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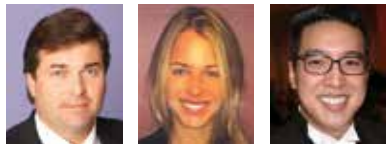

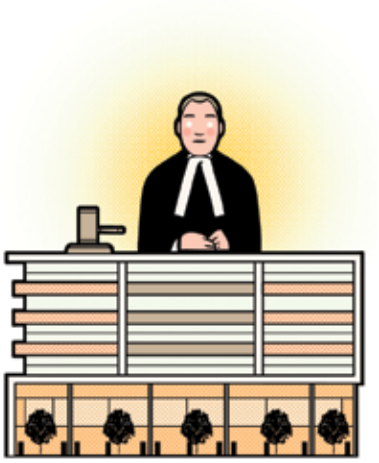

# Decisions From the Courts

## The Impact on Your Condominium Corporation

**Couture v. TSCC No. 2187, 2015 ONSC 7596; Couture v. TSCC No. 2187, 2016 ONSC 161**

*"In this case, like so many others involving neighbours, a discrete issue was allowed to escalate out of hand causing needless distress and expense. Like excellent tacticians, the parties let their counsel attack while they sat and watched for weakness. What they did not do was to act like good neighbours. They were not of the body."*

Perhaps the Honourable Justice F.L. Meyers, who presided in the recent case of *Polly Ann Couture v. Toronto Standard Condominium Corporation No. 2187*, felt it necessary to include these sentiments in the overview of his decision to emphasize that disputes within a condominium corporation, unlike many other types of conflict, are especially complicated as the parties involved remain in close proximity to each other. While condominium corporations embody community living, unlike traditional single family homes, there are rarely "high fences" in place to facilitate good, neighbourly behaviour.

In Couture, what should have been a trite issue escalated into a clash of wills between the parties, passing beyond anything resembling amicable or neighbourly behaviour, and was permitted to drag on without regard to the harm being caused on both sides. In his Judgment rendered on December 4, 2015, nearly four years after the dispute began, Justice Meyers is forthright in his disapproval of the strategic gamesmanship and generally unreasonable conduct exhibited over the course of the dispute.

The facts are unremarkable: consistent with many newer condominium corporations, parking availability came at a premium at TSCC 2187, a development with 44 residential units and only 32 parking spaces. Parking spaces at TSCC 2187 were therefore leased to residents on a priority and restrictive basis, and any change in residency resulted in the termination of the parking lease. Additionally, non-functioning and unlicensed vehicles were not permitted to be stored in the garage to avoid having other residents wait to obtain a spot to facilitate active transportation.

When it discovered that Ms. Couture's vehicle parked in space #20 had an expired license plate, two flat tires, and was uninsured, TSCC 2187's Board of Directors wrote to her on January 31, 2012, requiring that she bring her car into good standing by February 29, 2012, and requested that she confirm her intentions by February 15, 2012. When Couture did not respond, the Board sent a further letter on February, 29, 2012, extending the deadline to bring her car into good standing to March 31, 2012, failing which, her parking privileges would be withdrawn to allow other deserving residents the opportunity to rent her spot. The Board also returned Couture's post-dated common expense cheques for the months of April and May 2012, as they included $50 for the parking rent.

Couture responded on March 28, 2012, advising that while she had not received the first letter, she had immediately sent her car to the auto shop upon receipt of the Board's February 29, 2012 correspondence. Couture also took issue with the Board's interpretation of her rights to the parking space, and argued that she retained exclusive use of the space irrespective of her ownership of a vehicle, working or otherwise. As such, Couture re-submitted her maintenance cheques for April and May to the Board, inclusive of the parking rent.

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Rather than seizing the opportunity to have an amicable discussion regarding the issue, the Board responded by reminding Couture of its "exclusive authority to assign parking spaces to an owner on a priority basis," and confirmed that, due to her failure to provide the Board with any supporting documentation regarding her vehicle, her parking privileges would be withdrawn as of April 1, 2012, prior to the expiration of the Board's own previously set deadline of March 31, 2012.

The parties lawyered up and a clash of wills ensued. Couture refused to submit common expense cheques that did not include the $50 parking rent component, and TSCC 2187 continued to refuse to accept them. Couture invited TSCC 2187 to mediate the matter; however, the Board took the position that Couture had no valid claim, and so there was no dispute to mediate. The inevitable, but entirely avoidable result, was a lien being registered against Couture's unit for her failure to pay common expenses.

Although Couture made payment under protest, the additional legal costs associated with the lien further entrenched the parties, and matters continued to escalate. Around this time, the Board began fielding complaints that Couture's husband was behaving abusively and harassing other residents. As a result, the police were involved, charges were laid, and the Board began levying $250 administration fees (or fines) against Couture, purportedly to cover the costs incurred to TSCC 2187 in addressing her husband's conduct.

In light of TSCC 2187's refusal to mediate, Couture served the Board with a notice of arbitration in May 2013; however, TSCC 2287 failed to respond within five days as was required in accordance with its own By-law. Additional correspondence ensued, accompanied by more name-calling, threats of proceedings, and threats of costs, with TSCC 2187 levying further administrative fees against Couture as a result. TSCC 2187 then registered a second lien against title to Couture's unit in August 2013 in the amount of $14,511.16, which, according to the Court, included fees of thousands of dollars incurred back to 2009.

