



Volume 2010 – 1: March 2010

Metropolitan Toronto Condominium Corp. No. 710 v. All Unit Owners & Mortgagees of Metropolitan Toronto Condominium Corp. No. 710, [2010] O.J. No. 1252 (S.C.J.) (March 30, 2010)

The condominium’s board of directors, on behalf of the corporation, sought an injunction to prevent the holding of an owners’ meeting that was requisitioned by a group of unit owners. The condominium argued that while the meeting was property requisitioned, it should be deferred until after the court heard an application for the appointment of an administrator of the affairs of the condominium. The requisitioning unit owners did not oppose the appointment of an administrator, but the court noted that it was clear that they conceived the administrator more as an advisor to the board, not as a replacement for the board.

The court held that the condominium had met the required three-part test for granting an interlocutory injunction, and, as a result, the requisitioned owners’ meeting was postponed until after the hearing of the application for the appointment of an administrator.

The court concluded that there was a serious question to be tried. The application to appoint an administrator was very serious given the financial difficulties the condominium was facing and the fractional nature of the condominium’s governance. The condominium recorded a net operating loss of \$221,520.98 for the year ended 2009. Also, the mortgagee stated that if the court did not appoint an administrator, it would “seriously consider appointing a receiver and manager.” There were also numerous contentious issues surrounding the board and its relationship with the unit owners, including the board’s refusal to call a requisitioned owners’ meeting.

The court also concluded that irreparable harm would occur if the injunction was not granted, relying on York Condominium Corporation No. 25 v. Persaud for the proposition that “the holding of a meeting to elect a new board of directors has the potential to add further instability and uncertainty to an already difficult situation.” However, the court did recognize that boards can lose their support in the face of financial difficulties. As a result, the court thought it was best to postpone the meeting pending the hearing of the application at which all unit owners would have their say about whether an administrator should be appointed.

Finally, on the question of whether the balance of convenience favoured deferring the requisitioned meeting, the court concluded that it would “only add a further layer of litigation to this dispute and increase legal fees” if the requisitioned meeting was held before the application was heard.

Bottom line: the court must strike a balance between the differing views and interests of the unit owners, and, as such, a unit owner’s right to requisition an owners’ meeting is not absolute.



***Nipissing Condominium Corp. No. 4 v. Filfoyl*, [2010] O.J. No. 1101 (Ont. C.A.) (March 19, 2010)**

The declaration of the townhouse condominium limited occupancy of the unit to use as “one family residence”. Part I(1) of the declaration defined “family” as “a social unit consisting of parent(s) and their children, whether natural or adopted and includes other relatives if living with the primary group.” Problems began to arise in 2005, when a number of units were rented to groups of unrelated students attending the nearby Nipissing University. The condominium brought an application against the landlord unit owners to enforce the declaration and by-law.

The condominium was successful. The Court of Appeal upheld the decision on appeal. The court held that the unit owners were in breach of the Condominium Act, 1998, since the units were being occupied by multiple unrelated tenants in breach of the condominium’s declaration and by-law, which stated that the units could only be occupied as a “one family residence”. Finally, the court held that the “one family residence” restriction was not a violation of any of the enumerated grounds listed in the Human Rights Code.

Bottom line: a “one family residence” restriction will be upheld by the courts as a permissible restriction on occupancy within a unit.

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Volume 2010 – 2: April 2010

***Essex Condominium Corp. No. 89 v. Glengarda Residences Ltd.*, [2010] O.J. No. 882 (Ont. C.A.) (March 8, 2010)**

Glengarda Residences Ltd., developed the two condominiums (Essex Condominium Corporation No. 89 and Essex Condominium Corporation No. 101) in two phases. The two condominiums were later connected by a rotunda that housed facilities available to unit owners of both condominiums (the “shared facilities”). The shared facilities area was equipped with its own HVAC system, which Glengarda intended to sell to a financial institution who would then lease it back to the condominiums.

