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GOVERNMENT ANNOUNCES DETAILS OF RENT ASSISTANCE PROGRAM FOR SMALL BUSINESS TENANTS

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Commercial landlords and tenants have been monitoring government communications with the hope of hearing that some form of rental assistance is on the way.

On April 24, 2020, the federal government gave these parties cause for optimism with the announcement of an agreement in principle with the provinces and territories to provide rent reduction relief to qualifying small business tenants that have been significantly affected by the COVID-19 pandemic.

This aid program, known as the Canada Emergency Commercial Rent Assistance program ("**CECRA**"), will provide forgivable loans to qualifying commercial property owners who agree to lower the gross rent payable by their tenants for April, May and June 2020 by at least 75%.

The program will be administrated by Canada Mortgage and Housing Corporation ("**CMHC**"), with MCAP and First Canadian Title assisting in the processing of applications and delivery of loans. Each province and territory has agreed to contribute to the costs of implementation in varying proportions.

On April 29, 2020, CMHC added a page to its website[1] outlining the application process and eligibility criteria for CECRA. On May 19, 2020, CMHC announced that applications for CECRA would be submitted through an online application portal on its website, and provided sample documents for applicants to review in advance of the portal opening. On May 25, 2020, the application portal opened for registration for certain provinces on a staggered basis. As of May 29, 2020, the portal has been open for registration by all eligible applicants.

The CECRA program is aimed at small business tenants. However, Prime Minister Trudeau has indicated that the federal government is working on some form of rent assistance program for larger business tenants and it is has been reported recently that a coalition of retailers and landlords are lobbying on behalf of larger business for the implementation of a program comparable to CECRA.

[1] Available at: https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business.

KEY ELEMENTS OF CECRA

The key elements of the CECRA program are generally described as follows:

- The government will offer forgivable loans to qualifying commercial landlords to cover up to 50% of the monthly gross rent payable by eligible small business tenants for the months of April, May and June 2020. Landlords and tenants will each be responsible for 25% of the gross rent.
- The loans will be forgiven if the landlord enters into a Rent Reduction Agreement with the eligible small business tenant under which the landlord will have agreed: (i) to reduce rent to 25% of gross rent for the months of April, May and June 2020; and (ii) not to evict the tenant during the period in which the tenant receives the rent forgiveness or rent credit contemplated under the Rent Reduction Agreement. In addition, the landlord must not seek to recover any reduced or abated rent after the program expires.
- CMHC will disburse the loans directly to the landlord's financial institution. The landlord need not have a mortgage secured by its property to qualify; property owners with or without a mortgage are eligible for CECRA provided the other program requirements are met.
- Landlords must submit the following documents in support of their application for a CECRA loan: a Rent Reduction Agreement and attestations from each of the tenant and landlord confirming their eligibility for the program. Landlords must also agree to the terms and conditions of CECRA's form of Forgivable Loan Agreement which is viewable once an application has been created in the application portal.
- The deadline to apply for CECRA is August 31, 2020. Landlords who have not offered rent reductions of at least 75% for April, May and June will be able to do so retroactively to qualify for CECRA.
- Landlords must submit one application for all eligible tenants at one property. Once registered, the application portal will be available on a 24/7 basis for applicants to add information and upload documents.

ELIGIBILITY CRITERIA

1. Eligible Tenants

According to CMHC, in order to qualify for a CECRA loan the tenant must: (i) pay no more than $50,000 dollars in monthly "gross rent" per location[2]; (ii) generate no more than $20 million dollars in gross annual revenues (based on the 12 month period used to calculate the tenant's 2019 fiscal year) on a consolidated basis at the ultimate parent level[3]; and (iii) have experienced at least a 70% drop in pre-COVID-19 revenues. The 70% revenue decrease is to be determined by comparing revenues for April, May and June to revenues from the same months in 2019 or alternatively compared to average revenues for January and February 2020.

CMHC has indicated that the CECRA program will be available to non-profits and charities. Sub-tenancy arrangements are also eligible provided the other program requirements are satisfied.

