ARBITRATING CONDOMINIUM DISPUTES AND APPEALING THE ARBITRATOR'S DECISION TO THE COURTS:

AN ANALYSIS OF *YCC NO. 201 V YCC NO. 366* AND *LOUISEIZE V PCC NO. 103*

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1. INTRODUCTION

Nearly two decades ago, the *Condominium Act, 1998*, S.O. 1998, c.19, as amended (hereinafter referred to as the "**Condominium Act**"), introduced the concept of alternative dispute resolution (hereinafter referred to as "**ADR**"), and correspondingly enshrined mandatory mediation and arbitration in section 132 of the Condominium Act, as the two-step process for resolving certain condominium-related disputes or disagreements. Mandatory mediation and arbitration was lauded as one of the hallmarks of the Condominium Act, and was intended to achieve a more expeditious, restorative and cost-effective method of settling condominium disagreements, in an environment where, by its very nature, the parties to the dispute often have ongoing involvements or dealings with one another (which correspondingly negates the effectiveness of adversarial litigation). However, it soon became apparent that the current processes of mandatory mediation and arbitration were not necessarily the panacea to all condominium-related grievances or disputes, and the provincial government's comprehensive review of the condominium legislation between 2012 and 2015 revealed the need for swifter and more economical mechanisms to resolve disputes that arise within the unique context of condominium communities.

Accordingly, one of the primary goals of the *Protecting Condominium Owners Act, 2015* – the first overhaul of the Condominium Act in more than fifteen years[1] – was to provide simpler, less costly, and more efficient dispute resolution processes. Among its sweeping changes to the Condominium Act, the legislation created a new administrative authority, namely the Condominium Authority of Ontario (hereinafter referred to as the "**CAO**"), which aims to enhance condominium living through the provision of educational resources

[1] In 2012, the provincial government embarked upon an eighteen-month collaborative public engagement process that involved condominium owners, declarants, industry experts, and various stakeholders across the province. This process generated more than 2,000 submissions and more than 200 recommendations, with calls to strengthen consumer protection and support the needs of both current and future condominium owners. Based on the results of the review, the Ministry of Government and Consumer Services introduced the *Protecting Condominium Owners Act, 2015* (formerly Bill 106), which received Royal Assent on December 3, 2015.

and self-help tools for condominium owners and residents across the province.[2] The CAO is also responsible for overseeing and managing the operation of the Condominium Authority Tribunal (hereinafter referred to as the "**CAT**"), a new forum for dispute resolution that is intended to expedite the resolution of condominium-related conflicts, primarily between condominium corporations and unit owners, with the objective of reducing the overall costs associated therewith.[3] As explained by the Honourable David Orazietti, then Minister of Government and Consumer Services, the CAO (and the new administrative authority established thereunder) is expected to divert "approximately 75% of all cases from costly court litigation, mediation and arbitration, saving residents and condominium corporations tens of thousands of dollars each year, as well as saving them a tremendous amount of time and stress."[4] As of November 1, 2017, the CAT has the exclusive jurisdiction to hear and make legally-binding and enforceable decisions about certain types of disputes under the Condominium Act, as amended by the *Protecting Condominium Owners Act, 2015* (hereinafter referred to as the "**Amended Act**"), which disputes have been (and will continue to be) prescribed by the provincial government through the regulations.[5]

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[2] The legislation also enabled the creation of a second administrative authority, the Condominium Management Regulatory Authority of Ontario (hereinafter referred to as the "**CMRAO**"), which is responsible for the administration of the new mandatory licensing system for Ontario's condominium managers and condominium management service providers. The goal of the CMRAO is to improve the way that condominiums are managed and run, aiming for high-quality condominium management services across Ontario.

[3] The CAO conducted a public fee consultation from July 4, 2017 to July 18, 2017 to gather feedback on the proposed fees for the CAO's services. As of November 1, 2017, every condominium corporation in Ontario began collecting $1.00 per month (or $12.00 per year) per voting unit. If a dispute arises, parties may utilize the CAO's free online guided pathway tool. If additional assistance is necessary, the party who filed the dispute will pay a $25.00 filing fee to access the CAT's online dispute resolution system, where the parties can negotiate in a neutral forum and resolve disputes amongst themselves. If the issue is not resolved through negotiation, the parties will proceed to the assisted resolution stage (with an associated fee of $50.00), which will involve a dedicated CAT mediator who will attempt to settle the dispute collaboratively with the parties. If the parties advance to the final stage, the party who filed the dispute will pay a tribunal decision fee of $125.00, which provides the parties with a dedicated CAT mediator who will conduct a formal adjudication of the dispute and issue a binding order. In the event that a dispute proceeds through all dispute resolution stages, the total cost will be $200.00.

[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* 41st Parl, 2nd Sess, No 95 (15 September 2015) at 1550.

[5] The first dispute type that the CAT has jurisdiction over is access to condominium records (O. Reg. 179/17). It is anticipated that the types of disputes that can be filed with the CAT will increase in the near future. Note, however, that the Amended Act excludes certain disputes, including issues relating to easements, occupier's liability, sale of common elements, liens, amalgamation, termination of a condominium corporation, and disputes involving the determination of title to any real property [section 1.36(4)].

In addition to its adjudication powers, the CAT has the authority to direct that the parties to a dispute participate in ADR (which is now expressly defined under the Amended Act to include mediation, conciliation, negotiation, or any other means of facilitating the resolution of issues in dispute) in order to resolve a proceeding before the CAT, or any issue(s) arising in any such proceeding.[6] Although the goal of the CAT is to institute timely and inexpensive dispute resolution mechanisms without requiring the parties to engage in more formal legal proceedings, the CAT does not entirely replace traditional dispute resolution processes, and the mandatory mediation and arbitration provisions remain largely unchanged under the Amended Act.