Glengarda issued a disclosure statement that only identified the cost of the shared facilities lease in the projected first year budget under the repairs and maintenance section. It projected the annual cost to be \$34,900.00, which would be split between the two condominiums. However, when the disclosure statement was prepared the HVAC equipment had not yet been acquired and the lease was not yet negotiated. As a result, no terms or comments other than the one line in the budget were included in the disclosure statement. The condominiums only learned of the sale and lease back transaction approximately six years later as a result of a building audit.

The condominiums commenced an action claiming that the disclosure statement provided by the developer lacked necessary information about the HVAC lease. The trial judge found in favour of the condominium since Glengarda’s failure to include any narrative in the disclosure statement about the leased HVAC equipment was misleading and therefore violated section 52(5) of the Act. The judge awarded damages equal to the full amount of the lease, less the costs for the first year of the lease which he found had been “clearly set out in the shared facilities budget.”

The Court of Appeal allowed Glengarda’s appeal and set aside the judgment. Although the disclosure was not as informative as it could have been, it did meet the requirements of the Act. Despite being hidden in the proposed budget, the lease was clearly identified as an expense, albeit incorrectly as repair and maintenance. Therefore, it was not misleading, incomplete or deceptive even though it did not disclose the specific terms of the lease being entered into. Even if the disclosure statement was misleading, incomplete or deceptive, the condominiums did not suffer any loss in relying upon the statement. In fact, the condominiums paid the annual lease expense for six years before the issue was raised.

Bottom line: read your disclosure statement carefully and in its entirety.

***Metropolitan Toronto Condominium Corp. No. 985 v. VanDuzer*, [2010] O.J. No. 571 (S.C.J.) (February 9, 2010)**

The unit owner wanted to make changes to the exclusive use common elements, mainly the lattice work, fencing, trees and planter boxes. She also wanted to erect a gazebo and a water fountain. The condominium approved some of the items, subject to the unit owner’s entry into a section 98 agreement. The condominium did not approve the gazebo or water fountain. The unit owner erected the gazebo without the condominium’s approval. The condominium brought an application for the removal of the gazebo.



The court sided with the condominium. The gazebo was an addition, and therefore fell under s.98 of the Act, requiring approval of the Board and entry into a section 98 agreement. The court held that condominium boards had both the obligation and the right to manage common elements, including what was placed thereon. There were no statutory criteria limiting the scope of the board's discretion in assessing a request and either giving or denying approval of proposed alterations, additions or improvements.

Bottom line: requests for common element changes are in the discretion of the board of directors.

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**Volume 2010 – 3: August 2010***Alfred v. Wellington Condominium Corporation No. 11*, [2010] O.J. No. 2823 (S.C.J.) (July 2, 2010)

The unit owners alleged that almost immediately after they purchased their unit in 1996, they began to notice water entering their basement. They contacted the condominium and requested that the water leak be remedied. The unit owners claimed they suffered damages as a result of the leaking water. They claimed that the corporation owed them a duty and that the damages were caused by the condominium's breach of that duty. The unit owner further contended that the damage was caused by "nuisance" and constituted an independent tort for which damages were sought in addition/alternative to the claims in negligence.

The condominium moved to permanently stay the plaintiffs' action on the basis that Section 132 of the *Condominium Act, 1998*, required that the dispute be submitted to mandatory mediation/arbitration.

At the hearing the unit owners argued, in addition to the issues of tort, negligence and nuisance, that their claim was governed by the previous *Condominium Act* which was repealed and replaced with the current Act in 2001. Although the current *Condominium Act, 1998*, requires the parties to a condominium dispute to use the mediation/arbitration process to resolve disputes, the previous *Condominium Act* did not.

The court held that procedurally the present legislation governed. Although the alleged negligence and resulting damages occurred before the present legislation came into force, the procedures established by the current legislation were to be followed.

