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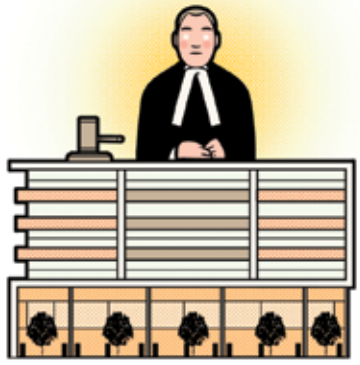
Case Law Update

Decisions From the Courts

- Owner's Unreasonable Expectations Over Parking Rights
- The Need for Legal Counsel to Review Status Certificates



Cheung v. York Region Condominium Corporation No. 759, 2017 ONCA 633

With parking coming at a premium at YRCC 759, the popularity of a restaurant (tenant) operating out of three units owned by Ms. Cheung was causing significant problems. Although YRCC 759 had 162 common element parking spaces, none were designated for the exclusive use of any of the units. From approximately 1989 to 2009, parking was on a first come, first serve basis – meaning that all of YRCC 759's parking spaces were routinely filled by restaurant patrons to the detriment of the complex's other business owners.

In an effort to address the long-standing parking problem, YRCC 759 enacted a by-law in 2009 permitting the leasing of two parking spaces to each unit owner. Although it was later discovered that the by-law was never registered on title to of any of the units (making it non-compliant with the requirements of the Condominium Act, 1998 (the "Act")), YRCC 759's unit owners nonetheless acted as if it was valid. Despite this, the monopolization of parking continued to be problematic, and in 2015, YRCC 759 implemented a new by-law (and registered it on title) to increase the number of parking spaces leased to each owner from two to four.

Ms. Cheung challenged the by-law, advocating that her tenant, the restaurant:

i) should be able to monopolize "all" of YRCC 759's 162 common element parking spaces;
ii) that in passing the by-law, YRCC 759's actions were oppressive; and,
iii) that the by-law itself was unreasonable, and accordingly, violated the Act.

On July 5, 2016, the lower Court disagreed that Cheung's expectations were either legitimate or reasonable, finding that the Act explicitly contemplated the possibility of what YRCC 759's by-law achieved. YRCC 759 was successful in having the application dismissed, and was awarded costs in the amount of $60,000.

The unit owner appealed.
On August 3, 2017, the majority of the Ontario Court of Appeal dismissed the appeal and upheld the decision of the lower Court, confirming that a condominium corporation has the ability to lease its non-exclusive use common element parking spaces to its unit owners. The Court affirmed that Section 21 of the Act provides a condominium corporation with authority to lease a part of its common elements by by-law, and further, that Section 56(1) of the Act enables a condominium's Board of Directors to create by-laws to govern the use and management of the assets of the corporation.

Although the unit owner argued that her expectation to have the use of all of YRCC 759's common element parking spaces was integral to her decision to purchase her units, the Court of Appeal found it reasonable to assume that all other unit owners would have had that same expectation. The Court went on to distinguish parking spaces from an exclusive use balcony, where there would be no expectation that any other unit owner could use that owner's space.

In reaching its decision that the 2015 by-law was valid and complied with the Act, the Court of Appeal adopted the reasons of the lower Court, reiterating that it is not the job of the Court to second-guess or substitute its own decision for that of a Board unless clearly unreasonable or contrary to either the Act or the corporation's governing documentation.

Affirming that that the by-law was reason-

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able and not oppressive, the Court of Appeal agreed that the unit owner's real complaint was not that YRCC 759 treated her differently from other owners, but rather that it did not treat her differently by permitting her tenant to continue to monopolize all the parking. While the purpose of the oppression remedy is to protect an owner's reasonable expectations, it was confirmed that the unit owner's unreasonable expectation lead to the parking problems at the centre of the litigation in the first place. In dismissing the appeal, YRCC 759 was awarded costs in the amount of $27,759.12, for an overall total of $87,759.12.

Author's Note: *Although many problems faced by condominium boards are routine at first glance, mundane issues can often turn out to be more complex than they appear. This decision reinforces that Courts will be reluctant to interfere with the daily affairs of a condominium corporation, provided that the Board has acted both reasonably and within the scope of its authority granted by the Act and/or the declaration, by-laws, or rules. We recently used this same approach to successfully challenge a Committee of Adjustments' Minor Variance at the Ontario Municipal Board, which was based on the assumption that a single owner had the use of 100% of the parking to the exclusion of all other owners.*

Keele Medical Properties Ltd. v. TSCC No. 1786, 2017 ONSC 1813

The background to this case is complex but nonetheless relevant, and begins with TSCC 1786's tumultuous history with its Declarant, Westmount, and its former Declarant-controlled Board of Directors. During the new Board's efforts to reconstruct TSCC 1786's almost non-existent financial history, it was discovered that a Special Assessment levied by the former Board against owners of parking units only had resulted in some unit owners paying amounts disproportionate to what was statutorily required, and others contributing insufficient and/or no monies towards same whatsoever. A legal opinion confirming that the Special Assessment was contrary to the Condominium Act, 1998 was obtained by the Corporation on November 14, 2015; however, no immediate decision was made by the Board about what to do about it.

