GARDINER MILLER ARNOLD LLP
390 Bay Street
Suite 1202
Toronto, Ontario
M5H 2Y2

Tel: 416-363-2614
Fax: 416-363-8451
www.gmalaw.ca

www.ontariocondolaw.com

Condo Alert!

Volume 3, Issue 1 Conference Edition 2010

Inside this Issue:

You can now connect with GMA on your favourite social networking site. Look for us on Facebook and LinkedIn, and follow us on Twitter (@GMALaw).

Court gives condo owner the boot for "extreme behaviour"

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

The forced sale of a condo unit is among the most drastic remedies a court can order on an application to compel an owner's compliance with the Act or with the by-laws or rules of a condominium corporation. In *MTCC 747 v. Korolekh*, a condo sought a court order directing an owner to sell and vacate her unit or, in the alternative, to change her behaviour so as to comply with s. 117 of the *Condominium Act, 1998*.

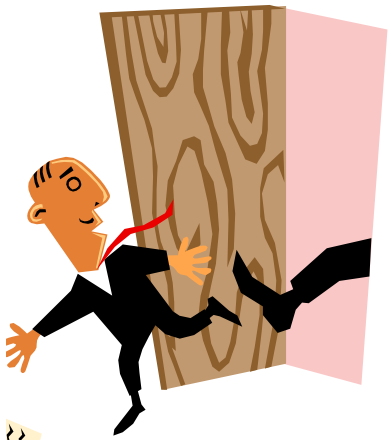
The condo alleged that the owner had breached this section and was responsible for:

- Physical assaults on other unit owners;
- Acts of mischief against other unit owners;
- Racist and homophobic slurs and threats repeatedly made against other unit holders;
- Playing extremely loud music at night;
- Watching and besetting other unit holders; and
- Using her large and aggressive dog to frighten and intimidate other unit holders and their children, as well as failing to clean up the dog's feces.

The owner did not directly respond to these allegations in the materials she filed at court. The court called the response a "bald conclusory denial" of the condo's detailed and voluminous allegations and said: "What is remarkable about the respondent's brief affidavit is that it never addresses any of the specific incidents that are put against her. Her position appears to be that they are all inventions. No facts or documents and no corroborating evidence are set out in the Respondent's Record in support of her broad denials."

The condo had assembled nine affidavits from various unit owners, from neighbours who are not unit owners and from the property manager. They painted a consistent picture of the owner's behaviour and of her impact on this small community. The affidavits were specific and detailed, they repeatedly corroborated each other and they were supported by contemporaneous documentation.

After considering the evidence, the court ultimately ordered the owner to list and sell her unit within three months of service of the court order and barred her from ever residing at the condo as an owner or tenant, among other things.



This remedy was based on several factors, including the fact that the community was small, made up of thirty units located in two storey townhouses, which shared a single courtyard as their common backyard; The owner effectively destroyed the courtyard's utility. The owner's behaviour was extreme in a number of senses including physical violence, use of a large aggressive dog to intimidate, verbal abuse of residents, interference with enjoyment of property as well as actual damage to property. The owner was ordered by a letter from the board of directors to cease her misconduct and remove her dog from the property. She was warned that the corporation was closely monitoring her behaviour and that court proceedings would be commenced, at considerable cost, if she persisted.

Instead of being chastened by this warning and taking the opportunity to comply with her statutory duties the owner continued with the same course of conduct. The assault on a neighbor and the killing of a neighbour's garden, as observed by a community member, both post-dated the warning letter and the board's order to comply. The launching of the present application did not lead to any offer or undertaking by the owner to change her ways. She was in denial and could not begin to reform. Given her broad and absolute refusal to acknowledge any wrongdoing and given the breadth of the misconduct, the court was reluctant to grant any order that would require it to manage owner's life, from her manner of speech, her music, her dog, her gestures and her menacing presence in the courtyard. Such an order might necessary in the interim, pending a sale of the owner's unit.

One notable aspect of this case is the evidentiary balance and analysis the court undertook to reach a conclusion. Enforcement matters are often decided on a case-by-case basis, a condo is always wise to have strong supporting and corroborated evidence of non-compliance allegations.

