COURT OF APPEAL FOR ONTARIO

CITATION: Kikites v. York Condominium Corporation No. 382, 2024 ONCA 34
DATE: 20240118
DOCKET: COA-22-CV-0041

2024 ONCA 34 (CanLII)

Gillese, Trotter and Coroza JJ.A.

BETWEEN

Andreas Kikites

Applicant (Appellant)

and

York Condominium Corporation No. 382

Respondent (Respondent)

Scott G. Lemke, Emma Chapple, and Alexa Cheung, for the appellant

Avi Sharabi and Leigh Clark, for the respondent

Heard: September 21, 2023

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated August 10, 2022, with reasons reported at 2022 ONSC 4606.

Trotter J.A.:

[1] This appeal arises from a noise-related dispute between the appellant and York Condominium Corporation No. 382 ("the Corporation").

A. FACTUAL BACKGROUND

[2] The appellant is a unit holder in a 45-story building in Toronto, known as the Palace Pier. He lives on the 22nd floor. His unit is directly below the unit occupied

by Ms. Nives Ceronja and her twin children, a son and a daughter. Ms. Ceronja's son is quadriplegic and suffers from a seizure disorder and experiences neuropathic pain. He needs around-the-clock medical care. This care requires the use of extensive medical equipment, including an oxygen and heart rate monitor on a table, a pump on a medical hospital pole with wheels, and an oxygen concentrator and humidifier. A nurse visits every evening and stays the night to assist in the care of Ms. Ceronja's son.

[3] According to the appellant, the noise emanating from Ms. Ceronja's unit is bothersome, especially during his normal sleeping hours at night. He has made over 200 noise complaints to the Corporation, going back to 2015. Repeatedly, when the appellant made a noise complaint, staff employed by the Corporation responded by investigating the source of the noise. This sometimes involved talking directly with Ms. Ceronja. On one occasion, it was determined that undue noise was caused by her daughter's play activity. The Corporation sent a letter warning Ms. Ceronja about this noise. The situation was rectified.

[4] During this early time period, the Corporation offered to conduct a noise study, which the appellant declined. He also refused the Corporation's requests to conduct further noise inspections. The appellant said that the intensity and frequency of the noise disturbances had largely abated and he did not wish to proceed.

2024 ONCA 34 (CanLII)

[5] Four years would pass before the appellant's noise complaints started up again. On September 5, 2020, the appellant confronted Ms. Ceronja at her unit by knocking aggressively on her door. The police attended at 4:00 a.m. and left shortly afterwards, indicating that they did not hear any noise. This inaugural event triggered numerous complaints by the appellant in the ensuing months. These complaints focused largely on Ms. Ceronja's unit, but also on noise generated by construction in other units in the building.

[6] At the end of March 2021, the appellant retained counsel and noise testing commenced. The first study was commissioned by the Corporation. The study resulted in a report dated October 8, 2021, concluding that the building was constructed in accordance with the Ontario *Building Code*, O. Reg. 332/12 and that "no noise and vibration controls are warranted at this time."

[7] The Corporation also retained an acoustical engineer to conduct testing in the appellant's unit from 9:00 p.m. to 12:00 a.m. on February 8, 10, and 14, 2022. No significant sound events occurred during these in-person monitoring sessions.

[8] The appellant commissioned a noise test that was conducted between November 5 and 15, 2021. A report indicated that "significant" sound intrusions were detected in the appellant's unit, with an average of 41 intrusions per night. However, the source of the sounds was not independently verified; that is, no one

2024 ONCA 34 (CanLII)

was simultaneously monitoring Ms. Ceronja's unit. The testers acted on the appellant's assertion that the noise emanated from Ms. Ceronja's unit.

[9] Leading up to the hearing, the Corporation commissioned another noise study. However, because the report was only available after a scheduling deadline set for this proceeding, the application judge disregarded the report.

2024 ONCA 34 (CanLII)

B. THE APPLICATION

[10] The appellant brought an application in the Superior Court seeking various forms of relief under the *Condominium Act*, S.O. 1998, c. 19 ("the Act"), including $300,000 in damages. Importantly, Ms. Ceronja was not made a party to this application, even though she was examined as a non-party.

[11] From a review of the appellant's Amended Notice of Application filed in the Superior Court, the application was based on ss. 134 and 135 of the Act. Whereas s. 134 provides for orders directing compliance with the Act, as well as the declarations, by-laws, and rules of the Corporation, s. 135 creates an "oppression remedy". The relevant portions of these sections provide:

> 134(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. [Emphasis added.]

. . .

> 135(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter. [Emphasis added.]