2. Eligible Landlords

CMHC advises that an eligible landlord (referred to as an "eligible commercial property owner") is one that: (i) is the registered owner of commercial property in Canada where the impacted small business tenant is located; and (ii) has declared rental income in its personal or corporate tax return in years 2018 and/or 2019 or has commenced generating

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[2] The term "gross rent" for the purposes of the program includes base, net or minimum rent or gross rent, monthly instalments of operating costs, property taxes and other additional rent amounts payable to the landlord (e.g., maintenance costs, repairs, utilities, management fees) and, percentage rent. A number of additional costs and penalties are excluded from "gross rent" (such as interest and penalties on unpaid amounts and insurance proceeds) and are itemized on CMHC's website.

[3] If the tenant or its ultimate owner produces consolidated financial statements, then the tenant would use revenues reported for the group level of companies.

commercial rental revenue on or before April 1, 2020. CMHC has indicated that commercial properties with a residential component or a mixed use which includes at least 30 per cent commercial component are also eligible for the program.

REQUIRED DOCUMENTATION

As mentioned, all CECRA applications must include a Rent Reduction Agreement and attestations from each of the tenant and landlord. CMHC has provided sample forms of these documents on their website. Landlords must also agree to the terms and conditions of a form of Forgivable Loan Agreement, which is viewable once an application has been created in the application portal. Certain key provisions of these documents are summarized below. It remains unclear how negotiable the terms in these documents will be, and whether CMHC will expect each applicant's documentation to mirror the terms of the samples.

1. Rent Reduction Agreement

The applicant landlord must enter into a Rent Reduction Agreement with each impacted tenant to document the required 75% gross rent reduction over the eligible three month period in accordance with the program terms and conditions. Key provisions of CMHC's sample form of Rent Reduction Agreement include the following:

- The agreement is conditional upon, and not binding until, final approval of the CECRA loan application. Accordingly, by entering into this agreement a landlord would not be committing itself to providing a rent reduction in the event the CECRA application is rejected.
- The agreement may apply retroactively so as to enable the parties to apply for a CECRA loan after the eligible three month period has ended, so long as they are able to prove eligibility during that period. If gross rent has already been paid in full for the eligible three-month period, the landlord must agree to either reimburse the tenant for the amount of gross rent paid in excess of the reduced rent payable during that period or provide a credit for future instalments of rent. If the parties have already entered into a prior rent deferral or reduction agreement for the eligible three-month period, the prior agreement is deemed amended to conform to the CMHC form of agreement and such amounts will be included in calculating the total amount of the required rent forgiveness.
- The tenant is required to confirm, to the best of its knowledge, that all information and declarations provided in connection with the CECRA application are true and correct, and acknowledge that any false or misleading information in the tenant's attestation may result in ineligibility (in which case the forgiven rent less any amounts paid by the tenant shall be due and owing to the landlord within 30 days' notice of ineligibility).
- The landlord agrees that it will not seek to either evict the tenant or recover the rent forgiven under the agreement for the period commencing on April 1, 2020 until the date on which the tenant is no longer receiving rent relief under the agreement.

2. Forgivable Loan Agreement

The landlord must also enter into a Forgivable Loan Agreement with CMHC which documents the terms and conditions of the CECRA loan. A sample Forgivable Loan Agreement was originally provided on the CMHC site, but has since been removed. Key provisions of the sample agreement include the following:

- The loan will be an unsecured, interest free, forgivable loan of up to 50% of the gross rent payable by the tenant minus a *pro rata* portion of any insurance proceeds available to the landlord or any non-repayable proceeds of any other federal or provincial commercial rent assistance programs which are received or receivable by the parties in respect of the eligible three month period.
- The loan proceeds must be used: (i) first, to reimburse or credit the eligible tenant(s) for any gross rent paid during the eligible three month period in excess of 25% of the gross rent during that period; and (ii) second, towards any costs and expenses relating directly to the property, including financing costs and operation, maintenance and repair obligations (e.g., common area maintenance, property taxes, insurance and utilities).
- The landlord must repay the loan on December 31, 2020, unless it is forgiven by CMHC on such date. The loan will be forgiven by CMHC unless an "Event of Default" occurs, which are as follows: (i) the landlord fails to comply with

the terms and conditions of the CECRA program, Forgivable Loan Agreement or Rent Reduction Agreement; (ii) the landlord makes false or misleading representations in its application and documents; (iii) the landlord commits fraud or misconduct; or (iv) events of bankruptcy and insolvency occur. If an Event of Default occurs, CMHC may terminate the loan and require immediate repayment with interest and exercise any rights and remedies under any documents or conferred by law, including assigning the loan to Canada Revenue Agency.

