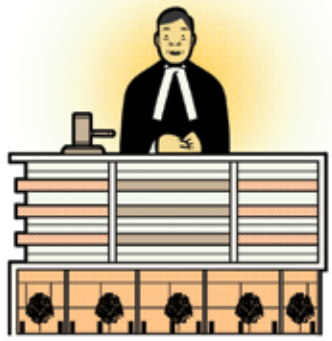
An Nguyen
Associate
Gardiner Miller Arnold LLP

Andrea Lusk
Associate
Gardiner Miller Arnold LLP

Case Law Update

Decisions From the Courts

- Important Principles for Insurance Deductible Chargebacks
- A Board's Poor Communication and Management Skills Pits Townhouse Owners Against High-Rise Unit Owners



Lozano v. TSCC 1765 – Negligence is not the standard in section 105 chargebacks for an owner's "act or omission"

This case revisits important principles for insurance deductible chargebacks, a typical scenario for many condominium corporations when there is a water leak from a unit damaging units below and the common elements.

The unit owners in this case, the Lozanos, had replaced a float in the toilet tank of their bathroom that had developed a crack in it in at some point in April 2018. The Lozanos left the country later that year for approximately 5 months, returning in April 2019, and during that time, they had a family member and friend visit the unit bi-weekly. In early April 2019, a water leak had begun from the toilet. The corporation retained a plumber, who reported that the leak had occurred as the result of a broken ballcock at the base of the stem, which caused water to constantly fill and overflow the toilet. The leak caused damage to the Lozanos' unit and units and hallways below.

The corporation's by-law provided that when an owner commits an "act or omission" that leads to damage, the owner will be liable to pay the lesser of the cost of repair and the deductible limit of the corporation's insurance deductible pursuant to section 105 of the Condominium Act (the "Act"). The total cost of the repairs in this case was approximately $5,500 and less than the corporation's insurance deductible. The corporation eventually registered a lien against the unit for the cost of repair and legal costs, which the Lozanos paid under protest.

The Lozanos sought a court declaration that the corporation had no lawful right to charge back the repair cost to the unit because they did not commit an "act or omission" that would make them responsible. The Lozanos submitted that they maintained the unit and that repairs were promptly made in 2018. The Lozanos asked the court to consider a higher negligence threshold of proving an act or omission, which would mean that no unit owner could be held financially responsible for repair costs except in cases where they deliberately caused damage.

The corporation asserted that the Lozanos committed an act by failing to have a plumber repair their toilet when the plastic parts first showed signs of decay in April 2018 and should have replaced the entire toilet part and not just a component.

The court reviewed the legal framework and case law regarding chargebacks of this nature, noting:

- The standard for establishing an act or omission is neither negligence nor strict liability but exists somewhere between the two;
- Owners must act reasonably in maintaining their units, but an unforeseen incident will not absolve a unit owner of their financial responsibilities towards repair costs;
- An owner's act or omission does not have to be negligent and the damage does not have to be foreseeable to make an owner liable for the cost of repair;
- Even when an owner is not aware that a unit component is broken, the court nevertheless found that this constituted an obvious omission to maintain and repair the component, for which the owner was liable;
- The negligence standard is not to be applied in condominium disputes of this kind. The standard is between negligence and strict liability and is closer to the latter.

The court further explained that condominium governance entails a balancing act since an owner's acts or omissions

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may have immediate and significant impact on neighbours given the proximity of condominium living. If the Lozanos' position for a higher negligence threshold was accepted, then other owners would be burdened with paying for repair costs or insurance deductibles more regularly. Sections 105(2) and (3) of the Act reflect a policy decision that protects all unit owners against recurring insurance deductible payments or the lesser cost of repairs. These costs should not be covered as a common expense.

The court ultimately found the Lozanos committed an act or omission in failing to maintain their toilet and have it inspected by a plumber. The Lozanos were aware that the toilet had previously malfunction but did not employ a plumber who could make thorough repairs. The court dismissed the application as the corporation was entitled to charge back the cost of repairs under section 105 of the Act and its by-law.

This type of scenario arises frequently in condominium living and is hotly contested by unit owners (and their insurers). But condominium corporations are entitled to charge back the lesser of the cost of repair and the deductible limit of the corporation's insurance policy under section 105 of the Act and its applicable by-law in circumstances when an owner commits an act or omission. This case reaffirms that a higher negligence threshold is not applicable in the condominium context which is meant to protect the ownership at large.

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Beswick v. YRSCC 1175 – The importance of adequate notice to owners

This case involves a mixed high-rise and townhouse condominium corporation where a dispute arose between a group of townhouse owners and the corporation, whose board of directors was controlled by high-rise unit owners.

