Should Past Instances of Spotty or Selective Enforcement of the Provisions of the Declaration Preclude Future Enforcement of the Declaration by the Condominium Corporation? - - - A Comment on the Decision in ***Peel Condominium Corporation No. 108 v. Young***

by

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SUMMARY

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1. INTRODUCTION

Section 17(2) of the *Condominium Act S.O. 1998, as amended* (hereinafter referred to as the "**Act**") imposes a duty on the condominium corporation to control, manage and administer the common elements, while section 17(3) of the Act requires the condominium corporation to take all reasonable steps to ensure that the owners and occupiers of the respective units in the condominium comply with the provisions of the Act, as well as the declaration, by-laws and rules. In addition, pursuant to section 119(1) of the Act, every unit owner is obliged to comply with the provisions of the Act, as well as the provisions of the declaration, by-laws and rules of the condominium, and section 119(3) of the Act confirms that the condominium corporation has the statutory right to require such compliance. Notwithstanding the foregoing, there have been instances where the provisions of the condominium's declaration, by-laws and/or rules have not been duly observed by all of the unit owners, nor vigilantly enforced by the board of directors. In such circumstances, particularly in those reported cases where restrictions on pets contained in the declaration, by-laws or rules of the condominium were not consistently (nor uniformly) enforced, the courts have not always insisted on the strict enforcement of such provisions or restrictions contained in the condominium's constating documents, since to do so was judicially considered to be inequitable or prejudicial to the non-compliant unit owner who had reasonably relied on the board's history of non-enforcement, to such owner's detriment [see *MTCC No. 601 v. Hadbavny (2001) 48 R.P.R. (3rd) 159*,

and *MTCC No. 949 v. Staib (2005) Carswell Ont 7105*, with leave to appeal in such last-mentioned case having been denied by the Ontario Court of Appeal in (2006) Carswell Ont 2060]. Another case involving spotty or selective enforcement of the declaration was *YCC No. 122 v. Sibblis (1989) 72 O.R. (2d) 12* (the "**Sibblis Case**"), where a unit owner proceeded to erect a satellite dish in his backyard, upon the exclusive use common elements appurtenant to his unit, without having first obtained the permission of the board of directors thereto, in contravention of the provisions of the declaration prohibiting an owner from making any change to an installation upon the common elements, or altering the common elements, and in contravention of an existing rule which prohibited the placement of any building or structure upon the common elements. The court in the Sibblis Case noted that the board had, on various occasions throughout the previous 9 years, informally permitted metal storage sheds and similar installations in the backyard common elements of various other units, and that no one specifically objected to the installation of the satellite dish in any event. Notwithstanding the aforementioned prohibitions outlined in the declaration and rule of the condominium, the court in the Sibblis Case nevertheless refused to order the removal of the satellite dish, and confirmed that its installation was akin to a pre-existing non-conforming use of a portion of the common elements, since the board of directors had never expressly objected to the installation of satellite dishes until only after this particular unit owner purported to do so, without seeking the board's approval.

While the result in the Sibblis Case may seem fair from the perspective of the non-compliant unit owner, based on the board's past history of allowing or ignoring other installations upon the common elements, it nevertheless begs the question of whether a condominium corporation's spotty or selective enforcement of any particular provision of the declaration should preclude the future

enforcement of such provision, to the potential detriment of any present and/or prospective unit owners. This question was squarely addressed by the court in the recent case of *PCC No. 108 and Young (2011) 4 R.P.R. (5th) 162* (hereinafter referred to as the "**Young Case**"), and this paper carefully reviews the judicial reasoning in this case.