- The landlord must not seek to evict the tenant nor attempt to recover any gross rent that has been forgiven except if the tenant is determined to have given false or misleading information in the tenant's attestation. In such event, the landlord is required to use commercially reasonable effort to recover the gross rent that was previously forgiven and to use such amounts to repay the loan to CMHC.

3. Tenant Attestation

The landlord must also obtain from each eligible tenant a signed attestation confirming the tenant's eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the tenant must declare and confirm, among other things, that: (i) it meets the eligibility requirements described above, (ii) has investigated, and where possible, made application for, any available business interruption insurance proceeds and commercial rent assistance offered by the government and must disclose any such proceeds which are receivable or received, and (iii) it is not subject to any actual or pending proceedings under any bankruptcy or insolvency legislation.

4. Landlord Attestation

The landlord must sign an attestation confirming that the information provided in the CECRA application is correct and attesting to the parties' eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the landlord must declare and confirm, among other things, that it: (i) has no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the tenant's attestation, (ii) has investigated, and where possible, made application for, any available rental loss insurance proceeds and commercial rent assistance offered by the government, (iii) has disclosed any such proceeds which are receivable or received to CMHC and shall pay some or all of such proceeds to CMHC in accordance with the Forgivable Loan Agreement, and (iv) has obtained any consents that may be required from its lenders to permit the parties to enter into the Rent Reduction Agreement and Forgivable Loan Agreement.

Both the landlord's and tenant's attestations also include integrity declarations whereby the attestor is required to declare and confirm that, among other things, the attestor and its affiliates have not been convicted of any criminal, penal or regulatory offences with respect to any financial matters and have not been declared by the federal or any provincial or territorial government to be ineligible to do business with such government body.

As mentioned, any false or misleading information contained in the landlord's or tenant's attestations may result in the CMHC rendering the applicant ineligible to benefit from the CECRA program, thereby entitling the CMHC to remedies for recovery of any benefits conferred.

5. Additional Information

In addition to the documentation noted above, CMHC has indicated that an application for CECRA must also include supporting information regarding the parties and the subject property, including: property address and type, property tax statement, the latest rent roll for each property and the number of commercial units, contact information for the tenant, the landlord and any co-owners, banking information (including a bank statement), the tenant's registered business name, lease area and monthly gross rent for the eligible three-month period.

CONCLUDING REMARKS

The roll out of the CECRA program is certainly welcome news for small business tenants who have been significantly impacted by the COVID-19 pandemic. However, questions remain about the program's mechanics and eligibility criteria.

What is the process for verification of a tenant's 70% decline in revenues and annual gross revenue? Would retailers and restaurants who have closed for business and shifted to operating pick-up and delivery services be excluded from the program if they are unable to demonstrate a 70% decline in revenues? We suspect these issues will be clarified in the course of CMHC's administration of the program.

Further, as the CECRA program remains voluntary, many eligible landlords have been reluctant to participate. As a result, there have been calls for government intervention to protect tenants from eviction or seizure of their property due to their inability to pay rent during the COVID-19 shutdown. On June 8, 2020, the Ontario Government responded to these calls with the announcement of proposed changes to the Commercial Tenancies Act which would, if passed, temporarily halt evictions of tenants that are eligible for the CECRA program and reverse evictions that occurred on or after June 3, 2020. It remains to be seen how the announcement of these legislative changes will impact the success of the CECRA program.