Accordingly, the purpose of this paper is to revisit the methodologies for resolving condominium-related disputes under section 132 of the Condominium Act, and the limited ways in which the parties to a dispute may appeal the arbitrator's decision to the courts. This paper will also review two recent cases of the Ontario Superior Court of Justice, whose judgements were released within the same week, namely *York Condominium Corporation No. 201 v York Condominium Corporation No. 366,* 2017 ONSC 3975 (hereinafter referred to as the "**YCC 201 Case**") and *Louiseize v Peel Condominium Corporation No. 103*, 2017 ONSC 4031 (hereinafter referred to as the "**Louiseize Case**"), wherein judicial intervention was sought to set aside the award of the arbitrator. This paper will conclude with a brief discussion of the CAT and the implications for the future of dispute resolution in the condominium industry.

2. Overview of Alternative Dispute Resolution

As a prelude to the discussion of the specific statutory provisions under the Condominium Act governing mandatory mediation and arbitration, the following is a brief summary to assist in understanding the differences between the two mechanisms for resolving disputes.

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[6] The Amended Act, sections 1.40(1) and (2). Whether or not the CAT itself will, in such circumstances, offer ADR services remains to be seen.

I. MEDITATION

Mediation, unlike arbitration, is not binding upon the parties to the dispute. Mediation is often seen as an extension of the negotiation process, whereby parties to a dispute appoint an impartial individual known as the mediator to assist them in coming to a mutually agreeable settlement. Mediation is relatively quick, inexpensive, private, and informal. Typically, the mediator meets with the parties together, in order to become acquainted with the issues in dispute. The next stage may involve the parties meeting separately with the mediator, until it becomes apparent to the mediator that another face-to-face meeting of the parties is necessary. The mediation process is flexible, since it allows the parties to explore a number of additional options that may be open to them. During the process, the mediator often brings his or her experience, insight, and fresh approach to the dispute that the parties may have not previously considered. The parties to the mediation have complete control over the final outcome, and are free to withdraw from the mediation at any time. If the dispute is not resolved within an agreed-upon time frame, then the mediator can, with the concurrence of both parties, provide a neutral evaluation report setting out the strengths and weaknesses of each party's position, together with a settlement recommendation. Thereafter, the parties may accept the settlement recommendation of the mediator, or come to their own settlement, failing which the parties will proceed to arbitration or litigation, or abandon the dispute entirely. All discussions between the parties with the mediator are made in strict confidence, unless the parties agree otherwise. The final resolution or settlement of the dispute through the mediation process is likewise confidential, and is not binding upon any other parties, nor with respect to future disputes involving the same parties and/or the same issues.

II. ARBITRATION

Arbitration involves the disputing parties retaining one or more impartial third parties to conduct a hearing and to make a binding decision on the matters at issue, based upon the merits of the dispute (which decision may or may not be subject to further appeal to a court of competent jurisdiction). In Ontario,

arbitrations are governed by the *Arbitration Act, 1991*, S.O. 1991, C.17, as amended (hereinafter referred to as the "**Arbitration Act**"), which sets out both default and mandatory provisions for the conduct of arbitrations. Pursuant to section 10(1) of the Arbitration Act, the Ontario Superior Court of Justice may appoint the arbitrator or arbitral tribunal, on a party's application, if the arbitration agreement governing the disputing parties provides no procedure for appointing same, or if a person with the power to appoint the arbitral tribunal has not done so after a party has given the person seven days' notice to do so. There is no appeal from the court's appointment of the arbitrator or arbitral tribunal. The single arbitrator, or the panel of arbitrators (generally three individuals), so selected by the parties in dispute or by the court, will, in most instances, conduct a preliminary hearing or meeting to determine and outline the procedures to be followed, and the time frame or schedule for completing the arbitration process. At this preliminary meeting, consensus on procedures can often be achieved with the assistance of the arbitrator, for example, in reducing the number of witnesses to be heard, and assisting the parties in establishing an agreed-upon set of facts to be presented and/or questions to be answered by the arbitrator (thereby reducing the overall costs of the process). The freedom for the parties to select the appropriate protocols and procedures is one of the most attractive features of arbitration. In this way, arbitration can be far less formal than a courtroom setting, and the rules of evidence may, in certain respects, be relaxed. The evidence can, but need not, be transcribed, according to the wishes of the parties. After all of the evidence has been heard, and the final arguments have been completed, the sole arbitrator or panel of arbitrators will render a decision and make an award, and issue detailed reasons in connection therewith, much like a judge following a traditional court proceeding. However, unlike a judicial decision, which may not be issued or rendered for a number of weeks or months following the proceedings, the parties to an arbitration generally require the arbitrator or panel of arbitrators to issue the award/decision within a stipulated time period following the hearing (usually within thirty days, depending on the complexity of the matters in dispute). Although the arbitrator's award can be enforced in the same manner as a court order, it is only binding upon the parties to the dispute, and not binding *in rem*,

and therefore has no precedent value, nor subject to the principle of *stare decisis*. Like mediation, the proceedings and the award/decision are confidential, as long as the arbitration agreement so provides. Confidentiality is compromised, however, whenever court intervention (and the corresponding appeal of the arbitrator's decision) is pursued.

III. Appeal Rights and Setting Aside Arbitral Awards

Whereas litigation affords the parties to a dispute an appeal (as of right) from all final orders of a judge, appeals from an arbitration decision are narrowly circumscribed under the Arbitration Act. Section 45 of the Arbitration Act provides that if an arbitration agreement does not specifically address appeal rights, then a party may seek leave to appeal to the Ontario Superior Court of Justice only on questions of law. Leave is not easily secured, as the court must first be satisfied that the importance to the parties of the matters at stake in the arbitration justifies an appeal, and thereafter be satisfied that the determination of the question of law at issue will significantly affect the rights of the parties. All other appeals (i.e. those involving questions of fact, or questions of mixed fact and law) must be expressly provided for in the arbitration agreement. Accordingly, if the parties wish to maintain expansive appeal rights (or, conversely, if the parties wish to curtail the right to appeal), they must do so by inserting clear contractual provisions in their arbitration agreement.

