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**Condo Law**

# Contemplating Litigation

## The Human Factor In Condo Law



The nearly-universal symbol of “justice” is a blindfolded woman holding a sword and a set of scales, to demonstrate the Court’s power and impartiality. With artificial intelligence disrupting almost every industry known to man, people have been wondering whether justice itself – or at least its dispensation – could be boiled down to a simple, cold, calculation of who is right and who is wrong according to the laws of the land. If justice truly is blind, then one would assume that indeed, robot judges are not too far away.

Academic studies have shown there is a human aspect in the manner that judges decide cases; for example, a judge may be more lenient after they’ve eaten a good breakfast. This is especially important in condominium law, where the parties themselves are very often people with real, everyday issues who are coming to the Court for help; and the Condominium Act is not always 100% clear-cut.

So is Lady Justice actually blind? Or is she peeking out from underneath her blindfold and looking at who are the parties standing before her?

**Condo Law is Inherently Human-Centric Law**

A condominium community is essentially a collection of strangers living together, bound by a certain set of rules forged in the condominium’s Declaration, By-laws, and Rules, as well as the Condominium Act. For many unit owners, their condominium unit will be the largest financial investment of their lives. Naturally, when you put so many strangers together with such a large personal stake on the line, emotions tend to run high.

Unlike commercial business disputes arising between large multinational corporations, a judge hearing a condominium law case is inherently likely to take into consideration the very real, very human emotions at play – rather than the strict letter of the law.

The high involvement of human nature in condominium law also means that there are endless fact patterns that arise in communities throughout Ontario. The Condominium Act itself is almost never entirely black-and-white; there is very often no guaranteed answer on who is right and wrong.

To add to these variables, most judges in the Ontario Superior Court of Justice do not come from a condominium law background themselves. Even the Condominium Authority Tribunal of Ontario (the “CAT”), a specialized Tribunal created by the province to handle condominium disputes, to our knowledge, currently only has 2 Members with a professional background working in condominium law.

In a perfect system of justice, every adjudicator, regardless of forum, would: 1) be well-versed in the intricacies of condominium law, and 2) have read all of the parties’ submitted materials in detail, in order to use the particular facts and relevant law to arrive at a fair and just outcome.

But we don’t live in a perfect system; judges are human beings, managing hundreds of case files from many different areas of law. Other types of cases on the judge’s docket that day, such as a catastrophic industrial accident or a billion-dollar merger, may seem much more important than a single condo dispute which only affects that 1 condo and that 1 specific unit owner. Last year, a judge ruled that condominium dis-

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putes were not sufficiently of the “public interest” to meet the threshold for free-speech protections, because such a dispute was confined only to that 1 particular condominium community.

So what does an overwhelmed human judge often do, when faced with a backlogged court system and 2 parties standing before them in what, perhaps, may seem like a relatively minor dispute in the grand scheme of the world?

Instead of issuing a complicated ruling based on the specialized legal principles of condominium law, some adjudicators will instead fall back on simply what feels the most “fair”.

But what feels “fair” at first instance, might not always be what is technically correct under condominium law. Sometimes, what is the most fair, practical, and just outcome in a condominium dispute runs contrary to established principles and practices of condominium law.

### **When Human Factors and Condo Law Collide**

Last year, a judge was understandably reluctant to allow the condominium corporation to sell an elderly woman’s condominium unit to enforce a lien. But because the condo had followed the strict letter of the law in compliance with the Condominium Act, the judge’s consideration of the “human factors” was outweighed by the judge’s obligation to follow the law.

In *York Condominium No. 187 v. Sandhu*, 2019 ONSC 4779 <<http://canlii.ca/t/j1z91>>, the condominium corporation correctly did everything it could under the Condominium Act. The tenant of a unit owner had commenced a \$5 million lawsuit against the condominium, lost in the Ontario Superior Court of Justice, and lost again on appeal to the Ontario Court of Appeal. Six days after the tenant filed his lawsuit against the condominium, the condominium’s legal counsel warned the unit owner in writing that her tenant’s lawsuit, if unsuccessful, could have disastrous financial consequences for her – since the

condominium would be charging back all of its legal costs to her unit’s common expenses.

The unit owner and her family, instead of urging their tenant to withdraw the lawsuit, filed an affidavit in support of the tenant’s lawsuit.

After the tenant’s lawsuit was dismissed, the condominium demanded payment

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of \$86,000 in legal costs from the unit owner and charged back same as common expenses.

The unit owner and her family vehemently refused to pay the chargeback. Eventually, the condominium’s legal counsel was forced to bring Power of Sale proceedings against the unit.

The unit owner and her family represented themselves in the Court. The unit owner was an elderly woman with limited English and minimal financial means, and argued that she never received the condominium’s letters and notices because she was out of the country.