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WHAT LANDLORDS NEED TO KNOW ABOUT BILL 184 AND PROSPECTIVE AMENDMENTS TO ONTARIO'S *RESIDENTIAL TENANCIES ACT, 2006*

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On March 12, 2020, Ontario's Minister of Municipal Affairs and Housing introduced Bill 184, proposing the new *Protecting Tenants and Strengthening Community Housing Act*. If passed, Bill 184 will effect changes to Ontario's *Residential Tenancies Act, 2006* (the "**RTA**"), which will be relevant to residential landlords and tenants.

As the COVID-19 crisis has largely dominated news coverage over the past two months and as vacancy rates for residential apartments remain at historic lows, these proposed changes have attracted relatively little attention.

While Bill 184 proposes a number of amendments to the RTA, the focus of this article is five proposed amendments that are likely to be of primary interest to landlords.

1. Compensation from Former Tenants

Currently, landlords are permitted to apply under Sections 87 and 89 of the RTA for the purpose of seeking compensation for rental arrears, overholding or damage to a rental unit where a tenant remains in actual possession of the rental unit beyond the expiry date of the lease. Bill 184 proposes to expand the application of these sections by permitting landlords to apply to the Landlord and Tenant Board (the "**Board**") for this purpose after the tenant vacates the unit, as long as the application is made within one year of the date that the tenant vacated.

Additionally, Bill 184 would permit landlords to apply to the Board to seek compensation with respect to a tenant interfering with another tenant's reasonable enjoyment of the residential complex, as well as a tenant's failure to pay any utility costs for which it was responsible, within one year from the date that the former tenant vacated the rental unit.

As such, landlords will be pleased to learn that they may no longer be restricted from pursuing a former tenant at the Board for compensation after the tenant has vacated the rental unit.

2. Improperly Increased Rents Deemed Not Void

Currently, Section 135(1) of the RTA provides that a tenant or former tenant of a rental unit may apply to the Board for an order requiring the landlord to pay the tenant any money that the landlord collected as rent in contravention of the

RTA, whether as a result of improper notice of a rental increase or a rental increase above the prescribed guideline amount set out by the Ontario Ministry of Housing and Municipal Affairs on an annual basis, provided that the application seeking such order was filed with the Board no more than one year after the illegal rent was paid.

Bill 184 proposes that a tenant cannot seek reimbursement for an improper rental increase if the tenant has already paid the increased rent for at least twelve consecutive months, provided that the tenant did not make an application to the Board challenging the validity of that rental increase within one year from the date that the rental increase was first charged.

These proposed amendments, if enacted, will provide peace of mind to landlords, as well as to prospective purchasers and lenders, that rental amounts paid by tenants for at least one year are no longer subject to challenge.

3. Increased Cost Consequences of Terminating a Tenancy in Bad Faith

Currently, if the Board concludes that a landlord has acted in bad faith in terminating a tenancy under Sections 48, 49 or 50 of the RTA by reason of the landlord's personal use, a purchaser's personal use, or for demolition, conversion or substantial renovation, the Board may order the landlord to compensate the former tenant for: (i) any portion of increased rent that it has incurred or will incur for a one-year period after vacating the rental unit; and (ii) reasonable out-of-pocket moving, storage or similar expenses incurred, as well as an administrative fine not exceeding $35,000.00.

Bill 184 proposes to supplement these potential penalties by permitting the Board in this context and in the Board's discretion to also require the landlord to compensate its former tenant(s) in an amount equal to up to twelve months' rent at the monthly rate last charged by the landlord to that tenant.

4. Affidavits now required in Connection with Applications to the Board to Terminate a Tenancy

Bill 184 proposes new requirements that a landlord must comply with when filing an application to terminate a tenancy pursuant to any one of Sections 48, 49 or 50 of the RTA noted above. Specifically, the Bill requires that the landlord include in its application a sworn affidavit setting out the particulars of the reason for termination, whether such termination is due to the landlord requiring the rental unit for its own personal use, a purchaser's personal use, or as a result of planned demolition, conversion or substantial repair and renovation to the rental unit. Additionally, the landlord is required to indicate in the affidavit whether or not it has within two years prior to filing the present application given any other notice of termination under Sections 48, 49 or 50 of the RTA in respect of the same or a different rental unit.

