COURT FILE NO.: 04-CV-264649 CM1
DATE: 20081229

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 946	)	*Mr. Jonathan H. Fine* for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
J.V.M. by her litigation guardian, the Public Guardian and Trustee	)	*Donald F. Bur* and *Christopher J. Jaglowitz* for the Respondent
	)	
Respondent	)	
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REASONS FOR DECISION

J. Macdonald, J.

INTRODUCTION

[1] Metropolitan Toronto Condominium Corporation No.946 (the applicant) moved in 2004 for an order requiring J.V.M. (the respondent), the owner of a condominium unit, to list and sell her unit or, in the alternative, for an order that she comply with the Condominium Act, 1998, S.O. 1998, c.19 (the Act) and the declaration, by-laws and rules of the applicant. The application was brought pursuant to ss. 134(3)(c) and 135(3) of the Act, which state, in their relevant parts:

> 134. (1) Subject to subsection (2), … a corporation, … 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 …

(2) If the mediation and arbitration processes described in s. 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.

(3) On an application, the court may …

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and,

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

…

135. (1) … a corporation, … may make an application to the Superior Court of Justice for an order under this section.

(2) On an application, if the court determines that the conduct of an owner, … 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.

(3) On an application, the judge may make any order the judge deems proper.

[2] The application was heard and decided by Madam Justice Ellen Macdonald who held on June 23, 2004 that, if the respondent did not comply with the requirements of the Act and the declaration, by-laws and rules of the applicant, there shall be an order requiring the respondent to vacate her unit and list it for sale. The order also permitted the applicant to inspect the respondent's unit as it saw fit, with or without notice to the respondent, and awarded substantial costs to the applicant. The order was not appealed.

[3] The respondent admits that she has breached the requirements of the Act and the declaration, by-laws and rules of the applicant.

[4] The applicant now moves for an order requiring the respondent to vacate, list and sell her unit, pursuant to E. Macdonald J's. order. The respondent opposes the order on the following grounds.

THE RESPONDENT'S POSITION

[5] The evidence establishes that the respondent has suffered for many years from paranoid schizophrenia. In the 15 years that she has she has lived in her unit, her symptoms have varied in intensity but there have been numerous difficulties, which I will address subsequently. In a ruling during argument, I held that these difficulties were caused by her illness. Consequently, as a result of her illness, the respondent is a person under disability pursuant to the Human Rights Code R.S.O. 1990, ch. H.19 (the Code).

[6] The respondent submits that the applicant has not complied with ss. 11 and 17 of the Code which impose a duty on the applicant to accommodate her disability, and that the applicant's attempt to force her out of her home therefore discriminates against her in her occupancy of accommodation, contrary to s. 2 (1) of the Code. In addition, the respondent submits that E. Macdonald J. did not prospectively determine the sufficiency of the applicant's accommodation of the respondent's disability in the time after her order of June 23, 2004. In the alternative, if E. Macdonald J. did determine that, the respondent submits that it is in the interests of justice that I determine anew the merits of her position that, in fact, she has not been accommodated by the applicant as the Code requires, in the time since E. Macdonald J's order.

THE APPLICANT'S POSITION

[7] In the hearing before E. Macdonald J., the respondent's Factum filed by her then counsel relied almost exclusively on Human Rights Code issues. The applicant submits that E. Macdonald J. considered and decided these issues, because she found that "(i)t is undisputed that the Corporation has done everything in its power to resolve the situation", and that "(t)he Corporation has demonstrated that it had displayed great sympathy to the unique circumstances of the respondent who is seriously disabled." Further, the judge found that "(t)here have been undisputed health hazards to the adjoining unit holders, and that "(t)he history of the matter suggests that there is a distinct probability that the cycles of the past will repeat in the future." In summary, the applicant submits that the judge found that the applicant's efforts to accommodate the respondent were all that could have been done, that the respondent's issues nonetheless caused health hazards to adjoining unit holders, that the cycles of the past, which the applicant submits refers not only to the respondent's cyclical schizophrenic symptoms and difficulties but also to the corresponding efforts of the applicant to accommodate her needs, will probably continue in the future.

[8] The applicant therefore takes the position that that E. Macdonald J. has determined all Human Rights Code issues, and the only issue to be determined is whether the respondent has breached the Act, and the declaration, by-laws and rules of the applicant. Since the respondent admits these breaches, since E. Macdonald J. ruled that the order now sought "shall" issue in that event, and since E. Macdonald J's order is now final and enforceable, the applicant submits that the order sought should issue without further inquiry. In the alternative, if the court should inquire into the sufficiency of the applicant's accommodation of the respondent since the date of E. Macdonald J's. order, the applicant submits that it has accommodated the respondent to the point of undue hardship, in accordance with the Code, and the order should now issue.

CONCLUSIONS ABOUT E. MACDONALD J.'s ORDER

[9] For my purposes in the present hearing, the important part of E. Macdonald J.'s order is that, if the respondent does not comply with the requirements of the Act, the declaration, by-laws and rules, she shall be ordered to vacate her unit and list it for sale. However, it is also important to determine what issues E. Macdonald J. decided, in making her order. That is because the applicant contends that the respondent's Human Rights Code issues were finally determined by E. Macdonald J. and the respondent should not be permitted to relitigate.

[10] E. Macdonald J.'s endorsement contains both her reasons and her order. In determining the issues which she decided, her reasons properly may be used to construe her order: *Canadian Pacific Railway v. Blain* (1905) 36 S.C.R. 159 at pp. 160-161, and 163. See also *Ontario (Director, Family Responsibly Office) v. Belittchenko* (2008), 90 O.R (3rd) 49 (Spence, J).

[11] In addition, the application which was before E. Macdonald J. now comes on before me for the purpose of putting the contingent component of her order into effect. Since I am hearing the same application as was before E. Macdonald J., I am entitled to review and rely on all the materials filed in the application, including the Factum filed by the respondent's counsel for the hearing before E. Macdonald J.. The Factum also helps to determine the issues which were submitted to E. Macdonald J. for decision.

[12] E. Macdonald J.'s endorsement was as follows:

> The Corporation has demonstrated that it has displayed great sympathy to the unique circumstances of the Respondent who is seriously disabled. The matter has a ten year history. It is this court's duty to balance her interests with those of the adjoining owners and the Corporation itself.
>
> It is undisputed that the Corporation has done everything in its power to resolve the situation. The history of the matter suggests that there is a distinct probability that the cycles of the past with repeat in the future.
>
> There have been undisputed health hazards to the adjoining unit holders. It is difficult for me as an outsider to impose the exact terms of a regime of regular inspection of the unit by the representatives of the Corporation. I order that regular inspections take place at times and in circumstances that I leave to the discretion of the Corporation. These inspections may be with or without notice. If there is non-compliance of the requirements of the Act and the declaration, by-laws and rules of the Applicant, there shall be an order requiring that the respondent vacate her unit and list the same for sale.
>
> Costs of this application are fixed at $10,000 payable by the Respondent and are to be recovered as though such are common expenses of the unit.

[13] It is completely clear that E. Macdonald J. heard and decided the respondent's contention that, up to June 23rd, 2004 she had been a disabled person who was entitled to accommodation in accordance with the Code. The endorsement itself speaks to these issues.

The respondent's Factum from 2004 confirms that her position before E. Macdonald J. was that the applicant was not entitled to the order that she vacate and sell her unit because the applicant had not accommodated as the Code required.

[14] While this much is clear, in my opinion, there are two reasonable ways in which to see E. Macdonald J.'s endorsement and thus what she decided and ordered. The first is that E. Macdonald J. decided, as of June 23rd, 2004, that the applicant had accommodated the respondent to the point of undue hardship, thereby discharging its duty pursuant to the Code. As a result, the remaining issue for E. Macdonald J. was exercising the discretion found in s.134(3)(c) and s. 135(3) of the Act to grant fair and equitable relief, or relief that she deemed proper. She exercised that discretion by giving the respondent a last chance to comply with the requirements of the Act, and the declaration, by-laws and rules, failing which "there shall be an order" requiring the respondent to vacate and sell her unit. E. Macdonald J. gave this last chance to the respondent because it was fair, equitable and proper to do so, even though she found a distinct probability that "the cycles of the past will repeat in the future". During the respondent's last chance to comply, the applicant was given the right to inspect the unit in its discretion, with or without notice.

[15] The second way to see the endorsement and thus, what E. Macdonald J. decided and ordered, is that she decided all of the above and more. She also decided that, during the respondent's last chance to comply with the Act, declaration, by-laws and rules in the time after June 23rd, 2004, the applicant would continue to accommodate the respondent to the point of undue hardship. Further, she also decided that the point when undue hardship would be reached, thereby ending the applicant's duty to accommodate the respondent and entitling it to the aforesaid order, was whenever the respondent should fail to comply with all four of the Act, declaration, by-laws and rules. E. Macdonald J. was clear in stating that the aforesaid order shall issue if the respondent should fail to comply with "… the Act and the declaration, by-laws and rules …". No breach or breaches of a lesser magnitude would lead to the order.