The court then went on to determine that disputes with respect to property maintenance, damage, repair and/or neglect were disputes properly considered under Section 132 of the *Condominium Act, 1998*. The court reviewed the decision in *McKinstry v. York Condominium Corp. No. 472* in which Jurianz J. gave the term "disagreements" found in Section 132(4) a broad interpretation. The court agreed with that case and concluded that such a broad interpretation was consistent with the objective of providing a speedy and cost-effective method for resolving disputes between unit owners and condominiums. The court affirmed that only in limited circumstances, such as where the oppression remedy is expressly pleaded, a party may proceed with a court application. The court concluded that the dispute was a "disagreement" within Section 132(4) of the Act as the claims were directly connected with the condominium's maintenance and repair obligations under the declaration and the dispute ought to be resolved via mandatory mediation and arbitration.

The court stayed the plaintiffs' action.

Bottom line: If a unit owner alleges a condominium has breached its repair and maintenance obligations under its declaration, the dispute must proceed to mediation and arbitration. The case, when read in conjunction with the *Condominium Act*, stands for the proposition that all "disputes" between a unit owner and his/her condominium corporation, with the exception of incidences of alleged oppression, must proceed to mandatory mediation and arbitration. This case adds to the growing consensus that nearly any court action a unit owner brings against a condominium must first be resolved via mediation/arbitration.

* *This case was argued successfully by SmithValeriotte Law Firm LLP*



**Volume 2010 – 4: September 2010.*****Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, [2010] O.J. No. 3491 (Ont. S.C.J.)**

The Condominium brought an application pursuant to sections 117 and 134 of the *Condominium Act, 1998*, S.O. 1998, c.19 (the “Act”) against one of the unit owners, Korolekh alleging that she repeatedly violated section 117 of the Act. The Condominium sought to have Korolekh ordered to sell and vacate her unit, or in the alternative, a strict compliance order pursuant to section 134 requiring her to change her behaviour and comply with section 117.

The Condominium was a townhouse development in downtown Toronto with 30 units. There was a common element courtyard. The courtyard was described as a vibrant gathering place for the unit occupants prior to Korolekh’s arrival. After her arrival, it became desolate and deserted. The Condominium Corporation alleged various violations of section 117 of the Act, which prohibits dangerous activities in a unit or common elements if the activity is likely to cause damage to the property or injure an individual. Specifically, the Corporation alleged that Korolekh had breached numerous provisions of the declaration, by-laws, and rules and had repeatedly breached section 117 of the Act, including:

- physically assaulted other unit occupants;
- made racist or homophobic slurs;
- threatened other unit occupants;
- committed acts of mischief against the property, such as throwing eggs at the other unit occupants’ windows, killing their plants, tampering with the other unit occupants’ cable service, and stealing property belonging to other unit occupants;
- used her large and aggressive dog to intimidate other unit occupants and their children;
- failed to clean up her dog’s feces;
- failed to remove the dog after it was deemed a nuisance by the board of directors; and,
- played loud music at night.

The Condominium produced nine affidavits from various unit occupants, neighbours, and the property manager to support its allegations. Korolekh denied the allegations in a brief affidavit that never addressed any of the incidents. Rather, she claimed that the dispute had to proceed to mediation/arbitration.

The Court held that the matter was not one for which mediation was required. The breaches of section 117 of the Act were the primary concern of the Application, although breaches of the Condominium’s declaration, by-laws and rules were alleged.

The Court held that Korolekh had repeatedly violated section 117 of the Act and the Condominium’s declaration, by-laws and rules. The repeated violations were serious, persistent and had a significant impact on the Condominium’s environment and community. Korolekh was unmanageable. As a result, there was no sense in having her remain in the Condominium where the other unit occupants feared her. Accordingly, she was ordered to list and sell her unit within three months. In addition, she was to remove her dog within ten days, and abide by the Act, declaration, by-laws and rules. If she fails to comply with any term of the order, the Condominium can apply for an order for possession of her unit. She was also ordered to pay costs of \$35,000 to the Condominium.

