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Condo Alert!

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Top 10 condo cases of 2023

Tony Bui, Andrea Lusk and An Nguyen

CAT's new jurisdiction saw a clarification on "activity" borne disputes - with many applications being dismissed as relating to maintenance and repair of common elements vs. noise and nuisance. The past year's decisions also hammered the final nail in the "chargeback" coffin - a chargeback for enforcement related costs is not proper without a finding of non-compliance and a fixing of costs by an adjudicator. Here are our Top 10 condo cases of 2023.

1. YCC 50 v. Overholt, 2023 ONCAT 123

The condo received smoking complaints and sent warning notices to the owner allegedly responsible for smoking. When complaints continued to come in, the condo had their lawyers send a legal letter. This cost was charged back to the owner's unit and a lien was registered. After registering the lien the condo *then* commenced a CAT application to obtain a compliance order, seeking full costs against the owner.

The condo was unsuccessful. The property manger did not investigate the complaints, but even if it had, the owner's unit was exempt from the smoking rules. The CAT was rather critical of the condo in its decision.

It is settled law that condos cannot charge back enforcement-related costs – specifically legal letters – without a court order, despite how any indemnification provisions are drafted. This violates the basic consumer-protection intention of the Act by depriving owners of their legitimate right to due process (i.e. to present their case in a tribunal/court of law).

2. TSCC 2581 v. Paterno, 2023 ONSC 7002

In opening its decision, the Court expressed its disapproval of the condo's conduct: "Truth being stranger than fiction, pursuant to the Condominium Act, 1998, this is a three-ring clown circus of an application by TSCC 2581 to evict Giovanni Paterno and to force him to sell his condominium apartment unit."

The condo commenced an application to address Paterno's harassment, disturbances and breaches of the condo's governing documents. Paterno was accused of acting aggressively, rudely, profanely and disrespectfully towards the condo's contractors, sending sexually explicit emails to female staff and exposing his genitals in the elevator. Notably, Paterno assaulted front desk staff and this resulted in criminal charges. Paterno plead guilty to mischief, uttering a death threat and breach of his probation order.

Paterno's behaviour was deplorable but the Court was sympathetic to Paterno's substance abuse issues and how this may have affected his behaviour, acknowledging that Paterno was remorseful, had already been punished by the criminal courts for his misdeeds and was making efforts to treat his substance abuse problems. Still, it issued a compliance order requiring Paterno to comply with the condo's governing documents, have no contact with the condo's staff and pay costs to the condo. The Court would not grant the condo's request to remove Paterno from his unit but if he breached the order, the condo could return to court to request his eviction.

Almost immediately after the compliance order was issued, the parties' lawyers discussed whether the condo would accept a smaller costs payment if Paterno moved out of his unit for two years. The condo's lawyer indicated he expected to receive instructions after a board meeting. The condo's lawyer was instructed to reject this offer and proceed with Paterno's eviction. Instead, the condo's lawyer sought an urgent motion – without notice – to force Paterno to sell his unit for breaching the compliance order. Paterno's lawyer followed up with the condo's lawyer on Paterno's proposal to vacate his unit – and at this point, Paterno rented his unit out and was not living in it – the condo's lawyer claimed it "did not have instructions regarding a response to the offer" despite commencing its urgent motion.

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To support its urgent motion, the condo claimed Paterno breached the compliance order by arguing with the concierge/a director. In the three months following the compliance order, the condo hired a 24/7 "tactical security guard" with specialized training over fears of Paterno's behaviour, at a cost of approximately $15,000.

The condo argued that Paterno's breaches were deliberate and contemptuous but its evidence was rejected.". Though Paterno clearly communicated with the condo's staff, ostensibly in breach of the compliance order, the Court noted that it was staff who first approached Paterno. Paterno could not be faulted for responding, though his response was "aggressive, rude, profane and obnoxious". There was also no evidence that Paterno was unmanageable or acted deliberately to breach the compliance order. The urgent motion was dismissed.

3. CCC 132 v. Newton, 2023 ONSC 2705

A townhouse condo owner replaced components of his common element garage door and front door. He claimed the corporation verbally approved the work, the corporation disagreed.

The condo brought a compliance application for an order permitting it to remove and replace the doors. The owner brought a cross-application for an oppression remedy, asking the court to force the board to approve his modifications.

The court found that while the owner may have talked to *someone* about the replacement, it was not the board, and the board's direct approval was never sought or obtained for the modifications.

The owner and board tried to resolve the issue, but when they could not agree the condo offered to have its contractor replace the doors at the corporation's cost.

The court found there was no oppression. It is a core function of the board to make decisions on maintaining uniformity of appearance and the court will not step into the board's shoes on property management decisions. There was no evidence the board ever approved the modifications and when it learned of them, the board acted in good faith to try and resolve the issue.