[16] It was not inconsistent for E. Macdonald J. to decide that, up to June 23rd, 2004, the applicant's duty under the Human Rights Code had been discharged by accommodating the respondent to the point of undue hardship and to decide also that, after June 23rd, 2004, during the respondent's last chance to comply, the applicant could again be subject to a duty to accommodate the respondent, in ways that would not give rise to undue hardship.

[17] I am satisfied that the second interpretation is not only reasonable, it is the most reasonable interpretation of E. Macdonald J.'s endorsement and thus, of what she decided and ordered. Significantly, I am therefore satisfied that, in respect of the time after June 23rd, 2004, E. Macdonald J. decided that the applicant would comply with the Code by continuing to accommodate the respondent's disability to the point of undue hardship, and that she also decided that undue hardship would occur if and when the respondent should breach all four of the Act, declarations, by-laws and rules. My reasons are as follows.

[18] First, the issues of the respondent's disability, the relationship between her disability and her conduct, and the applicants duty to accommodate the respondent pursuant to

the Code were, I find, substantial issues raised by the respondent for E. Macdonald J. to determine. This is obvious from the Factum and clear from the endorsement

[19] Second, the applicant sought an order in respect of the future relationship between it and the respondent. The order made, while different from that sought, nonetheless was entirely prospective. It governed the future rights and remedies of the applicant and respondent, contingent upon future events.

[20] Third, significantly, E. Macdonald J.'s order limited the applicant's right of recourse to the court in the future, in the event of difficulties with the respondent. Instead of the broad right to move for relief pursuant to ss. 134 and 135 of the Act in the event of the respondent breaching any of the Act, the declaration, by-laws, or rules of the respondent, E. Macdonald J. deprived the applicant of future recourse to the Court unless the respondent should breach all four of the Act, declaration, the by-laws and the rules. I find this to be significant because if the applicant should have future difficulties with the respondent of a lesser dimension, for example conduct breaching three or fewer of the Act, declaration, by-laws and rules, E. Macdonald J. put the applicant in the position of having to accept the respondent's conduct or having to take steps to accommodate or ameliorate any unacceptable effects of the respondent's conduct, without access to the Court.

[21] At the least, E. Macdonald J. put the applicant in a position which would be highly conducive to continuation of its past, strong efforts to accommodate the respondent. However, in my view, the order went farther than that. In addition to creating a compelling reason for the applicant to continue its accommodation of the respondent, I am satisfied that E. Macdonald J. found that the applicant would accommodate the respondent in the future, to the point of undue hardship as the Code requires. My reasons are as follows.

[22] Ending the respondent's right to own and occupy her unit also ends the applicant's duty to accommodate the respondent, pursuant to the Code. That is because it is the respondent's right to equal treatment in her occupation of her condominium accommodation which gives rise to the applicant's duty to accommodate, being the condominium corporation. Further, the duty to accommodate exists to the point of undue hardship for the accommodating party, pursuant to ss. 11 and 17 of the Code. When E. Macdonald J. held that the respondent's breaches of all of the Act, declaration, by-laws and rules shall result in an order requiring the respondent to vacate and sell her unit, the judge therefore held that these breaches shall end the applicant's duty to accommodate the respondent. However, as ss. 11 and 17 of the Code provide, an existing duty to accommodate may only end at the point of undue hardship for the accommodating party. It follows therefore that E. Macdonald J. held that breaches by the respondent of all four of the Act, the declaration, the by-laws and the rules would be the point at which undue hardship for the applicant would arise, in any future dealings with the respondent.

[23] Fourth, the immediately preceding conclusion is confirmed by the fact that, in the event that the respondent should breach the Act, declarations, bylaws and rules, E. Macdonald J. ordered that there "shall" be an order "requiring"' that the respondent vacate her unit and list it for sale. The mandatory nature of the Order establishes that E. Macdonald J. intended that, in

the future, the court would determine if there had been a breach of all four provisions and, if so, E. Macdonald J. intended to preclude reconsideration of accommodation issues. Why? In my opinion, that was because she had already decided the future accommodation issues.

[24] Fifth, E. Macdonald J.'s endorsement properly may be taken into account in determining the nature and effect of her order, if there is any doubt about the meaning of the order itself. I do not think there is any such doubt but if there is, the endorsement supports the above-mentioned conclusions. The endorsement confirms that E. Macdonald J. did decide that the applicant would accommodate the respondent appropriately in the future in the event of further difficulties with her. I refer to the second paragraph of her endorsement where she stated:

> It is undisputed that the corporation (the applicant) has done everything in its power to resolve the situation. (*parentheses added*)

In my opinion, this statement responds to what was a substantial issue before E. Macdonald J. namely the applicant's duty to accommodate the respondent's disability.

[25] Then, in the second paragraph of her endorsement, E. Macdonald J. stated in the sentence immediately after the one just quoted that: "(t)he history of the matter suggests that there is a distinct probability that the cycles of the past will repeat in the future." It is significant that in consecutive sentences in a discrete paragraph, E. Macdonald J. addressed first the undisputed evidence of accommodation and then referred to the "cycles of the past" repeating "in the future". The respondent submits that E. Macdonald J. referred only to the cycles of the respondent's illness and her resulting behavioral difficulties. I reject this submission because first, the applicant's accommodation of the respondent's cyclical difficulties was, of necessity, also cyclical and second, it is reasonable to conclude that E. Macdonald J. put these sentences in a discrete paragraph because they addressed a discrete subject. Reading these sentences together, that subject was the applicant's accommodation of the respondent. In my opinion, E. Macdonald J.'s reference to the cycles of the past repeating in the future expressed her conclusion that all three of the cycles in issue would repeat. They are the cyclical nature of the respondent's schizophrenia, the resulting cyclical severity of the respondent's behavioral issues and the applicant's resulting and therefore cyclical accommodation of the respondent's disability.

[26] Sixth, the fact the parties did not dispute that the applicant had done "everything in its power" to accommodate the respondent provided a solid factual basis for E. Macdonald J.'s determination that the applicant would continue to accommodate the respondent in the future. In the second sentence of the second paragraph of her endorsement, E. Macdonald J. held that there was a "distinct probability" of the aforesaid cycles repeating in the future. This is a strong finding in respect of future events, not a finding based on a chance or possibility. For both reasons, I conclude that E. Macdonald J. was well satisfied that the applicant would accommodate the respondent, in the event of the respondent's future breaches of obligations which were not of sufficient magnitude to trigger her mandatory order that the respondent vacate and sell her unit.

ISSUE ESTOPPEL, CAUSE OF ACTION ESTOPPEL AND RELITIGATION

(a) Introduction

[27] E. Macdonald J.'s endorsement was not in the materials filed before me. It came to my attention during argument. As a result, I asked counsel to consider whether issue estoppel arose in respect of the respondent's Human Rights Code arguments. Counsel provided me with further argument on this issue, and upon the Court's discretion to permit relitigation of decided issues. The issue of cause of action estoppel was not raised during argument.

[28] In deciding this matter, I came to the conclusion that E. Macdonald J.'s exercise of the discretions contained in ss. 134(3)(c) and 135(3) of the Act while taking into account the Code's accommodation requirements constituted a cause of action. That led me to consider whether the respondent's position gives rise to cause of action estoppel instead of issue estoppel.

[29] From the amalgam of Condominium Act discretions and Human Rights Code duty which were part of E. Macdonald J.'s decision, the respondent has extracted Human Rights Code issues as the subject of further litigation. However, as I will explain subsequently, I am of the view that the proper approach in determining the present issues is either to apply the aforesaid discretions in the Act, while also applying the Code's requirements or alternatively, if E. Macdonald J.'s decision means that the discretions in the Act are not available to me, then to invoke the Court's discretion to permit relitigation of decided issues to the same end, in order to meet the demands of justice in this case.

[30] The former approach may mean that the estoppel to be considered is cause of action estoppel. The latter approach, invoking a different discretionary basis for reconsidering Human Rights Code issues may mean that the estoppel to be considered is issue estoppel.

[31] Recognizing the structural differences between these two estoppels, I do not think that I need to determine which properly arises, for two reasons. First, depending on how the issues before E. Macdonald J. are viewed and how the issues before me are defined, either form of estoppel may arise, yet the effect of either is the same: the respondent would be estopped from relitigating issues which already have been decided. Second, either estoppel is subject to a discretion to permit relitigation of decided issues. As I will explain subsequently, I find that it is appropriate in this case to exercise my discretion to permit the respondent to relitigate one Human Rights Code issue.

(b) Issue Estoppel

[32] The applicant takes the position that E. Macdonald J.'s order, interpreted properly, discloses that all of the respondent's present Human Rights Code issues have been finally determined. The applicant therefore asserts that issue estoppel prevents these issues being relitigated.

[33] The respondent submits that issue estoppel does not arise because E. Macdonald J.'s order was not final. It was conditional because it left the question of future breach of the four criteria mentioned therein for subsequent determination.

[34] The criteria for the operation of issue estoppel were set out by Dickson J. (as he then was) in *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248 at p. 254:

1. that the same issue has been decided;

2. that the judicial decision which is said to create the estoppel is final; and

3. that the parties to both the prior decision and the proceeding under consideration are the same, or are those parties' privies.