An appeal of an arbitration award, or an application to set aside an arbitration award, must be commenced within thirty (30) days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based.[7] In the case of an appeal on a question of law, the court may confirm, vary or set aside the award, or may remit the award to the arbitral tribunal with the court's opinion on the question of law, and give directions about the conduct

[7] The Arbitration Act, section 47(1). This section does not apply if the appellant or applicant alleges corruption or fraud.

of the arbitration.[8] Section 46(1) of the Arbitration Act provides for the following grounds to set aside an arbitral award:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the Arbitration Act;

(e) the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law;

(f) the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with the Arbitration Act;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud; or

(j) the award is a family arbitration award that is not enforceable under the *Family Law Act,* R.S.O. 1990, c. F.3, as amended.

In light of the fact that the language of section 46(1) is discretionary, rather than mandatory, the court may decline to set aside the arbitrator's award, even if the court concludes that the arbitrator or arbitral tribunal contravened the aforementioned judicial principles. Indeed, courts accord great deference to arbitral

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[8] *Ibid*, section 45(5).

decisions, since those decisions are made in a forum that the parties have expressly chosen to resolve their disputes, and the arbitrator is selected by the parties (either based on his or her expertise in the area that is the subject matter of the dispute, or because the arbitrator is otherwise qualified in a manner that is acceptable to both parties). Moreover, the Arbitration Act itself entrenches the primacy of arbitration proceedings over judicial proceedings (once the parties have entered into an arbitration agreement), by directing the court generally not to intervene with the arbitrator's decision, and by establishing a "presumptive" stay of court proceedings in favour of arbitration.[9] Consequently, the parties to an arbitration should, by and large, assume that the arbitrator's award will be final and binding, inasmuch as appeals from arbitral decisions are generally quite limited.

3. MANDATORY MEDIATION AND ARBITRATION UNDER THE CONDOMINIUM ACT

The mechanism for triggering mandatory mediation/arbitration under the Condominium Act is found in section 132, which provides that each of the following agreements shall be deemed to contain a provision to submit any disagreement between the parties to a dispute to mediation and, if necessary, to arbitration:

(a) an agreement between a declarant and a condominium corporation;

(b) an agreement between two or more condominium corporations;

(c) an agreement between a condominium corporation and a unit owner regarding permitted alterations or improvements to the common elements, pursuant to clause 98(1)(b) of the Condominium Act; and

(d) an agreement between the condominium corporation and its property manager.[10]

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[9] *Ontario Hydro v Dennison Mines Ltd.*, [1992] OJ No 2948, (Ont. Gen. Div.) per Blair J. (as he then was), at page 3.

[10] The Condominium Act, section 132(2). The Amended Act repeals paragraph 4 of section 132(2) and substitutes the following wording: "An agreement that the corporation has entered into with a condominium management provider or a condominium manager and under which the corporation receives condominium management services".

Sections 132(3) and (4) of the Condominium Act [now sections 132(4) and (5), respectively, of the Amended Act] also require that any disagreement between the declarant and the condominium corporation regarding the first year budget statement, or the declarant's obligation to reimburse the condominium corporation for any resulting first year deficit, as well as any disagreement between the condominium corporation and any unit owner(s) with respect to any provision(s) of the declaration, by-laws or rules, must be submitted to mediation and, if necessary, arbitration. The matter(s) in dispute will automatically proceed to arbitration if the parties have not selected a mediator within sixty (60) days after the parties initially submitted the disagreement to mediation, or within thirty (30) days after the mediator so selected has delivered a notice confirming that the mediation has failed.[11] In this way, any party to a dispute could frustrate the statutory mediation process (and thereby trigger the arbitration process) simply by failing to agree upon a mediator, inasmuch as there is no recourse to the courts for the appointment of a mediator (in contrast to the arbitration process, where any party to the dispute can apply to the court for the appointment of an arbitrator).

The Amended Act expands the scope of mandatory mediation/arbitration by expressly requiring that any disagreement regarding a shared facilities agreement, as described in the new section 21.1 (i.e. entered into between two or more condominium corporations, a condominium corporation and any other person, a condominium corporation and one or more declarants, a declarant and one or more condominium corporations, two or more declarants, or a declarant and any other person), must be submitted to the mediation/arbitration process outlined in section 132(1) for ultimate resolution.[12] Even if the parties to a dispute have not entered into a shared facilities agreement, the parties shall be deemed to have agreed in writing to submit a disagreement arising from the shared (or proposed shared) use, maintenance, repair, insurance, operation or administration of any shared land, assets, facilities and/or services (including a disagreement with respect to any question of law or equity in connection therewith) to mediation and

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[11] *Ibid*, section 132(1).

[12] The Amended Act, section 132(2).

arbitration.[13] The Amended Act further requires that any disagreement between the declarant and the condominium corporation regarding the preparation and delivery of the budget for the first fiscal year likewise must be submitted to mediation and, if not successfully resolved, to arbitration.[14]

In addition to the foregoing amendments, the Amended Act creates a new section 132(6), which clarifies that the mandatory mediation/arbitration process outlined in section 132(1) and (5) [formerly section 132(4) of the Condominium Act] does not apply to any matter in dispute for which a person may apply to the CAT for resolution. This new provision is intended to operate in conjunction with section 1.42(1) of the Amended Act, which provides that the CAT has the exclusive jurisdiction to exercise the powers conferred upon it, and to determine all questions of fact or law that arise in any proceeding before it.[15] Therefore, although the Amended Act endeavours to expand the range of disputes intended to be resolved by mandatory mediation and arbitration, the establishment of the CAT, and the future expansion of its powers to resolve those condominium-related disputes that are prescribed by the regulations, may ultimately narrow the scope of section 132 and the mandatory mediation/arbitration process.

