Mario D. Deo
BA, LL.B.
Fine & Deo
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By Dalia Yonadam
BA, LL.B. (Hons.)
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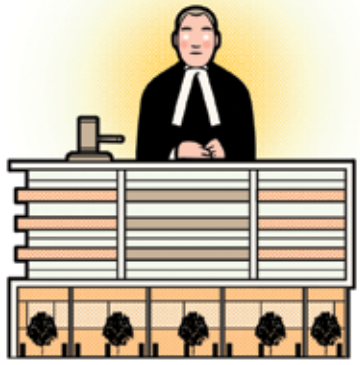
Case Law Update

Decisions From the Courts

Harassment of Managers or Staff is a Serious Problem for Condo Corporations That Must Be Addressed



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Lahrkamp v. MTCC 932

12-Day trial. Three actions. J. Prattas DJ described this case as a "long, tortuous, labyrinthine and costly litigation saga."

This case is about a unit owner seeking production of records from MTCC 932. In each of the three actions, the plaintiff was also seeking damages of $500 against the defendant pursuant to section 55(8) of the Condominium Act, 1998 (the "Act"), for failure to produce the records requested.

The records requested by the plaintiff included the following:

1. Accounts receivable ledgers;
2. General ledgers;
3. Bank statements;
4. Proxies;
5. Owner lists;
6. Board of director meeting minutes;
7. Portfolio valuation summaries and details; and,
8. Transaction summaries.

J. Prattas DJ found that the Act is "worded in favour of transparency, openness and disclosure for the unit owner – except for enumerated exceptions and matters of privacy and confidentiality"; however, he also found that it does not give the unit owner carte blanche to make unreasonable requests/demands for records "or to go on a crusade or to go on a fishing expedition."

J. Prattas DJ found that when a condominium corporation is considering a records request, the criteria should be applied objectively: "what does a reasonable owner require to inform him/herself about the proper functioning of his/her condominium corporation?"

The plaintiff's position on the other hand, was that the criteria should be applied subjectively because, as an owner, he was entitled to examine every record of the condominium corporation and to satisfy himself for his own personal reasons.

J. Prattas DJ found that the plaintiff's conduct and dealings regarding records requests was not because he was genuinely interested in looking into the specific dealings of the condominium corporation. Rather, it was determined that the plaintiff was either "oblivious to the fact that he was wasting other people's time and money, or, more likely, that he took a genuine interest in pestering the Board and others with his demands."

The plaintiff was found to be a litigious person, as he had commenced or been involved in more than a dozen proceedings, including motions, against the condominium corporation.

In the end, the plaintiff was entitled to redacted copies of proxies for the years 2012 to 2015, and redacted copies of the board minutes for 2012 to 2015, subject to copying charges and labor charges.

The plaintiff was not entitled to receive copies of the owner lists because his reasons (which were to allow communication with owners regarding the operation of the condominium corporation) were vague and infringed on the privacy rights of the communal owners.

The plaintiff was not entitled to receive copies of the general ledgers because he "provided no credible evidence as to what information may be contained in these ledgers that would be of interest to him, nor any credible evidence that access to these ledgers would permit him to ascertain whether the Board or property manager had properly discharged their obligations." It was found that the plaintiff was on a "pure fishing expedition" regard-

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ing the general ledgers. Furthermore, as a result of the confidential and sensitive information contained therein, which would require redaction, J. Prattas DJ found that the plaintiff's request would cause a significant burden on the condominium corporation in time and expense, and based on the evidence in this case, such production was not warranted.

The plaintiff was not entitled to receive copies of the accounts receivable ledgers because he "did not produce any cogent reason as to why he wanted to inspect" them. It was found that it would be too onerous to produce all of these records and that the plaintiff was on a pure fishing expedition regarding the accounts receivable ledgers.

The plaintiff was not entitled to receive copies of bank statements and the portfolio evaluation details because the court was not persuaded that his reasons were reasonably related to the purpose of the Act.