[35] The first and third criteria clearly are met. In respect of the second criterion the respondent submits that E. Macdonald J.'s decision was conditional, not final.

[36] The question of finality, however, depends on a different criterion. As Iacobucci J. explained in *R. v. Litchfield* [1993] 4 S.C.R. 333 at page 349, when addressing finality in the context of the rule against collateral attack on a judgment, "Court orders are considered final and binding unless they are reversed on appeal". In *Danyluk v. Ainsworth Technologies Inc.* [2001], 2 S.C.R. 480, Binnie J. addressed finality in the context of issue estoppel and came to the same conclusion at paragraphs [57] and [58].

[37] Issue estoppel also applies to "all issues of fact or law which were essential to the earlier conclusion …": see *R. v. Sweetman* [1939] O.R. 131 (C.A.) per Masten J.A. for the court at page 137.

[38] In *Danyluk (supra),* Binnie J. held at paragraph [62] ff. that the court has a discretion to refuse to apply issue estoppel. As Binnie J. stated at paragraph [67], the discretion exists "to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case".

(c) Cause of Action Estoppel

[39] The criteria for the operation of cause of action estoppel are found in *Grandview (Town) v. Doering* [1976] 2 S.C.R. 621. Subsequent decisions have isolated theses criteria. In *Cobb v. Holding Lumber Co.*[1977], 79 D.L.R. (3rd) 332 (B.C.S.C), Bouck J. stated at page 334 that Ritchie J.'s reasons in Grandview disclosed four principles for the test of cause of action estoppel:

1. where a given matter becomes the subject of litigation, the law requires the parties to bring forward their whole case.

2. it applies where the issue sought to be litigated anew was not pursued in the first action either through negligence, inadvertence or even accident and covers every point which properly belonged to the first action.

3. in special circumstances a party may be allowed to pursue the same matter in a second action but only if he can show that the new facts that he has discovered could not have been ascertained by reasonable diligence on his part and presented by him in the first action.

4. the burden lies upon the party who brings the second action to at least allege the new facts could not have ascertained by reasonable diligence in the first instance.

In *Bjarnarson v. Manitoba* [1987], 21 C.P.C (2nd) 302 (Man. Q.B.), Hewak C.J.Q.B. stated at page 304 that the Court in Grandview identified four criteria that must be present before the doctrine of cause of action estoppel will apply:

1. there must be a final decision of a court of competent jurisdiction in the prior action;

2. the parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action,

3. the cause of action in the prior action must not be separate and distinct; and

4. the basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

In *Danyluk (supra)*, Binnie J. at paragraph [54] provided a definition of cause of action, as follows;

> "[54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.).

[40] When cause of action estoppel applies, the Court also has a discretion to relieve against it by permitting relitigation, in order to avoid real injustice: *Toronto (City) v. Canadian Union of Public Employees*, Local 79 [2001] O.J. No. 3239 (C.A.), affirmed on another ground [2003] 3 S.C.R. 77.

(d) Analysis

[41] In both issue estoppel and cause of action estoppel, the competing broad principles are preventing inappropriate relitigation while protecting against real injustice. In my view, it would be inappropriate to permit the respondent to litigate again the various issues which were decided against her by E. Macdonald J., for the following reasons. The respondent had a full hearing on Human Rights Code issues, with the assistance of counsel. Based on a substantial record including agreed facts, E. Macdonald J. determined the measure of accommodation to which the respondent was entitled from the applicant, pursuant to the Code. The respondent did not appeal the order. On the agreed facts before me, she did not suffer from mental disability during the appeal period or for several years thereafter. She continued to

occupy her unit subject to the terms of the order. It was only when she admittedly breached the terms of the order and the applicant sought to enforce it that she has attempted to relitigate the findings and conclusions on which the order was based. There is no suggestion that the hearing before E. Macdonald J. was anything other than fair and just, which is consistent with the absence of an appeal. These are strong reasons for not permitting relitigation of issues which have been decided. Nonetheless, it is necessary to consider whether refusing relitigation of some or all of these issues will result in real injustice.

[42] From the applicant's perspective, it won the case before E. Macdonald J. but was denied any remedy at that time, except for costs. In addition, its right to seek the remedies which the *Condominium Act* provides was curtailed, for the respondent's benefit, causing considerable further burdens for it and for other owners. In this circumstance, given the respondent's admission that she is in breach of E. Macdonald J.'s order, the applicant contends that any further inquiry into these decided issues would unjustly deprive it of the hard won, carefully circumscribed and prospective remedy given to it by E. Macdonald J.'s order.

[43] From the respondent's perspective, substantial injustice would occur unless she is entitled to raise again the issue of accommodation pursuant to the Code, in the period after the order of June 23, 2004. While the respondent wishes to raise all related issues, of significance is her submission that the applicant did not, in fact, accommodate her, and that no Court has heard and determined that issue on the basis of evidence about what really happened.

[44] Substantial injustice may also befall the respondent because of the seriousness of the order in issue. The respondent is in jeopardy of losing her home. That is significant for anyone but the impact upon the respondent is likely to be much more onerous, given her illness. There is medical evidence that the loss of her home may well destabilize her. Her history of instability leading to involuntary hospitalization shows that the order in issue could cause or contribute substantially to her involuntary incarceration in a psychiatric facility. It does not overstate matters to say that the order in issue may go to the core of a vulnerable person's life.

(e) Conclusions

[45] E. Macdonald, J.'s order was made pursuant to one or both of ss. 134(3)(c) and 135(3) of the Act, in which the Legislature has given the Court broad and potentially ameliorative discretions. The court is empowered in s. 134(3)(c) to grant relief which is "fair and equitable in the circumstances" and in s. 135(3), to make any order which is deemed "proper".

[46] Given the respondent's admission that she has breached all of the Act, the declaration, by-laws and rules, the question arises of whether E. Macdonald J.'s mandatory order in those circumstances exhausts the discretions in s.134(3)(c) and s.135(3) of the Act. It may be, as the applicant contends, that I have been left with none of the potentially ameliorative discretions in these sections. My answer to this contention is disclosed by the following analysis.

[47] E. Macdonald, J.'s order is based on the provisions of one or both of ss. 134(3)(c) and 135(3) of the Act. The order which I am asked to make is based on E. Macdonald, J.'s order. Consequently, the order I am asked to make is also based on ss. 134(3)(c) and 135(3) of the Act. That alone suggests that I am able to exercise the discretions contained therein.

[48] If it is correct that the prior order leaves me with discretion pursuant to one or both of the aforesaid sub-sections of the Act, then I must apply the requirements of the Code in exercising that discretion, because the Code takes primacy over the provisions of the Act.

[49] On the other hand, if it is correct that the prior order left me with no such discretion, I conclude that it would be in the interests of justice to exercise my discretion pursuant to either the *Danyluk* or *Toronto* decisions *(supra)* to do what the discretions in ss. 134(3)(c) and 135(3) of the Act allow, with regard to the issue of whether the applicant has accommodated the respondent since June 23, 2004. My primary reasons are these. First, the Court has not determined whether the respondent has in fact been accommodated, on the basis of evidence about what has happened as distinct from evidence which was prospective in nature. Second, the order in question is very significant to the respondent. Her vulnerability means that care must be taken to ensure that her rights have been respected.

[50] It is therefore not necessary for me to determine whether E. Macdonald, J.'s order left me with any discretion pursuant to the aforesaid subsections of the Act. If it did, I will exercise that discretion. If it did not, I will exercise my discretion pursuant to the *Danyluk* or *Toronto* decisions *(*supra) to achieve the same end. In doing either, I will apply the provisions of the Code.

[51] I will therefore determine whether, on the evidence before me, the applicant has established that it did in fact accommodate the respondent in the time since the order of June 23, 2004. However, I will not revisit E. Macdonald J.'s determination that, in that time period, the threshold at which undue hardship for the applicant would arise in discharging its duty to accommodate would be when the respondent breached all of the Act, the declaration, the by-laws and the rules. In my view, determining when undue hardship would arise was an essential factor in E. Macdonald J.'s determination of the circumstances which would result in the respondent being ordered from her unit. That determination was based on evidence which was much the same as the evidence of subsequent events which is now before me, and it was not appealed. I conclude that the respondent's attempt to reopen that determination is simply an attempt to reopen a lost argument in an effort to obtain a different result. The interests if justice do not require that that issue be reopened.

[52] The respondent's admission that she has breached all four of the triggering criteria in E. Macdonald J.'s order and my refusal to reopen the determination that these breaches end the applicant's duty to accommodate the respondent will not automatically result in an order ending the respondent's ownership and occupancy rights. If the applicant has not accommodated the respondent, I will take that failure to comply with the Code into account in exercising my discretion.

[53] The respondent does not seek to reopen E. Macdonald J.'s determinations in respect of matters on or before June 23, 2004.

[54] The respondent asked the Court to reopen Human Rights Code issues on the basis of s. 98 of the *Courts of Justice Act*, R.S.O. 1990 ch. C.43, which states:

> 98. A Court may grant relief against penalties and forfeitures on such terms as to compensation or otherwise as are considered just.

The discretion which I will exercise is as broad as that contained in s. 98 of the *Courts of Justice Act*. It is therefore not necessary to consider this section.