4. RECENT ARBITRATION CASES

I. THE YCC 201 CASE

a) The Facts of the Case

Three condominium corporations (hereinafter collectively referred to as the "**Condominium Corporations**"), namely York Condominium Corporation No. 366 ("**YCC 366**"), York Condominium Corporation No. 201 ("**YCC 201**"), and York Condominium Corporation No. 102 ("**YCC 102**"), were parties

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[13] *Ibid*, section 132(3).

[14] *Ibid*, section 132(4). See also section 83.1(3), which requires the declarant to ensure that the budget of the condominium corporation for its first fiscal year is prepared in accordance with the regulations and is delivered, within the prescribed periods of time, to the post-turnover board of directors or to the pre-turnover board of directors, if the post-turnover board has not been appointed.

[15] The Amended Act expressly provides, however, that the CAT shall not inquire into or make a decision concerning the constitutional validity of a provision of an Act or a regulation [section 1.42(2)].

to a shared facilities agreement (the "**SFA**") which purported to govern the shared use, operation, management, maintenance and/or repair of a recreation complex shared by the Condominium Corporations (hereinafter referred to as the "**Recreation Complex**"). The Recreation Complex was managed and operated by the Yonge Village Recreation Centre Limited (the "**YVRC**"), a corporation incorporated under the Ontario *Business Corporations Act,* R.S.O. 190, c. B-16, as amended (hereinafter referred to as the "**OBCA**"). Each of the Condominium Corporations held shares in the YVRC, and the YVRC was also a party to the SFA.

Disputes arose between the Condominium Corporations regarding their respective obligations to fund the cost of operating and maintaining the Recreation Complex. The dispute was referred to an arbitrator (hereinafter referred to as the "**Arbitrator**"), and the Condominium Corporations agreed that the arbitration would proceed in two phases. The first phase of the arbitration would deal with purely legal issues, on which no evidence was required, while the second phase would deal with factual matters and issues pertaining to the quantum of damages or costs, upon which evidence would be required. The Arbitrator received submissions from the parties to determine the scope of each phase of the arbitration, and the Arbitrator ultimately added some, but not all, of the issues raised by YCC 201 to the first phase of the proceedings. In narrowing the ambit of the first phase of arbitration, the Arbitrator noted that the dispute over the payment of the expenses to operate the Recreation Complex had been ongoing for nearly four years, and further observed that disputes with respect to shared facilities and reciprocal agreements should be resolved as quickly as possible (and should not drag out for years), as such delay negatively impacts the affected condominium communities, and particularly the owners and residents thereof. Significantly, however, while the Arbitrator did not include all of the issues identified by YCC 201 in the first phase of the proceedings, the Arbitrator indicated that this was without prejudice to YCC 201's right to raise any of the remaining issues in the second phase.

In his arbitration award/decision (hereinafter referred to as the "**Arbitrator's Award**"), the Arbitrator concluded, *inter alia*, that the SFA does not require the YVRC to deliver audited financial statements to the Condominium Corporations, nor does the SFA stipulate that the YVRC must operate in accordance with the OBCA, as a precondition to the payment of the common operating expenses in respect of the Recreation Complex. YCC 201 sought leave to appeal this finding, pursuant to section 45 of the Arbitration Act, and to have the Arbitrator's Award set aside pursuant to the grounds outlined in sections 19 and 46 of the Arbitration Act, on the basis that the Arbitrator did not treat YCC 201 equally and fairly.

b) The Court's Ruling and Analysis

At the outset, Justice Monahan confirmed that judicial review of commercial arbitration awards will generally proceed on the basis of a "standard of reasonableness", which means that the court will not intervene to overturn or alter the arbitrator's award so long as same falls within the purview of reasonably possible outcomes or decisions that are legally acceptable and defensible, based on the facts and the applicable law. This deferential standard is premised on the fact that the parties to commercial arbitrations invariably select the number and identity of the arbitrators, either based on their expertise in the area that is the subject of the dispute, or because they are otherwise eminently qualified and/or acceptable to the disputing parties.[16] Although courts have recognized that there may be rare cases where a more exacting standard of review of an arbitrator's decision may be appropriate (such as constitutional questions, or questions of central importance to the legal system as a whole, and correspondingly outside of the arbitrator's expertise), Justice Monahan found that no such exceptional legal question arose before the Arbitrator in this case. The Arbitrator had been asked to interpret the provisions of a shared facilities agreement providing for, *inter alia*, the management and operation of the Recreation Complex. Justice Monahan noted that there was nothing to suggest that the particular agreement in question was one commonly used in the condominium

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[16] *Sattva Capital Corp. v Creston Moly Corp.,* 2014 SCC 53 at paras 104-105.

sector, or that the resolution of the contractual interpretation issues before the Arbitrator would have broader application or significance for other parties, or for the legal system generally. Moreover, the Arbitrator's Award was not a final resolution of the matters in dispute between the parties, but merely resolved a limited number of preliminary legal issues, and the parties were provided with the opportunity to raise additional legal arguments and to adduce evidence in the second phase of the proceedings. For the foregoing reasons, Justice Monahan determined that the court's review of the Arbitrator's Award should proceed on the basis of a standard of reasonableness.