Other than the conditional production of the proxies and board minutes ordered by J. Prattas DJ, the balance of the plaintiff's claims were dismissed.

Conclusions and points to remember:

1. It is necessary to look at facts surrounding each records request to determine whether the condominium corporation has a reasonable excuse in not providing the records for examination.

2. The plaintiff's reasons for wishing to inspect the Owner's List (which were to allow communication with owners regarding the operation of the condominium corporation) were found to be vague and infringing on the privacy rights of the communal owners.

3. All personal information shall be redacted from a proxy so that the requesting party is not able to determine who voted and how they voted, or any personal information about such proxy donors.

4. To be certain that redacted information is not to be ascertained in a condominium corporation's records, the court found it reasonable for a condominium corporation to provide third generation photocopies.

5. The court found it reasonable for a condominium corporation to charge photocopying charges of $1.00 per page because in order to make third generation redactions, four photocopies at $.25 per page must be made.

6. The court found it reasonable for a condominium corporation to charge $1.00 in labour charges per set of minutes and per proxy.

7. The court found it reasonable for the above-noted charges to be paid in advance prior to any inspection.

8. The court found it reasonable that the time and place of such inspection shall be mutually agreed between the parties within 20 days, failing which the condominium corporation shall determine the time and place of such inspection on its own action reasonably.

9. Although the plaintiff was entitled to examine records of the defendant, he

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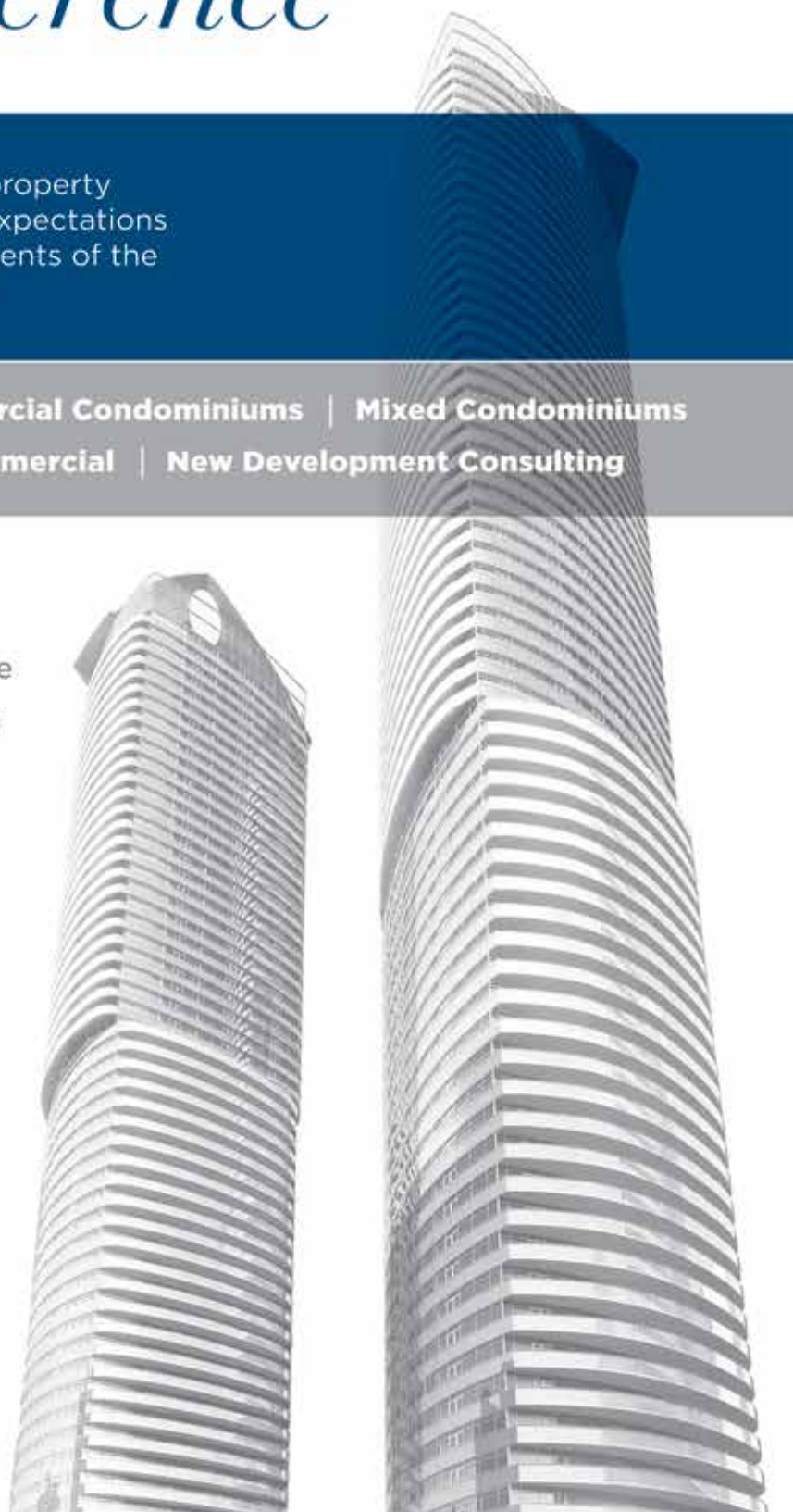