[12] As discussed in more detail in the following section, the appellant's main focus before the application judge was on the oppression remedy in s. 135. This was emphasized in the factums filed on the appellant's behalf in the Superior Court, and in this court. However, at the hearing of the appeal, new counsel for the appellant relied almost exclusively on s. 134. In his reasons, the application judge did not refer to any particular section of the Act; however, his singular focus was on the oppression remedy.

[13] In terms of evidence concerning the noise allegedly emanating from Ms. Ceronja's unit, the application judge characterized the case as a "contest of experts and a mixed record": para. 19. He made the following findings, at paras. 10-12:

> [10] This late-night activity, while necessary for Ms. Ceronja's son, is alleged to create a level of noise that may not be bothersome during the daytime when the Respondent's security personnel have visited the unit, but that is bothersome during what would be the Applicant's sleeping hours after midnight. In that respect, the Applicant's claim is credible. It cannot be a coincidence that where there is an unusual amount of movement and activity after midnight in one unit in a condominium building, there might be an unusual amount

2024 ONCA 34 (CanLII)

> of noise from that movement and activity in the unit below.
>
> [11] The Respondent has taken the position that the Applicant is overly sensitive to such noise. The Applicant takes issue with that, and I don't blame him. Other than the fact that he has complained about the noise, there is no evidence that he is somehow unusually sensitive.
>
> [12] The more likely explanation is that the occupants of the unit above him are making some noise by having the nurse walk around and by running some medical equipment. It is not excessive to the point that it would be particularly noticed or bothersome in the daytime, but the fact is that there are daytime-like noises at nighttime coming from the unit above the Applicant. That experience, night after night, might well be experienced as a nuisance by most people who keep to standard sleeping hours. [Emphasis added.]

[14] The application judge went on to find that the Corporation's responses to the appellant's many complaints were appropriate. As he said at paras. 17-18:

> [17] In the case at bar, the Respondent sent its employees to the Applicant's and to Ms. Ceronja's unit on multiple occasions. When they identified remediable instances of noise, such as where Ms. Ceronja's daughter was running around the apartment, the Applicant asked that the bothersome activity cease. On the other hand, they could not, and would not, ask that the medical care needed by Ms. Ceronja's son cease.
>
> [18] When the [Applicant] produced expert reports describing unusual sounds at night, the Respondent responded with its own expert reports. Those reports stated that the construction of the building was satisfactory and that there was not an excessive level of noise. Applicants' counsel take issue with those reports, but that is what they say. The Respondent cannot be said to have done nothing when it invested in two different

2024 ONCA 34 (CanLII)

> experts who produced reports that the Applicant doesn't like. [Emphasis added.]

[15] The application judge found that the Corporation's actions in retaining its own expert reports went "above and beyond what might be expected": para. 19. He rejected the appellant's main submission that the appropriate remedial order would be to compel the Corporation to install a raised and padded floor in Ms. Ceronja's unit. He found that the Corporation had no legal authority to renovate Ms. Ceronja's unit. He observed: "If that were to be the remedy, Ms. Ceronja would have to be a party to the Application." Given that she was not, "the court is left with no remedy for his complaint": para. 21.

[16] The application judge's ultimate conclusion on the oppression remedy is captured in the following passage of his reasons, at para. 22:

> The condominium corporation – the one and only Respondent before me – has done what it could and has not been oppressive in its conduct. It is not in a position, and cannot be expected, to either do internal renovations to another unit owner's unit. And given the conflicting sound engineering evidence and the fact that the noise is non-bothersome all day long, the Respondent is not in a position to compel another unit owner to renovate her unit. In any case, the Court certainly would not be in a position to order such a remedy without fulsome participation and legal submissions from that unit owner. [Emphasis added.][1]

[17] The application was dismissed. The application judge made no costs award.

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[1] The application judge's finding on oppression is repeated in para. 23 of his reasons.

2024 ONCA 34 (CanLII)

C. ANALYSIS

(1) Proper Scope of the Appeal

[18] In a factum prepared by counsel who appeared before the application judge, the appellant submits that the application judge: (1) failed to apply the relevant two-part test for the oppression remedy; (2) failed to consider the broad range of remedies available in s. 135(3) of the Act; (3) failed to consider other relevant provisions of the Act; and (4) erred in finding that he could not grant the remedy requested because Ms. Ceronja was not a party to the proceedings.

[19] Different counsel appearing at the appeal hearing attempts to take the case in a different direction. His focus was on the failure of the application judge to make a compliance order under s. 134 of the Act.