Bottom line: this case confirms that where the alleged violations are primarily in relation to the *Condominium Act, 1998*, the Corporation is entitled to proceed directly to the Superior Court of Justice without first attempting to resolve the matter with mediation/arbitration. Where a unit owner persistently engages in activities which risk harm to the property or persons within the property, the court is authorized to order that unit owner to sell his or her unit.

Volume 2010 – 4: September 2010.***Jia v. Toronto Standard Condominium Corporation No. 1479, [2010] O.J. No. 3201 (Ont. S.C.J.)***

The plaintiff commenced an action against the Condominium, its property management firm, and the Condominium's Superintendent for damages arising out of her forcible arrest and eviction from the Condominium. The plaintiff is a real estate agent attending to the unit of one of her clients at the time of the alleged arrest and eviction. She was waiting for her clients in the lobby when she was asked to leave by the Condominium's Superintendent. She refused and he forcibly ejected her from the lobby. The events were caught by the security cameras. The defendants alleged that the ejection was justified given the plaintiff's conduct shortly before the ejection.

The court held that the plaintiff was not trespassing and the Superintendent had no reasonable basis for arresting her or ejecting her. In any event, the force used to eject her was unreasonable in the circumstances.

The court held that as occupier of the premises, the Condominium had a positive duty to take such care as was reasonable to keep the premises reasonably safe for all persons in attendance. The Superintendent was an employee of the Condominium, and as such, the Condominium was vicariously liable for his actions. However, the property management company was not liable since none of its employees or agents participated in the assault and battery.

The court held that the Condominium and Superintendent were jointly and severally liable for damages from the forcible arrest and ejection. Specifically, the plaintiff was awarded \$49,540.13 in damages, including \$8,500.00 for aggravated damages, \$30,000.00 for general damages, and \$10,000.00 for loss income.

Bottom line: The Condominium must be careful in its hiring and supervision of employees. Like any other employer, a Condominium will be vicariously liable for the actions of its employees when they are acting within the scope of their employment.

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**Volume 2010 – 5: October 2010*****Lahrkamp v. Metropolitan Toronto Condominium Corp. No. 932 (Ruling: October 29th, 2010).***

The unit owner requested a variety of records pursuant to section 55 of the *Condominium Act, 1998*, S.O. 1998, c.19; (the “Act”) but was refused by the Condominium. The unit owner brought an action in the Small Claims Court seeking \$500.00 in damages and production of the records sought. Pursuant to subsections 55(8) & (9) of the Act a unit owner may commence an action in the Small Claims Court to recover \$500.00 from a condominium that refuses a request to examine or copy records without reasonable excuse. In addition, section 55(10) of the Act permits a judge to order a condominium to produce records for examination by a unit owner.

The Condominium maintained that the records would only be produced for examination if the unit owner provided a satisfactory reason for the request. In refusing the request, the Condominium relied upon the exit language contained in subsection 55(3) which requires a condominium to permit examination of the records by a unit owner “all purposes reasonably related to the purposes of this Act.” Remarkably, the Court permitted each party to call a witness to testify or make submissions as to the proper interpretation to be given to subsection 55(3).

The Court disagreed with the Condominium that every request for documents must be accompanied by reasons for the request. Instead, a reason reasonably related to the purposes for the Act “may be self evident from the surrounding facts, or may be reasonably inferred from the nature of the record requested.” It will be up to the Court to review the facts and determine whether a condominium had a reasonable excuse in not providing the records for examination.

The unit owner requested records with respect to a front lobby expenditure, his own unit, an owners’ list, proxies and ballots from the previous AGM, notices of rules, and minutes from meetings of the board of directors. Some of the requested records were refused by the Court due to the time and expense required to produce such records and the failure of the unit owner to provide an adequate reason. Other records were granted including proxies and ballots from the AGMs of 2009 and 2010, the minutes from board meetings, and all notices of rules provided for in subsection 58(6) of the Act. The Court ordered the Condominium to produce a variety of records since the reason for the request was either self-evident from the records requested or could be inferred from the nature of the request. Other records were to be produced because they were fundamental to the rights of the individual unit owners.

