Brian Horlick
B.Comm., B.C.L., LL.B., ACCI, FCCI
Horlick Levitt Di Lella LLP

Timothy M. Duggan
B.A., LL.B.
Horlick Levitt Di Lella LLP

Case Law Update

Decisions From the Courts

- A Residential Unit is Not a Hotel, Regardless of Length of Lease
- When a Boardroom becomes a Ballroom

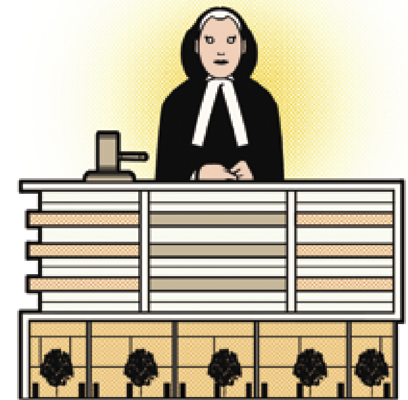


ILLUSTRATION BY JASON SCHNEIDER

Kapoor et al v TSCC 2450 and TSCC 2477 (Ontario Superior Court of Justice, May 21, 2019)

TSCC 2450 and TSCC 2477 are sister corporations, being phases 3 and 4 in a large condominium development. The corporations are located in close proximity to the Rogers Centre. Together, they consist of over 800 residential units plus recreation facilities.

The Kapoor family are owners of units in both condominium corporations and are directly involved in a company called North American Private Accommodations Inc. The website for this company advertises its services as including executive rentals as well as hotel apartments and short-term rentals. This company provides its guests with check-in and check-out times as well as the ability to make online reservations through sites such as Expedia.com and Booking.com. Since purchasing their units, the Kapoor family asserts that they have rented out their units as executive rentals for a minimum of seven days to members of a single family.

In 2018, residents of the two corporations began expressing concerns about short-term rental activity in the buildings. In response to the concerns raised, the boards decided to each pass new rules regulating transient tenancies and hotel-like activities in the units. The new rules provided in part that no residential unit was to be occupied under a lease or sublease for transient, hotel-like or hosting purposes. These rules, of course, soon began to have a dampening affect on what was to that point a flourishing business.

Under s. 58(2) of the Condominium Act (the"Act"), rules must be reasonable and consistent with the Act, the declaration and the by-laws. Accordingly, the Kapoor's took the position that the rules were invalid and unenforceable as being inconsistent with the declaration which provided in part that there are no restrictions on the minimum or maximum length of lease of a residential unit.

The condominium corporation, on the other hand, took the position that the rules were valid as being consistent with the declaration which also provided that each residential unit shall be occupied and used as a private, single-family residence and for no other purpose.

Soon after, the Kapoor's brought an application in the Superior Court of Justice where they sought a declaration that the rules were invalid and unenforceable. The condominium corporations then brought their own application seeking an order that the Kapoors comply with the new rules.

One of the tasks the court had to deal with was to review the manner in which the condominium corporations had interpreted their declarations. To this end, the court's position was that in reviewing a condominium corporation's interpretation of its declaration, the standard of review is one of reasonableness. Referring to the Court of Appeal decision in LCC 13 v Awaraji, the court stated that it is for the condominium corporation to interpret its declaration and that so long as its interpretation is not unreasonable, the court should not interfere.

In this case, the court was of the view that the condominium corporations' interpretation of their declarations, which focused on the nature of the use rather than on the length of any lease of the units, was reasonable. The court was further of the view that if the use complied with the re-

The Property Management Company where the Principals of the firm are directly involved with the day to day operations of your Condominium.
We offer more than 40 years of combined experience to our clients in the Condominium community.

Direct communications with our clients is the cornerstone of our business.

Office:
100 Bass Pro Mills Drive
Unit 36
Vaughan, ON L4K 5X1

Phone: (905) 760-7890
Fax: (905) 760-7855

Email and Website:
info@atrensmgmt.com
www.atrensmgmt.com

quirement of a private, single-family residence, there is no restriction on the length of the lease. Additionally, the court noted that the condominiums' interpretation of the meaning of "private single-family residence" was consistent with a number of previous court decisions which understood that such use was inconsistent with hotel-like operations, such as that which the Kapoors were engaging in.

The court referred to the decision in Ottawa-Carleton Standard Condominium No. 961 v Menzies where owners were leasing their unit on a repeated short-term basis in a hotel-like operation contrary to that corporation's single-family dwelling provision. In the Menzies case, the court found that single family use cannot be interpreted to include one's operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. The court was of the view that single family use was incompatible with the concepts of "check in" and "check out" times, "cancellation policies", "security deposits" and "cleaning fees".

> The court held that unit owners in multi-unit residential condominium buildings are not entitled to perfect silence in their units

In this case, the Kapoors asserted, which assertion was not substantiated, that despite the short-term nature of their activities, they were in fact collecting identification from their guests to ensure that those guests were from a single family and so the terms related to single family use had to be interpreted differently.

Despite the above assertion, the court took the position that while the no minimum lease provisions made the case more difficult, the condominium corporation's interpretation of their declarations was reasonable. Specifically, the court was of the view that it was reasonable for the condominium corporations to read the no minimum lease provisions and the single-family use provisions together in a manner that did not prioritize the no minimum lease provisions. The court was further of the view that it was therefore open to the condominium corporations to read the single-family use provisions as focusing on the nature of the use and to conclude that it did not permit a hotel-like operation.

After dealing with the Kapoor's application, the court then dealt with the condominium corporations' application for a compliance order under s. 134 of the Act. The court allowed the application and ordered the Kapoors to comply with the provisions of the Act, the declarations and the rules. As a result of this, the Kapoors were prohibited from continuing to operate their short-term rental business.