Furthermore, since an appeal under section 45(1) of the Arbitration Act is permitted only on a question of law, the court must first determine whether the grounds of appeal advanced by the applicant raise any questions of law that are, in fact, appealable. In the case at bar, Justice Monahan confirmed that the Arbitrator's finding that the SFA does not require the delivery of audited financial statements, nor compliance with the provisions of the OBCA, as a prerequisite to the obligation to fund the common operating expenses in respect of the Recreation Complex, is a matter of contractual interpretation. The Supreme Court of Canada has held that the interpretation of a contract is inherently fact specific (and thus involves issues of mixed fact and law), because the decision-maker must consider the surrounding circumstances in order to ascertain the objective intentions of the parties to the contract. By characterizing the interpretation of a contractual provision as an issue of mixed fact and law, rather than purely as a question of law, the courts have thereby intentionally narrowed the scope of reviewable arbitral decisions permitted pursuant to section 45(1) of the Arbitration Act. Justice Monahan cited the Supreme Court of Canada decision in the case of *Creston Moly Corp. v Sattva Capital Corp.,* 2014 SCC 53 as authority for the proposition that treating contractual interpretation as a question of mixed fact and law is consistent with the goal of limiting the number, length and cost of appeals to the courts. While appellate intervention may be possible in certain arbitration cases, the Supreme Court of Canada has indicated that such intervention should be limited to those rare instances where the results can be expected to have far-ranging precedent value. As

a result, appellate courts, particularly those whose jurisdiction depends on having an arguable question of law to consider, should exercise caution before granting leave to appeal from decisions involving the interpretation of contracts. Since there was no indication on the record to suggest that the interpretation of the SFA would have broader significance for the condominium industry at large, or for the legal system as a whole, Justice Monahan concluded that the grounds of appeal advanced by YCC 201 raised questions of mixed fact and law, rather than questions of law, and therefore fell outside the purview of section 45(1) of the Arbitration Act.

Despite the court's conclusion which confirmed that the Arbitrator's interpretation of the SFA only raised or constituted a question of mixed fact and law, Justice Monahan nevertheless proceeded to analyze whether the Arbitrator's findings were reasonable under the circumstances, in the event that the interpretation of the SFA did, in fact, raise questions of law that could lawfully be appealed. The obligation of the Condominium Corporations to fund the common operating expenses of the Recreation Complex was set forth in the SFA, and the Arbitrator found that the provisions of the SFA were clear and unambiguous in requiring that the payment of the common operating expenses in a particular year must be made during that year, in accordance with the proposed budget for that year, rather than being paid in arrears in accordance with audited financial statements. The fact that the budget was intended to be a forward-looking document, estimating future revenues and expenses, was reflected in the language referring to the board of directors' "best estimates of all expenses of the operation of the recreation building and facilities for the coming year" and further language referring to changes "from the expenditures forecast in the annual budget."[17] The budget was expressly intended to include "an estimate of all anticipated income to be received", and to indicate "the balance of the expenses not anticipated to be met by all such income."[18] In contrast, audited financial

[17] The Yonge Village Recreation Centre Limited Reciprocal Agreement made March 31, 1973, Responding Application Record, Tab 2 at pages 20-21.

[18] *Ibid*.

statements come into play only after the year in question has concluded, in order to determine any necessary adjustments with respect to the payments that have already been made by the Condominium Corporations. Thus, the Arbitrator concluded that the SFA did not make the delivery of audited financial statements a precondition to the obligation to make the monthly payments required to fund the common operating expenses of the Recreation Complex. The Arbitrator further pointed out that this funding model reflected the practical reality that the YVRC required funds to meet its expenses on a current or ongoing basis. The only way that the YVRC could satisfy its current obligations would be through funds received during and throughout the year in which those obligations arose. Otherwise, the YVRC would always be in default of its payment obligations, and would be unable to continue operating the Recreation Complex, as required under the SFA. Accordingly, Justice Monahan found that the Arbitrator's interpretation of the SFA was reasonable, and advanced a key purpose of the agreement, which was to ensure that the Recreation Complex continued to be used and operated for the benefit of the residents of the condominium community.

Justice Monahan likewise rejected YCC 201's submission that the Arbitrator erred by ignoring the relevant and mandatory requirements of the OBCA in the Arbitrator's Award. As Justice Monahan pointed out, the parties to the SFA could have easily inserted language into their contract in order to make compliance with the OBCA (and the corresponding delivery of audited financial statements) a pre-condition or pre-requisite to the obligation of the Condominium Corporations to fund the common operating expenses of the Recreation Complex. However, in the view of the Arbitrator, the parties chose not to do so, with the result that the SFA does not make compliance with the OBCA a relevant factor in determining whether the Condominium Corporations are obliged to fund such expenses. Moreover, YCC 201 failed to identify any provisions in either the OBCA or the Condominium Act that mandated the delivery of audited financial statements in connection with the operation of the Recreation Complex, or any provisions that would preclude, or be inconsistent with, the terms of the SFA, as interpreted by the Arbitrator. In light of the

foregoing, Justice Monahan concluded that the Arbitration Award was reasonable, and should not be disturbed by the court.

Finally, YCC 201 endeavoured to set aside the Arbitrator's Award pursuant to sections 19 and 46(1)(6) of the Arbitration Act by arguing that the Arbitrator had not treated all parties to the arbitration equally and fairly, or failed to give all parties an opportunity to present their case, as evidenced by the fact that the Arbitrator precluded YCC 201 from raising certain legal issues in the first phase of the arbitration proceedings, akin to a judicial ruling "striking out a pleading because it disclosed no cause of action."[19] However, Justice Monahan confirmed that the Arbitrator's ruling merely determined the scope of the first phase of the arbitration, and that any issue that was outside the parameters of the first phase of the arbitration could be raised by the parties in the second phase. The court concluded that each party was aware of the case that it had to meet, and received a fair opportunity to present arguments on the issues to be addressed in the first phase of the proceedings, and that there was nothing unjust about this process, since the parties themselves had agreed to proceed with a two-phase arbitral process. In any event, the rulings in question were procedural rulings, which the courts have repeatedly held are not subject to appeal.[20] Justice Monahan ultimately dismissed YCC 201's application to set aside the Arbitrator's Award, with costs to the victorious respondent.