Bill 184 includes proposed amendments that permit the Board to consider a landlord's previous use of notices of termination under Sections 48, 49 and 50 in determining whether or not it is acting in good faith in currently applying for the termination of a tenancy under those same Sections.

Like the proposed increased cost consequences for landlords who are found to have acted in bad faith, as described above, the proposed affidavit requirements are intended to deter landlords from acting disingenuously when terminating tenancies under Sections 48, 49 or 50 of the RTA, as well as to provide the Board with additional evidence regarding applications where it is alleged that a landlord has terminated a tenancy in bad faith.

5. Penalties

Currently, Section 238(2) of the RTA provides that corporations found liable for a breach under the RTA are liable on conviction to a fine of not more than $100,000. Bill 184 proposes to increase this maximum fine to $250,000.

Status of the Bill

As of June 15, 2020, Bill 184 has passed its Second Reading in the Legislative Assembly of Ontario and has been referred to the Standing Committee on Social Policy for further review and comment.

As Bill 184 has not yet been passed and is subject to further amendments, landlords and tenants are encouraged to watch for additional information regarding the status of Bill 184 as it works its way through the Ontario Legislature and to ensure that they are in a position to comply with the RTA, as amended, if and when Bill 184 comes into force.

In addition, readers should note that this article does not contain an exhaustive list of the proposed amendments to the RTA under Bill 184. For example, Bill 184 also includes important proposed amendments to Section 194 and Section 206 of the RTA which, if enacted, would reduce restrictions on landlords and tenants finalizing binding settlement agreements with respect to certain applications pending at the Board and would expedite the issuance of eviction and payment orders by the Board where tenants have failed to comply with the terms of binding settlement agreements.

The authors would be pleased to answer any questions you may have regarding Bill 184 and/or related matters.

RECENT CASES

Condominium Corporation's Levying of Special Assessment Was Not Oppressive Conduct

Ontario Superior Court of Justice, February 20, 2020

The applicant owned a unit in a condominium building in Hamilton. The building, built in 1847, was noted to be of significant cultural and historical importance. The respondent condominium corporation (the "Corporation") took the position that the building required significant repair and maintenance due to its aging infrastructure. The Corporation learned that its reserve fund was underfunded in 2015 and levied a special assessment in order to "catch up" and fund investigations and ongoing necessary work. In December 2016, with one month's notice, the board of the Corporation levied a special assessment in the amount of $181,666, in addition to the reserve fund contribution and 2017 budget. The amount was to be paid by the 12 unit owners. The applicant believed that the amounts in the reserve fund would suffice to cover the required repairs. She was the only unit owner that had not paid her share of the special assessment, at $10,882, due in April 2017. In 2017, contractors provided quotes for the replacement of the building's balcony and the elevator, at an excess of $1.6 million.

In May 2017, a lien was registered against title to the applicant's unit. In August 2018, the Corporation sent a notice of sale under lien to the applicant. The applicant brought an application seeking relief under section 135 of the Condominium Act, 1998 (the "Act"), taking the position that the lien was registered in contravention of the Act and the Corporation's rules, bylaws, and declaration and that the board acted in an oppressive and unfairly prejudicial manner. The Corporation brought a motion for summary judgment and enforcement of the lien. To date, the board had not carried out the repairs.

The motion was granted. The Court did not accept that the Corporation's failure to complete a reserve fund study every three years, as required by section 94 of the Act, amounted to oppressive conduct. The Corporation had failed to obtain a full study since 2012 because postponement had been recommended so that the true cost of the balcony replacement could be reflected. The delay in the balcony replacement project was due to city permit issues beyond the control of the Corporation.

The Court did not accept that the board breached the voting provisions under section 97(4) of the Act by not putting the option for the replacement of the balcony and elevator to the owners for a vote. Pursuant to section 97(1), remedial work does not trigger the voting requirements under section 97(4). The work was remedial as the balcony and elevators were common elements and the Corporation had a duty to repair and maintain the common elements under the Act. The Court found that remedial work constituted "repair" and "maintenance." It was satisfied that the work of remediation included material that was close in quality to the original.