Hogan v. Metropolitan Toronto Condominium Corp. No. 595 (Ontario Superior Court of Justice, January 22, 2019)

The applicants, Ms. Hogan and Mr. Davis, were the owners of a dwelling unit located on the ground floor of the respondent condominium corporation, having purchased their unit in 1982. The corporation's common element amenities included a room known as the 'boardroom' that was located on the first level below grade, below the applicants' unit. Historically, the corporation's rules had not permitted the playing of music in the boardroom. However, in 2017, in response to requests from several unit residents, the corporation's board of directors decided to amend the rules to permit the playing of music in the boardroom at a reasonable volume. Notice of this amendment to the rules was sent to the unit owners in August, 2017.

The applicants opposed the proposed amendments to the rules, as they did not want to be able to hear any music from the boardroom in their unit regardless of the volume of the music. To this end, the applicants, together with other unit owners, submitted a requisition for a meeting to vote on the proposed rule. The meeting took place

in October, 2017. Although the owners who attended the meeting favoured permitting the playing of music in the boardroom, due to procedural issues at the meeting the proposed rule was not passed.

Before the corporation could put forward a new rule for a new vote of the owners, the applicants retained counsel, who wrote to the corporation in November, 2017 to take the position that any audible music from the boardroom in the applicants' unit, regardless of how loud it was, would be oppressive to the applicants. The corporation offered to conduct acoustical testing in the applicants' unit to determine whether the noise transmitted to the applicants' unit from the boardroom exceeded objective thresholds for noise transmission in a multi-unit residential building. This offer was refused by the applicants.

In April, 2018, the corporation circulated notice to the owners of a revised new rule that, like the first proposed amendment, would permit the playing of music in the boardroom at a reasonable volume. The unit owners, including the applicants, did not submit a requisition for a meeting of owners to vote on the revised new rule. Instead, the applicants commenced this application, seeking a declaration that the proposed new rule was oppressive contrary to section 135 of the Act, and an order preventing the corporation from permitting any music to be played in the boardroom. The applicants then brought an urgent motion for an interim injunction restraining the new rule from coming into effect. The applicants' motion was heard by the court in May, 2018, and was dismissed.

In January, 2019, the applicants' application was heard by the court. By the time of the hearing, the rule permitting the playing of music in the boardroom at a reasonable volume had been in place since May, 2018, and there was no evidence before the court of any complaints relating to that music. The applicants did not put evidence before the court that music played in the boardroom was above the applicable objective threshold. Instead, the applicants took the position that, because the corporation's rules had prohibited the playing of music in the boardroom since they purchased their unit in 1982, they had a reasonable expectation that the rules would not be changed. The applicants were of the view that they were entitled to hear no music from the boardroom whatsoever, regardless of its volume.

The court disagreed, noting that section 135 of the Act protects legitimate expectations and not "wish lists". The applicants' expectation that they would not hear any music whatsoever from the boardroom was properly characterized as a "wish list" item, not a legitimate expectation. Similarly, the applicants' expectation that the corporation's rules would never be amended was not a legitimate expectation that would be protected by section 135 of the Act.

Citing previous decisions of the court in Dyke v. Metropolitan Toronto Condominium Corp. No. 972 and Wu v. Peel Condominium Corp. No. 245, the court held that unit owners in multi-unit residential condominium buildings are not entitled to perfect silence in their units, but rather are entitled to not have noise enter their units at a level above an objectively reasonable threshold. The court noted that there was no evidence whatsoever before it of the noise levels in the applicants' unit (let alone whether those noise levels exceeded the objectively reasonable threshold), and that the rule in question did not permit music to be played if same was above a reasonable volume. The court held further that, by offering to conduct acoustic testing in the applicants' unit (which offer was refused by the applicants), the corporation had acted reasonably and in good faith, and that there was no basis for the court to intervene. Given the foregoing, the court dismissed the applicants' application, and awarded costs of $10,500 to the corporation.

Author's note: *this case reinforces the guidance given by the courts in the Dyke and Wu cases noted above with respect to noise entering a condominium unit and the circumstances in which the court will intervene. Given the communal nature of condominium living, some compromise between unit residents will inevitably be required, and the court's decision in this case provides further confirmation that a unit owner's subjective expectations regarding noise will not necessarily be protected by the oppression remedy provisions of the Act. While unit owners are entitled to be free from objectively unreasonable noise entering their units, they are not entitled to perfect silence.* CV

President's Message

Continued from page 3

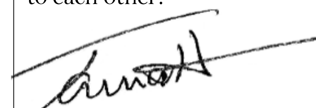
opportunities for learning and networking. Even if you missed the early bird discount, there may still be time for you and your board to register and attend. Not only will it provide you with a well-informed board, you will leverage what you learned and make your community even better than it is today. Whether your takeaways lead you to conduct a major overhaul of your vision and restructure your planning processes or make incremental changes by tweaking or revisiting your communication platforms, you will gain knowledge from the speakers, vendors and other attendees. We highly recommend using break times and the social event to network with people you haven't met before, as learning opportunities also exist outside of the classroom setting.

We are hosting the semiannual Leaders Forum this fall for CCI National with a theme of Reaching New Heights. Watch the website for updated information or ensure we have your email address so you don't miss this event. Representatives from across the country attend to share success stories, new opportunities and advances in the condo world.

I'd like to extend kudos to the board for always stepping up, making a difference and being the driving force to support condos to be financially and socially responsible by coming up with new ideas, sourcing great presenters and leveraging networks for our members.

Stay current, informed and empowered by attending our events, reading the Condovoice magazine and ensuring you are getting regular e-blast updates by providing (or updating) your email address. We hope to see you at the Condo Conference and many other events this fall.

We are all in this together - be excellent to each other!



Tania Haluk
CCI-Toronto, President