Finally, on September 13, 2013, Couture commenced an Application against TSCC 2187, seeking, among other relief, an order that her parking privileges be restored, repayment of money paid to have the first lien discharged, the discharge of the second lien, an injunction preventing the Board from treating her unfairly, and various monetary damages. However, the Application was put on hold when Couture's husband was arrested in November 2013 as a result of allegations of assault arising as a result of disputes with neighbours, and Couture moved out of TSCC 2187 in 2014 and sold her unit in June 2015 after making payment for the second lien under protest, alleging safety concerns as her reasoning.

**While condominium corporations embody community living, unlike traditional single family homes, there are rarely "high fences" in place to facilitate good, neighbourly behaviour**

After a two year hiatus, the Application ultimately proceeded on December 1, 2015, and, not surprisingly:

1. Regarding the termination of Couture's parking lease, the Court found that, having set out a notice period in which it required Couture to show only some steps to comply, TSCC 2187 was then bound to refrain from terminating Couture's rights until the notice period ran its course;
2. The Court concluded that TSCC 2187 had acted illegally and oppressively towards Couture, holding that the liens were invalidly registered against title to her unit, and were used by TSCC 2187 to punish Couture in legal fees rather than as bona fide methods to collect amounts actually fairly subject to lien rights; and
3. TSCC 2187 was also found to have acted in violation of its own by-laws by refusing to participate in mediation and arbitration, and the repeated administrative fines levied against Couture were held by the Court to be ultra vires the scope of TSCC 2187's authority.

However, while Couture was entitled to expect lawful, good faith, and neighbourly treatment from the Board, the Court further found that:

1. Couture was plainly engaged in perpetuating an agenda of her own, and determined that she too had failed to conduct herself or the proceedings on a reasonable basis; and
2. In almost four years, Couture failed to produce any evidence demonstrating that she had ever had her car restored to working order.

As such, the Court determined that Couture did not suffer any harm or compensable loss from TSCC 2187's breach of her parking rights, and queried why Couture would have engaged in such a "horrendous escalation of hostilities" if she did not need parking for anything other than the storage of a "junker".

Nonetheless, as the Court found that TSCC 2187 had wholly ignored Couture's legitimate expectations and failed to conduct its affairs reasonably and in good faith, Couture was awarded Judgment in the amount of $15,623.05, plus prejudgment interest, which was inclusive of the return of funds that she paid out on the liens under protest and $1,000.00 as nominal damages for oppression. However, in light of the Court's disapproval of both parties' conduct and the unnecessary escalation of the within matter without regard to the harm being caused or the costs incurred in excess of $100,000, the parties were left to bear their own costs.

**Author's Note:** *This case underlines the importance of taking steps to manage disputes in condominium cases and serves as a warning to parties on the dangers of escalating conflict, which often spirals completely out of control and imposes harsh negative sanctions on all parties involved. The Court also engages in a discussion of Section 134 of the Condominium Act, acknowledging that while the provision provides a condominium corporation with a broad right of recovery for costs incurred in*


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*obtaining compliance orders, it "unfortunately incentivizes recalcitrant, litigious behaviour by condominium boards of directors and their advisors whom may be so inclined." This is consistent with a string of cases over the past years, which push back against a condominium corporation's ability to recover full costs. Justice Meyers goes on to caution Boards against commencing litigation with the view towards utilizing any judgment obtained to attach a lien to the owner's unit to recover their full indemnity costs.*

### MacDonald v. Chicago Title Insurance Co. of Canada (Ontario Court of Appeal, December 3, 2015)

For many, the purchase of a home is the largest transaction that they will ever be involved in. A purchaser's lawyer has a professional obligation to advise their client of the various options available to ensure that the purchaser receives what was bargained for.

Traditionally, the lawyer would carry out a series of on- and off- title searches and provide an opinion regarding title. More commonly now is the use of title insurance, which allows for cost savings for the purchaser since some of the searches need not be carried out. The most common form of homeowners' title insurance covers damages arising out of defects in the property's title that, although undiscovered before the closing date, may later have consequences for the purchaser. For example, a purchaser who obtains title insurance is not required to obtain a tax certificate to confirm that property taxes assessed against the property have been paid up to closing. If the purchaser discovers after closing that this is not the case, title insurance typically covers the purchaser for the property taxes not attributable to the purchaser's period of ownership.

**Pursuant to a 2005 agreement lawyers were no longer required to conduct off-title searches where a title insurance policy had been purchased by the homebuyer**

In MacDonald, the homeowners discovered after closing that the previous owner had removed load-bearing walls of their house, without the necessary permits, rendering the property unsafe and causing the City of Toronto to issue a work order against the property in relation to this alteration. The homeowners claimed under their Title Policy, issued by the Chicago Title Company of Canada, for the cost of the temporary and permanent repairs needed to make their house structurally sound again. The title insurer denied their claim, and a trial judge ruled in the insurer's favour.

On December 3, 2015, three judges of the Ontario Court of Appeal unanimously overturned the trial ruling, holding that the trial judge was incorrect in limiting the intended scope of title insurance policies, and that he had failed to understand that municipal work orders are not regularly registered on title. The Court of Appeal ruled that work orders are title defects which are only discovered when the purchaser's lawyer conducts an off-title search of the property, and that pursuant to a 2005 agreement between the Law Society of Upper Canada and the major title insurance carriers in Ontario, lawyers were no longer required to conduct off-title searches where a title insurance policy had been purchased by the homebuyer.

**Author's Note:** *Status Certificate reviews are another example of off-title searches carried out during the purchase of a condominium property, and are normally required by a title insurer. However, when considering unauthorized alterations to the exclusive-use common elements, it is not uncommon for same to be left off of the Status Certificate. Care should be taken to ensure that such alterations are addressed before closing, to help prevent a greater dispute from arising down the road.* CV