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COURT OF APPEAL FOR ONTARIO

WEILER, BLAIR and ROULEAU JJ.A.

B E T W E E N :	
METRO TORONTO CONDOMINIUM CORPORATION NO. 545	**Jonathan H. Fine for the appellant**
Applicant (Appellant)	
- and -	
BEULAH STEIN, DAVID STEIN, SUZANNE DRUKER AND SYED RISWAN WARSI	**Robert A. Spence for the respondents**
Respondents (Respondents in Appeal)	
	Heard: March 8, 2005

On appeal from the judgment of Justice Nancy J. Spies of the Superior Court of Justice dated June 29, 2005.

ROULEAU J.A.:

OVERVIEW

[1] This is an appeal by Metropolitan Toronto Condominium Corporation No. 545 (the Corporation) from the dismissal of its application for an order permitting it to enter the respondents' dwelling units to carry out certain repairs or maintenance.

[2] The Corporation maintains that the manner in which the respondents carried out remediation work on the fan coil units (FCUs) located in their condominium units left their units in a condition that was "likely to damage the property[1] or cause injury to an

[1] Property is defined in the *Condominium Act*, 1998, S.O. 1998 c. 19 as follows: "'Property' means the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements".

individual."[2] As a result, the Corporation argues that it was entitled to the order sought pursuant to ss. 19, 117, 119 and 134 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the *Condominium Act*). The Corporation further argues that the application judge made palpable and overriding errors of fact in reaching her decision to dismiss the application. Finally, it submits that, by failing to afford the appropriate degree of deference to decisions of the Corporation, the application judge committed a reversible error.

[3] For the reasons that follow, I would dismiss the appeal. The application judge made no palpable and overriding error of fact nor did she fail to afford the Corporation's decision the appropriate degree of deference.

SUMMARY OF THE RELEVANT FACTS

The parties

[4] The Corporation manages a 231 unit condominium at 55 Skymark Drive in Toronto. The respondents are unit holders in this condominium.

The dispute

[5] In May 2004, the Corporation commissioned an investigation of possible mould contamination in the heating and air conditioning FCUs located in the various condominium units of the building. The report provided to the Corporation by George White, a mycologist, confirmed that there was mould contamination in the FCUs. Substantial mould contamination was found in ten of the thirteen FCUs that he examined.

[6] The report stated that it is difficult to actually assess the risk related to mould exposure, but that it could safely be assumed that there is an increased risk associated with any increase in exposure. The risk identified was an "occupant risk". Although the report did not suggest that mould from the FCUs in one residential unit would disperse to another unit, the report noted that there would be risks to the property value and reputation if the issues were not handled in a sensible and timely manner.

[7] White opined that it was more prudent to eliminate the risk factor than to determine what the acceptable level of risk actually was. He cautioned that this approach, however, was not always cost-effective and ran the risk of overreacting in some settings. He then suggested that, in response to mould contamination, three different remedial options were available. The first, and most expensive, involved removing the contaminated insulation, replacing it with a different insulation and modifying the FCUs to minimize the recurrence of mould contamination. The second involved removing most of the contamination by HEPA vacuums and disinfectants. The third was a combination of the first and second options.

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[2] The *Condominium Act, 1998*, s. 117.

[8] On June 28, 2004, the Corporation held a special meeting of residents. White was present at this meeting and the issue of mould contamination was discussed.

[9] Having previously determined that the repair and maintenance of FCUs was a unit holder responsibility, the Corporation advised the residents, by August 26, 2004 letter, of their responsibility and gave residents a list of contractors who carry out this type of repair. The letter indicated that this list was neither a referral nor a recommendation.

[10] The Corporation then retained Construction Control Inc., consulting engineers and building scientists, to research and investigate the problem and to prepare specifications for mould remediation. In September 28, 2004, another meeting of unit holders was held. The President of the Corporation advised those in attendance that the unit holders were free to make their own arrangements for mould remediation. However, he indicated that they would have to comply with the protocol for remediation set by the Corporation's engineers.