The court ordered the removal and replacement of the modified doors. The condo had to itemize the costs it sought to charge back to the owner for compliance to ensure there was no duplication. It is not clear from the decision whether the replacement of the doors was at the owner's cost or the corporation's (as initially offered).

4. Gangoo et. al. v. TSCC 1737, 2023 ONSC 260

The applicant owners alleged that the condo's elections were unfair and contrary to the Act and condo's governing documents. They wanted an order disqualifying (or requiring resignation) of directors but the terms of all directors had either expired or been vacated when the application was brought. The owners limited their claim to oppression and sought monetary damages.

The court reviewed several procedural matters related to the condo's elections, which took place when the new mandatory proxy form rolled out (a year of mass confusion). While the condo claimed that it had complied as best it could, there were certain acts which the court found went beyond the reasonable expectations of the owners, and therefore entitled them to oppression damages.

Before the AGM, the owners specifically asked management about the admissibility of their proxies and were told they were "fine" by management. Management did not communicate this confirmation to the chair or registrar of the meeting and the proxies were, in fact, not fine. The owners were not given the opportunity to correct the proxies, which the corporation considered "deposited" and therefore a record of the corporation. The oral candidate disclosure requested of one of the applicant owners went "off-script" and asked for information beyond what was required and may have been prejudicial. This was the basis of the oppression finding. The court found obvious shortcomings in the condo's collection and tabulation of ballots and votes but chalked these up to carelessness, not to oppression.

Having found that oppression was proven, the court assessed the owners' damages. The owners were seeking hundreds of thousands of dollars. The court awarded them $5,000. The owners lost the potential opportunity to serve on a volunteer board and the court could not identify quantifiable damages arising from that lost opportunity. The court took the owners' conduct into consideration. While the court found that the owners may have suffered some embarrassment, they also overreacted to some of the condo's alleged misconduct (such as classifying a board member leaving a note on one of the owners' doors as harassment) and exacerbated the situation in doing so.

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5. YCC 444 v. Ryan, 2023 ONCAT 81

This case started as a smoking nuisance case involving the condo and two residents, Ms. Powell (the smoker) and Ms. Ryan (the complainant) who lived across the hall from one another. The condo brought a CAT application against both residents.

The application against the smoker, Ms. Powell, was settled when she agreed to a consent order to use reasonable efforts to prevent smoke and odours from being transmitted from her unit to the common elements and into other units.

The condo continued the application against Ms. Ryan, claiming she created a nuisance, acted in a manner that disrupts the comfort and quiet enjoyment of others, and harassed Ms. Powell and her family and the condo staff. The condo's rules specifically prohibited harassment of residents and staff.

The Tribunal determined it had jurisdiction to hear the case under section 117(2) of the Condo Act. While harassment can deal with conduct that is likely to have serious consequences that may fall under section 117(1) of the Act (which is outside the CAT's jurisdiction), harassment can include conduct that is a nuisance, annoyance or disruption under section 117(2) of the Act, which is within the Tribunal's jurisdiction.

The Tribunal found that Ms. Ryan consistently harassed Ms. Powell, her family and the management and staff in an attempt to stop Ms. Powell from smoking. She shouted insults at Ms. Powell and posted offensive and harassing notices on her unit door (among other abusive conduct). This behaviour constituted a nuisance, annoyance or disruption. Ms. Powell was ordered to stop the harassing behaviour and to comply with the condo's rules.

6. HCC No. 61 v. Kolarovaliev, 2023 ONSC 4921

The condo enacted a no-smoking rule to make its premises smoke-free. It exempted a few owners who were smokers when the rule was enacted via a legacy agreement. The agreement had strict conditions which prohibited smokers from creating smoke nuisance or transfer that interferes or disturbs the use or enjoyment of others.

The condo started a court application against these owners for a compliance order under section 134 of the Act, alleging that the owners repeatedly breached the legacy agreement and allowed smoke from their unit to escape to the hallways and through the balconies of adjoining units. Before starting the application, the condo tried to resolve the issue with the owners, including paying for and participating in mediation and paying for an inspection report and agreeing to paying for a share of any remediation identified in the report. The condo asked the court to void the legacy agreement and enforce the no-smoking rule to prohibit these owners from smoking in the unit.

The court accepted the condo's evidence, which included various affidavits and written reports from differing complainants and found that the condo was empowered to enforce its no-smoking rule under section 119(1)-(3) of the Act. The court also recognized that the condo tried to confirm the allegations instead of taking them at face value.

The court ordered the legacy agreement terminated and prohibited the owners from smoking in the unit. The owners could smoke on the property only if they were outside the building and at least 9 meters away from all doorways, windows or air intakes of the building.