2. THE FACTS OF THE CASE

The facts in the Young Case are simple and straightforward. The respondent unit owner installed a tankless gas water heater in her unit, and in doing so, constructed a vent through the outside wall of her unit. The outside wall comprised part of the common elements, and accordingly the unit owner made an alteration to the common elements without procuring the prior consent of the board of directors thereto, in contravention of the provisions of the registered declaration which expressly prohibited any such alteration of the common elements, without the consent of the board. The applicant condominium corporation requested the unit owner to remove the vent and to restore the wall to its original condition, and when she refused to do so, the condominium corporation sought a compliance order under section 134 of the Act, to compel the unit owner to remove the vent or to pay the condominium for the cost of restoring the wall to its original condition. The respondent unit owner claimed that it would be unfair to enforce the provisions of the declaration against her, because another unit owner had previously constructed a furnace vent through the rear wall of their unit, below the fence line, and at least three kitchen exhaust fans had been installed through the exterior walls of three other units, without any enforcement proceedings having been commenced by the board in connection therewith. The respondent also argued that the doctrine of promissory estoppel should prevail to prohibit the condominium corporation from enforcing the declaration under these circumstances, particularly because she was led to reasonably believe,

through the past inaction of the board involving other unit owners who likewise contravened the same provisions in the declaration regarding unapproved alterations of the common elements, that she would be permitted to break through the outside wall of her unit, and that the condominium corporation has selectively enforced the declaration against her, which is inequitable.

The applicant condominium corporation argued that it is statutorily obliged to enforce the provisions of the declaration for the benefit of all unit owners, and any contravention can only be permitted if it is expressly authorized by the board. The condominium corporation also confirmed that there had been no selective enforcement of the declaration, because any prior contraventions were only minor in nature, and the more serious alterations either fell within the board's policy regarding approved venting through exterior walls, or will be the subject of future enforcement proceedings to be pursued against the other non-compliant unit owners, depending on the result or outcome of this case. The condominium corporation also relied on a provision in the declaration that stipulated, in substance, that any violation of the declaration so permitted by the board shall not prevent the enforcement of any similar violation that may subsequently occur.

3. THE TRIAL COURT'S RULING

At the outset of his analysis, Justice Gray confirmed that in his view, the evidence fell far short of supporting or validating any detrimental reliance defence, inasmuch as there was no representation made by or on behalf of the condominium corporation to the respondent unit owner regarding any permitted venting through the outside wall of her unit, upon which the latter could reasonably rely. Of more significant concern, however, was the issue of selective enforcement of the declaration, in light of the number of instances where similar breaches of the declaration went unaddressed, or were condoned, by the applicant and its board. The court noted that the argument

of selective enforcement raises the issue of fairness, and correspondingly obliges the court to balance competing interests, namely the board's statutory duty to enforce the declaration for the benefit of all unit owners, on the one hand, and the legitimate complaint of the individual unit owner who violated the declaration under circumstances where the board had permitted other similar violations to occur without consequence. Although the court in the Young Case acknowledged that there had been a degree of selective enforcement sufficient to give rise to a concern, it did not approach the rampant non-enforcement prevalent in some other reported cases involving restrictions or prohibitions on pets. Justice Gray considered the circumstances before him to be somewhat analogous to the selective enforcement of a municipal by-law, and referred (with approval) to the decision of the Court of Appeal in the case of *City of Toronto v. Polai [1970] 1 O.R. 483*, where the appellate court ruled that despite the discriminatory enforcement of the impugned by-law on the part of the municipality, the substantial public interest in the enforcement of the by-law should prevail over the private interests of the admitted transgressor, notwithstanding the discriminatory application and resulting inequity to the latter. Justice Gray proceeded to apply the same reasoning in the context of enforcing the condominium's declaration, and noted that the declaration is akin to a constitution which binds all unit owners, and there's a collective interest on the part of all unit owners in having the declaration enforced, even if some unit owners have been allowed to contravene same on occasion. The court in the Young Case confirmed that the collective interest of all unit owners in having the declaration enforced, even in the face of a prior history of spotty or selective enforcement by the board of directors, must prevail over the private interests of a non-compliant unit owner. Parenthetically, Justice Gray noted that the situation would undoubtedly be different if there had been a history of massive or large scale non-enforcement, as was the case in some earlier reported cases involving pets. It's also of some interest to note that while the

condominium corporation's selective enforcement of the declaration did not bar it from attaining the compliance order it sought, such selective enforcement was nevertheless relevant to the issue of costs, and Justice Gray was not prepared to automatically award costs to the successful condominium corporation on a substantial indemnity basis, without entertaining further written submissions regarding same.