[11] In October 2004, the Corporation reiterated that the remediation was the responsibility of the unit holders and advised that the Corporation had approved Dry Coil Limited (Dry Coil) as the authorized contractor after the usual tendering process.

[12] Each of the respondents chose not to use the pre-approved contractor and made this intention known to the Corporation. In response, the Corporation wrote to the respondents, requiring that they comply with a list of conditions at their own expense. These conditions included pre and post remediation air quality tests and that the remediation be done in accordance with the New York Protocol, Level 5. The letter also advised that a note would be placed in the file for each of the units, indicating that periodic inspections of the FCUs were required.

[13] The respondents formally advised the Corporation that they did not consider that they were required to comply with these conditions. Despite the Corporation's continuing insistence that its listed conditions be complied with, the respondents ignored them and proceeded to have the remediation carried out by their own contractor, Reliable Fan Coil Maintenance (Reliable).

[14] Reliable was one of the contractors mentioned in the August 26, 2004 list of contractors provided by the Corporation. The remediation by Reliable was done at a cost of about $100 per FCU, as compared to approximately $1500 per FCU if done by the Corporation's contractor. The remediation done by Reliable was completed to the New York Protocol, Level 1 standard. In Reliable's view, the Level 1 standard was sufficient.

[15] The respondents did not provide the Corporation with reports following the remediation. They did, however, advise the Corporation that it could, at its expense, have its engineer and contractor inspect the work done by Reliable. The Corporation maintained its position that a Level 5 remediation was required. Since the respondents had readily admitted that only a Level 1 remediation was carried out, the Corporation felt that there was no point in inspecting the work. The Corporation then brought an

application under s. 134 of the *Condominium Act*. It is the dismissal of that application that is the subject of this appeal.

The decision under appeal

[16] At the hearing of the application, the respondents took the position that the application could not proceed on the merits because s. 134(2) of the *Condominium Act* required that the dispute be submitted to mediation and arbitration before resorting to the courts. The Corporation responded that s. 134(2) of the *Condominium Act* applied to disputes regarding the declaration, by-laws and rules of a condominium but did not apply to an application seeking the interpretation of the Act itself.

[17] The application judge rejected the respondents' objection and allowed the application to proceed on the basis that "the Corporation has very carefully limited its relief to sections 117 and 19 of the Act". By limiting its dispute to the interpretation of the Act itself, the failure to proceed to mediation and arbitration was not a legal impediment to the bringing of the application.

[18] In her reasons, the application judge made the following relevant findings of fact:

a) there was no evidence that mould contamination in the FCUs of a specific unit created a risk to other residential units;

b) the work done by Reliable had effectively remediated the mould contamination in the respondents' units and, in any event, mould in an FCU was only an issue for the residents of the unit with the contaminated FCU;

c) the Corporation's evidence went no further than to show that the work done by Reliable was "not as careful or complete" as the work done by Dry Coil; it did not go so far as to say that the Level 1 remediation carried out by Reliable was insufficient to deal with the problem;

d) with respect to the Corporation's concern that Reliable's work had not included changes to the slope of the drain pan, there was no evidence that the drain pans had ever overflowed in the respondents' units nor was there evidence that overflowing pans pose a risk for mould contamination to other units as opposed to water damage;

e) there was no evidence that the Board of the Corporation had considered the less expensive options suggested by White; and

f) there was no evidence that the way in which the respondents had remediated their units would affect the sales of units other than those of the respondents.

[19] The application judge rejected the Corporation's submission that, by remediating to a Level 1 rather than a Level 5 standard, the respondents had created a dangerous situation as contemplated by s. 117 of the *Condominium Act*. She went on to find that

this section of the Act did not empower the Board of the Corporation to impose a particular method of remediation where it could not establish that the method chosen by the respondents had not reasonably dealt with the problem.

[20] The application judge concluded that the Corporation failed to meet its onus of proving that a condition currently existed that was "likely to damage the property or cause injury to an individual".[3] In the event that she was wrong on this point, and that the Corporation had in fact established the existence of such a condition, she went on to consider whether the Corporation was acting reasonably so as to justify the court granting the discretionary relief being sought. On this latter issue the application judge concluded that the Corporation had not acted reasonably in imposing its standard of remediation. Central to this conclusion was her finding that the Board of the Corporation had failed to consider reasonable alternatives to the requirement that all units carry out a Level 5 remediation. Reasonable lower cost alternatives ought to have been considered, especially in light of there being no evidence of harm to other units.