7. Tarski v. YRSCC 1179, 2023 ONCAT 80

The owner of a penthouse unit alleged unreasonable noise and nuisance coming from the mechanical room above his unit. The condo investigated the complaint and both sides produced reports about the potential causes and solutions to the transfer. After reviewing all the evidence, the CAT found the dispute outside of its jurisdiction as it dealt with maintenance and repair obligations under ss. 89 and 90 of the Condo Act, not noise and nuisance under s. 117(2) of the Act.

Although the CAT has jurisdiction to hear noise and nuisance complaints, under s. 117(2) those complaints must be *caused by an activity carried out or permitted by the condo*, not by general building functions.

Common element noise and nuisance can fall under the CAT's jurisdiction if the condo has a provision in its governing documents which prohibits noise or nuisance, howsoever caused, or if the transfer stems from the use of the common elements by others. However, in this case there was no such provision and it could not be established based on the evidence that the noise transfer was due to use by others, just general operation.

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8. SCC 104 v. Leary, 2023 ONCAT 52

A unit owner leased her unit and outdoor parking space to tenants. The tenants parked a truck with advertisements or badging in the rented parking space. The condo's rules provided that no licensed commercial vehicle may be parked at the property and no vehicle parked on the property may have advertisements or signs affixed to it. The unit owner and the tenants argued that the rule is unreasonable and being enforced inconsistently, and the Tribunal should order that it be repealed. The condo argued that the rule was enacted to preserve a consistent aesthetic with the neighbouring community.

Under section 58(1) of the Act, rules of a corporation must be made for one of the two purposes: (1) to promote safety, security or welfare of owners and property of the corporation, and (2) to prevent unreasonable interference with the use and enjoyment of units and common elements.

The Tribunal considered whether the rule complied with section 58(1) of the Act. It found that no risk was identified as justification for the rule. There was no effect on others since the truck was parked in a separate, private driveway. The Tribunal also determined that the interference of a commercial vehicle was trivial, and the community should tolerate it. The condo was ordered to not enforce the rule against the owner and tenants. Rules must be reasonable and address actual interference (not trivial interference).

9. PSCC 779 v Rahman, 2023 ONSC 3758

In January 2021,the parties appeared before the CAT to dispute accessibility parking spaces and indemnity provisions. There have since been over 15 reported decisions on their legal warfare.

In 2023, PSCC 779 appeared before the Divisional Court to appeal the CAT's foundational decision, arguing that the CAT erred in (a) "reversing the legal onus on Rahman to prove PSCC 779's chargeback was unlawful" and (b) misinterpreting the principles from the 2020 Amlani decision regarding indemnity provisions. These legal issues have generally been addressed since Amlani but as they keep coming up, it's worth reiterating.

First, PSCC 779 argued that the CAT improperly denied PSCC 779's chargeback for its enforcement costs as Rahman did not prove the chargeback was illegal. The Divisional Court quickly dismissed this argument as PSCC 779 was wrong on the parking issue: Rahman's onus to prove that "the chargeback for enforcement steps was illegal" was unnecessary as PSCC 779 was unsuccessful in arguing it was entitled to enforce the parking matter against Rahman in the first place – the Divisional Court noted that the CAT's conclusion was correct in law and "surely is a matter of simple common sense".

The Divisional Court went on to refer to the CAT's oft-cited interpretation of Amlani where it stated that "Amlani… does not stand for the proposition that, through deft wording of an indemnification clause, a condominium corporation can deprive an owner of his or her day in court", seeing no error in the Tribunal's interpretation and application of principles stated in Amlani.

It's been said at all levels of the court and CAT. Condos cannot chargeback for enforcement costs without first proving non-compliance as a precondition, regardless of what declaration indemnification provisions say.

10. TSCC 2804 v. Micoli et al., 2023 ONCAT 21

The condo brought an application to the Tribunal regarding a tenant's nuisance and breach of rules after the owner took no steps to obtain a tenant's compliance or have him evicted from the property. The Tribunal accepted the condo's extensive evidence that the tenant created noise that was a nuisance and harassed staff. He treated staff as his owner personal food delivery, verbally harassed them, left garbage in the hallways and created frequent excessive noise in the unit. The Tribunal ordered the tenant to stop the bad behaviour.

The condo sought recovery of over $45,000 under its declaration indemnification provisions. The Tribunal awarded legal fees of $8,500 payable by the owner to the condo. The Tribunal also awarded damages to the condo of $18,000, payable by the owner and tenant jointly and severally.

The tenant appealed the cost award arguing he should not be jointly liable to pay the condo $18,000 in damages. The Divisional Court accepted the tenant's argument. The appeal court determined that awarding damages against the tenant was unfair because the issue was not raised until the hearing and it was a "matter of basic fairness for a party to know the potential jeopardy of they face in an administrative hearing." The court varied the CAT order, making the owner solely responsible for the damages awarded.