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Condo Alert!

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Top 10 condo cases of 2022

Tony Bui, Andrea Lusk and An Nguyen

2022 saw the return of oppression damages, the CAT finding its stride in pet cases, costs and damages and dealing with difficult owners. We present our top 10 condo cases of 2022:

LESSONS ON OPPRESSION

1. *Wong v. TSCC 1918*

This owner's unit shared a wall with the condo's mechanical room, which housed the garbage compactor. The owner complained for years about the noise and vibration coming from the compactor. Several investigations were done and in one instance, the property manager described the noise as "unbearable."

What followed for several years were continued complaints by the owner and some piecemeal attempts to address the transmission. However, the noise itself remained unresolved. Notably, no one from the corporation investigated the transfer for years after some remedial steps had been taken, despite continued complaints from the owner; the owner even hired a lawyer to write to the corporation but received no substantial response.

The owner then brought an application for compliance and oppression, to remedy the noise issues. The condo obtained further reports in to address the transmission in the interim, but it did notify the owner of this before the application was commenced. Upon learning about the application, the condo did a 180 and told the owner it would take no further steps to address the transmission unless the application was withdrawn.

The court found that on the evidence, the owner established that the corporation acted oppressively in the lack of timeliness of its responses and its decision to stop work because of the application. The court assessed damages in favour of the owner at $30,000 for the interference with the use and enjoyment of her unit. The court also exercised its wide discretion under s. 135 of the Condo Act to require the condo to require the condo proceed with the remedial work its contractors recommended. In a separate cost endorsement, the court awarded the owner $32,470.27 for her costs of the application.

2. *Kikites v YCC 382*

Noise is one of the most common sources of condo disputes. However, noise disputes are tricky and its important to recognize that each situation must be assessed on a case-by-case basis.

In *Kikites*, the applicant unit owner brought an oppression application against the condo alleging transfer of nighttime noise into his unit. The noise complained of came from the unit above: it came from a quadriplegic child's medical equipment and the attendance of his nurse. Interestingly, the applicant did not include or seek relief from the upstairs unit owner/mother of the child in his application.

Both sides – the complainant and the condo – tendered sound engineering reports, with conflicting findings. The parties' general evidence was that the owner complained about the noise, the condo investigated and found it was not excessive. The court accepted that the condo tried to, both objectively and subjectively, investigate the noise. Its experts did not find the transfer of noise excessive.

The owner then requested that the court require the owner above to install a raised and padded floor in her unit. The court found this was beyond its and the condo's authority in the proceedings and on the evidence before it. The court recognized that such night-time noise, night-after-night, might be a nuisance. However, the owner sued the condo, not the owner above. The court found that the condo had done what it could and had not been oppressive in its conduct.

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3. ***Moran v. Peel Condominium Corporation No. 485***

Staying on topic with oppression applications – but moving away from noise – we turn to a case involving an owner's renovation request.

The unit owner submitted a request to renovate his kitchen and washroom and required the service elevator to move construction material. The condo approved the renovation request provided the work was completed in four days and elevator use was restricted to two times for 20 minutes each. The owner needed more time and flexibility to complete the project and use the service elevator given the complexity of the renovation work. The condo refused without justification. Even after the owner became homeless as his unit was not habitable, the condo maintained its refusals. As such, the owner brought an oppression application against the condo.

The court concluded that the condo acted oppressively. The owner had a reasonable expectation that the condo would consider his renovation request fairly and provide timely decisions. Instead, the condo ignored the owner's communications, delayed responses and did not fairly consider the owner's situation. The court found that the condo's insistence that the service elevator could only be reserved for 20-minute increments was arbitrary as there were no rules or policy that supported the condo's position. The court awarded the owner special damages of about $36,000 for the cost of renting alternate accommodation and storage fees and costs of $15,000.