The board was also authorized, under the Corporation's bylaws to levy extraordinary expenditures for urgent repairs without a vote. The evidence supported that the board based its decision on expert reports on the deteriorating state of the building. The Corporation's declaration stated that the Corporation "may" by a vote of members make substantial alterations. This provision was permissive and did not require a vote. The applicant failed to establish that there had been a breach of her reasonable expectations and the Court concluded that it could not be said that the board's acts or conduct were oppressive or prejudicial to the applicant such that a remedy under section 135 of the Act was appropriate. The Court granted judgment enforcing the lien and granted leave to issue a writ of possession of the applicant's unit.

MacDonald v. Wentworth Condominium No. 96, 2020 OREG ¶ 59,404

Failure to Obtain Survey Did Not Entitle Purchaser to Repudiate Agreement of Purchase and Sale

Ontario Superior Court of Justice, February 20, 2020

In March 2017, the plaintiff vendors and the defendant purchaser entered into an agreement of purchase and sale ("APS") for a residential property in Oakville. The purchase price was $1.15 million and the purchaser paid a $50,000 deposit. The closing date was August 18, 2017 and the date to complete all requisitions was August 1. The purchaser did not submit any requisitions. On the date the APS was executed, the purchaser was provided with a document that purported to be a survey and was signed by an Ontario Land Surveyor and dated. On the day before the closing date, the purchaser's counsel sent correspondence to the vendors stating that the APS was "null and void," requesting the return of the deposit, and outlining various concerns, including the vendors' alleged failure to comply with the term in Schedule "A" to the APS stating that the vendors agree "to provide, at the Seller's own expense, not later than two weeks, an existing survey of said property showing the current location of all structures, buildings, fences, improvements, easements, rights-of-way, and encroachments affecting said property." On the closing date, the vendors' counsel responded to the purchaser's counsel by stating that the purchaser had breached the APS and forfeited the deposit. The transaction did not close.

The vendors relisted the property and sold it to another buyer for $920,000. They brought an action, seeking $253,647 in damages for breach of contract. The purchaser counterclaimed for the return of the deposit. The vendors brought a motion for summary judgement.

The motion was granted. The Court found that the survey provided in March 2017 was "bare bones" and did not appear to show the current location of the items listed in the Schedule "A" clause that was relied on by the purchaser. Despite this, the Court did not find that the purchaser was entitled to repudiate the contract.

Following *Hatami v. 1237144 Ontario Inc.*, 2018 OREG ¶ 59,270 (Ont. Sup. Ct.), affirmed by the Court of Appeal, the Court found that even if the vendors did not strictly comply with the survey term in Schedule "A," this would not have entitled the purchaser to refuse to close the transaction. The Court found that a different, more detailed or original survey was in no way "essential" to the transaction, as such a survey had nothing to do with financing, zoning, or any other requirement related to the purchaser's ability to close. A more detailed survey did not "go to the root of the bargain." This was further supported by the fact that the purchaser had not complained about the survey that was provided until just hours prior to the closing date.

The vendors' argument that the purchaser waived the survey requirement also had substantial merit, as the purchaser's counsel had communicated in writing prior to August 17 that a different survey was not required. While the purchaser claimed this was done without his instructions or approval, he did not initiate a formal claim against his agent. The vendors were entitled to the damages sought and the deposit was forfeited.

Hannivan v. Wasi, 2020 OREG ¶ 59,405

Condominium Corporation's Response to Unit Owner's Noise Complaints Was Not Oppressive Conduct

Ontario Superior Court of Justice, February 27, 2020

The applicant was the owner a unit in a condominium building. In 2009, she began to experience noise disturbances from her next-door neighbour who had moved in that year. The two units shared a common wall and a balcony separated by a partition. In September 2011, the applicant placed her first complaint to the management and the board of the respondent condominium corporation (the "Corporation"). The complaints related to loud conversations on the balcony at late hours and loud music that could be heard through the wall. The applicant placed further complaints in June and July 2012, July 2013, August 2013, July 2016, and July 2018. In response, the Corporation sent demand letters to the neighbour referring to the noise complaints and quoting the condominium rule on noise and nuisance.

