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Condo Alert!

VOLUME 10, ISSUE 1 WINTER 2021

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Top 10 condo cases of 2021

Tony Bui, Andrea Lusk and An Nguyen

Costs and chargebacks had prominence in many of the decisions from Ontario courts and tribunals this year, tied with an emphasis on mediation/arbitration before commencing court process.

10. *Star Woodworking et al. v YRSCC 1311 et al.*

Several unit owners sued their declarant and the condo corporation. Most of the claims related to the declarant's conduct before the condo was created and involved allegations of conspiracy and misrepresentation. The owners want to rescind their agreements of purchase and sale because they allege the declarant did not disclose material changes to the condo's governing documents.

The condo was roped into the dispute as the successor of the declarant – the claims against the condo relate to the enforceability of its declaration (if changes were allegedly not disclosed to buyers) and its by-laws (passed after turnover) and allegations of oppression in enforcing these documents.

The condo brought a motion to stay the action against it, arguing that s.132(4) the Condo Act required the unit owners submit their dispute related to the declaration and by-law, and the validity or enforceability of those documents, to mandatory mediation and arbitration and that was essentially the crux of the owners' claim against the condo. The court was very concerned that if it stayed the action against the condo in favour of mediation and arbitration, it would be bifurcating or splitting the dispute and increasing the risk of multiplicity of proceedings that might result duplication or in inconsistent verdicts.

However, the court recognized that while deferring the arbitration until the litigation ends was possibly the efficient outcome, that would be the opposite of the primacy of arbitration intended by the Condo Act and confirmed by the Supreme Court of Canada. The court also found that the unit owners' claims of oppression were "piggybacking" off the same allegations related to the compliance issues even though they were called "oppression" in the claim. The court ultimately stayed the claims against the condo corporation in favour of mediation and arbitration.

9. *Rahman v. PSCC 779*

This was the first CAT case to deal with parking disputes under its expanded jurisdiction. The condo objected to Mr. Rahman parking in visitor parking spots. Mr. Rahman argued he needed to park there for disability-related reasons and provided proof of his disability. The CAT held that Mr. Rahman was entitled to park in the visitor spots due to his disability. The condo was not entitled to its enforcement or legal costs – which were charged back to Mr. Rahman before the matter got to the CAT – and the CAT went further in awarding a $1,500 penalty against the condo for its "aggressive actions constituting harassment".

What appeared to be straightforward parking dispute, quickly spiraled into a bitter legal battle. The condo brought preliminary motions before the CAT challenging its jurisdiction and following the Tribunal's decision the condo brought an application for judicial review. Unfortunately for the condo, the application for judicial review was dismissed as the condo should have pursued its statutory rights of appeal instead.

Overall, the condo could have spared itself a lot of expense, animosity and grief. As the infamous *Amlani* decision from last year noted, reasonableness is the overarching principle when it comes to enforcing a condominium's governing documents.

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8. *TSCC 1724 v. Evdassin*

The condo obtained a compliance order under section 134 of the Condo Act against Mr. Evdassin in 2020. The compliance order included a costs award against him and to secure the costs award, the condo registered a lien against Mr. Evdassin's unit. However, the lien secured the condo's full legal costs even though the court only awarded the condo partial legal costs. As a result, Mr. Evdassin challenged the validity of the lien.

The same judge who awarded partial legal costs accepted that the condo's lien for full legal costs was valid. Section 134 (5) of the Condo Act allows condos to add "court ordered legal costs as common expenses" along with "any additional actual costs to the corporation in obtaining the order". Here, the condo added the remainder of its legal fees to obtain Mr. Evdassin's compliance with the condo's Declaration as "additional costs in obtaining the order" (in other words, the portion that the court did not award).

Section 134 (5) is a powerful provision to protect innocent unit owners from contributing to legal costs resulting solely from a non-compliant owner's actions. However, it should not be mistaken as a *carte blanche* right for condos to tack on all legal costs to a compliance order: the legal costs must be incurred in relation to the compliance order and must still be reasonably docketed.

7. *O'Regan v. CCC 169 et al.*

An unfortunate case of eggs left cooking on the stove, resulting in a fire and smoke damage to the unit and common elements. The condo put out the fire, cleaned the hallways, ceiling, floors and installed 15 air scrubbers to deal with the resulting smoke damage. The cost of this work was $8,637.03, but the condo only required reimbursement of the $5,000 deductible from the owner. The owner did not pay the amount and a lien was registered. The owner brought a claim and urgent motion for determination of the validity of the lien, since it was preventing him from renewing his mortgage and otherwise he alleged that it was the condo's actions that caused the common element smoke damage, that the lien was invalid because the condo did not mediate the dispute and the timing of registration was incorrect.