[20] The appellant's new argument hinges on the s. 17(3) duty of the Corporation to "take all reasonable steps to ensure that the owners … of units … comply with this Act, the declaration, the by-laws and the rules". Section 119(3) creates a right in the Corporation to ensure compliance. The mechanism by which these rights and obligations are enforced is through an application for a compliance order under s. 134.

[21] This new submission essentially ignores all previously made oppression submissions and is focused on an alleged nuisance originating in Ms. Ceronja's unit. The appellant now relies on s. 117(2) of the Act, which provides:

2024 ONCA 34 (CanLII)

> (2) No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,
>
> > (a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or
> >
> > (b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation. [Emphasis added.]

2024 ONCA 34 (CanLII)

[22] The appellant submits that these provisions, in combination, should result in a compliance order under s. 134, requiring the Corporation to take "all reasonable steps" to address the nuisance he has identified. Counsel urges us to rule that the application judge found there to be a nuisance in para. 12 of his reasons (reproduced in para. 13, above), paving the way for this court to make an order under s. 134. Counsel submits that a letter to Ms. Ceronja, insisting on compliance with the Act, would be an appropriate first step as a remedial response.

[23] But this is not what the appellant asked the application judge to do. As noted above, the Amended Notice of Application requested relief under a number of provisions of the Act, including s. 134. However, the appellant's factum in the Superior Court barely makes mention of s. 134; the focus was on oppression, under s. 135. The same can be said of the factum filed in this court.

[24] I accept the submission of counsel for the Corporation that the operation of s. 134 took a secondary role at the hearing of the application. It was relied upon to augment the remedial aspect of the application in the event of a finding of

oppression. I note that both ss. 134(3) and 135(3) furnish an application judge with a broad and arguably overlapping remedial discretion to address the various complaints brought under these sections.

[25] I further agree with the Corporation that the application judge stopped short of finding that there was a nuisance. I repeat the tentative finding, at para. 12: “That experience, night after night, might well be experienced as a nuisance by most people who keep to standard sleeping hours” (emphasis added). He stopped short of reaching a formal, legal conclusion on the existence of a nuisance because he was not tasked with doing so; he was asked to find oppression.

[26] In my view, the appellant should not be permitted to re-cast his application at such a late stage in the appellate process. The application was all about the steps, or lack of steps, taken by the Corporation in responding to the noise situation. The appellant made a litigation choice to focus these proceedings, in which he sought $300,000 in damages, on the Corporation instead of on Ms. Ceronja. The application judge acknowledged this reality at para. 21: “While I understand why the applicant may not have been enthusiastic about drawing Ms. Ceronja into this legal dispute, and I would not want to hazard a guess as to what would have been the result had he done so, the fact is that at present the court is left with no remedy for his complaint”. The appellant should not be permitted to take a new approach to his application now, after his initial litigation choice did not have its intended outcome.

2024 ONCA 34 (CanLII)

[27] In *York Condominium Corporation No. 221 v. Mazur*, 2024 ONCA 5, the court was faced with a similar situation. The appellants had failed to seek a s. 135 remedy before the application judge; they raised it for the first time on appeal. This court refused to entertain the new argument because "it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal": at para. 12.

[28] In this case, although the appellant made some references to s. 134 in his Amended Notice of Application, and in his written submissions to the application judge, the application judge was not asked to undertake the analysis that we are being asked to "review" on appeal. To allow the appellant to change direction in this manner would require this court to engage in a fact-finding exercise. This is not the role of an appellate court. Moreover, permitting a new issue to be raised at this juncture runs counter to the interests of finality in litigation. Consequently, the following reasons focus on the application judge's rejection of the appellant's request for an oppression remedy.

(2) The Oppression Remedy

(a) The Test for Oppression

[29] The oppression remedy, already described above, is found in s. 135 of the Act, which provides:

2024 ONCA 34 (CanLII)

> **(1) Oppression remedy**
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> **135(1)** An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
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> **(2) Grounds for order**
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> **(2)** On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
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> **(3) Contents of order**
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> (3) On an application, the judge may make any order the judge deems proper including,
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> > (a) an order prohibiting the conduct referred to in the application; and
> >
> > (b) an order requiring the payment of compensation. [Emphasis added.]