The Corporation posted notices on common areas regarding "quiet enjoyment hours" of 11 p.m. to 7 a.m. and noting that "sound travels easily on balconies." In 2013, the board refused the applicant's request to direct the neighbour to not

have any conversations on the balcony after 11 p.m. The Corporation engaged counsel who sent a compliance letter to the neighbour in October 2018 demanding that the neighbour cease and refrain from creating and transmitting noise. The dispute between the applicant and neighbour was submitted to mediation in January 2019 but was not resolved. In July 2019, the Corporation and the neighbour reached an agreement stating that the neighbour shall comply with the Corporation's rules, not play music or speak loudly after 11 p.m., and not wear hard soled shoes.

The applicant brought an application under section 135 of the Condominium Act, 1998, seeking a declaration that the Corporation acted oppressively towards her in disregarding her interests over the interests of the neighbour. She sought damages and an order rectifying the issue.

The application was dismissed. To establish oppression, the applicant was required to show that there had been a breach of her reasonable expectations and that the conduct complained of amounted to "oppression," "unfair prejudice," or "unfair disregard." The Court found that pre-2018, the Corporation ought to have done more to escalate matters, such as putting economic pressure on the neighbour to behave more appropriately late at night. Given the Corporation's prompt responses to the applicant's complaints and given the long gaps between her complaints, however, the Court refused to conclude that the Corporation had unfairly disregarded the applicant's interests or acted in bad faith until 2018. The Court did not find that the Corporation's position that it cannot prohibit conversations in normal voices on balconies after 11 p.m. was unreasonable. It was not the Court's role to second-guess the Corporation's approach to the application of its rules that was within a range of reasonable options.

The Court dismissed the argument that the settlement agreement, which provides sanctions for the neighbour if she breaches the terms, demonstrates that the Corporation had been acting in bad faith for years in taking the position, since 2011, that it cannot regulate how people use their units. The Court found no inconsistency in the Corporation's positions between 2011 and 2018. Its position was evidenced by its continuous prompt response to the applicant's complaints. The applicant failed to establish that the Corporation acted oppressively toward her.

Zaman v. Toronto Standard Condominium Corporation No. 1643, 2020 OREG ¶ 59,406

Respondents Contravened Express Terms of Utility Easement in Installing Pool Amenities

Ontario Superior Court of Justice, March 6, 2020

The respondents were the owners of a residential property (the "Property") in the applicant Town of Oakville (the "Town"). The Property was subject to an easement, registered in 1972, that provided that the owners grant the Town the right to construct, operate, maintain, replace, and repair underground sewers, drains, pipes, conduits, wires, and services for so long as it desires along and under the land. The easement further stated that the owners reserved "the right to use the surface of the said land for any purpose which does not conflict with the Town's rights hereunder and specifically excluding the planting of any tree and the erection of any building or structure."

The easement was ten feet wide and ran along the Property's western border, containing an underground hydro wire that provided electricity to a nearby property. In 2000, the Town sold the easement to the co-applicant Oakville Hydro Electricity Distribution Inc ("Hydro"), retaining an interest in it. Prior to purchasing their property in 2012, the respondents were aware of the easement but believed it was abandoned. In 2014, the respondents installed a pool and surrounding deck on the easement. The pool amenities constituted a "building" under the Building Code Act, 1992 and were installed without a building permit.

The applicants applied for a declaration that the pool amenities encroached on the easement and sought an injunction or mandatory order requiring the respondents to remove them at their expense and remediate any damage to the easement.

The application was granted. The Court dismissed the respondents' argument that they were not prohibited from erecting a tree, building, or structure within the easement as long as this item did not conflict with the rights of the easement holder. This interpretation of the easement did not make common sense, as it made the easement's reference to "tree ... building or structure" superfluous. The plain wording of the easement delivered a two-part message to the property owner: (1) to not use the surface of the easement land for any purpose that conflicts with the Town's rights; and (2) to

not under any circumstances plant a tree or erect a building or structure within the easement. While the easement had a broad purpose, the prohibition against placing buildings, structures, and trees was consistent with it.