Prostitution laws still enforceable

Christopher J. Jaglowitz, B.A., LL.B., ACCI

While the Ontario Superior Court recently ruled that the anti-prostitution sections of the *Criminal Code* are unconstitutional, police continue to lay charges and shut down common bawdy houses across the province. Similarly, condominium corporations can and should continue to enforce their documents against sex trade workers that set up shop in their units.

Despite the controversial court ruling, the anti-prostitution provisions remain enforceable until such time that the Supreme Court of Canada agrees with the lower court. The appeals will take months or years to be heard.

If the prostitution laws are ultimately struck down, condominiums can no longer rely entirely on the "no unlawful use" prohibitions in their documents to shut down brothels in their complex. Condos can, however, utilize their anti-nuisance rules and the "no commercial use" clauses in their declarations. Local by-laws might also be of assistance.

PIPEDA Compliance

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

Condos generally are not subject to PIPEDA criteria. The test whether PIPEDA applies depends upon whether the condo has collected, used, retained and disclosed owners' and residents' private information primarily for "commercial purposes". A new legal case sheds light on rationales which both condominiums and their management companies can use to argue that such personal information generally does not constitute a breach of the requirements of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

In *State Farm v. Privacy Commissioner,* the definition of a "commercial activity" was considered in accordance with the definitions set out in s. 2 (1) of the PIPEDA, being "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fund-raising lists". Section 4 (1) (a) of PIPEDA confirms that its privacy obligations apply to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities.

The judge in the *State Farm* case held that the insurer and its law firm were entitled to collect personal information about a plaintiff who had sued the insurer's customer for injuries sustained by the plaintiff in an automobile accident. The court assessed the primary characterization of the purpose for which the insurer's law firm collected personal information about the injured plaintiff in order to assess the dominant factors as to why the information was collected and used. The judge held that the law firm's collection of the personal information against a third party was not a commercial activity, but was only incidental to the commercial activity (i.e., the insurance contract between the insurer and the defendant) and therefore was not subject to the PIPEDA requirements.

In a condo scenario, the primary characterization of the relationship between a condominium corporation and its unit owners is non-commercial in nature; the condominium corporation is not carrying on business to buy and sell goods or render services for a profit or to otherwise promote commerce and trade. A condominium generally uses such private information only in order to enable it to fulfill its objects and duties to control, manage and administer the common elements, assets and affairs of the corporation.

Although property managers previously have been held liable to comply with PIPEDA requirements, this recent case provides a new argument that managers only collect and use owners' and residents' personal information to enable the condominium corporation to fulfill its non-profit functions and as such, its management company's primary purpose is not commercial. By extension, condominium management companies may now be able to use this precedent to argue that their involvement is only incidental to a non-commercial activity, even when a manager reveals residents' names and addresses to a communications provider or smart sub-meter administrator which in turn uses such information to service only the residents of the condominium. In cases where it is necessary to provide residents' or owners' personal information in order to service the units of the condominium corporation, the condo's manager must insert a clause in the third party agreement which prohibits use of such personal information for any other purpose.

Parallel Proceedings under the *Condominium Act* and the *Human Rights Code* – What can a condo do?

Syed Ali Ahmed, B.Math, B.A., J.D.

Disputes between condominium corporations and unit owners may be resolved through mediation and arbitration or court applications for compliance orders under the *Condominium Act, 1998* (the "*Act*"). When faced with a compliance proceeding under the *Act*, unit owners sometimes bring an application under the *Human Rights Code* (the "*Code*") to the Ontario Human Rights Tribunal (the "Tribunal") alleging that the provision or rule they are alleged to have violated infringes on their human rights. This may result in parallel and possibly conflicting proceedings between the condominium and the unit owner under different statutes.

Applications under the *Human Rights Code*

The unit owner's complaint to the Tribunal will typically allege that the provision of the condominium's declaration, by-laws or rules they are alleged to have violated should not apply to them because it is discriminatory under the *Code*. The *Code* prohibits discrimination based on protected grounds which include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and disability, or a ground analogous to the listed grounds. However, Section 34(11) of the *Code* provides that an application to the Tribunal may not be brought if the applicant has commenced an ongoing civil proceeding seeking monetary compensation or restitution for the alleged infringement of their right, where a court has finally determined whether the right has been infringed or the matter has been settled. Section 45 of the *Code* allows the Tribunal to defer an application. Section 45.1 of the *Code* allows the Tribunal to dismiss an application if it is of the opinion that another proceeding has appropriately dealt with the substance of the application. Sections 34(11), 45 and 45.1 are guards against parallel proceedings but they do not fully eliminate that possibility.