The Court ordered the Condominium to pay the unit owner \$500.00 plus court costs of \$175.00 and prejudgment interest. In addition, the Court ordered the Condominium to produce for examination the proxies and ballots from the AGMs of 2009 and 2010, the minutes of the board of directors meetings, and all notices of rules provided in subsection 58(6) of the Act.

Bottom line: The lack of a reason is not a blanket provision in the *Condominium Act, 1998*, to refuse a record request. A condominium may require a reason if it is not self-evident from the records requested, the costs of production would be excessive or significant time has elapsed. The ‘open-book’ concept for records still appears valid, although moderated. However, this issue will not likely be concluded until the Ontario Court of Appeal weighs in, as this Small Claims Court decision is only persuasive to other courts.



Volume 2010 (6): December

Corchis v. Essex Condominium Corp. No. 28, [2010] ONCA 787 (C.A.)

Appeal by contractor from a judgment in a third party action requiring it to pay \$916,452 to the condominium on account of negligent misstatement, negligence and breach of contract. In the original action, the unit owner successfully sued the condominium for breach of contract and negligence for failing to keep the roof in a proper state of repair. The unit owner was awarded \$1,018,279.30 against the condominium for damages, pre-judgment interest and costs. The condominium issued a third party claim against the contractor.

The Court of Appeal concluded that the condominium could not prove negligent misstatement as it failed to act in a reasonable manner. When the original complaints were made by the unit owner the Board elected to ignore the retained engineers and architects. Instead, the condominium relied upon the advice of the contractor, declarant, and a unit owner. Rather than replacing the roof as recommended by the engineers, they decided to repair it.

Since the contractor promised to fix the leaking roof, the Court of Appeal concluded that the contractor had breached its contract with the condominium. However, the condominium had to bear the cost of the delay caused by its own negligence. The Court set aside the award of damages and awarded \$50,913.97 to the condominium.

Bottom line: The condominium should have relied upon its professionals. Instead of paying \$130,000 to replace the roof as suggested by the engineers, the condominium decided to follow the advice of the contractor, declarant and unit owner and repair the roof. In the end, the decision cost the condominium over \$950,000.00.

Lexington on the Green v. Toronto Standard Condominium Corp. No. 1930, [2010] ONCA 751 (C.A.)

The condominium's declaration provided that the condominium must purchase from the declarant a "Residence Manager Unit" for \$240,000.00 within 120 days of registration of the declaration. The first board of the condominium, appointed by the declarant, entered into a purchase agreement for the purchase of the manager's unit. After the turnover meeting, the new board of directors elected by the unit owners decided not to purchase the manager's unit. Instead, they sought to terminate the agreement pursuant to section 112 of the *Condominium Act, 1998*; (the "Act").

The declarant brought an application under section 134 of the Act for an order requiring the condominium to purchase the unit. The application judge dismissed the application, holding that section 112 of the Act authorized the board to terminate the purchase agreement within 12 months from the turnover meeting. She ordered the declaration be amended accordingly. The declarant appealed the decision arguing that the condominium could not avoid the purchase agreement since it arose from a provision in the declaration.

The Court of Appeal held that section 112 of the Act did not confer authority on the board to terminate an obligation arising from a declaration. Rather, section 112 of the Act allows a board to terminate agreements entered into on behalf of a condominium. Since the provision requiring the condominium to purchase the manager's unit was in the declaration and not in an agreement, the purchase could not be avoided under section 112. As a result, the condominium was ordered to purchase the manager's unit from the declarant.

Bottom line: This case confirms the courts hesitancy to override the provisions of a condominium's declaration, absent some error or inconsistency which arises out of the carrying out of the intent and purpose of the declaration or description.

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