from harassing, threatening or intimidating anyone employed by the corporation and from interfering with any work done by the corporation in the future. The court found that a further compliance order was not necessary because the owner's conduct was not persistent or egregious to warrant orders to permanently restrict him. For example, the court found that the corporation's request for an order limiting the owner's communication with management was not proportionate when he was rude on one or two occasions in the past. The court found that the corporation's application over-reached and many of the orders sought were not responsive to the conduct alleged (and likely added to the hostility between the parties).

4. Beswick et. al. v. YRSCC 1175

A group of townhouse owners brought an application against the condo, whose board was controlled by high-rise owner directors. The townhouse owners alleged that the high-rise majority of the board treated the townhouse owners inequitably, oppressively and charged them for expenses without notice.

The court reviewed the disputed expenses and held that the townhouse owners were not responsible for retroactive repair costs where the condo failed to give notice under section 92 of the Act and owners were not given the opportunity to complete their own work.

The court was also critical of the board's poor management, communication and lack of adherence to the corporation's governing documents. The court emphasized that clear and timely communication with owners would have reduced animosity at the community. However, the court did not find that the board's actions were oppressive, and no damages were ordered.

3. Lozano v. TSCC 1765

The owners' toilet leaked while they were away from the unit. The condo registered a lien under section 105 of the Act for the lesser of the cost to repair the water damage and the deductible limit of the corporation's insurance policy. The owners argued that the corporation had no lawful right to chargeback the repair cost because they didn't commit an "act or omission" and they maintained the unit and fixed the toilet issue when it first arose. The owners asked the court to consider a higher negligence threshold of proving an act or omission, which would mean that no owner could be held financially responsible for repair costs except in cases where they deliberately caused damage.

The court held that "negligence" is not the standard in section 105 chargebacks for an owner's "act or omission" - the standard is between negligence and "strict liability" and is closer to the latter (strict liability imposes responsibility on a party, regardless of whether the act was intentional or not. It requires proof that the act actually happened and that the responsible party failed to take all reasonable care to avoid it).

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The court reasoned that if a higher negligence threshold were accepted, then other owners would be burdened with paying for repair costs or insurance deductibles more regularly. Section 105 the Act reflects a policy decision that protects all owners against recurring insurance deductible payments or the lesser cost of repairs, which costs should not be a common expense shared by all owners.

The court ultimately found that the owners committed an act or omission in failing to maintain their toilet and to have it inspected by a plumber. The condo was entitled to charge back the cost of repairs.

2. YRSCC 1206 v. 520 Steeles Developments Inc.

The condo sued many parties in a construction deficiency lawsuit, including its former property manager. The former property manager asked the court to dismiss the lawsuit because the condo didn't give notice under s. 23 of the Act before "commencing" it.

Section 23 of the Act says that a condo can sue on behalf of itself or owners for damage to common elements, assets, individual units and about contracts involving the common elements or a unit. However, before it "commences" the lawsuit, it must give written notice to owners about the general nature of the claim. Such notice is not required for lien enforcement litigation, compliance applications or small claims court actions.

This condo *did* "commence" the lawsuit by issuing a notice of action without giving prior notice to owners. A "notice of action" is like a placeholder court document, to be formalized with a more detailed "statement of claim". Before it formalized the action with a statement of claim, the condo circulated an AGM package outlining the general nature of the claim, explained that the notice of action was filed because there was an expiring limitation period, included a draft of the statement of claim and included a vote in the AGM material to approve the statement of claim. Owners voted and approved the statement of claim at their AGM and it was filed a few days later.

There was precedent to challenge the lawsuit based on the notice technicality. In 1983 the Court of Appeal ruled that a condo's failure to give notice rendered its lawsuit a nullity.

The 2020 Court of Appeal said that a lot has changed since 1983 - that "nullity" is too harsh an outcome and disconnected from the underlying purposes of the Act, especially because nothing in the Act describes what happens if you fail to give notice (specifically that doing so cancels a lawsuit).

In allowing the lawsuit to proceed and reversing its 1983 decision, the Court of Appeal commented that the Act is consumer protection legislation and section 23 is intended to make sure owners know that their condo is about to sue on their behalf. Third parties should not be able to escape liability to owners or benefit from a procedural defect because of a failure of the condo to give advance notice of a lawsuit.

1. Amlani v. YCC 473

The condo received complaints of smoking from the Amlanis' unit. Mr. Amlani continually sought an open dialogue with the condo to resolve the issue. The condo was not receptive. In brief:

- Amlani offered to conduct engineering inspections at his cost;
- Amlani rented his unit to a tenant with a no-smoking provision in the lease even though smoking was not prohibited at the condo;
- Despite moving out, the condo continued to send Amlani legal letters; and
- Amlani sought mediation. The condo's lawyer responded by unilaterally scheduling it without consulting Mr. Amlani. During the mediation, the condo's lawyer left halfway through (and the condo attempted to recover the entire cost of the mediation from the Amlanis even though the cost of mediation was to be split).

The condo refused to discuss the dispute with Mr. Amlani. Instead, it registered a lien and attempted to sell the Amlanis' unit to recover $25,108.77. The sale came to a halt when the court concluded that the condo acted oppressively by refusing to negotiate or consider Mr. Amlani's solutions: the lien was discharged and costs were awarded against the condo.

The corporation unsuccessfully appealed the decision: it had relied on its declaration's indemnity provision as a catch-all to charge everything back to the Amlanis. The Divisional Court found the condo could not rely on its indemnity provision to charge back compliance and enforcement costs without a court order (because compliance and enforcement costs are subject to a court order under section 134 of the Act and a declaration cannot be contrary to the Act). However, indemnity provisions can be used to recover costs unrelated to compliance and enforcement such as repairing damage to the common elements. ***