With respect to the owner's argument on mediation, he alleged that the lien resulted from a compliance scenario, and the condo could not charge the remedial work back as a common expense without first mediating the dispute and otherwise obtaining an order which would allow the addition of the "chargeback" to the common expenses. This is the *Amlani* interpretation which has been continuously upheld (but not applicable to this case).

The court disagreed with the owner. The condo did not require an order to cause the owner to comply with the Act in this case. It was permitted to collect actual expenses it incurred as a result of the act or omission of an owner as a common expense under it's declaration's indemnity provision.

The court also reviewed the timing of lien registration and found no issue with that aspect, as the lien had been registered within 3 months of default. While the condo had paid its contractor for the work earlier in 2019, it did not demand reimbursement of its deductible from the owner until January 2020, with a deadline to pay by March 1, 2020. After that deadline expired the condo issued a form 14 and registered the lien with notice to the owner and mortgagee within 3 months of the deadline.

A last note on this case is that the owner had the option of paying his own insurer's $1,000 deductible to dispose of the matter through insurance. However, he brought the action because it was "the righteous" thing to do.

6. *TSCC 2370 v Chong et al.* *(*ONCAT)

The condo brought a CAT proceeding for an order requiring a tenant to remove his dogs because the dogs barked in the unit and caused a nuisance. The Tribunal found that the tenant violated the condo's declaration and rules, the board was reasonable in deeming the dogs a nuisance per the rules and ordered the dogs' removal within seven days.

The Tribunal applied two principles in awarding costs – (1) Rule 46 of the CAT Rules of Practice states that the CAT will not order a user to pay another user's legal fees, unless there are exceptional reasons to do so, and (2) the Tribunal's power to enforce a condo's indemnification provision is subject to the CAT's costs rules.

The Tribunal ordered that the unit owner was responsible for the condo's legal fees related to its enforcement costs before the CAT application was filed, under the condo's indemnification provision, despite the owner's reasonable efforts to obtain the

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tenant's compliance. The bulk of the condo's legal fees for the proceeding were considered under the CAT's Rules of Practice and were awarded against the tenant because he persistently and blatantly breached the rules despite the condo's escalating efforts, which was an exceptional reason to award legal fees.

5. *Berman v. YCC 99*

"The oppression remedy starts by someone having an expectation" are the opening words of this October 1, 2021 decision. In this case, the owner expected his bedroom window would be replaced by the condo when he said it needed replacement. The court, off the bat, calls this a subjective feeling or desire. The court continues: "to be actionable at law, a person's feeling of expectation must also be objectively reasonable. In addition, even if a reasonable expectation is not met, the applicant also needs to show that he has been oppressed, unfairly prejudiced, or unfairly disregarded."

This was a case of gradual deterioration of a window, causing a very slight temperature loss (in a 50-year-old building). The condo told the owner that his window was in the budget for replacement in 2021. The owner sued in November 2020 and the window was replaced in March 2021, as promised by the condo. The owner sought $50,000 damages from the condo and not only from the condo, but from the board personally.

The court dismissed the application. It found that the condo had met its statutory duty, inspected the window, been responsive to the owner, and undertook other maintenance and repair when budgeted and/or needed. The court did not believe that the condo acted unreasonably or in any way oppressively. There were several factors or solutions which could ameliorate the slight temperature drop. The court found that the application, seeking tens of thousands of dollars for a 2-degree temperature difference between rooms, gave credence to the allegations against the owner of bullying and aggressive behaviour against condo personnel. The court could not find a corresponding arrogance or nastiness as against the condo that is typically found in oppression cases. The parties disagreed about the quality of the window – this is not the basis for an oppression remedy. It was not proven that the window needed replacement earlier than budgeted.

Finally, the court commented on the owner's claims against the directors personally. This was described as a "bald" pleading and arguments about the qualifications of directors without any relief requested was "throwing mud." Suing the directors was called "vexatious" by the court.

4. *MTCC 868 v. Pang*

The condo liened the owner's unit for unpaid common expenses, and this action was for an order for vacant possession to enforce a power of sale. The owner defended the action, saying she had paid her common expenses to management and brought a counterclaim against the condo for $11,350 for damages resulting from a flood in her unit. The condo brought a summary judgment motion. On the eve of that motion, owner agreed to pay the arrears and interest, which disposed of the motion. However, a dispute remained about how much the owner owed in legal fees as part of the lien and collection (with the condo seeking full recovery of its fees totaling just over $56,000 and the owner arguing that the fees should be no more than $15,000).