The position of the parties

[21] The Corporation submits that the application judge disregarded important parts of the evidence relevant to the issues being determined and made palpable and overriding errors in respect of several findings of fact. Further, the Corporation maintains that, even on the facts as found, the application judge committed reversible error in failing to show the appropriate level of deference to decisions of the board of a condominium corporation in accordance with this court's decision in *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.).

[22] The respondents submit that the application judge made no palpable or overriding errors of fact. On the *Dvorchik* issue, they submit that *Dvorchik* has no application to the present case. *Dvorchik* was dealing with the reasonableness of condominium rules and not with an attempt by the Corporation to obtain forcible entry into the respondents' units to remedy a situation that was internal to the units.

STATUTORY PROVISIONS

[23] The relevant sections of the *Condominium Act* are as follows:

Right of Entry	**Droit d'entrée**
19. On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a	19. Sur préavis raisonnable, l'association ou la personne qu'elle autorise peut entrer dans une partie

[3] The *Condominium Act*, 1998, s. 117.

part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation

privative ou dans les parties communes dont le propriétaire a l'usage exclusif à toute heure raisonnable pour réaliser la mission de l'association et accomplir les devoirs de celle-ci ou pour en exercer les pouvoirs.

Dangerous activities
117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

Activités dangereuses
117. Dans une partie privative ou dans les parties communes, nul ne doit tolérer une situation de fait ni exercer une activité susceptibles d'endommager la propriété ou de causer des blessures à un particulier.

Compliance with Act
119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Observation de la Loi
119. (1) L'association, les administrateurs, dirigeants employés de celle-ci, le déclarant, le bailleur d'une association condominiale de propriété à bail, les propriétaires, les occupants de parties privatives et quiconque est titulaire d'une sûreté réelle sur une partie privative et l'intérêt commun qui s'y rattache sont tenus d'observer la présente loi, la déclaration, les règlements administratifs et les règles.

Responsibility for occupier
(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

Responsabilité pour l'occupant
(2) Le propriétaire prend toutes les mesures raisonnables pour veiller à ce que l'occupant de sa partie privative ainsi que tous ses invités, mandataires et employés ou ceux de l'occupant observent la présente loi, la déclaration, les règlements administratifs et les règles.

Right against owner
(3) A corporation, an owner and every person having a registered

Droit par rapport aux propriétaires
(3) L'association, les propriétaires et quiconque est titulaire

mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

Compliance order

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.

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Contents of order

(3) On an application, the court may, subject to subsection (4),

d'une hypothèque enregistrée sur une partie privative et l'intérêt commun qui s'y rattache ont le droit d'exiger que les propriétaires et les occupants de parties privatives observent la présente loi, la déclaration, les règlements administratifs et les règles.

Ordonnance de conformité

134. (1) Sous réserve du paragraphe (2), un propriétaire, l'occupant d'une partie privative projetée, une association, un déclarant, un bailleur d'une association condominiale de propriété à bail ou le créancier hypothécaire d'une partie privative peut, par voie de requête, demander à la Cour supérieure de justice de rendre une ordonnance exigeant la conformité aux dispositions de la présente loi, de la déclaration, des règlements administratifs, des règles ou d'une convention intervenue entre deux associations ou plus en vue de l'utilisation, de la fourniture ou de l'entretien en commun ou du partage des frais des installations ou des services des parties à la convention.

Condition préalable à la requête

(2) Si les processus de médiation et d'arbitrage visés à l'article 132 sont disponibles, aucune personne n'a le droit de demander, par voie de requête, que soit rendue une ordonnance en vertu du paragraphe (1) à moins que n'aient échoué ses tentatives au moyen de ces processus pour qu'il y ait conformité aux dispositions concernées.