THE FACTS:

[55] The respondent's concession that she is in breach of the terms of E. Macdonald J.'s order and my finding that her difficulties with the applicant had been caused by her schizophrenia do not do away with the need to consider the factual details of the respondent's difficult relationship with the applicant. The facts since June 23, 2004 are important in relation to accommodation. In addition, the facts prior to June 23, 2004 are relied on by the applicant in seeking the forced termination of the respondent's ownership interest. Further, the facts prior to June 23, 2004 are a reason for my conclusion that E. Macdonald J.'s determination of what would constitute undue hardship for the applicant in the time after June 23, 2004 should not be relitigated. I am satisfied that the facts upon which E. Macdonald J. made this determination were, as she anticipated, very much the same as the facts now before me.

[56] I am grateful to counsel for their work in reviewing, agreeing on and summarizing factual issues. I have reviewed the statement of agreed facts in relation to the affidavit evidence and find that the brevity of the general statements in the summary mutes somewhat the burden of the respondent's illness-related behavior. I will begin by addressing the medical evidence about the nature of the respondent's disability.

(a) Medical Evidence

[57] Dr. Anna Skorzewska is a psychiatrist and the head of the Acute Care Unit of the University Health Network. She has treated the respondent for approximately five years. She has provided a report and been cross-examined. I find the following to be proven. The respondent is presently 49 years old and has a thirty year history of paranoid schizophrenia. Schizophrenia is a chronic illness in which symptoms are always present, but may be subdued and controlled or alternatively, much more evident and problematic. Medications, if taken, help to control the symptoms but are not good enough to eliminate them. It is a debilitating illness which affects the "entirety of the adult years" of those who suffer from it.

[58] The illness is characterized principally by paranoid and grandiose delusions and can include auditory hallucinations, difficulty forming clear thoughts and difficulty organizing behavior. The respondent has ongoing paranoid and grandiose delusions. The delusions become more severe with relapses. With such an increase in the severity of her delusions, the respondent has difficulty organizing herself and managing activities of daily living. Relapses

can occur for several reasons, including stressful events and failure to take medications. They may also occur spontaneously. The respondent has had many relapses with numerous resulting hospitalizations because of, I infer, her disorganization and inability to care for herself and her unit. These relapses frequently were caused by the respondent's failure to take her medication. As Dr. Skorzewska has said, the respondent's "stability in the community was not long lasting".

[59] In recent years, the respondent has become more adherent to her treatment, both taking her medication and appearing for her psychiatric appointments. As a result, for approximately three years from the summer of 2004 to the summer of 2007, the respondent was out of hospital, achieved unprecedented stability, and took some community college courses. However, there have been relapses when the respondent became more paranoid, stopped taking her medication, and there was, according to Dr. Skorzewska "significant deterioration" in both self-care and in the care of her condominium. As a result, the respondent was hospitalized in the summer of 2007 and again in early 2008.

[60] In Dr. Skorzewska's opinion, when the respondent is unwell, she "stops being able to provide for herself" and "cannot take care of her apartment". When she is well, the opposite is true. The respondent, like others with this illness, does not recognize when she is getting ill.

[61] The respondent has given Dr. Skorzewska the impression that the condominium unit represents independence, freedom and status to the respondent. I find that, while Dr. Skorzewska has formed this impression, she has not expressed this to be her opinion. I infer that this is because of the delusional content of the respondent's utterances. While Dr. Skorzewska stated in her written opinion that the stress of the legal proceeding and potential loss of her unit caused the respondent to relapse recently, she admitted in her cross-examination that this was speculation, and I so find. I accept, however, that any form of stress is capable of causing the respondent to relapse, and her relapses may also occur spontaneously.

[62] I find therefore that the respondent's pattern of alternating periods of functioning either relatively well despite ongoing symptoms or functioning poorly, with a resulting inability to care for herself and her unit, will continue despite ongoing psychiatric treatment, ongoing support from the respondent's outreach worker and the respondent's limited family support.

(b) Agreed Facts

[63] The following is taken from the agreement statement of facts:

DATE	EVENT
1991	
Jan 2/91	MTCC 946 created
1992	

DATE	EVENT
Nov 3/92	Respondent obtains title to unit 203
1993	
Feb 7/93	MTCC 946 contacted officer of Protective Services Division of Intercon Security to knock on door and enter unit if no answer.
Feb 7/93	Odour in corridor, garbage bags in hallway. Intercon Security entered unit and presumed the respondent was dead when she did not respond. Police and ambulance called. Respondent's father contacted and he stated that the respondent was not taking her medication and that this was why she was in the condition observed.
Feb 8/93	Letter from MTCC 946 to respondent re Feb 7/93. Security officer for MTCC 946 observed garbage bags in front of unit 203 and foul odour emanating from unit. MTCC 946 calls plumber for plugged toilet. Respondent refused to allow MTCC 946 access to unit.
Feb 8/93	Respondent removed from MTCC 946 by police.
1994	
Apr 12/94	MTCC 946 source of leak coming from respondent's unit. Foul smell, larva and flies all over unit.
Apr 21/94	Complaint letter from neighbouring resident re unpleasant garbage odour in hallway of second floor. Mouse droppings found in unit 202.
Mid-June/94	Police attended at respondent's unit, observed "so messy. … health hazard to respondent and neighbouring residents."
June 20/94	Letter to respondent, requested to clean unit 203 within 3 days of receipt of letter.
July 11/94	Letter from MTCC 946 advising respondent that unit continues to remain in a messy state and unit constituted a health hazard to resident and neighbouring residents. MTCC 946 made several attempts to contact respondent by telephone and knocking on unit door. Respondent required to clean unit 203 within 3 days of receipt of letter.
1995	
Jan 21/95	MTCC 946 observed respondent leaving various, mainly food items, in hallway.
Jan 17, 18/95	MTCC 946 received complaint from neighbouring resident re hysterical screaming emanating from unit 203. Manager calls respondent's father with no response. Police attended at unit 203 and took respondent to Hospital. Funeral Sanitation Services contacted to clean unit. 46 Garbage bags removed from unit 203.

DATE	EVENT
Feb 24/95	"Permission to Enter", document prepared by MTCC 946, signed by the respondent in the presence of superintendent of MTCC 946.
Jul 29/95	Video surveillance shows respondent disconnecting telephone receiver from front lobby of MTCC 946 and leaving the building with receiver in her hand.
Aug 2/95	Complaints received by residents of MTCC 946 re loud noise emanating from unit 203. Some neighbouring residents fearful of respondent.
Aug 3/95	Superintendent observed food items and beverage cans in hallway outside of respondent's unit and elevator on second floor of MTCC 946. Foul smell emanating from unit 203.
Aug 4/95	Attempt to contact respondent's father, but he changed his phone number. Message left with respondent's doctors. Call to St. Michael's Hospital's psychiatry department and left message.
Aug 5/95	Security reports indicate respondent screaming profanities and moving furniture, etc. in unit. Very strong foul odour emanating from unit 203.
Aug 5/95	MTCC 946 security staff to patrol second floor and remove items left behind by respondent.
Aug 6/95	MTCC 946 received complaints re loud noise emanating from unit 203 at 3:00 a.m.
Aug 9/95	Friends of respondent attended at unit 203 and contacted police. Respondent handcuffed by police and removed from unit 203.
Aug 9/95	Respondent wrestling with and resisting police, screaming profanities. "Jorge I'm going to fucking get you for this, you fucking Jew, I'm going to fucking get you!" Superintendent felt threatened by respondent and fearful of his safety and of residents of MTCC 946.
Aug 9/95	Superintendent observed unit 203 in very bad state. ... very strong and foul odour of faeces and urine…faeces and urine on floor in areas of unit ...cans, uncleaned dishes all over unit floor.
Nov 23/95	Complaints received by neighbouring residents of respondent of loud and disturbing noise (cries and screams) emanating from unit 203. Superintendent tries to call respondent, but no answer. Superintendent calls respondent's father who advises she is fine.
Dec 12/95	Complaints by neighbouring resident, re respondent screaming, banging on walls and making other disturbing noise in unit 203 between 2:00 a.m. and 8:30 a.m. Police contacted and respondent removed from unit 203.
1996	