The court reviewed general costs principles in litigation, but qualified those principles with the legislative scheme for recovery of legal costs under the Condo Act, which is different from considerations in other litigation. An owner who breaches her statutory obligation to pay common expenses is responsible for all reasonable legal costs and expenses incurred in collection. The Condo Act is designed to ensure that innocent owners are not left with the financial burden of legal fees and costs incurred to enforce a debt owed by another unit owner. The court in this decision found that so long as the costs were reasonable, they were fully collectable as part of the lien enforcement.

This was not the first time the condo had to pursue the owner for unpaid common expenses. It had taken several steps in the past to collect her common expenses and she had a pattern of defaulting, therefore was aware of the legal consequences of not paying. What started as a simple lien enforcement in this case was complicated by the owner's decision not to resolve the matter early on (or even later on). Rather than dealing with the lien when it was a few thousand dollars, the owner challenged the proceeding and brought a counterclaim alleging that her floors and furniture were damaged by the condo's agent in resolving a flood which she also alleged stemmed from improper maintenance of the pipes by the condo. The owner had several opportunities to settle the matter which would have addressed and resolved the condo's legal fees. The court awarded the condo the entire amount it was seeking for its legal fees.

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3. *YCC 188 v Chaudhry*

The condo brought a successful compliance application against an adult son and his parents (the unit owners) in 2017 because the son engaged in a campaign of harassment against the board and the parents took no steps to prevent his misconduct. But this didn't stop the son's conduct and the condo was forced to seek a further compliance order and a contempt order in 2021.

In 2021, the court found that the son breached the 2017 compliance order by engaging in discriminatory and threatening communications with management and the board in violation of s.117 of the Condo Act. The court found that the son's conduct called for serious measures to prevent the recurrence and ordered that the son was prohibited from occupying any unit in the condo, visiting the property or having contact with management or the board. The court held that the parents did not take reasonable steps to ensure their son did not violate the Condo Act again and costs were awarded against them.

However, the court declined to make a finding of contempt against the son. The court emphasized that contempt orders are discretionary, and the purpose is to obtain compliance with court orders, not to punish. Here, the court gave the son the benefit of the doubt because the son stopped the bad behaviour and promised to respect the court order. But the court also granted the condo its cost of the contempt motion because the condo successfully proved the elements of contempt and there was no reason why the son should not have to pay the costs.

2. *Landont Ltd. v. FCC 11*

This was a maintenance and repair dispute between the owner and condo. The owner used its unit to operate a commercial parking lot. The parties agreed that the concrete slab below the lot was a common element, but disagreed on whether a waterproofing membrane installed on the upper surface of the concrete slab was part of the common elements. The Court held the membrane was a common element – and therefore the condominium's obligation to maintain and repair – as the condo:

- Claimed it installed he membrane "on behalf of the previous unit owner" – however, the condo paid for the installation and there was no evidence the cost was charged back to the unit;
- Amended its Declaration to change maintenance and repair obligations but did not address the membrane; and
- Had a budget in its reserve fund to replace the membrane.

1. *HCC 77 v. Mitrovic*

The court ordered two owners to wear a mask or face covering while on interior common elements but also permitted them to travel on any interior common elements between their unit and the main entrance of the building or their parking spot by the most direct route without a mask. These owners had raised disability as the primary reason for an accommodation and exemption of provincial, municipal and the condo's policies mandating masks or face coverings be worn in common areas of the condo. However, the owners refused to provide information or documentation of a disability until the court hearing.

The court confirmed that the condo had the right and obligation to enforce its mandatory mask policy to prevent undue risk to other residents. The court ordered a permanent injunction prohibiting those owners from entering other floors of the building (except where their units were located) because this activity constituted a dangerous activity contrary to section 117 of the Condo Act and their right to access those non-public areas, mask-less, must be balanced against the safety of other residents of the condo.

Honourable mention: *TW Cross Investments Ltd. v. PSCC 1052*

The owner brought a CAT application arguing that the condo's recently amended pets provision in its declaration did not follow proper procedure and was therefore invalid and unenforceable. In response, the condo brought a motion arguing that the application was "solely about process" which the CAT did not have jurisdiction to deal with.

The CAT dismissed the condo's motion as the root of the dispute dealt with a declaration provision "prohibiting, restricting or otherwise governing pets or other animals in a unit" – this is squarely within the CAT's jurisdiction. Despite the procedural issues raised by the owner, the CAT noted that it is not precluded from dealing with issues in determining the "validity of a provision". And notwithstanding the novel legal question, the CAT noted it has the exclusive jurisdiction to determine any questions of fact or law that come before it.