Throughout the judgment in favour of the condominium, the Superior Court judge went to deliberate lengths to try and explain the realities of condominium law to the unit owner and her family. The judge ruled that the condominium did everything it could possibly do under the Condominium Act, to put the unit owner on notice about the possible chargeback of the condo’s legal costs incurred in defending against her tenant’s unsuccessful lawsuit. The judge also acknowledged the ultimate conflict between the “human factors” at play here, namely that the unit owner was an elderly woman about to lose her unit,

versus the established principles of condominium law:

*“It pains me to make an order that will take away an elderly woman’s home. Mr. Casalino-ovo has persuaded me, however, that the alternative would be to burden the 253 other unit owners of 3390 Weston Road with the costs of Mr. Saadilla’s litigation which they had no means of controlling.”*

The other unit holders of 3390 Weston Road purchased their units with the expectation that they could not be held responsible for such costs. The Condominium Act and the by-laws of the condominium absolutely forbade it. To deny this motion would break that trust and effectively send a message to condominium owners throughout the province that the courts will not enforce the laws that they have relied upon. That is not a tolerable message.”

Not every condominium case that gets brought before courts or tribunals ends up like the result in *Sandhu* though. Here, the human factors were arguably on the side of the condominium; because the innocent, non-defaulting unit owners should not be held financially liable for the behavior of 1 specific owner/tenant. But not every judge or adjudicator arrives at the same correct understanding of both the Condominium Act and the human factors at play.

Which is precisely why the CAT’s entirely-online system for adjudicating disputes is highly problematic, and will become even more problematic as the CAT’s jurisdiction expands.

### **The CAT Removes the Human Face from Disputes**

Currently, the CAT’s jurisdiction is limited to only hearing disputes about a condominium’s record-disclosure obligations under Section 55 of the Condominium Act. However, the Ontario government is considering, in the very near future, expanding the scope of the CAT’s jurisdiction to include more contentious condominium disputes such as nuisances like noise, odours, and smoke.

These types of highly-subjective, highly-contentious disputes between neighbours and condominium corporations usually boil down to credibility contests that, in the authors’ view, are not amenable to be-

ing resolved through an entirely-online dispute resolution system (the “ODR”).

For example, if one owner says that they smelled an intolerable cooking odour inside their unit one evening, yet the other owner says that they did not cook such foods in their unit that night, then who is the CAT Adjudicator supposed to believe? The Adjudicator will have to ultimately make a credibility assessment between the parties; namely, who to believe about what actually happened that evening.

For many years now, social justice critics of the current judicial system have rallied against what they perceive to be failures of the “in-person” trial system. These critics argue that human judges are not, in fact, blindfolded like Lady Justice, and will instead use their implicit biases to arrive at problematic conclusions about the credibility of certain witnesses. Indeed, in 2019, an Alberta judge acquitted a couple who treated their son’s illnesses with natural remedies rather than taking him to a medical doctor, because the judge did not accept the expert evidence proffered by the Crown prosecution, Dr. Bamidele Adeagbo – some believe it was due to the fact that he spoke in court with a Nigerian accent. Proponents of the “legal realism” school of thought would therefore argue that if the doctor’s evidence had merely been reviewed in writing by the judge without any in-person testimony, then Dr. Adeagbo’s expert evidence might

have been accepted as valid, since the judge would not have heard the doctor’s Nigerian accent.

But when you read above that the Crown’s medical expert was named “Dr. Bamidele Adeagbo”, what type of person did you picture? You did not need to see Dr. Adeagbo’s face or even hear his voice, for your brain to jump to that conclusion based on the doctor’s name alone.

Adjudicators are human beings too, like you and I, with explicit and implicit biases of their own. Without any face-to-face interaction between the Adjudicator and the witness, the Adjudicator will not be able to assess the person’s mannerisms or demeanor for signs of deception or lying. Instead, the Adjudicator will merely be taking what the witness is saying at “face” value.

When the emotional stakes of condominium law are that high, and the neighbours as well as the condominium are that heavily-invested in the outcome of the dispute, to have a CAT Adjudicator from faraway issue an edict about the everyday lives of these parties without ever having met any of the parties seems cold, calculated, and distant.

If the Small Claims Court, the Human Rights Tribunal, the Landlord Tenant Board, and numerous other “access to justice” forums in Ontario can all recognize the benefits of having an in-person trial – so that

the adjudicator can weigh the human factors at play, or so that the human parties can feel that their human need to be heard has been satisfied. – then why can’t the CAT?

Condominium law is inherently comprised of disputes between human beings in a human system of justice, involving the homes of people trying to live in a community with one another. Removing the human aspects of this human-centric type of litigation, benefits neither the unit owners or the condominium corporations who are governed and managed by human directors. CAT Adjudicators may still make certain assumptions about an online witness from their names, technical proficiency with the online system, or their style or level of writing. If so, we might as well come face-to-face with such biases and allow the human factors to fully come to bear.; instead of pretending like they don’t exist inside the ODR system.

At least with an in-person trial, instead of being a faceless online avatar, “Victor Yee” or “Antoni Casalnuovo” will be accompanied by a face, a persona, and a demeanor that can convey so much more than simply the written words on a page. If a picture is worth a thousand words, then actually seeing and interacting with someone in person must be worth billions.

Reading the printed words on a page can only convey so much – even if the writers are fantastic advocates! **CV**

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