The townhouse owners brought an application against the corporation for damages for oppression, alleging that the "high-rise" majority of the board treated the townhouse unit owners inequitably, oppressively, and charged them for expenses not previously charged back to owners without notice.

The corporation took the position that its conduct was in the best interest of the community and that they treated the townhouse owners fairly and provided appropriate notice. The corporation maintained that the previous board had poorly managed the corporation and that the current board was returning the corporation to compliance with its declaration and by-laws. The corporation further asserted that the townhouse owners should have been aware of their responsibilities as set out in the declaration and no notice was required

to be given in implementing the declaration.

Despite the corporation's position, board members did not appear to be aware of what was in the declaration when cross-examined on their affidavits.

The crux of the dispute revolved around four core issues:

(a) Steps and interlock of the townhomes - The townhouse owners were charged approximately $5,000 each for the replacement cost of their exclusive use steps and interlocking. The corporation gave no advance notice or warning to the townhouse owners that they were obligated to repair the exclusive use common elements at their own cost before completing the work, as required under section 92 of the Act. The corporation took the position that the owners were responsible for knowing what their responsibilities were under the declaration and notice was not required. Further, the corporation replaced the steps and interlocking of townhouse units that did not need it and initially paid for the project from the reserve fund (which is only to be used for major repair and replacement of common elements under s.93 of the Act). The court held that without notice being given as required by section 92, owners did not have the opportunity to do their own work and should therefore not be responsible for these retroactive repair costs.

(b) Water charges - The board sent communications to the townhouse owners charging them retroactively for water consumption for the previous year. No prior notice was given to these owners and the water charges were not based on actual water meter readings, contrary to the corporation's declaration, which required charges based on a reading of the unit's water meter. The court ordered that the townhouse units should be charged based on meter readings going forward and that the corporation was responsible for the retroactive water charges. The court further found that the corporation's conduct was not fair or equitable towards the townhouse units.

(c) Landscaping and snow removal - For the first time since the condo was registered, the corporation unilaterally decided that the townhouse units were responsible for the maintenance, landscaping, and snow removal of the front verandas and gardens, contrary to the declaration. There was no corresponding decrease in the monthly common expense fees. The court confirmed that maintenance and landscaping of these components was clearly the responsibility of the corporation as set out in the declaration. The court further determined that the snow removal was also the corporation's responsibility.

(d) Amenities – The townhouse units were unilaterally required to pay for amenities for the first time since 2011. However, the court was satisfied that these charges were imposed pursuant to the declaration.

The court was critical of the board for its poor management and communication skills. The board failed to provide notices to owners in a timely manner and failed to send notices in the manner specified by owners (i.e. mail or email). The court emphasized that clear and timely communications with owners would have improved the atmosphere and reduced animosity at this community.

The court was also critical of the board's lack of adherence to the declaration, bylaws, and rules and overall failed leadership, but ultimately found that the board did not act oppressively because their actions were not found to be unfairly prejudicial, unfairl in disregard or oppressive. No damages for oppression were ordered.

This case demonstrates the importance of providing adequate notice to owners, especially under section 92 of the Act, where owners must be given an opportunity to complete work themselves before the corporation can and charge back the cost. Condominium corporations that do not provide adequate notice under section 92, giving an opportunity for the owner to do work themselves, should not expect to recover their costs. The case also stresses the importance of clear communication between boards and the owners.

Editor's Message

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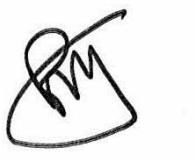
success at the Tribunal will, in most instances, come without a costs award to offset the condominium's legal fees.

Ultimately, making owners not a party to the litigation bear such costs in their entirety raises fairness issues. Given this situation, it is conceivable that condominiums with an indemnification provision covering costs incurred due to rule violations may charge their Tribunal-related legal fees to the losing party's unit in the same manner as common expenses (which could potentially generate additional litigation). It is also conceivable that some condominiums may wish to look towards their managers for representation at the Tribunal. Managers who find themselves in this situation need to be extremely careful about not crossing the line into providing legal services, otherwise they may find themselves in trouble, not just with the CMRAO, but also with the Law Society. Moving forward, it is likely that the expanded CAT jurisdiction will eventually give rise to specialized, affordable CAT paralegals, much like what exists today at the Landlord and Tenant Board.

All told, time will tell how condominiums react to this situation. To date, there have been no published decisions under the Tribunal's expanded jurisdiction, but it is safe to say that it is no longer "business as usual" when it comes to routine pet, parking, and storage disputes.



Brian Horlick
B.Comm, BCL, LL.B., ACCI, FCCI