DATE	EVENT
Apr 16/96	Complaints received re respondent's cries and moaning.
Apr 18/96	Strong odour in hallway emanating from unit 203.
Apr 19/96	3:30 a.m. - Paramedics, police and fire department attend at unit 203 in response to panic alarm activated from within unit. Respondent unaware of situation around her, but neither police nor paramedics will remove her from unit.
Apr 19/96	Victim Services office advised MTCC 946 Heath Department would be contacted to inspect respondent's unit and declare unit unfit for living. Respondent's father contacted twice and was advised that the respondent was not seen or heard from for several weeks. Toronto Public Inspector's office contacted re concerns of condition of unit 203, poses health risk to residents of MTCC 946. Respondent's social worker contacted.
Apr 20/96	Complaint letter from neighbouring resident re second floor hallway so putrid and overwhelming "one must grab a gulp of air in elevator".
Apr 23/96	Police, public health nurse, paramedics and fire department attend at Unit 203 as per call from superintendent.
Apr 23/96	Superintendent contacts respondent's father and advises respondent to be taken to hospital. Respondent's father responds "You fellows do what you have to do" and could not attend as he was too busy.
Apr 23/96	Fire department breaks into unit 203 with police. Respondent handcuffed, placed on stretcher and taken to hospital. Superintendent entered unit 203 and in unsanitary state. ... rotten food throughout unit and threatening note.
Apr 24/96	Superintendent of MTCC 946 contacts respondent's father advises him that a funeral sanitation/cleaning company, plumbing company and pest control company to conduct cleaning at unit 203.
Apr 24/96	Letter from resident of unit 202 to MTCC 946 re repeated concern of condition in unit 203". ... health hazard to residents of second floor. ... interferes with our peaceful enjoyment of our home".
Dec 11/96	Complaint received by resident of unit 202 re noise emanating from unit 203.
1997	
Mar 20/97	Inspection of unit 203. Strong and foul odour emanating from unit 203.
Apr 4/97	Superintendent meets with respondent's social worker. … not heard from respondent in a week. … concerned about respondent. Social worker spoke with respondent through unit door. … respondent denies social worker access.
Apr 5/97	Complaints from resident of unit 202 re strong smell of faeces emanating

DATE	EVENT
	from unit 203.
Apr 8/97	Police contacted, entered unit with paramedics and fire department, removed respondent from unit on a stretcher and taken to hospital.
Apr 8/97	MTCC 946 observed unit in unsanitary condition. … toilet clogged with faeces and other items. … faeces on bathroom floor, toilet seat and lid. … piles of clothing, empty cans and bottles on bathroom sink counter. … refrigerator full of rotten food, could not close door to refrigerator. … garbage, empty bottles, cans, newspapers, clothes scattered all over unit. ... very strong and foul odour in unit.
Apr 9/97	Tour of Duty Report form prepared by Primary Response Inc. re clean and disinfect unit, replacement of toilet, garbage bags removed from unit. Funeral Sanitation Services re cleaning services performed in unit 203.
1998	
Mar 11/98	Superintendent advised by respondent's father that respondent admitted to hospital due to medication not being taken.
2000	
Dec 1/00	Agreement made between MTCC 946 and Respondent.
2001	
Apr 5/01	MTCC 946 inspected respondent's unit and observed canned food items piled high on kitchen counter and other rooms cluttered with clothes, paper and other items.
Apr 19/01	MTCC 946 attended at respondent's unit for regular every other Thursday inspection. … knocked on door several times and no answer ... did not wish to enter unit alone because of safety concerns and respondent's past aggressive behaviour with police ... telephoned respondent and left message advising would call again on May 3/01 re inspection, but respondent requested to call and set up inspection, but no response.
Jul 13/01	MTCC 946 received letter from OPG&T advising of their appointment as guardian of property for the respondent and responsible for her business and legal affairs involving property. Public Guardian requests access to unit 203.
Sept/O1	MTCC 946 receives phone calls from the respondent's medical doctor (Cavanagh) and social worker (Gibbins), who ask MTCC 946 to inspect unit 203 weekly after respondent's return to live in unit.
Sept 26/01	MTCC 946 advised by hospital employee that respondent was to be released from hospital and returning to unit 203. MTCC 946 staff advised "to assist her in any way you can".

DATE	EVENT
Oct 1/01	Discussion between medical doctor (Cavanagh) of respondent and solicitor for MTCC 946: request that MTCC 946 inspect respondent's unit because the condition of unit was a reflection of respondent's mental health.
Oct 2/01	MTCC 946 advised by OPG&T that respondent declared capable of managing her finances and OPG&T no longer authorized to manager respondent's financial and legal affairs involving property.
Oct 12/01	Letter from solicitor for MTCC 946 to medical doctor (Cavanagh) and social worker (Gibbins) of the respondent advising MTCC 946 does not have authority, nor expertise to assess mental and physical health of any resident of corporation, including the respondent, contrary to wishes of caregivers. MTCC 946's solicitor expresses serious concerns regarding prior acts of respondent. ... endangering safety and possibly lives of residents of corporation ... MTCC 946 relying on respondent's health care professionals to ensure there would not be any further recurrences of action or omissions of respondent. MTCC 946 also communicates with psychiatrist, Dr. Spivak, who was primarily responsible for respondent's treatment. Letter from Dr. Cavanagh advising MTCC 946 she is no longer involved with respondent. Regular inspections by MTCC 946 not part of treatment plan.
Oct 12/01	Respondent returns to unit 203 from hospital.
Oct 17/01	Letter from Dr. Cavanagh to MTCC 946's solicitors advising she is no longer involved with the respondent. Regular inspections by MTCC 946 are not part of respondent's treatment plan.
2002	
May 6/02	Inspection of unit 203.
May 30/02	MTCC 946 unable to reach respondent since May 6/02.
May 30/02	MTCC 946 again attempt to inspect respondent's unit. Respondent inside unit, but would not allow access.
Jun 10 & 13/02	MTCC 946 contact Dr. Windram, one of respondent's medical doctors: concerned that respondent would not allow unit inspection for some time. As per doctor's request, manager attends at unit, but no response from respondent. Call back to doctor. MTCC 946 advised by Dr. Windram that she would not authorize police to take respondent to hospital at that time.
Jul 5/02	Security for MTCC 946 and building's plumber entered respondent's unit to investigate leak, discovered unit was filthy, piled high with garbage and

DATE	EVENT
	faeces on the floor. ... they note that "it can't get any worse" in report.
Jul 8/02	Carpet on second floor close to respondent's unit was soaked with water and wallpaper peeling above. MTCC 946 contacted respondent's caseworker, Paula, and advised her of leak and concerns for well-being of respondent. Advised by caseworker she would contact doctor to determine if respondent could be picked up for treatment.
Jul 14/02	Respondent removed from MTCC 946 by police after being called by MTCC 946.
Jul 16/02	Further unit inspection by MTCC 946: observed excessive garbage and debris. ... faeces on living room carpet, and in the bathroom sink, among other places ... flammable items left in oven and on stove. ... very high risk of fire in corporation … serious health and safety risk to residents of corporation.
Jul 16/02	Funeral Sanitation Services cleaned unit 203. Removed garbage, spoiled food, large amounts of faecal matter, containers full of urine.
Sept 4/02	Further complaint letter from neighbouring resident of MTCC 946. ".. hazards... feces and garbage... water left running... danger of fire... rancid garbage.... odours... pests... recurring situation has become intolerable."
Sept 11/02	Respondent returns to unit. Sept 19/02, MTCC 946 writes her to request resumption of unit inspections. MTCC 946 advised by respondent's social worker that the respondent did not want any further inspections of unit 203 and that MTCC 946 should refrain from conducting further inspections.
Nov 21/02	Solicitors for MTCC 946 advise to continue inspections for safety reasons. MTCC 946 attempts further inspection. Knocked on respondent's unit door; no answer. By letter, respondent was advised that MTCC 946 wishes to resume inspections to unit 203.
Dec 5/02	MTCC 946 conducts further inspection: observed respondent's unit was very untidy... piles of clothes, papers and debris scattered all over unit and numerous cans of food and newspapers piled on kitchen counters near stove.
Dec 19/02	MTCC 946 attempted to inspect respondent's unit; knocked several times, but no one answered.
2003	
Jan 2/03	MTCC 946 inspected respondent's unit: observed unit was in same condition as Dec 5/02 inspection.
Jan 15/03	MTCC 946 received letter from resident of neighbouring unit, complaining of unpleasant smell of urine and faeces emanating from unit 203; expresses concern for health risks to residents.
Between Jan	Superintendent could smell foul odour in second floor hallway emanating

DATE	EVENT
2 & 17/03	from unit 203 ... Complaints made by neighbouring residents of smell and disturbing noise.
Jan 16/03	MTCC 946 attempts to conduct scheduled inspection: knocked on respondent's unit door several times, no one responded. Due to foul smell and unsuccessful attempts to inspect respondent's unit, police was contacted. Respondent was removed from MTCC 946 by police.
Jan 17/03	Foul smell and disturbing noises reported to be coming from respondent's unit. In light of those reports and MTCC 946's inability to enter the unit to inspect the day before, MTCC 946 contacted police; Police remove respondent from MTCC 946 premises, with considerable struggle from respondent, who attempts to get at J. Paiva while being removed.
Jan 20/03	MTCC 946 entered unit: intolerably strong and foul odour of urine and faeces, faeces on top of toilet lid; observed piles of garbage, papers, bags, boxes, various debris all over unit. Kitchen counters and stove covered with paper, plastic bags, paper and plastic food containers, cans and various items, creating very high risk of a fire.
Jan 29/03	Funeral Sanitation Services clean and disinfects respondents unit. ... garbage and faecal matter removed from unit... entire unit sprayed with sanitizing agent.
May 15/03	Respondent returns to unit 203.
Jul 30/03	MTCC 946 was contacted by Ms. Paula Tookey, mental health outreach worker, responsible for looking after the respondent; she advises that police have been contacted and required to attend at respondent's unit.
Jul 30/03	MTCC 946's superintendent assists police with access to unit 203; respondent screams and yells at police, and must be restrained by police before being removed.
Jul 31/03	MTCC 946's superintendent returns to unit 203 with security and Funeral Sanitation Services. Observed garbage and decaying food, maggots on the carpets and walls, an infestation of flies and moths, toilet full to the rim with faeces and a sink full to the rim with mouldy water.
Aug 6/03	Constant inspections and cleaning of unit 203 is taking up disproportionate amount of time of staff and property manager causing undue burden.
2004	
Feb 23/04	Advance notice of inspection given to respondent.
March 1/04	MTCC 946 conducts further inspection after giving notice to respondent. Foul odour. Insects observed crawling about on the floors; moths flying about the unit; piles of paper stacked in the oven and on top of the stove.

