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Case Law Update

Decisions From the Courts

- Grandfathering Smokers Would Defeat "Reasonable Limitations"
- Warantless Police Entries and Condo Charter Violations
- Board Conduct Deemed Not Oppressive in Kitec Replacement Project

Wellington Condominium Corp. No. 31 v. Silberberg, 2019 ONSC 6594
The Applicant, Wellington Condominium Corp. No. 31 ("WCC 31"), commenced a court application against Mr. and Ms. Silberberg, due to ongoing complaints of tobacco smoke originating from the Silberbergs' common element balcony. WCC 31 sought an order enforcing compliance with WCC 31's "no smoking" Rule (the "Rule").

Among other things, the Silberbergs argued that the Rule was improperly passed and/or that the Rule was unreasonable, and should not be enforced by the Court.
When the Silberbergs first moved into their unit in 2009, they were advised that there were no conditions/restrictions relating to smoking (i.e. residents were permitted to smoke in their units and on the exclusive-use common element balconies). At some point after the Silberbergs took occupancy, WCC 31 began receiving complaints about smoking from other residents.

As a result of those complaints, WCC 31 proposed a new Rule, which prohibited smoking on any part of the common elements or the exclusive-use common element balconies. The owners of WCC 31 requisitioned a meeting to discuss and vote on the proposed Rule. Although the Silberbergs submitted a proxy to vote against the proposed Rule, they did not attend the requisition meeting in person. The Rule was ultimately adopted by the owners, with minor modifications.

The Silberbergs continued to smoke on their exclusive-use common element balcony, and WCC 31 continued to receive complaints from surrounding residents.

Firstly, the Court held that there was no evidence indicating that the Rule was improperly passed. Importantly, since the Silberbergs were not present at the requisition meeting nor did the Silberbergs raise any objections to the requisition meeting at the time, the Court found that the Silberbergs could not now raise objections in their defence to the court application. In other words, the Silberbergs waived their right to object when they failed to attend the requisition meeting in person and failed to expressly object to the requisition meeting.

Secondly, the Court considered whether or not the Rule was reasonable, and in doing so, noted that judges should only interfere with a condominium corporation's Rule where it is clearly unreasonable. The Court, in addressing the harmful effects of second hand smoke, considered the legislative environment in Ontario (i.e. the Smoke-Free Ontario Act 2017 and the Tobacco Damages and Health Care Costs Recovery Act), and concluded that it was not unreasonable to impose further restrictions on smoking on the property. In addition, the Court also acknowledged that smoke from cigarettes produces an odour, which could lead to claims of nuisance from other residents.

Thirdly, the Court considered whether the Rule should have permitted existing smokers in the building to smoke on their balcony (i.e. should existing smokers be "grandfathered"). The Court found that grandfathering existing smokers was not necessary, nor was it required by the Condominium Act, 1998. The Court went on to explain that grandfathering existing smokers would defeat the purpose of the Rule.

An important point to be taken from this case is that "grandfathering" is not statutorily required, and in some cases, it may not be necessary at all. WCC 31's decision to not grandfather existing smokers, in this case, was particularly reasonable in light of the fact that existing smokers were still permitted to smoke in their units, and were also at liberty to walk off the property a certain distance to smoke . As the judge described, "the limitations on smoking that

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the condominium has imposed are entirely reasonable and do not leave the Silberbergs without options".

R v. Yu, 2019 ONCA 942

This Court of Appeal decision, which was rendered on December 2, 2019, deals with the constitutionality of investigative techniques employed by the police in condominiums. This case also dealt with the authority of the board of directors and the property manager to permit the police access to the common elements, and to install hidden surveillance cameras, without a warrant.

In this appeal, the appellants challenged, among other things, warrantless entries by the police into the common element areas of multi-unit buildings and the warrantless placement of hidden cameras in the hallways as being a violation of their right to be secure from unreasonable search and seizure, pursuant to Section 8 of the Charter of Rights and Freedoms.

The Court of Appeal held that the vast majority of the warrantless police entries onto the common elements did not violate the Charter. A condominium corporation has a statutory duty pursuant to subsections 17(1) and 17(2) of the Condominium Act, 1998, to administer the common elements and to manage the property of the corporation on behalf of the owners. The Court held that the board and property management have the authority to regulate access to the common elements and accordingly, the appellants would have reasonably expected that the board and property management could consent to police entry into the building and its hallways and, in fact, would be likely to consent to police entry if informed of the possibility of criminal activity within the building.