4. MY VIEW OF THE DECISION

In my respectful opinion, the ruling of the Court in the Young Case is absolutely correct, and essential for the future viability of the condominium. If Justice Gray had ruled otherwise, so that the board's past instances of spotty or selective enforcement of the provisions of the declaration effectively precluded the present or future enforcement of the declaration by the condominium corporation, then no present or prospective unit owners could safely rely on the provisions of the declaration, to know what they can or cannot do vis-a-vis their respective units or the common elements, without explicit judicial intervention or guidance, and such a result would not only undermine the very essence of condominium living (namely a communal living environment that's intended to be circumscribed and governed by the provisions of the condominium's registered declaration, by-laws and rules, binding upon all unit owners and occupants alike, without exception), but would most assuredly give rise to endless disputes between the board and various unit owners that would forever embroil the condominium corporation in costly and protracted litigation, to the detriment of all concerned. Simply put, if one's ability to rely on the provisions of the registered declaration were to be dependent on the degree of consistent and uniform enforcement of the declaration provisions by the condominium corporation, throughout its entire existence, then no unit owner or occupant (present or prospective) could ever be assured of such reliance, because it

would be exceedingly difficult (if not practically impossible) to accurately determine or confirm whether any and all breaches or contraventions of the provisions of the declaration, from and after the date of registration of the condominium, have been properly addressed or duly enforced (in all or most instances) by all past and present boards of directors

Ever since I read the decision in *YCC No. 216 v. Borsodi (1983) 42 O.R. (2d) 99* (hereinafter referred to as the "**Borsodi Case**"), which dealt with "adult-only" provisions in a declaration that were being challenged, and where the court ultimately ruled that such restrictions were demonstrably justified in a democratic society pursuant to section 1 of the Canadian Charter of Rights and Freedoms [and which decision was ultimately not approved by the Ontario Court of Appeal in *Dudnick v. YCC 216 (1991) 16 R.P.R. (2d) 177*], I've always adopted the view articulated by Judge Moore of the District Court of Appeal in the U.S. case of *Hidden Harbour Estates Inc. v. Basso [1981] 393 Southern Reporter 637,* which was expressly referred to (and approved by) Judge Allen in the Borsodi Case, namely that the declaration of a condominium is more than a mere document spelling out the mutual rights and obligations of the respective unit owners, but rather is akin to a series of covenants running with the land, circumscribing the extent and limits of the use and enjoyment of the respective units and common elements, and that absent the express consent of the board, or a formal amendment to the declaration registered on title for all to see, the provisions and restrictions set forth in the condominium's declaration should not be impaired or diminished, nor rendered unenforceable, merely because of some previous act or omission on the part of the board of directors, including any past instances of spotty or selective enforcement of the provisions of the declaration. Rather, the provisions of the declaration ought to be clothed with a very strong presumption of validity, arising from the fact that the declaration is registered on title against each and every unit in the condominium, and every unit owner is deemed, at law, to have actual

knowledge of its contents, and by accepting title to their respective units in the condominium, all unit owners should correspondingly be deemed to have willingly accepted the restrictions imposed upon them by the registered declaration. In my respectful opinion, the provisions of the declaration should not be invalidated or deemed unenforceable (in whole or in part) absent clear evidence that the impugned provisions are patently unreasonable or arbitrary in their application, or clearly abrogate some fundamental constitutional right or principle. Simply put, no individual unit owner who has acquired ownership or possession of his or her unit, with actual knowledge (or deemed knowledge) of the provisions and restrictions outlined in the registered declaration, ought to be permitted to disrupt the integrity of the condominium scheme of common ownership, and its corresponding regulated ownership, through such owner's individual desire for change, or to be different or non-compliant, however laudable or preferable that pursuit may appear to be. Although every unit owner is entitled to consider the interior or his or her unit as such owner's home and castle, nevertheless the use and enjoyment of such owner's unit, and of the common elements that are owned by all unit owners as tenants-in-common, must be subordinated to, and concomitantly governed by, the paramount provisions of the declaration, because the benefits of an orderly, uniform and harmonious condominium living environment (and the communal ownership and use of the common elements inherent in condominium tenure) demand nothing less.

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