DATE	EVENT
Mar 23/04	MTCC 946's solicitors contact OPG&T.
Jun 23/04	If non-compliance by respondent, the respondent "shall" be required to vacate her unit and list the unit for sale.
Jul 14/04	Superintendent fearful that respondent may be violent towards him and cause him bodily harm particularly during one of his inspections of the unit.
Summer /04 to Summer /07	During intervention period, respondent remained stable for 3 year period.
2006	
Jul 5 & 7/06	Correspondence between MTCC 946 and respondent regarding moth problems and requirement to spray unit; respondent refuses to allow her unit to be sprayed.
Aug 9/06	MTCC 946's superintendent entered the respondent's unit and took photographs of the state of the unit at that time.
Dec 21/06	Entered unit 203 with a fire technician to perform an annual fire inspection; observed disturbing amounts of litter, debris and clutter, and also that unit was badly infested with moths.
2007	
Mar 1/07	MTCC 946 entered the respondent's unit to change a defective smoke detector; the superintendent and security officer entering the unit observed litter, debris and moths, among other things, in the respondent's unit.
Mar 16/07	Fire safety assessment conducted on respondent's unit, with resulting Fire Safety Assessment Report, dated March 16, 2007, concluding, inter alia, that the condition of the suite poses a marginal risk, however, the combustible load and additional fire load must be viewed as serious safety concern.
Mar 16/07	MTCC 946 conducts a further inspection of the respondent's unit with contractor, Magical Pest Control Inc., resulting in the report dated Mar 21/07 advising that the respondent's unit is heavily infested with Indian Meal Moths.
Mar 21/07	Magical Pest Control report "... heavily infested with Indian Meal Moths ... to stop the spread of infestation to other apartments ... treatment needs to be done as early as possible".
Apr 10, 2007	The Public Guardian and Trustee, was advised of the motion and served with the motion materials.
Apr 13, 2007	Mr. Bur acknowledges receipt of the materials and advises, *inter alia*, that he would attend the motion on April 17, 2007.

DATE	EVENT
Apr 17/07	Mr. Bur was in attendance and made submissions regarding the issue of the appointment of a litigation guardian only. Because the Public Guardian and Trustee had no standing at that time, the Public Guardian and Trustee had no authority to make arguments regarding the substance of the motion; Condominium Corporation permitted to clean unit. Respondent prohibited from storing materials. Costs of the motion and of the cleaning of the unit to the Applicant and such costs were ordered recoverable as common expenses.
Apr 29/07	MTCC 946 investigates a water leak outside unit 203; security attends at respondent's door and asks to enter; respondent refuses to allow entry, but advises that everything is under control.
Apr 30/07	MTCC 946 was contacted by the respondent's social worker, Ms. Denise Aarons, who expressed concern for respondent's well being, indicated she had received no response when she knocked on the respondent's unit door the day before, and was concerned that respondent missed a month's worth of appointments. She indicated that she would be contacting the respondent's doctors.
May 1/07	MTCC 946 contacted again by Ms. Aarons, who advises she would like to involve the police and have the respondent taken to hospital. Police enter unit 203 and locate respondent sprawled on the kitchen floor, seeming very confused and with slurred speech. Police take the respondent to the hospital. The Respondent was involuntarily committed to Hospital by her doctor under the authority of the Mental Health Act.
May 2/07	Photographs taken of the unit after respondent's removal.
May 4 & 6/07	Funeral Sanitation Services cleaned and disinfected unit 203. Observed that freezer compartment of the refrigerator contained evidence of a fire. Cleaning services report that it disposed of 150 bags of garbage and food.
May 31/07	The condominium corporation attempted to register a Certificate of Lien (Tab D) but the registration was put on hold because of the previous registration on title by the OPGT of a restriction preventing dealing with the property without the consent of the OPGT. (Tab E). Mr. Bur was subsequently advised of the inability to register the lien and a request was made on behalf of the Applicant that the OPGT consent to the registration of the lien or remove the restriction from title. On July 20, 2007 and after receiving notification from the Respondent's doctors that she was being released from hospital and that she was capable of managing her property, the OPGT removed the registration (Tab F).
June 1/07	The Respondent defaults on her June 1, 2007 common expense payment.
July 1/07	The Respondent defaults on her July 1, 2007 common expense payment.

DATE	EVENT
July 25/07	The condominium corporation issues Notice of sale Under Lien.
Sept 24/07	Inspection reveals substantial amount of garbage bags.
Oct 1/07	Mr. Jaglowitz's firm handled the re-financing which enabled the Respondent to discharge the lien and avoid sale proceedings. Payment of $22,209.52 was made on or about October 1, 2007 (relevant documentation at Tab H). The arrears which were paid included arrears of common expenses, the costs ordered payable by Belobaba, 1., the extra actual costs incurred by the condominium corporation in obtaining the Order of Belobaba, J. and the costs of clean up ordered by Belobaba, J. No objection was made to the amount paid and no rights were reserved.
Dec 5/07	Pursuant to the Order of Belobaba, J., and in reliance on s.134 of the Condominium Act, 1998 the Applicant moved by Notice of Motion dated December 5, 2007 and amended January 14,2008, for various relief including an order requiring the listing and sale of the Respondent's unit, an order permitting the condominium corporation to clean the unit and dispose of hazardous materials in the interim, a determination of whether a litigation guardian ought to be appointed and costs. In support of the motion, evidence was tendered including several sets of photographs, several affidavits of the superintendent describing the unit, and a Fire Safety Assessment Report as an exhibit to an affidavit.
Dec 19/07	MTCC 946 enters the respondent's unit and takes photographs of the unit.
2008	
Jan 4/08	MTCC 946' s fire safety consultant and a fire protection engineer inspect the respondent's premises, and deliver a report concluding, among other things, that there is an existing fire risk which must be viewed as a serious life safety concern to the resident, neighbours and emergency service employees.
Jan 9/08	MTCC 946 attend for further inspection of the respondent's unit and takes further photographs.
Jan 16/08	OPGT's factum submitted.
Jan 21/08	Respondent ordered to clean unit, failing which, the condominium corporation may do so. Respondent to pay costs of the day fixed at $500
Feb 7/08	Superintendent of MTCC 946 contacts police due to concern for respondent's well being.
Feb 7/08	It took police officers several minutes before able to locate respondent. Because of deterioration in her mental health condition, the Respondent was

DATE	EVENT
	hospitalized, where she remained until her discharge on April 30, 2008.
Feb 7/08	Advised by respondent's social worker that respondent well known to psychiatrists at Toronto General Hospital.
Feb 7/08	Respondent's unit continued to be a fire risk and safety concern to MTCC 946.
Feb/Mar/08	The respondent failed to comply with the Order of Klowak, J and accordingly, pursuant to Klowak, J.'s Order, MTCC 946 hired Funeral Sanitation Services to clean and disinfect respondent's unit. The condominium corporation also transported and stored certain of the Respondent's possessions.
Mar 1/08	Respondent defaults on March 1, 2008 common expense payment.
Apr 1/08	Respondent defaults on April 1, 2008 common expense payment.
Apr 2/08	OPG&T appointed as litigation guardian.
May 21/08	The Respondent agreed to pay two months common expenses plus the NSF charge, and on or about May 22, 2008, made that payment.
May 28/08	The Applicant registered a lien against the Respondent's property pursuant to the Condominium Act, 1998 taking into account the aforementioned payment all in accordance with agreement between the parties.

(c) Fire Safety Reports and Findings

[64] As the agreed facts indicate, fire safety assessments were conducted in the respondent’s unit in March 2007 and January 2008.

[65] The conclusion from the 2007 assessment was that “the condition of the suite poses a marginal risk, however, the combustible load and additional fire load must be viewed as a serious safety concern.” The affidavit of the applicant’s superintendent explains this. He viewed the respondent’s unit at that time. It was very full of papers, books, clothing and bagged items covering substantial portions of the floor area, sometimes to a depth of several feet. I find that is the combustible load and additional fire load to which the inspector referred. I accept that it constituted a serious safety concern.

[66] The 2008 fire safety inspection led the inspector to conclude, and I find that the combustible load, as well as the additional fire load, were a “serious life safety concern” to the respondent, neighbours and emergency service employees. The evidence establishes that the condition of the respondent’s unit was substantially the same as at the time of the 2007 inspection and, while slightly improved in some regards, it was worse in others. The

superintendent's affidavit proves how real the fire risk was. On February 7, 2008 he entered the respondent's unit with police officers who removed her to hospital. The respondent was incoherent. She had placed a large amount of clothing, books, paper and other articles on the stove burners. His photographs show a large amount of combustible load close to the stove.