Examples of Parallel Proceedings under the *Condominium Act* and the *Human Rights Code*

In one case, a condominium corporation filed a court application for a compliance order against a unit owner alleged to be renting out his unit to individual tenants in violation of the single family use provision in the condominium's declaration. The unit owner filed a complaint in the Tribunal alleging that the single family use provision was discriminatory under the *Code* based on the family status of his non-related tenants. The condominium corporation requested an early dismissal of the human rights complaint under s. 34(11) of the *Code*. The Tribunal declined, noting that the unit owner was not seeking a remedy in court for the alleged infringement of human rights, and that s. 34(11) did not apply (*Simard v. Nipissing Condominium Corporation No. 4*). The result was that both court and Tribunal proceedings continued in parallel. However, once the Court of Appeal ruled that single family use provisions were not discriminatory under the *Code* (*Nipissing Condominium Corporation No. 4. v. Kifloyl*) the Tribunal dismissed the complaint on the basis that a court had finally determined the issue.

In another example, a unit owner facing mediation and arbitration proceedings under the Act for her alleged violation of the condominium's single family use provision filed a complaint to the Tribunal alleging discrimination under the *Code*. The condominium corporation asked the Tribunal to stay the complaint in favour of the arbitration. The Tribunal declined, stating that it had some doubt whether the arbitration would deal with the human rights issues between the parties (*Howard v. Halton Condominium Corporation No. 59*). The condominium corporation then applied in court to appoint an arbitrator under the *Act*. The unit owner brought a court motion for a stay or dismissal of the arbitration on the basis that another proceeding was pending between the same parties in respect of the same subject matter. The motions judge dismissed the motion, finding that the test for granting a stay had not been satisfied and that the arbitrator had jurisdiction to deal squarely with the human rights issues. The condominium corporation made a second request to the Tribunal for a deferral of the human rights complaint, which was granted. The Tribunal accepted the motions court's view that the arbitrator will have jurisdiction to deal squarely with the human rights issues and agreed that parallel proceedings ought to be avoided.

What Can a Condominium Corporation Do when Faced with Parallel Proceedings?

Condominium corporations would generally prefer to obtain compliance from a unit owner through mediation and arbitration and/or a court application under the *Act*. Mediators and arbitrators selected will often have special expertise in condominium law, and arbitrators and courts can give more comprehensive rulings than the Tribunal, which can only rule on any human rights issues. In addition, Section 134(5) of the *Act* allows a successful condominium to add all of its actual costs in obtaining a compliance order to the unsuccessful unit owner's common expenses.