Keele acquired title to the commercial units shortly after this discovery on December 10, 2014 as a result of an agreement of purchase and sale ("APS") entered into with Westmount dated August 11, 2014. After Keele entered into the APS, it was provided with a status certificate dated April 11, 2014, which TSCC 1786 had previously issued to Westmount in connection with a separate and failed transaction. Keele's lawyers were subsequently provided with two additional Status Certificates by TSCC 1786, dated October 20, 2014 and December 5, 2014, respectively. The latter Status Certificates contained several "warning paragraphs" of qualifications concerning the financial turmoil experienced by the Corporation, including the very real possibility of an impending increase in common expenses or special assessment; however, the Board had not yet made a decision on what to do with the Special Assessment.

On January 15, 2015, TSCC 1786's Board decided 1) to cancel the "Original" Special Assessment due to its non-compliance with the Act; and 2) that a "New" Special

"TCECC No. 1508 has wasted considerable time and expense in my view by insisting on this litigation when mediation was available to the parties. It could have achieved a more conciliatory resolution long before now."

- Michael G. Quigley, J.
Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna, 2012 ONSC 1504 (CanLII)

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Assessment would be levied in the proportionate interests of all units as set out in Schedule "D" of TSCC 1786's Declaration, to be implemented on March 1, 2015. Unit owners who had contributed to the Original Special Assessment would receive a credit of all amounts paid, to be applied as prepaid common expenses towards future common expense obligations at TSCC 1786, including payment of the New Special Assessment. Notice of the New Special Assessment was issued by TSCC 1786 to all unit owners on January 20, 2015.

Westmount had owned 79 of the 360 parking units at TSCC 1786 (21.9%), which were subsequently transferred to Keele as part of the purchase of the commercial units. However, Westmount never contributed to, nor was it even assessed with the Original Special Assessment. Thus, no credit was applicable to these parking units, and Keele was advised that it would have to pay the New Special Assessment for the commercial units in full.

Surprise! Keele refused to pay the New Special Assessment, alleging that TSCC 1786 had misrepresented material information and that there was inadequate disclosure in the three Status Certificates it received prior to its purchase of the commercial units, thereby rendering it exempt. TSCC 1786 registered a condominium lien against title to the commercial units on May 29, 2015 to secure payment. Keele then commenced this Application, also arguing that the condominium lien registered by TSCC 1786 was invalid and, therefore, unenforceable.

In considering the critical issue of the validity of the Special Assessment before it, the Court reviewed the wording of the three Status Certificates issued to Keele and found that each provided sufficient evidence of the fact that TSCC 1786 was having financial difficulty, with the October and December Certificates containing additional information: 1) to unequivocally inform a prospective purchaser that TSCC 1786 was operating at a deficit; 2) that the Board was considering the need for a Special Assessment; and 3) that TSCC 1786 was in a state of administrative difficulty, without copies of all financial records belonging to it and with incomplete records of payments and owner contributions to reserve fund accounts.

Additionally, the Court found that subsequent to Keele's receipt of the April Status Certificate from Westmount, it had negotiated additional terms into Schedule "A" of the APS, which provided Keele with a contractual right to set-off monies otherwise payable under a vendor take-back mortgage for any future special assessment, indemnification for any monies owed on the Original Special Assessment, and/or protection against an increase of common element fees. This appeared to the Court to suggest that Keele was aware of TSCC 1786's poor financial situation, and had even taken additional steps to protect itself against future expenses. Application dismissed!

In the view of the Court, the "general but no less material disclosure" that TSCC 1786's Board was considering the need for a special assessment, coupled with the notice of TSCC 1786's state of administrative difficulty, fully and accurately informed the prospective purchaser of TSCC 1786's knowledge of the state of its finances, including the potential of an impending Special Assessment in the 2014-2015 fiscal year. Accordingly, finding that there was adequate disclosure in the three Status Certificates, the Court confirmed that Keele was not exempt from paying the New Special Assessment and found TSCC 1786's condominium lien to therefore be valid and enforceable.

Author's Note: *This case serves as a reminder to prospective purchasers of condominium units that it is crucial to have legal counsel undertake a thorough review of a Status Certificate to ensure the purchaser is getting what they believe they have transacted for. For condominium corporations, this case underlines the importance of involving your legal counsel in drafting the appropriate wording for a Status Certificate when unusual circumstances present themselves. Rule of Thumb: provide sufficient information so that a reasonable and prudent purchaser knows to make further inquiries if inclined to do so. Unfortunately, as this case underlines, litigation is sometimes unavoidable, even when a condominium corporation adheres to (and even goes above and beyond) this guideline, and even when no further inquiry was made by the purchaser.*