Tel: 905.673.7338
Fax: 905.673.8952

info@dukamanagement.com
www.dukamanagement.com

3397 American Drive, Unit #21
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was not entitled to abuse such right by pestering the board of directors or staff and any copies of documents had to be paid in advance.

10. It is up to the condominium corporation to decide what notice is reasonable and what is a reasonable time and place for the appellant to examine the records.

11. A condominium corporation may refuse a record if the burden and expense to the corporation is in issue.

Toronto Standard Condominium Corp. No. 1633 v. Toronto Standard Condominium Corp. No. 1809, [2017] O.J. No. 1024 (Ontario Superior Court of Justice, March 1, 2017)

The applicant, Toronto Standard Condominium Corporation No. 1633 ("TSCC 1633") and the respondent, Toronto Standard Condominium Corporation No. 1809 ("TSCC 1809"), are adjacent high-rise mixed use condominium developments, which were registered by the same declarant. The declarations provided TSCC 1809 an easement over a Shared Laneway, wherein any vehicle entering or existing TSCC 1809's underground parking garage would have to drive over the said Shared Laneway. As the condominium corporations do not have a cost-sharing agreement, TSCC 1633 took issue with the wear and tear of the Shared Laneway caused by the unlimited vehicles accessing TSCC 1809's parking garage. TSCC 1633 made an application for a declaration and order that TSCC 1809 be responsible to "share permanently the costs of operation, maintenance, repair and replacement of the shared laneway."

TSCC 1633 based its application on the following grounds; a) TSCC 1809 enjoys the benefit of easements without a cost sharing agreement, which was intended by the common declarant b) it has not continued towards the shared facilities, specifically the costs of operation, maintenance, repair and replacement of the Shared Laneway c) it refused to accept responsibility towards costs related to the Shared Laneway d) it refused to execute a proposed easement and cost-sharing agreement with TSCC 1633 e) TSCC1633 obtained an engineering opinion which stated that TSCC 1809 is responsible for 23.3 percent of the cost to maintain and repair the Shared Laneway, f) Baghai, the developer, did not take responsibility for the operation of the shared facilities, but left this responsibility to TSCC 1633, and g) TSCC 1633 relies on sections 119, 133, 134 and 135 of the Condominium Act, 1998 (the "Act").