(d) Other relevant facts

[67] In March 2007 the respondent's unit was heavily infested with Indian meal moths. In May 2007, after the respondent's involuntary committal, photographs establish that her unit was very full and very disorganized. The respondent arranged for the unit to be cleaned and disinfected. There was evidence of a fire in the freezer compartment of the refrigerator. One hundred and fifty bags of garbage and food were removed.

[68] On June 1 and July 1, 2007 and again on March 1 and April 1, 2008, the respondent did not make her common expense payments to the applicant.

THE CONDOMINUM ACT:

[69] Various types of condominium corporations are recognized by the Act. The two most common are freehold condominium corporations in which owners own their units and appurtenant common interests in freehold, and leasehold condominium corporations. The definitions of "owner" in the Act vary according to the corporation's type so that, for example, in a leasehold condominium corporation, the owner owns a leasehold interest.

[70] The evidence does not state explicitly whether the applicant is a freehold condominium corporation or a leasehold condominium corporation. However, all of the evidence is consistent with the respondent owning a freehold interest in her unit, and I so find.

[71] The following provisions of the Act are relevant:

> s. 5(1): A corporation created or continued under this Act is a corporation without share capital whose members are the owners.
>
> s. 10: Units and common elements are real property for all purposes.
>
> s. 11(1): Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of the owner's unit.
>
> s. 17(1): The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> s.17(2): The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.
>
> s. 17(3): The corporation has a duty to take all reasonable steps to ensure that the owners … comply with this Act, the declaration, the by-laws and the rules.

s.116: An owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules.

s. 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.

s. 119(1): … an owner … shall comply with this Act, the declaration, the by-laws and the rules.

s. 119(3): A corporation … (has) the right to require the owners … of units to comply with this Act, the declaration, the by-laws and the rules.

s. 134: see paragraph [1].

s. 135: see paragraph [1].

[72] The relevant parts of the declaration filed pursuant to the Act are as follows:

Article V(1)(a) obliges each owner to maintain his or her unit.

The declaration also obliges each owner to pay his or her share of the common expenses in accordance with the formula contained in the declaration.

[73] Most of the applicant's by-laws deal with corporate matters. However, a by-law obliges each owner to pay his or her share of the common expenses.

[74] The relevant rules of the applicant, with which the respondent is statutorily obliged to comply, are as follows:

Rule 4 No owner shall do anything in his or her unit which will in any way increase the risk of fire …, and no owner shall obstruct or interfere with the rights of other owners or in any way injure or annoy them. Rule 12: prohibits owners or occupants from storing combustible or offensive goods in their units.

(a) Analysis

[75] The significant features of the Act are as follows. The respondent, as owner of her unit, is entitled pursuant to s. 11(1) to "exclusive" ownership and use of her unit, which is real property pursuant to s. 10. However, her entitlement is subject to the Act, the declaration and the by-laws, but not the rules. The respondent as owner is therefore entitled to exclude the corporation and its agents from her unit except to the extent that the Act, the declaration or the by-laws permit them to enter. The respondent therefore, has substantial independence from the applicant within her unit, in much the same way that the owner of a detached dwelling house is substantially independent. This is relevant to the applicant's duty to accommodate the respondent's disability pursuant to the Code. While the Code takes precedence over the Act,

the means available to the applicant to accommodate the respondent within her own unit, absent her consent and cooperation, are limited.

[76] The Act, in s. 19 gives the corporation and its agents the power to enter a unit to "perform the objects and duties of the corporation" or to "exercise the powers of the corporation". However, the objects, duties and powers of the corporation do not include managing the respondent or her unit. For example, s. 17(1) states that the corporation's objects are to manage the property and assets of the corporation, which does not include the respondent's unit and certainly does not include her person. The duty of the corporation to "control, manage and administer" which is found in s. 17(2) is only in relation to common elements, and not in relation to an owner's unit. Pursuant to s. 17(3) the corporation has a duty "to take all reasonable steps" to ensure that owners comply with the Act, the declaration, the by-laws and the rules. What is reasonable depends on the context. For it to be reasonable for a corporation to force its way into a female owner's unit, against her will, for the purpose of ensuring her compliance with the Act, the declaration, the by-laws or the rules would require extreme and unusual circumstances.

[77] The applicant has placed reliance on s. 117 which states that no owner shall "permit" a condition to exist, or "carry on" an activity in the unit if it is likely to damage property or cause injury to an individual. When the respondent is sliding into the grip of paranoid schizophrenia, I doubt that she could be said to be permitting something to exist. It is much more likely, on the evidence, that when she is in this state, the problems caused by her illness are beyond her voluntary control. The same may also be said about her capacity to "carry on" activities. The Legislature did not bar acts, which would have addressed conduct without any aspect of accompanying cognition. The concepts of permitting something or carrying it on include an element of volition or purposefulness which likely was not present, on the evidence, whenever the respondent's schizophrenic conduct became problematic for the applicant or for others in her building. For this reason, the language of s. 117 is not well suited to the case of an owner suffering from a psychiatric illness which renders her incapable. For this reason, it is likely that s. 117 was inapplicable whenever the respondent's slide into schizophrenia resulted in the problems which give rise to this application. Consequently, it is also likely that the corporation was not under a duty pursuant to s. 17(3) to pursue the respondent's compliance with s. 117, when her conduct deteriorated to the point that the applicant's intervention otherwise might have been warranted.

[78] The corporation itself was given a specific character by the Act. Pursuant to s. 5(1), the owners are members of the corporation, and under s. 17(1) the corporation's objects are to manage the corporation's property and assets "on behalf of the owners". It is therefore, reasonable to interpret the corporation's right under s. 119(3) to require an owner to comply with the Act, the declaration, the by-laws and the rules as being exercisable on behalf of the owners generally.

[79] The condominium corporation, in taking any action in respect of one owner, should be cognizant of the rights of other owners. That follows from the structure of the Act and the nature of a condominium. Any measures taken to accommodate the needs of a disabled owner like the respondent may impact on other owners. Consequently, the position of

a condominium corporation has been likened to that of a union in which actions to benefit one member must be assessed with regard to the effects of that action on other members: *Leonis v. Ontario Human Rights Commission* (1998), 33 C.H.R.R. D 479 (Ont. Bd. Of Inquiry) at para. 57 ff. This analogy draws on the *ratio* in *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4d) 577 (S.C.C.) at pages 590-91, to which I will return when addressing the duty of accommodation pursuant to the Code.

THE HUMAN RIGHTS CODE

[80] The following sections of the Code are relevant:

> 2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of … disability …
>
> 10. "disability" means,
>
> …
>
> (d) a mental disorder,
>
> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> 11(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
>
> s. 17(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

> **s.** 47(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

(a) Analysis

[81] As I have held, the conduct on which the applicant relies in seeking to terminate the respondent's ownership interests is caused by her paranoid schizophrenia, a disability under the Code. It follows therefore that the applicant seeks to terminate the respondent's ownership interests because of her disability. I am unable to accept as valid the applicant's attempts to distinguish between the respondent's mental illness and her resulting behaviour, in an attempt to argue the inapplicability of the Code to the matters in issue. The respondent's inability to conduct herself differently is part of her mental disorder and thus is part of her disability.

[82] The right to equal treatment with respect to occupancy of accommodation guaranteed in s. 2(1) of the Code applies to condominiums: *York Condominium Corporation #216 v. Dudnik* (1991), 79 D.L.R. (4th) 161 (Div. Ct.).

[83] Discrimination includes more than infringement of rights because of a person's disability. Section 11(1) addresses constructive discrimination or adverse effect discrimination, in which facially neutral requirements, qualifications or factors may be discriminatory. An exception exists pursuant to s. 11(1)(a) if a requirement, qualification or factor is reasonable and *bona fide* in the circumstances. This exception is limited by s. 11(2) based on the duty to accommodate to the point of undue hardship.

[84] The applicant's duty to accommodate the respondent is also based on s. 17 of the Code which addresses persons with disabilities. Section 17(1) provides that a right of a person, for example the right to equal treatment in occupancy of accommodation, is not infringed only because the person is incapable, by reason of disability, of performing or fulfilling the essential duties or requirements attending the exercise of the right. However, pursuant to s. 17(2), a person shall not be found incapable unless the person's needs cannot be accommodated without undue hardship.

[85] Pursuant to both ss. 11(2) and 17(2), the concept of accommodation to the point of undue hardship is to be considered on the basis of the costs, any outside sources of funding and any health and safety requirements.

[86] Pursuant to s. 11, the applicant's attempt to force the respondent from her unit is *prima facie* discrimination against her in her occupancy of accommodation. Pursuant to s. 17, the Court is not entitled to find that the respondent is incapable, only by reason of disability, of performing or fulfilling the essential duties or requirements attending her exercise of her right to equal treatment in occupancy of accommodation unless the Court is satisfied that her needs cannot be accommodated without undue hardship. Subject to determining the accommodation issue, the agreed facts and evidence demonstrate clearly that, by reason of her paranoid schizophrenia and resulting conduct, the respondent is incapable of performing or fulfilling the

essential duties or requirements attending her rights in relation to her unit. As Dr. Skorzewska stated and I find, when the respondent is unwell, she stops being able to provide for herself and cannot care for her unit. As the agreed facts demonstrate, the respondent is often in this state and as a result, is so incapable of caring for herself and her unit that she is involuntarily admitted to a psychiatric hospital.