TAILS FROM THE CAT

4. ***Yeung v. Metropolitan Toronto Condominium Corporation No. 1136***

The CAT previously ordered Mr. Yeung seek permission from it before filing any applications; he remains the only person in the history of the CAT to be subject to this condition. In this matter, Mr. Yeung sought permission to file a new application for a records dispute. The CAT invited submissions from the parties on whether the factors considered in the previous order against Mr. Yeung applied to this application.

The CAT denied Mr. Yeung's request and maintained its order against him. It concluded that Mr. Yeung's request was similar in nature to his prior requests, the issues in dispute were minor and that he was using the CAT to impose his standard for recordkeeping and governance on the condo. None of these are proper uses of the CAT.

The condo received $500 in costs against Mr. Yeung. Although a far cry from the $5,000 it sought, the CAT rarely awards costs. In this case, costs were ordered to recognize that Mr. Yeung's application was improper and other owners who were not involved with and did not support Mr. Yeung's personal grievances should not have to contribute to the condo's legal fees.

5. ***Gale v. HSCC 61***

The CAT awarded $2,000 costs against an owner in a records dispute. The owner was a party to six previous CAT proceedings with the condo, with mixed success. The condo asked the CAT to restrict this owner's ability to file future applications arguing that the owner's records requests/application were an abuse of process and brought for an improper purpose.

The CAT did not find the owner vexatious or that the application was brought for an improper purpose.

However, the owner was cautioned in prior CAT proceedings that he may face cost consequences if it was determined in a future proceeding that he had abused records request process. Here, the CAT ordered the owner to contribute to the condo's costs because his past conduct indicated that he was partly motivated to bring the application for an improper purpose to undermine the board's decision-making and to harass the board into keeping records in a way the owner felt was appropriate.

MEDIATE AND ARBITRATE, NOT LITIGATE

6. ***1386444 Ontario Inc. v. 2331738 Ontario Ltd. (Century Cabinet Doors Inc.)***

A trial judge ordered a permanent injunction against a corporate unit owner operating an industrial business out of the unit as their machinery created unreasonable noise and nuisance. The injunction prevented the company from operating their machinery between 9 PM and 5 PM on weekdays. The company appealed but it was dismissed by the Court of Appeal: the Court upheld the trial judge's findings that the company was creating an unreasonable nuisance.

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The company argued that the complaining unit owners should have soundproofed their units. The Court of Appeal rejected this argument because the obligation to abate a nuisance falls on the party that creates the nuisance – not on the victim of the nuisance.

The company also suggested that because the unit was municipally zoned for commercial and industrial uses, they had "statutory authority" to operate their machinery "beyond the reach of the laws of nuisance". The Court of Appeal quickly dismissed this position. While the zoning by-law permitted industrial uses, this does not mean parties have a license to create nuisances. Zoning by-laws dictate what is permissible within a municipal area but a condominium corporation can pass by-laws and rules that are more restrictive than the zoning by-law.

7. ***23 St. Thomas Inc. v. MTCC 1255***

Two neighbouring condominiums are subject to a reciprocal agreement and indemnity agreement between them. After a payment dispute arose, one condo submitted the matter to mediation/arbitration as required by s. 132 of the Condo Act. Rather than participating in mediation/arbitration, the other condo and the corporate owner of all of its units responded by commencing a civil action for the same facts but also framed civil action as one of economic tort.

The condo seeking mediation and arbitration brought a motion and successfully stayed the civil action as between the condos. The Court held that it was "not bound by the legal labels used by the parties and must examine the core issues of the claim, i.e. the pith and substance of the allegations contained in the pleading" and ultimately found that the "pith and substance of the [civil] action relates to disputes arising from the interpretation and application of the [Agreements]". Although the civil action was not stayed against the owner of the condo units, as it was not a party to the agreements between the condos, the Court recognized that the condo was attempting to piggyback onto the owner's claim to avoid mediation/arbitration under the Condo Act.

The prioritization of mediation/arbitration to resolve condominium-related disputes and judicial disapproval of parties piggybacking onto claims to avoid mediation/arbitration is not new. The legislature clearly intended to provide for quick and cost-effective alternative dispute resolution whether it is through mediation/arbitration or the Condominium Authority Tribunal.