Contenu de l'ordonnance

(3) Sur requête et sous réserve du paragraphe (4), le tribunal peut,

(a) grant the order applied for;	a) rendre l'ordonnance demandée;
(b) require the persons named in the order to pay,	b) exiger des personnes nommées dans l'ordonnance qu'elles paient :
(i) the damages incurred by the applicant as a result of the acts of non-compliance, and	(i) le montant des dommages-intérêts accordés au requérant du fait de la non-conformité,
(ii) the costs incurred by the applicant in obtaining the order; or	(ii) les frais engagés par le requérant en vue d'obtenir l'ordonnance;
(c) grant such other relief as is fair and equitable in the circumstances.	c) accorder les autres mesures de redressement justes et équitables dans les circonstances.

ANALYSIS

[24] I will deal first with the Corporation's submission regarding the application judge's findings of fact. Second, I will deal with the submission that this court's decision in *Dvorchik* applies to the case at bar and that the application judge erred in failing to show deference to the Corporation's decision to require Level 5 remediation.

The findings of fact

[25] The application was decided based on affidavit evidence and the accompanying cross-examinations. Notwithstanding the fact that there existed factual disputes, the parties agreed that the court should proceed to hear and decide the matter on the record before it without the benefit *viva voce* evidence.

[26] The Corporation challenges several findings of fact made by the application judge. In oral argument it focussed on the following findings:

a) there was no evidence that a Level 5 remediation was required in this specific case;

b) Peter Adams, the engineer hired by the Corporation, did not report that such a high level of remediation was necessary because of the potential for mould dispersion from one unit to another nor did he say that overflowing drip pans pose a risk for mould contamination to other units;

c) the Corporation's concern that mould would spread throughout the building was not supported by the Corporation's experts; and

d) the Corporation did not act reasonably or keep an open mind concerning other less expensive ways of dealing with the problem.

[27] The Corporation submits that each of these findings is in error and discloses a misapprehension of the evidence. I disagree. The application judge's reasons provide a comprehensive review of the extensive materials filed. They outline the evidentiary basis for the various findings of fact made and, in my view, disclose no palpable and overriding error. I will address each of the four challenged findings in turn.

a) The need for a high level of remediation

[28] In challenging the application judge's finding that there was no evidence that a Level 5 remediation was required, the Corporation referred to various portions of the evidence that, it says, demonstrate the need for a high level of remediation. For example, the Corporation pointed to the evidence of Janet Valianes who testified that, although no report was prepared assessing the various options, she assumed from the fact that the consulting engineers had selected the high level of remediation option that they considered this level of remediation to be necessary. Although such an inference could be drawn from this evidence, it was up to the application judge to decide. She chose not to draw it. Further, even if the application judge had drawn that inference, it would not necessarily translate into evidence that this high level of remediation was required specifically for the FCUs in the respondents' units.

[29] All of the other evidence referred to by the Corporation in support of its submission on this point addresses the mould issue in a similarly global or generic way. I took the application judge's findings as applying specifically to the FCUs at issue in these proceedings: the FCUs located in the respondents' units. None of the evidence cited by the Corporation says that a high level of remediation is required for every FCU in the building nor does it specifically address the FCUs in the respondents' units. The application judge considered all of the evidence and chose not to draw the inference urged on her by the Corporation.

b) Peter Adams' report

[30] The Corporation submits that, contrary to what the application judge found, the Adams report concludes that the Level 5 remediation was required to prevent the spread of mould from one unit to another. In making this submission it relies principally on a statement made in his report regarding poorly functioning drip pans. That statement is as follows:

> Poorly functioning drip pans are of a concern, as they can contribute large volumes of water to hidden areas within common elements or to other unit owners' spaces. Water from the drip pans can lead to damage at other locations and

> possible mould growth, putting other owners at risk of damage.

Later in his report, Adams concluded that the Reliable procedure "resulted in a partial solution that covered the problem and did not address the significant issue of overflowing drip pans."

[31] The Corporation submits that these excerpts are at odds with the application judge's finding that, although an overflowing drip pan can contribute to mould growth in the vicinity of the FCU in question, nothing in Peter Adams' report says that "this can pose a risk for mould contamination to other residential units in the building, as opposed to water damage."