[30] This court stated the test for oppression in *Mohamoud v. Carleton Condominium Corporation No. 25*, 2021 ONCA 191, 13 B.L.R. (6th) 43, another case involving a condominium corporation's response to a noise complaint. As the court stated at para. 8:

> Under s. 135(2) of the Act, the court must determine whether the impugned conduct is, or threatens to be, oppressive or unfairly prejudicial to the applicant or unfairly disregards their interests. The test under s. 135(2) has two prongs. First, the court must assess whether there has been a breach to the claimant's reasonable expectations. If the answer is yes, the court must then go on to consider whether the conduct complained of amounts to oppression, unfair prejudice, or unfair disregard of the relevant interest: *Metropolitan*

2024 ONCA 34 (CanLII)

> *Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation*, 2011 ONCA 667, 285 O.A.C. 372, at paras. 5-6; *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 61 B.L.R. (5th) 173, at para. 29. [Emphasis added.]

[31] In applying this test, deference is afforded to the decisions of condominium boards. In *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 61 B.L.R. (5th) 173, Hoy A.C.J.O said, at para. 53:

> [T]he first question for a court reviewing a condominium board's decision is whether the directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board's balancing of the interests of a complainant under s. 135 of the *Act* against competing concerns should be accorded deference. The question in such circumstances is not whether a reviewing court would have reached the same decision as the board. Rather, it is whether the board reached a decision that was within a range of reasonable choices. If it did, then it cannot be said to have unfairly disregarded the interests of a complainant. [Emphasis added.]

(b) Application to this Case

[32] In his factum, the appellant submits that the application judge erred in a number of respects. His main ground is that the application judge failed to state and then properly apply the two-part test for oppression recognized in the case-law. Embedded in this submission is the claim that the application judge's reasons are insufficient. He further submits that the application judge failed to consider the full range of remedial options available to him under s. 135(3), and that he erred in

2024 ONCA 34 (CanLII)

concluding that he could not grant the remedy he requested – the renovation of Mr. Ceronja's unit – without her formal participation in the proceedings. I would not accept these submissions.

2024 ONCA 34 (CanLII)

[33] In terms of failing to explicitly state and then apply the two-part test for oppression, I follow the direction of the Supreme Court of Canada in *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, in which Karakatsanis J. said at para. 74:

> Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application -- the presumption that "the trial judge understands the basic principles of criminal law at issue in the trial": *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, "Trial judges are presumed to know the law with which they work day in and day out": see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

This approach is not restricted to the criminal law; it enjoys application in other realms of appellate review: see e.g., *1346134 Ontario Ltd. v. Wright*, 2023 ONCA 307, 166 O.R. (3d) 250, at paras. 56-57; *Farej v. Fellows*, 2022 ONCA 254, at paras. 46-47, leave to appeal refused, [2022] S.C.C.A. No. 180; *Hague v. Hague*, 2022 BCCA 325, at paras. 18-22.

[34] Although the application judge did not specifically refer to s. 135, when read as a whole, his reasons reveal an appreciation of the principles engaged by that

provision. He cited cases that applied s. 135, all in the context of noise complaints, including *Zaman v. Toronto Standard Condominium Corporation No. 1643*, 2020 ONSC 1262, in which the governing test for oppression and the relevant jurisprudence are discussed (at paras. 23-31). The application judge also relied on his own decision in *Dyke v. Metropolitan Toronto Condo Corp. No. 972*, 2013 ONSC 463, another noise complaint case, in which he concluded that the test for oppression in s. 135(2) had been met, and for which he granted a remedy under s. 135(3).

[35] In reviewing the application judge's reasons in a case such as this – where it is alleged that a condominium corporation has acted oppressively – the two steps of the oppression test may tend to merge. In *Mohamoud*, the unit-holder argued that the condominium corporation ignored her complaints and deliberately dragged its heels in responding, a submission that the application judge did not accept. As this court said, at para. 11:

> After thoroughly engaging with these concerns, the application judge made the following finding:
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> > I find that Ms. Mohamoud had a reasonable expectation that CCC25 would comply with its statutory obligations to repair and maintain its common elements. I also find that CCC25 acted reasonably and in compliance with these obligations.
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> Stated otherwise, the application judge found that the appellant failed to satisfy the first prong of the test: the respondent did not act in a manner that breached the

2024 ONCA 34 (CanLII)

> appellant's reasonable expectations because it acted reasonably and complied with its statutory obligations.

[36] In this case, where the Corporation is alleged to have acted oppressively, the appellant's expectation of quiet enjoyment of his unit is not the focus of the analysis. Although the noise complaint is the underlying factual premise of the application, the legal issue is what the appellant could reasonably have expected the Corporation to do about it.

