

**Volume 2011 (3): March*****Durham Condominium Corporation No. 63 v. On-Cite Solutions Ltd., [2010] O.J. No. 5214 (S.C.J.)***

The industrial condominium sought an order requiring the unit owner to restore a wall within the unit to its original condition. Originally, the unit had a 36-inch doorway, but at some point after construction the doorway was widened to 10 feet. Prior to purchasing the unit, the unit owner requested a status certificate from the condominium. Two days after the request the status certificate was signed by the board of directors. However, seven days prior to the closing date of the transaction, the president conducted a routine inspection of the unit and noticed the unapproved change to the doorway. After the new unit owner took possession, the condominium sent a letter advising it of the unauthorized alteration of the wall. In the spring of 2010, the unit owner retained a structural engineer to reinforce the wall. The wall was not returned to its original configuration, but the wall was apparently structurally sound.

The Court dismissed the condominium's application. The Court held that the unapproved wall was a circumstance that was financially material to the purchaser's purchase decision and should have been disclosed in the status certificate. The condominium knew of the problem in a timely fashion, and the unit owner relied upon the status certificate to its detriment. As a result, the condominium was estopped from pursuing the new unit owner for the unapproved change. In addition, the Court held that it was neither fair nor equitable to order the restoration of the wall where the unit owner paid to reinforce it even though it was not the one who altered it. Nor was there any useful purpose in compelling the restoration.

Bottomline: If a condominium is aware of an unapproved change, it must provide timely notice to a purchaser by listing it in the status certificate to the unit. In addition, should the unapproved change come to light after the status certificate is issued, the condominium now has a duty to inform the potential purchaser as soon as possible.

[In the author's opinion, this case is incorrectly decided. Pursuant to section 76(6) of the Condominium Act, 1998, S.O. 1998, c.19, the status certificate binds the condominium as of the date it is given or deemed to have been given. The president's knowledge of the unapproved change was imputed to the condominium, and rightly so. However, the Court confuses the matter by ruling that the president's unsuccessful effort to bring the issue to the purchaser's attention after the status certificate was issued was an admission of his responsibility to do so. The Court suggested that he could have amended the status certificate or sent a revised version or supplementary letter. In my humble opinion, the Court's interpretation that paragraph 12 of the status certificate requires the condominium to disclose the information as a potential increase in the common expenses for the unit is forced and plainly inconsistent with the Act. With all due respect to the Court, imposing such an obligation on the Corporation improperly involves the condominium in the purchase and sale transaction where it is neither a party nor statutorily obligated to do so.]

It is apparent from reading the case that the court was concerned with the condominium's powers and duties under the Act. The Court referred to section 134 as a "draconian tool" used by condominiums to order removal of attractive and useful features. For example, the Court reviewed section 134(5) of the Act, and awarded no costs to prevent the condominium from claiming any of its legal costs from the unit owner. To do so, the Court relied upon section 134(3) which gives the court discretion in hearing a section 134 application to make any order it deems fair and equitable. As a result, the Court refused to award costs to the condominium.]

**Volume 2011 (3): March*****Peel Condominium Corporation No. 108, [2011] O.J. No. 1203 (S.C.J.)***

The condominium brought an application for an order requiring the unit owner to remove a tankless gas water heater vent which was installed without prior approval or entry into a section 98 agreement. The condominium also sought to have its costs for restoring the wall to its original condition. The unit owner disputed the condominium's ability to enforce, claiming the condominium had been selectively enforcing the Declaration and it would be unfair to enforce against her.

The Court allowed the application. The Court acknowledged that the condominium had been selective in its enforcement efforts. There were at least three other unit owner owners that had installed vents through the exterior common element walls to their units which were similar to the one the unit owner in this case had installed. Counsel for the condominium acknowledged the other issues, and indicated that enforcement proceedings would be commenced with respect to the other units depending upon the result of this case. In allowing the application, the Court stated:

“In my view, there has been a degree of selective enforcement by the applicant sufficient to give rise to a concern. However, it does not approach the sort of rampant non-enforcement that has arisen in some cases, particularly those involving the keeping of pets.”

And further:

“Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the Declaration enforced must prevail over the private interest of the respondent. The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets.”

Bottomline: A condominium may be able to enforce even if past, including similar, transgressions have been permitted. The Court will look at the number and severity of the other transgressions in making its determination. Also, the collective interest of the other unit owners within the condominium shall prevail over the private interests of one unit owner.

[Note: there was no mention of mediation/arbitration proceedings with respect to this dispute].

Further update on January's Legal Update

York Region Condominium Corporation No. 890 v. RPS Resource Property Services, [2010] ONSC

The Court has determined costs in the proceeding. As you may recall, the condominium was successful against its former property management firm and the president of the management firm for breach of contract, breach of trust, and conversion. The Court referred to the basic principle that conduct that is reprehensible, scandalous or outrageous, either giving rise to the action or in the proceedings themselves, is grounds for costs on a substantial indemnity basis. As a result, the Court awarded the condominium its costs on a substantial indemnity basis, being \$113,267.80, against the property management firm and its president.