[32] I disagree. The quotes from the Adams' report are ambiguous. They can reasonably support both the interpretation advanced by the Corporation and the interpretation made by the application judge. The application judge understood that the failure to correct the slope of the drip pans could lead to water damage in other units. She interpreted the statements in Adam's report as indicating that, if other units suffered water damage as a result of overflowing drip pans, this, in turn, could lead to mould forming in those units. This, however, is different from mould contamination transferring from one unit to another. The application judge was focussed on the suggestion that mould can be transferred from unit to unit. She concluded that the report made no allegation in that regard. That was a finding open to her on the record.

c) The Corporation's concern that mould would spread throughout the building was not supported by the Corporation's experts

[33] Because the application had been brought pursuant to s. 117 of the Act, the application judge focussed on the Corporation's concern that the presence of mould in the respondents' units might affect the units of other residents or the common elements. In reaching the conclusion that mould is not transferred from one unit to another, the application judge relied in part on a statement to that effect. That statement was attributed to one of the Corporation's experts, Mr. White and was contained in the unsigned minutes of a special meeting of unit owners produced in the course of the litigation from the managers' files.

[34] The Corporation submits that the weight of the evidence is to the contrary and that it was inappropriate for the application judge to rely on this evidence rather than the evidence of another expert, Mr. Adams.

[35] I have dealt with the evidence of Mr. Adams in the previous section and found that it does not contradict the application judge's finding. With respect to the statement attributed to Mr. White, I find no error in the application judge having referred to the statement contained in the unsigned minutes. A business' records are admissible where

they were made, and usually are made, in the ordinary course of business.[4] As stated by the application judge, the minutes were prepared for the Corporation. They were produced by the Corporation from the manager's files and appended to her affidavit flied in the proceedings. The *Condominium Act* requires the Corporation to keep minutes of its meetings,[5] and there was no suggestion that the statement contained therein was not made, was not accurate or was not consistent with his report filed in the proceedings.

d) The Corporation did not act reasonably

[36] The application judge also found that even if there were a basis for finding that a condition existed in the respondents' units that was "likely to damage the property or cause injury to an individual", she would have exercised her discretion and would have refused to grant the relief sought. This was because the Corporation had not considered less expensive alternatives than the one it imposed on all owners. She found this to be unreasonable, particularly in light of the Corporation's inability to show the existence of a risk that the mould could spread from one unit to another.

[37] Section 134 of the *Condominium Act* provides that compliance orders "may" be granted. The application judge therefore retains a discretion and, on the evidentiary record and findings made, I see no basis to interfere with the exercise of her discretion on this point.

The *Dvorchik* Issue

a) The position of the parties

[38] According to the Corporation, the application judge ran afoul of the principles established by this court in *Dvorchik*. The Corporation submits that *Dvorchik* stands for the proposition that rules are only considered to be unreasonable where they are contrary to the legislative scheme of the *Condominium Act* or are clearly unreasonable. Unless the rule has been found to be unreasonable, trial judges are not entitled to substitute their opinion for that of the condominium corporation.

[39] The Corporation argues that, in the present case, it reached the decision that unit owners had to carry out Level 5 remediation based on the advice of experts. It was, therefore, clearly reasonable. This decision was in substance, if not in form, a rule and the application judge failed to apply the requisite deferential approach when evaluating this decision. Deference was required by *Dvorchik* and the application judge's decision should be set aside.

[40] The respondents submit that *Dvorchik* was a case about rules adopted by a condominium corporation pursuant to the *Condominium Act*. That decision has no application to the case at bar. In the present case the Corporation was attempting to

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[4] *Evidence Act*, R.S.O. 1990, c. E23, s. 35.
[5] *The Condominium Act*, 1998, s. 55(1).

obtain forcible entry into the respondents' units to remedy a situation that was internal to the units.

b) The decision in *Dvorchik*

[41] In *Dvorchik*, the Corporation applied under s. 49(1) of the then *Condominium Act*, R.S.O. 1990, c. C.26, for an order directing the respondent to comply with a corporation rule that prohibited unit holders from having pets weighing more than twenty-five pounds. Section 49(1) is similar to s. 134(1) of the current *Condominium Act*.