[37] Read as a whole, the reasons of the application judge reflect that he considered these issues to be interrelated. While the application judge agreed that ongoing noise at late hours could be bothersome, he dismissed the application because the Corporation acted reasonably in the circumstances. Although the Corporation sent only one letter to Ms. Ceronja (about the noise created by her daughter), the Corporation engaged her numerous times in trying to solve the problem. The application judge found that, in fact, the Corporation had gone above and beyond what was expected of it in the circumstances by retaining acoustic engineers and conducting noise-testing. The analysis of steps one and two of the test merged – the application judge found neither a breach of reasonable expectations nor conduct that was unfairly prejudicial or that unfairly disregarded the interests of the appellant.

2024 ONCA 34 (CanLII)

[38] In this respect, this case is comparable to *Mohamoud*. In *Mohamoud*, the court itemized the steps taken by the condominium corporation to address the unit holder's concerns, at para. 13:

> [T]he application judge was satisfied that the respondent had addressed the appellant's complaint in a reasonable manner by meeting with her, communicating with her orally and in writing, visiting her unit on multiple occasions, retaining contractors and experts to investigate, and in following the recommendations of the experts. The application judge's finding that the respondent's conduct did not amount to oppression, unfair prejudice, or unfair disregard is entitled to deference on appeal.

[39] The Corporation's actions in this case were nearly identical. Similarly, the application judge's finding that the Corporation acted reasonably is entitled to deference. In my view, there was no basis for the application judge to intervene. The actions of the Corporation were well within the range of reasonable choices. It cannot be said that the Corporation unfairly disregarded the appellant's interests in addressing this difficult situation.

[40] The appellant further submits that the trial judge failed to consider other remedies available to him under s. 135(3) of the Act. Again, for ease of reference, this provision provides:

> **(3)** On an application, the judge may make any order the judge deems proper including,
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> > **(a)** an order prohibiting the conduct referred to in the application; and

2024 ONCA 34 (CanLII)

(b) an order requiring the payment of compensation.

[41] Given that the application judge did not find that the test for oppression had been met, it is not strictly necessary to address this ground of appeal. Nevertheless, this submission is without merit. The application judge was not required to consider alternative remedies that the applicant did not request. The application judge noted at para. 20 of his reasons: "Applicant's counsel suggest in their submissions that the real remedy here is the one proposed by the Applicant's engineer – installing a raised and padded floor in Ms. Ceronja's unit" (emphasis added). As appellant's new counsel acknowledged at the hearing, this was "not a winning argument," for the reasons outlined above. Nothing more was required of the application judge with respect to remedies.

[42] I would dismiss this ground of appeal.

[43] The appellant also submits that the application judge erred in concluding that he could not make an order for the renovation or remediation of Ms. Ceronja's unit because she had not been made a party to the proceedings. I do not accept this submission.

[44] Again, this goes back to the heart of the matter before the application judge. The appellant sought redress against the Corporation through the oppression remedy. Although Ms. Ceronja was examined as a non-party, she did not participate in the application.

2024 ONCA 34 (CanLII)

[45] The trial judge thoroughly addressed this issue in paras. 20-22 of his reasons:

> 20 … From an engineering point of view that may well be a remedy, but from a legal point of view it is a problematic suggestion. While the condominium rules provide that each unit owner deserves quiet enjoyment of their property, they also provide limitations to the condominium corporation's authority.
>
> 21 Specifically, the corporation has ownership and control over the common elements and what is usually called the 'envelope' of each unit, but it has no right in or authority over the interior of any privately owned unit. The Respondent is not in a position to renovate Ms. Ceronja's unit and install new flooring. If that were to be the remedy, Ms. Ceronja would have had to be a party to the Application. While I understand why the Applicant may not have been enthusiastic about drawing Ms. Ceronja into this legal dispute, and I would not want to hazard a guess as to what would have been the result had he done so, the fact is that at present the court is left with no remedy for his complaint.
>
> 22 The condominium corporation - the one and only Respondent before me - has done what it could and has not been oppressive in its conduct. It is not in a position, and cannot be expected, to either do internal renovations to another unit owner's unit. And given the conflicting sound engineering evidence and the fact that the noise is non-bothersome all day long, the Respondent is not in a position to compel another unit owner to renovate her unit. In any case, the Court certainly would not be in a position to order such a remedy without fulsome participation and legal submissions from that unit owner.

[46] I see no error in the application judge’s approach.

2024 ONCA 34 (CanLII)

Disposition

[47] I would dismiss the appeal. If the parties are unable to agree on costs, they may submit written submissions, no more than 3 pages in length each, along with their Bills of Costs, within 30 days of the release of these reasons. Reply submissions are not permitted.

Released: January 18, 2024 “E.E.G.”

“Gary Trotter J.A.”
“I agree. E.E. Gillese J.A.”
“I agree. Coroza J.A.”

2024 ONCA 34 (CanLII)