II. The Louiseize Case

a) The Facts of the Case

Michael Louiseize (hereinafter referred to as the "**Owner**") purchased, and ultimately owned, three residential condominium units (hereinafter collectively referred to as the "**Units**") in Peel Standard Condominium Corporation No. 103 (hereinafter referred to as the "**Condominium Corporation**"), which

[19] The YCC 201 Case at para 35.

[20] See, for instance, *Inforica Inc. v CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642 at paras 18, 23-25, 28-30.

were acquired between the years of 2001 and 2004. The declaration of the Condominium Corporation expressly provided that each condominium unit shall be occupied and used as a private single-family residence, and for no other purpose. The declaration also contained a clause that specifically provided that the Condominium Corporation's failure to take action to enforce any provision(s) in the Condominium Act and/or the declaration, irrespective of the number of violations or breaches, shall not constitute a waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provisions (hereinafter referred to as the "**Non-Waiver Clause**"). The Owner never lived in any of the Units, and at all material times rented out each of the Units to unrelated tenants, in contravention of the Condominium Corporation's declaration. In fact, the Owner conceded that his use of the Units was not (and had never been) in compliance with the provisions of the declaration, and he admitted to failing to provide the Condominium Corporation with the names of the persons occupying the Units, despite repeated requests by the Condominium Corporation for this information. Aside from sending the Owner the odd notice reminding him of the single-family use restriction, and asking him to provide the particulars of the leases, the Condominium Corporation took no steps to enforce the declaration until October of 2013.

The dispute between the Condominium Corporation and the Owner was ultimately referred to an arbitrator (hereinafter referred to as the "**Arbitrator**") in November of 2016. At the arbitration, the Condominium Corporation sought a declaration that the Owner was in breach of the declaration (inasmuch as the occupants of the Units were multiple unrelated tenants, occupying the premises in a manner similar to a rooming/boarding house), as well as an order requiring immediate compliance with the single-family use restrictions contained in the declaration. The Owner sought a declaration that the Condominium Corporation had failed to take reasonable steps to enforce the provisions of the declaration, as well as an order granting him the right to rent rooms within the Units to unrelated tenants, for a period equal to one half of the total time that he owned the Units up until January 30, 2014, or in the alternative, compensation for the loss of income at the rate of $600 per month per unit, for the same period of time. In the Arbitrator's award/decision

(hereinafter referred to as the "**Arbitrator's Award**"), the Arbitrator acknowledged that the Owner was in breach of the Condominium Corporation's declaration, but nevertheless allowed the Owner to continue to occupy the Units in contravention of the single-family use restriction until August 31, 2017. In a separate costs award, the Arbitrator awarded the Condominium Corporation costs of $30,000 (plus taxes and disbursements), and required the Owner to reimburse the Condominium Corporation for all fees and expenses incurred by the Arbitrator.

The Owner sought leave to appeal the Arbitrator's findings pursuant to section 45 of the Arbitration Act, and to have the Arbitrator's Award set aside and varied, such that he would be afforded 75 months to change the use of one of the Units, and 55 months to change the use of one of the other Units. The Owner also asked that the Arbitrator's award of costs be varied such that each party to the dispute would be required to pay its own costs, and to bear the costs of the arbitration equally.

b) The Court's Ruling and Analysis

As a preliminary matter, Justice Gordon confirmed that section 45 of the Arbitration Act provides that a party may appeal an arbitration award/decision to the court on a question of law, but only with leave of the court, and that the court will generally only grant leave if satisfied that the importance to the disputing parties of the matter(s) at stake in the arbitration justifies an appeal, *and* that the court's determination of the question of law at issue will significantly affect the rights of the parties to the dispute. Justice Gordon determined that both requirements were met in this case, inasmuch as the Units comprised a considerable stream of income for the Owner, and the resolution of the issues on appeal would clearly assist the Condominium Corporation in making future decisions regarding other unit owners, with respect to compliance with the single-family residence provisions of the declaration. Having concluded that the test for the granting of leave was satisfied, Justice Gordon then proceeded to consider the appropriate standard of judicial review. Justice Gordon confirmed that with respect to questions of law in these circumstances, there

is a presumption that the court will review the Arbitrator's Award based on a standard of reasonableness, inasmuch as it was fair to assume that the parties to the arbitration would not have selected the Arbitrator unless he or she was possessed of some expertise in condominium law, and that the Arbitrator's Award would therefore be given a considerable degree of deference by the courts. In this case, there was no indication on the record that said presumption should be displaced.

The first argument advanced by the Owner was that the Arbitrator erred in law in his interpretation and application of section 17(3) of the Condominium Act, which imposes a duty upon the Condominium Corporation to take all reasonable steps to ensure compliance with the provisions of the Condominium Act, as well as the provisions of the declaration, by-laws and rules.[21] The Owner argued that although the Arbitrator referred to section 17(3) in his award, the Arbitrator did not make any finding as to whether the Condominium Corporation's failure to enforce the provisions of the declaration for approximately ten (10) years was reasonable. Justice Gordon rejected this submission, and concluded that the Arbitrator clearly found that the Condominium Corporation was in breach of its statutory obligations under section 17(3), because without such a finding, the Owner would have been required to comply with the provisions of the declaration immediately. However, due to the Condominium Corporation's failure to diligently enforce the single-family residence provisions of the declaration, and to correspondingly compel compliance therewith by all unit owners consistently following the registration of the declaration, the Arbitrator intentionally deferred or delayed compliance by the Owner (and thereby granted an indulgence to the Owner) for an additional nine (9) months. In light of same, Justice Gordon was not satisfied that the Arbitrator had made any error in law in this respect.