The Court found that it was not reasonable for the condominium board or its delegates to consent to surreptitious video surveillance on behalf of the residents

The Court, however, did take issue with the placement of hidden hallway cameras installed prior to the issuance of a warrant, notwithstanding the fact that the police had obtained the consent of the condominium manager prior to their installation. The Court found that it was not reasonable for the condominium board or its delegates to consent to surreptitious video surveillance on behalf of the residents.

The Court, of course, noted that camera surveillance by police is distinguishable from camera surveillance by the condominium corporation. However, surveillance in condominiums was notably commented upon as follows:

"A resident or occupant's reasonable expectations surrounding camera surveillance in a condominium building depend on whether the cameras are visible, and whether the resident has been informed by the condominium management as to the location of any security cameras installed in the building. If there is no visible camera, and if the resident has been told that there are no security cameras, then residents are entitled to expect their movements are not subject to camera surveillance".

Hawkins v. Toronto Standard Condominium Corporation No. 1696, 2019 ONSC 2560

This dispute arose as a result of Toronto Standard Condominium Corporation No. 1696's ("TSCC 1696") decision to initiate a building-wide project to replace Kitec piping, which is known to be defective. Although the replacement of the Kitec piping was the responsibility of the individual unit owners, TSCC 1696 was able to negotiate a bulk rate with a contractor and spread the inspection and engineering costs over many units, making it more economical for unit owners. Unit owners were provided with the option of opting out of using TSCC 1696's contractor and retaining their own contractor. Every owner except for the applicant, Ms. Hawkins, opted into the program.

Ms. Hawkins took issue with the Kitec re-

placement project and with being required to use TSCC 1696's contractors or otherwise follow their requirements with respect to the piping replacement.

In October, 2017, Ms. Hawkins claimed that, when she opened her walls, only copper piping was installed in her unit and stated that there was no replacement of Kitec piping with copper, notwithstanding that TSCC 1696 had photographs of Kitec piping in her unit. After much back and forth, TSCC 1696's engineers accessed the unit, where they found that that the Kitec piping visible in the photographs had been replaced with copper piping, that showed evidence of poor workmanship.

In the end, the court found that TSCC 1696 acted reasonably in seeking to ensure that the piping in the unit was safe and that its conduct was not oppressive

As a result of the engineers' findings, TSCC 1696's lawyers asked Ms. Hawkins to provide: (a) the name and contact information of the plumber that carried out the piping replacement work, along with a copy of their license, liability insurance and, if applicable, WSIB clearance certificate; (b) a copy of the closed City of Toronto Building Permit for the piping replacement work in the unit; and, (c) the signed report of a professional plumber showing a successful air or water pressure test following the piping replacement work.

Ultimately, it was confirmed that the piping replacement was conducted without a permit. Ms. Hawkins contacted a plumber to perform an air pressure test. That test could be completed either by isolating the suite at the main valve (outside of the unit) or from within the unit. TSCC 1696 refused to allow Ms. Hawkins' plumber to access the main valve because it would involve shutting off a main valve, which would impact other units in the building. Initially, TSCC 1696's contractors were not willing to review and approve the work conducted in Ms. Hawkins' unit, as they were not willing to assume the risk. Eventually, TSCC 1696 convinced its own contractor and engineer to conduct the pressure testing after TSCC 1696 signed an indemnity in favour of the contractor. The pressure testing was completed in December, 2018 and the plumbing passed the air pressure test.

Ms. Hawkins claimed that TSCC 1696's conduct was oppressive, that TSCC 1696's focus on securing compliance with the Kitec Replacement Project blinded it to other options, and that TSCC 1696 was so wedded to its position that it initiated and maintained a campaign of questionable conduct from October 2017 to December 2018.

In coming to a decision, the court considered, among other things, the following:

- TSCC 1696 introduced the Kitec Replacement Project to the entirety of the condominium and all owners were given the opportunity to opt-in or opt-out of the program;
- The work throughout the entire building needed to be coordinated and TSCC 1696 needed to protect the safety and security of the property;
- Ms. Hawkins initially denied that the piping in her unit had been replaced; and,
- TSCC 1696 had an obligation to ensure that dangerous conditions did not exist in the building. Once the board learned that Kitec piping was present, it had a duty to take steps to eliminate the potentially harmful condition, and Ms. Hawkins should have reasonably expected that TSCC 1696 would need to take steps to assure itself of the safety of the work in her unit.

In the end, the court found that TSCC 1696 acted reasonably in seeking to ensure that the piping in the unit was safe and that its conduct was not oppressive. It was not unfair or disrespectful to Ms. Hawkins' interests for TSCC 1696 to insist on confirming the safety of the piping in her unit.