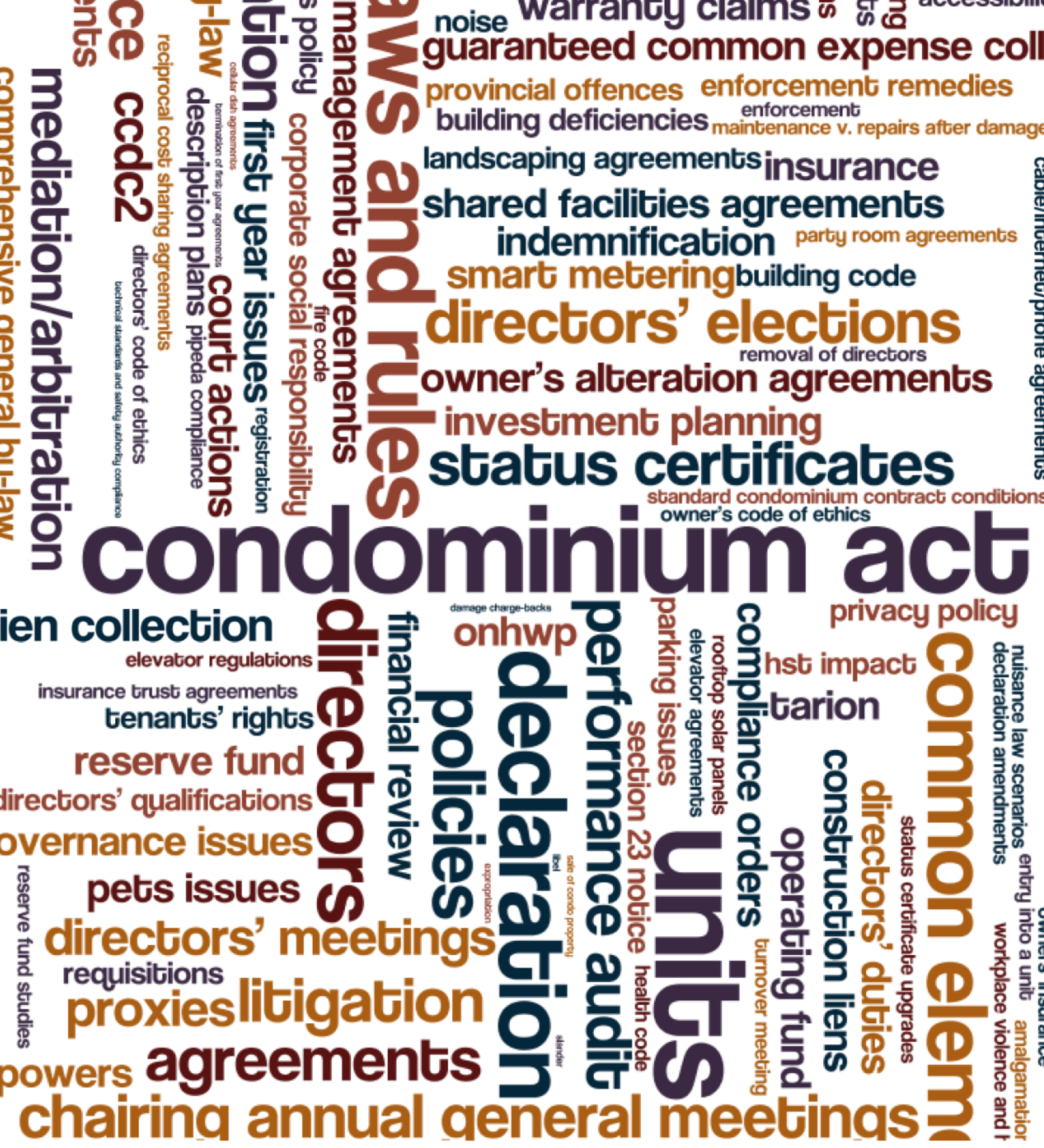
A condominium corporation faced with parallel proceedings under the *Act* and the *Code* may consider the following submissions in its request to the Tribunal for a dismissal or deferral of the human rights complaint:

- Section 34(11) of the *Code* bars the human rights complaint if the unit owner is seeking compensation or restitution from the arbitrator or court for the alleged infringement of their human rights.
- If the proceeding under the *Act* was brought first in time it should be completed prior to any human rights complaint.
- The arbitrator or court proceeding under the *Act* will have jurisdiction to deal squarely with any human rights issues as well as all other issues in the dispute.
- A Tribunal ruling that the unit owner's human rights were not infringed may not ultimately resolve the dispute. The condominium corporation may still have to obtain compliance through a proceeding under the *Act*.
- Parallel proceedings over the same subject matter ought to be avoided.

A dismissal order for a human rights complaint can be obtained from the Tribunal if a court has finally determined the human rights issue or the matter has been settled between the parties, or if the Tribunal can be convinced that another proceeding has appropriately dealt with the substance of the application.

Conclusion

Condominium corporations should be alert to the possibility that in the face of a compliance demand unit owners may retaliate by bringing a complaint to the Human Rights Tribunal. The prospect of lengthy, costly and conflicting parallel proceedings highlights the importance of resolving disputes early and effectively before they spiral out of control.



Let *us* sort it out.

GMA GARDINER MILLER ARNOLD LLP
BARRISTERS & SOLICITORS

The CondoLawyers™

390 Bay Street, Suite 1202, Toronto, Ontario M5H2Y2 Tel: (416) 363 2614 www.gmalaw.ca www.ontariocondolaw.com