The Owner's second argument was that the Arbitrator erred in law by finding that there was no obvious intent to mislead the Arbitrator, notwithstanding the fact that the Condominium Corporation's main

[21] This section remains unchanged under the Amended Act.

witness had changed his evidence on cross-examination. Justice Gordon noted that this was a factual finding by the Arbitrator, and thus could not be the subject of review on appeal.

The third argument raised by the Owner was premised on the Arbitrator having found there to be no acquiescence by the Condominium Corporation with respect to the Owner's non-compliance with the provisions of the declaration. Justice Gordon disagreed with this submission, and explained that a fair reading of the Arbitrator's decision, in its entirety, confirmed that the Arbitrator found there to be some, but not complete, acquiescence by the Condominium Corporation. While the Arbitrator accepted that the Condominium Corporation had knowledge that the Owner was in breach of the declaration, and although it preferred to have documentary evidence to confirm the identity of the occupants of the Units and substantiate its position before taking any enforcement steps, the Condominium Corporation could have taken compliance steps years earlier. Although he did not specifically refer to this as acquiescence, it was a tacit acceptance by the Arbitrator that the Condominium Corporation did, in fact, acquiesce for several years. Ultimately, the Condominium Corporation's inaction was one of the factors considered by the Arbitrator in arriving at his decision. However, the Arbitrator also found that the various notices delivered by the Condominium Corporation to the Owner constituted reasonable requests for information about the occupants of the Units, prior to taking any enforcement steps. Consequently, the Arbitrator determined that it could not be said that the Condominium Corporation completely acquiesced. In turn, Justice Gordon accepted such findings as reasonable, and therefore found no error in law.

The Owner's fourth argument was that the Arbitrator failed to apply section 176 of the Condominium Act (which expressly provides that the Condominium Act applies despite any agreement to the contrary), when analyzing the effect of the Non-Waiver Clause in the declaration. The Owner argued that the Non-Waiver Clause is contrary to section 17(3) of the Condominium Act [which imposes a duty on the Condominium Corporation to take all reasonable steps to ensure that the owners of units comply with the provisions of the Act, the declaration, the by-law and the rules], because the Non-Waiver Clause effectively

permits the enforcement of the provisions of the declaration even when such provisions are unreasonable in all of the circumstances [i.e. unreasonable, in light of the Condominium Corporation acquiescing to the Owner's breach or non-compliance, for approximately ten (10) years]. However, the court noted that the Arbitrator's reliance upon the Non-Waiver Clause was a secondary or alternate means of granting a remedy to the Condominium Corporation, and that even if the Arbitrator was wrong to have relied upon the Non-Waiver Clause, there were other reasons for the relief granted. Justice Gordon also pointed out that section 17(3) of the Condominium Act does not mandate that all of the steps that are taken by the Condominium Corporation must be reasonable, but rather that the Condominium Corporation must (at a minimum) take all reasonable steps, even if other steps that it may take to ensure compliance are not necessarily reasonable, or are not carried out reasonably. In this way, section 17(3) imposes a duty upon the Condominium Corporation to act reasonably, as opposed to a restriction on how it acts (or on how the Condominium Corporation gets to the desired result of compliance). For the aforementioned reasons, Justice Gordon concluded that the Non-Waiver Clause was not contrary to section 17(3) of the Condominium Act, either on its face or in its application, and that no error in law was consequently made.

The fifth argument advanced by the Owner was that the Arbitrator erred in law by considering similar fact evidence (i.e. relating to the occupation of another dwelling unit owned by the Owner in a different condominium). However, Justice Gordon rejected this submission, noting that there was insufficient evidence to determine whether these similar facts actually contributed to (or figured significantly in) the ultimate decision of the Arbitrator. In the context of the entire decision, the Arbitrator seemed to use the similar fact evidence only as additional confirmation that the Owner had not relied upon the inaction of the Condominium Corporation to his detriment, nor did the Owner's position worsen over the years during which he had owned the Units. Rather, the Owner had benefitted financially as a result of the Condominium Corporation's failure to enforce the terms of the declaration, and Justice Gordon ultimately found no error in law in this respect.

The final argument raised by the Owner was that the Arbitrator erred in law by failing to provide the Owner with a commercially-reasonable time frame within which to wind down his affairs. The Arbitrator found, as a fact, that the Units were readily rentable as single-family dwellings, and that all existing leases could be terminated on sixty (60) days' notice. Additionally, there was minimal evidence before the Arbitrator to indicate why additional time would be required, and no evidence whatsoever of what would constitute a commercially-reasonable time frame within which to wind down the Owner's affairs. In any event, the amount of time provided to the Owner to bring the use of the Units into compliance with the declaration was entirely in the discretion of the Arbitrator. Accordingly, Justice Gordon determined that there was no error in law that would justify altering or overturning the Arbitrator's Award.

With respect to the Arbitrator's costs award, the Owner argued that the Arbitrator erred in principle because he assessed fees on a partial indemnity basis, but nevertheless required payment of his expenses in full. Justice Gordon noted that the expenses attributable to the Arbitrator are akin to disbursements, which are required to be paid, in full, notwithstanding an award of partial indemnity fees. Justice Gordon was therefore not satisfied that the Arbitrator made any error in principle in his award of costs. In the end, the court dismissed the appeal, and ordered costs in favour of the Condominium Corporation in the amount of $8,200, all inclusive.