[42] At first instance, Keenan J. found the rule restricting pet size to be invalid and unenforceable. He did so because the Condominium Corporation had failed to provide evidence proving that the twenty-five pound limit was reasonable.

[43] In allowing the appeal, the Court of Appeal made the following statement about the deference to be paid to condominium corporations:

> The condominium board was not obliged to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the Board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners (para. 5).

c) Does *Dvorchik* apply?

[44] The court in *Dvorchik* was considering the enforcement of a rule adopted by a condominium corporation pursuant to s. 29(1) of the previous *Condominium Act* (s. 58 of the current *Condominium Act*). The rule adopted in that case clearly fell within the scope of the rule-making authority of the condominium board. The operative section of the Act specified that the condominium corporation's rule-making power was only limited by the requirements that the rules be "reasonable" and "consistent" with the *Condominium Act*.

[45] The case at bar does not involve a rule, and the sections relied on by the Corporation do not contain language similar to s. 29 of the previous Act. The *Dvorchik* decision is, therefore, clearly distinguishable on its facts.

d) Should the principles in *Dvorchik* be extended to apply in the present case?

[46] The Corporation argues that its judgment that, absent a Level 5 remediation, a dangerous situation will be allowed to exist in those units is a reasonable one made with the benefit of expert advice. As a result this decision should be given the same deference as provided in *Dvorchik* without regard to the fact that it is not a "rule" or "by-law" of the Corporation.

[47] In my view, *Dvorchik* should not be extended to the present case. I say this for two reasons. First, the decision by the Corporation that it would not seek to structure the remediation requirement as a rule creates an important distinction from *Dvorchik*. Second, this case raises both different and competing rights and duties under the *Condominium Act*.

[48] It is important not to lose sight of the fact that the Corporation chose to frame its application as a dispute with respect to the interpretation of ss. 117, 119 and 134 of the *Condominium Act* and not as "a disagreement between the parties with respect to the declaration, by-laws or rules" of the corporation (see s. 132(4) of the *Condominium Act*). Whether or not the remediation requirement could be made into a rule, the Corporation appears to have chosen not to make it a rule so as to avoid the s. 134(2) requirement to go to mediation or arbitration as a precondition to any court application. Thus, the Corporation's failure to adopt the requirement for Level 5 remediation as a "rule" is more than semantics. It reflects a strategic decision by the Corporation. By choosing this route, the Corporation cannot benefit from the statutory provision relied on in *Dvorchik*.

[49] More importantly, in the present case, the court is being called upon to enforce a decision of the Corporation that, unlike *Dvorchik*, is not within the Corporation's exclusive area of responsibility. Here there are competing obligations and duties. The *Condominium Act* provides that unit holders are responsible for the maintenance of their units.[6] The Corporation only has authority to interfere with and override these unit holders' responsibilities and obligations where the unit holder has failed in his obligation to such a degree that a risk outlined in s. 92(3) or a condition likely to damage the property or cause injury to an individual as described in s. 117 is allowed to exist and continue.[7]

[50] As the statutory rights and obligations of both parties are engaged, a careful balancing is required. There is no statutory or principled reason why deference should be afforded to the Corporation's decision on the facts of this case.

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[6] The *Condominium Act*, 1998, s. 90(1).

[7] Section 92(3) of the *Condominium Act*, 1998 provides that if an owner fails to carry out his or her maintenance obligations within a reasonable time and "if the failure presents a potential risk of damage to the property or the assets of the corporation or a potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation." This is substantially the same as the combined effect of ss. 19, 117 and 119.

CONCLUSION

[51] For these reasons, I would dismiss the appeal. I would award the respondents their costs on a partial indemnity basis fixed at $10,000 inclusive of GST and disbursements.

"Paul S. Rouleau J.A."

"I agree R.A. Blair J.A."

"I agree K.M. Weiler J.A."

RELEASED: June 21, 2006

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