It was irrelevant that other trees or structures were on the easement before the pool amenities were installed. The test for proprietary estoppel was not met, as there was no evidence to suggest that Hydro had any knowledge of the other structures before the pool amenities were installed. As a result, it could not be said that Hydro induced or allowed the respondents to build the pool amenities. There was also no evidence that the respondents acted to their detriment to the knowledge of the applicants. As the respondents contravened the express terms of the easement in having the pool amenities installed, the applicants were entitled to the relief sought.

In the alternative, the Court found that the applicants failed to establish that the respondents substantially interfered with the rights of the easement holders. The test was whether the easement could be substantially and practically enjoyed or utilized by the applicants as conveniently as before the pool amenities were installed. Actual and substantial interference with the granted rights of the easement holders was required. The evidence did not show that the pool amenities could cause something more than some unspecified or unknown, probably minor, degree of inconvenience to the applicants.

Town of Oakville v. Sullivan, 2020 OREG ¶ 59,407

Condominium Granted Order Requiring Unit Owner's Compliance Permitting Access to Unit

Ontario Superior Court of Justice, March 10, 2020

The respondent owned a unit in a condominium building operated by the applicant condominium corporation (the "Corporation"). In 2017, the Corporation discovered that the building was constructed with Kitec pipes, which are known to fail prematurely and create a risk of water damage. In response, the Corporation developed a program to replace all the defective pipes, with unit owners being responsible for the cost of pipe replacement within their units and the Corporation responsible for coordinating the contractors. When the contractors attended at the respondent's unit on their scheduled date in January 2019, he refused to allow them in, claiming he was sick. When the building manager and contractors returned on the rescheduled date in March 2019, the respondent refused to let them in again, demanded the manager's identification, and used foul language.

The Corporation alleged that the respondent had been abusive to the Corporation's employees or interfered with their work in the past. It brought an application seeking an order requiring the respondent to replace the pipes or pay for the Corporation to do so. It also sought orders prohibiting the respondent from abusing, harassing, or intimidating anyone employed by the Corporation both in regard to the pipe replacement work and with regard to any future interactions or need to enter his unit to perform the objects and duties of the Corporation, as well as an order that the respondent may only communicate with the property manager in writing in a civil manner and strictly regarding issues that relate to the Corporation.

The application was allowed in part. Under s. 134(1) of the Condominium Act, 1998 (the "Act"), the Court has the discretion to order a unit owner to comply with any provision of the Act. Where the unit owner fails to complete work necessary to maintain their unit and this creates a potential risk of property damage, the Corporation can complete the work, with the unit owner being responsible for the costs, pursuant to section 92(3) and (4). As it was not in dispute that the continued presence of the Kitec pipes created a risk of serious property damage, the Corporation was entitled to an order that it be permitted access to the unit to replace the pipes.

The Court accepted the Corporation's evidence as to the respondent's conduct during contractors' attempts at entering his unit for the pipe repairs. His conduct was contrary to section 19 of the Act, which provides that the Corporation or anyone authorized by the Corporation may enter a unit to perform the objects or duties of the Corporation. The Court found it was appropriate to order the respondent to not interfere with the contractors hired by the Corporation to perform pipe repairs in his unit.

The Court found that the respondent had failed to cooperate with the Corporation and its contractors in June 2018 and May 2019, and that in July 2019, he had made comments suggesting that a board member was taking bribes. The

respondent violated the condominium rule prohibiting owners from creating a nuisance as well as those provisions of the declaration and the Act granting the Corporation a right of access to his unit on reasonable notice. The Court, however, did not find that the additional orders requested by the Corporation were warranted and found their breadth not responsive or proportionate to the conduct alleged. Much of the conduct complained of was not particularly serious and there was no evidence of any problems since July 2019. A broad, indefinite compliance order was not required. The order respecting contact with the manager was also not a proportionate response, as there was no evidence that the respondent had communicated about irrelevant matters in the past.

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