5. CONCLUSION

When the condominium legislation was enacted in the late 1990s, the provincial government recognized that due to the communal nature of condominium tenure, and the shared ownership of the common elements (including the shared use and enjoyment of various hallways, lobbies, corridors and parking facilities, as well as various recreational amenities and other facilities), ADR would be a logical fit for addressing and resolving condominium disputes. Mediation and arbitration, if conducted in a timely,

orderly and affordable manner, would be far preferable than the time-consuming, expensive and adversarial litigation process. Both mediation and arbitration provide opportunities for the parties to a dispute to resolve their conflicts more collaboratively, privately, and with more flexibility than traditional litigation, while reducing the strain placed on the province's backlogged court system. By allowing the parties to work together to reach an agreeable outcome between or amongst themselves, mediation helps to preserve and foster relationships, and to promote and preserve a sense of community or community pride/values. Although the parties to an arbitration do not determine the final outcome of the dispute, they have the ability to select both the arbitrator (or panel of arbitrators) and the timelines and procedural processes that are integral to the arbitration (including the manner of giving or producing evidence and the time within which the arbitral decision shall be rendered). The foregoing aspects of arbitration allow for more control over the adjudication process than litigation, and hopefully results in the parties having more confidence in (and/or satisfaction with) the outcome (in the form of the arbitral award), particularly since the arbitrator selected presumably possesses the expertise and skills in the subject matter of the dispute, and correspondingly understands both the applicable condominium law and the practical realties of condominium living.

The two cases discussed in this paper highlight the very limited scope for appealing an arbitrator's decision, pursuant to the provisions of the Arbitration Act. For those condominium disputes where the issues involved are inextricably tied to the interpretation of the provisions of the declaration, by-laws or rules, or the provisions of a condominium-related contract (such as a shared facilities agreement), the courts will be reluctant to intervene. For these reasons, the case law on arbitrating condominium disputes, appealing the arbitrator's decision to the courts, and the standard of judicial review in connection therewith, clearly underscores the overwhelming importance of the selection of the arbitrator to resolve the dispute, inasmuch as his or her decision is likely to be final and binding on all parties to the dispute, with limited rights of appeal. Therefore, it is critical that the parties to the dispute select an arbitrator who has expertise in the subject matter of the dispute, as well as arbitration experience and a reputation for being balanced and fair,

so that both sides will ultimately have confidence and trust in the process, and respect for the arbitrator's decision.

Although the Condominium Act mandates the resolution of certain condominium disputes through mediation and arbitration (and ultimately by court action if necessary), these mechanisms are not without their pitfalls, and can be quite costly and time consuming for the parties involved. The recent proclamation of the Amended Act, and the establishment of the CAT, has ushered in a new era of ADR that has the potential to reduce the complexity, duration and excessive costs of condominium-related conflicts. The CAT's jurisdiction is currently quite narrow in nature (i.e. presently relegated to disputes about proxies and access to the condominium's records), but the legislation expressly allows for the jurisdiction of the CAT to be expanded by regulation, which provides for greater flexibility in a rapidly-changing market. Moreover, because section 176 provides that the Condominium Act applies despite any agreement to the contrary, the parties to a dispute cannot opt out of the CAT's jurisdiction by mutual agreement.

Perhaps one of the most interesting and innovative features of the CAT is that it operates primarily as an online tribunal, which is expected to increase efficiency, and to decrease the costs associated with traditional dispute resolution mechanisms. While new to Ontario, the use of online dispute resolution (hereinafter referred to as "**ODR**") is not unprecedented.[22] Last year, British Columbia launched the Civil Resolution Tribunal to oversee dispute resolution for small civil claims ($5,000 and under) and specific strata property disputes of any amount.[23] The launch came after much beta testing and fine-tuning, the results of which were quite encouraging, both in terms of the resolution rate and user satisfaction. Proponents of ODR argue that many aspects of the justice system remain out of reach to the poor and marginalized, and that ODR

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[22] Broadly, ODR refers to the application of technology to dispute resolution. ODR strives to take advantage of the availability and increasing development of internet technology. ODR may occur in "real time" or proceed in an asynchronous manner, depending upon the rules of the ODR provider, as well as the wishes of the parties. Often, this process is more convenient and cost efficient than face-to-face meetings in order to negotiate, mediate, or otherwise resolve existing disputes.

[23] The Civil Resolution Tribunal is the first online tribunal in Canada, established under the authority of the *Civil Resolution Tribunal Act*, SBC 2012.

may offer ways to serve them better. By bringing dispute resolution out of the courtroom and into cyberspace, ODR provides parties with swifter, cheaper, and more convenient mechanisms for resolving disputes, thereby expanding access to justice. On the other hand, an ODR forum requires all parties to the dispute to possess adequate technology (and the ability to effectively utilize same) in order to participate meaningfully in the process. Additionally, parties with language barriers and/or difficulties communicating in writing (or understanding the English language) may find the ODR process particularly challenging. The great paradox of ODR is that it operates in an electronic environment that, by its very nature, isolates the disputing parties and maintains the physical distance between them, whereas traditional dispute resolution mechanisms (such as mediation) typically encourage the participants to engage in direct, face-to-face or interpersonal contact.

It remains to be seen whether the use of ODR will prove to be well-suited for resolving condominium-related disputes in Ontario. The CAT is in its early stages of development, and will likely continue to be refined and enhanced as the tribunal's caseload grows. What should be kept in mind is that some parties to a dispute, even a dispute that will be resolved by the CAT, may feel the need to retain qualified legal counsel in order to argue their case effectively, particularly since the ultimate decision or order issued by the CAT will be final and binding on the parties to the dispute, and an appeal to the court will only be available on a question of law.[24] While it is ambitious (if not presumptuous) to think that all of the Condominium Act's shortcomings will be resolved by the *Protecting Condominium Owners Act, 2015*, the creation of the CAT appears to be a promising step towards achieving effective dispute resolution for certain condominium-related grievances, and its early success will no doubt encourage the government to move more quickly on the passage of regulations designed to expand the scope of condominium-related disputes over which the CAT will preside.

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[24] The Amended Act, sections 1.46(1) and (2).