P.J. Cavanagh J. found that TSCC 1633 failed to establish "a breach of its reasonable expectations through the conduct of TSCC 1809" as there is no provision in the declaration of either of the condominium corporation that references a cost-sharing agreement with respect to the Shared Laneway or an easement, to be entered into between both parties. TSCC 1633's Disclosure Statement stated that "if the property is developed in more than a single phase, the Costs of the Services and Easements shall be shared on specific terms, including that Baghai on its behalf and on behalf of the condominium corporation(s) to be created, shall enter into an "Easement and Cost Sharing Agreement, which will be binding…" However, the development of

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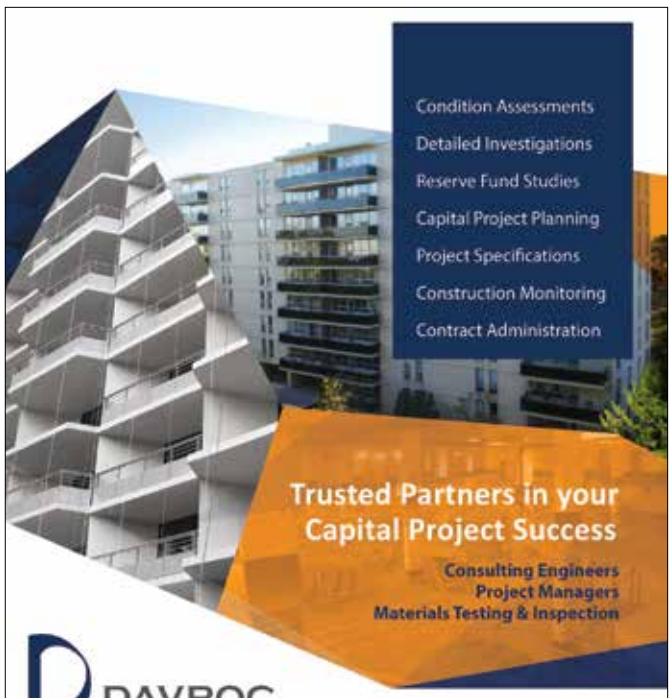

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TSCC 1633 resulted in construction of a single phase development, which P.J. Cavanagh J. held, is not in contravention of TSCC 1633's disclosure statement, and would not reasonably have "caused a unit purchaser to expect that TSCC 1809 would be required to contribute to the costs of the maintain and repairing of the Shared Laneway."

P.J. Cavanagh J. also found that TSCC 1809 is not bound by any contractual obligation to pay for the repair and maintenance costs for the Shared Laneway. TSCC 1809 did not have any common law or statutory obligation to share in the laneway costs and that TSCC 1633 is not entitled to a remedy founded in unjust enrichment due to an absence of a contract between the two corporations.

TSCC 1633 relied upon the recent amendments to the Act, regarding condominium corporations who share facilities. Specifically, Section 21.1(1) of the amended Act states that:

Subject to the regulations, if any [two or more condominium corporation] share or are proposed to share in the provision, use, maintenance, repair, insurance or administration of any land, any part of a property or proposed property, any assets of a corporation or any facilities or services, they shall enter into an agreement that meets the prescribed requirements and shall ensure that it is registered in accordance with the regulations.

However, P.J. Cavanagh J found that although s. 21.1 (1) may affect the rights and obligations of TSCC 1663 and TSCC 1809 when it comes into force, it is not applicable to the application at this time. Accordingly, the application was dismissed.

YCC 163 v. Robinson – Ontario Superior Court of Justice (April 19, 2017)

The condominium corporation brought an application against a unit owner who habitually engaged in insult, body shaming, and name calling against staff. There were numerous e-mails from the relevant unit owner submitted as exhibits. The conduct was characterized as direct and ongoing harassment, and made work life particularly intolerable for the condominium corporation's manager.

The court held that the conduct amounted to an infringement of the s. 117 of the Condominium Act, 1998 ("the Act"), which provides that, "No person shall … carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual." In so holding, the court cited the Korolekh case,[1] which also dealt with s.117 of the Act. In Korolekh, it was noted that "bodily harm" has been held to mean "any hurt or injury" and "to include psychological harm", provided it is more than "transient or trifling".[2]

A cease and desist order was made against the unit owner, and the condominium corporation was awarded $15,000 of its legal costs.

[1] Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh, 2010 ONSC 4448 (August 17, 2010, Code J.).
[2] Ibid. at para. 71