MISSED LIMITATION = BAD SITUATION

8. ***Thermal Exchange Service Inc. v. MTCC 1289***

This Court of Appeal decision considered the *Limitations Act, 2002* in a payment dispute between a condo and its HVAC contractor. Under the *Limitations Act*, there is a general 2-year limitation period and the clock starts from the date the party with the claim "discovered" the loss or damage. The contractor alleged that the condo failed to pay its invoices. The condo alleged the contractor was statutorily-barred from collecting the debt.

The condo did not dispute it requested the work, that the work was done or that the contract was with it, not individual unit owners. The contractor issued invoices, due within 30 days, and the condo paid them – albeit typically late. In about 2008, the contractor decided to send "batch invoices" covering prior work.

In 2016, the parties discussed outstanding invoices (some as old as 2008) and the condo's property management advised that the contractor would not be paid until the condo collected from owners. The manager collected a large sum of the outstanding arrears and paid those to the contractor, but the condo refused to pay the balance arguing that the contractor was out of time to collect it.

The contractor sued in 2017. The amount at issue was just over $85,000. The lower court held that the contractor started a court process as soon as it knew that the invoices would not be paid and therefore the action was not barred by the limitation period expiry. The condo appealed.

The Court of Appeal highlighted two factors that prevented the limitation period from expiring. First, each late payment was applied to older arrears on a "running account" of the contractor. Second, whenever the contractor followed up with the manager about unpaid invoices, the manager acknowledged them by saying she was "working on it." This led the contractor to believe the invoices would eventually be paid and that collection could be remedied without the need to resort to the court. Therefore, the Court of Appeal dismissed the condo's appeal.

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THE CAT AND DOGS

9. ***YRSCC 1375 v. Sousa***

The condo brought a CAT application to remove King – Ms. Sousa's German Shepherd – from the premises. The declaration prohibited "German Shepherds" and "dogs over 25 lbs at maturity". Ms. Sousa sought accommodation under the *Human Rights Code* and provided medical documents confirming her disability and dependence on King. The condo acknowledged Ms. Sousa's disability but was not convinced she required a German Shepherd to manage her disability. The condo had no issue with her having a dog that *was not* a German Shepherd weighing over 25 lbs.

The CAT dismissed the condo's application. While the medical documentation did not say "Ms. Sousa requires a German Shepherd", it did expressly state that King was "indispensable" to addressing Ms. Sousa's needs. The CAT concluded that King was not merely a preference and that he could not simply be replaced by another dog. The CAT also rejected the condo's argument that her disability could be accommodated by a dog that didn't violate its declaration. This position was no accommodation for her disability at all since she is already entitled to have a non-German Shepherd that weighs less than 25 lbs.

Both parties sought costs but the CAT ruled in favour of Ms. Sousa. She was awarded $6,250 in costs and the intervener – her mother, the unit owner – was given a proportionate credit to common expenses of the $15,000 the condo claimed to prevent her from contributing to the condo's legal fees. In awarding costs, the CAT criticized the condo's request for additional medical evidence as excessive and improper. Further, the condo's strict adherence to the black letter of its declaration and failure to accommodate Ms. Sousa's disability effectively made resolution impossible without the CAT.

10. ***Decoste v. HCC 134***

The courts have held that no-pet restrictions in a condo's declaration are enforceable. In this case, both parties agreed that the enforceability of the "no-dog" *rule* was not in dispute. The issue before the CAT was whether the board interpreted and applied the rule reasonably.

The owner requested an exemption to the condo's newly passed no dog rule and wanted legacy status for a dog which the owner put a deposit on but was not yet in her possession. The condo argued that the owner was not entitled to an exemption because the rule set out a legacy exemption cut-off date and the owner didn't meet the criteria as she wouldn't have a dog until after the exemption date. The CAT agreed and determined that the condo's decision to deny an exemption was reasonable.