(b) Conclusions

[87] As mentioned, the respondent admits that she has breached all of the Act, the declarations, the by-laws and the rules of the applicant. I have found that this conduct resulted from her disability. Her actions as a result of her disability have therefore reached the threshold of undue hardship determined by E. Macdonald J. The 2007 and 2008 fire safety assessments establish that a substantial part of her conduct which has created undue hardship is also a breach of health and safety requirements. To the extent that her breaches of the Act, the declarations, the by-laws and the rules consist of her failure to pay common expenses, undue hardship arises from costs factors. What remains to be determined is whether the applicant has proven that it accommodated the respondent's disability to the point of undue hardship.

[88] I am satisfied on the whole of the evidence that, after June 23, 2004, the applicant accommodated the respondent's disability to the point of undue hardship. My reasons are as follows.

[89] The duty to accommodate includes both a procedural duty and a substantive duty: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* [1999] 3 S.C.R. 3. The procedural duty to accommodate requires the accommodating party to obtain all relevant information about the person's disability to the extent it is available. This procedural duty feeds the accommodating party's obligation to give consideration to how it may properly meet its obligation. The substantive duty to accommodate is the obligation, short of undue hardship, to take steps to avoid discrimination. The nature of both the procedural and substantive duties depends on the particular circumstances of the case.

[90] By the time of the events now under consideration, the applicant was very well versed in the characteristics of the respondent's illness, its cyclical nature and its manifestations. As the agreed facts demonstrate, the applicant was involved with the respondent's father, social worker and doctors from time to time. As E. Macdonald J. found, the applicant had done everything in its power, displaying great sympathy for the unique circumstances of the respondent, prior to June 23, 2004. While I would not characterize the applicant's conduct since June 23, 2004 as displaying great sympathy, I am satisfied that it has met the procedural component of its duty to accommodate the respondent.

[91] The applicant took the following steps in discharge of its substantive duty of accommodation.

[92] From June 23, 2004 to July 2006, there were no relevant issues. During the summer of 2006, the applicant became aware of a substantial number of moths in the respondent's unit.

[93] The March 2007 fire inspection, which disclosed "serious safety concerns" led the applicant to move before Mr. Justice Belobaba on April 17, 2007 for an order that the respondent be required to list and sell her unit. It is obvious from the order made that Belobaba J. was concerned that the respondent was a person under disability and that a litigation guardian might need to be appointed for her. He adjourned the applicant's application to compel the respondent to list and sell but permitted it to be brought back on if the applicant also moved to determine whether a litigation guardian should be appointed for the respondent. In addition, Belobaba J. granted leave to the applicant to enter the respondent's unit, to clean it and fumigate it, and to remove and dispose of hazardous articles or substances. The applicant was also given the right to inspect the unit. The respondent was restrained from storing materials in her unit in breach of the declaration or rules.

[94] In May 2007, the applicant's agent entered and cleaned the respondent's unit, removing 150 bags of garbage. There was also evidence of a fire in the freezer compartment of the refrigerator, which also establishes how real was the fire risk implicit in the respondent' s conduct. The applicant's cleaning of the respondent's unit was accommodation of her disability.

[95] On January 21, 2008, the applicant moved again before Madam Justice Klowak for an order requiring the respondent to list and sell her unit. Klowak J was also concerned about whether the respondent was a person under disability. She adjourned the substantive motion, in part to permit medical evidence to be filed about the respondent's mental health status. Klowak J also ordered the respondent to clean her unit, failing which the applicant was entitled to do so. Shortly thereafter, the respondent was involuntarily hospitalized.

[96] The applicant's agent therefore cleaned and disinfected the respondent's unit and put many of her belongings in storage. These steps constitute accommodation of the respondent's disability.

[97] In early February 2008, the applicant's superintendent was in communication with the respondent's social worker. The subject of discussion was the respondent's mental health status. The social worker advised that the respondent had missed three weeks of appointments. The superintendent had not seen the respondent in three weeks. The superintendent took the responsibility to attempt to contact the respondent, being concerned about her. He went to her unit but was able to obtain no response. As result of his concerns, he contacted the police. The police attended and the superintendent facilitated their entry into the respondent's unit. The respondent's unit was so clogged with possessions that it took three police officers several minutes to find her lying on the floor, under a pile of clothing, incoherent. There was a strong odour of urine and feces in the unit. The toilet was blocked and overflowing. The respondent was removed to hospital by police. The superintendent observed, and I find that the respondent had placed clothing, books, papers and other articles

on the stove burners. The surrounding area was piled high with what I have found to be combustible load and fire load.

[98] The superintendent, as agent of the applicant, showed substantial concern and effectiveness in mitigating for the respondent the risks of her significant mental health crisis. His effective intervention, with the assistance of police, also ended the risk of fire for the respondent and others in the building. All of this was accommodation of the respondent's disability. In itself, the accommodation afforded to the respondent in February 2008 was to the point of undue hardship, based on the aforesaid health and safety issues.

EXERCISING MY DISCRETION

(a) Mediation and Arbitration

[99] Pursuant to s. 134(2) of the Act, the respondent submits that the applicant is disentitled to the order it seeks because it did not proceed first to mediation and arbitration.

[100] The mediation and arbitration processes available under the Act are described in s. 132. The only basis upon which these processes would have been available to the parties is pursuant to s. 132(4), which states that every declaration shall be deemed to include that "a disagreement … with respect to the declaration, by-laws or rules …" shall be submitted to mediation and arbitration. Section 134(2) does not refer to disagreements with respect to the Act itself. This application results from a disagreement between the parties about whether the discretions contained in one of both of ss. 134(3)(c) or 135(3) of the Act should result in the respondent being forced to vacate and sell her unit. Section 134(2) has no application. In addition, it can only apply to a s. 134 application. It does not apply to a s. 135(3) application.

[101] In any event, this issue either was determined by E. Macdonald J. or ought to have been raised for her determination. The respondent is estopped from raising it now. I see no injustice to the respondent in refusing to permit this issue to be litigated at the present time.

(b) Context

[102] The order I am asked to make follows the "last chance" order made by E. Macdonald J four and a half years ago. There is now over fifteen years of difficult history. On the whole of the evidence, I am satisfied that the respondent frequently is not capable of meeting the responsibilities of living alone in her unit. Absent intervention by the Court, the cycles of the past will repeat in the future.

(c) Undue Hardship

[103] The parties have placed the evidence of events prior to June 23, 2004 before me. The evidence satisfies me that, prior to June 23, 2004, the applicant clearly accommodated the respondent to the point of undue hardship. If E. Macdonald J erred in determining that the respondent's breach of all four of the Act, the declaration, the by-laws and the rules would be the point at which undue hardship would be reached after June 23, 2004 or, if I have erred either in concluding that that was her finding, or in refusing to reconsider that issue, then undue

hardship, differently defined, is clearly established by the evidence. I refer to the persistent fire risk established not only by the fire safety assessments but by the evidence that in February 2008, the respondent had combustible items on the stove burners with a significant volume of other combustible items in close proximity and further, had either lit a fire in the freezer or attempted to extinguish a burning object by putting it there.

(d) The respondent's accommodation plan

[104] I reject the respondent's proposed plan as ineffective to meet the risks which her conduct has created, and will create. Her proposal for increased inspection and consultation is incapable of meeting the fire and safety risks in an effective and responsible manner.

(e) The rights of others in the condominium

[105] I return to the *ratio* of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud (supra).* A condominium corporation is not identical to a union. However, some aspects of a corporation's relationship with its members, being the owners, are similar to a union's relationship with its members. For this reason, a corporation's duty to accommodate to the point of undue hardship should be considered in light of its obligations to other owners. The burden of funding the corporation falls on the owners. The cost of accommodation is borne by the owners at least in the first instance, and ultimately, if the accommodated owner does not reimburse the corporation. Of greater significance is the health and safety risk to other owners, each of whom makes his or her home in this condominium.

[106] In *City Park Cooperative Apartment Inc. v. Becker* (2006), 207 O.A.C. 49 and in *Lakeshore Gardens Cooperative Inc. v. Bhikram* [2006] O.J. No. 2941, the Divisional Court dealt with cooperative housing issues. In both cases, the Divisional Court drew upon the *ratio* in the Central Okanagan decision in holding that the impact on others of accommodating one person is a relevant factor in considering whether there is undue hardship. While there are differences between cooperative housing and a condominium, again there are areas of similarity.

[107] In determining the criteria of undue hardship, E. Macdonald J was attentive to the rights of other owners and the corporation. She stated "(i)t is this court's duty to balance (the respondent's) interests with those of the adjoining owners and the Corporation itself." (parentheses added).

CONCLUSION AND ORDER

[108] The applicant has satisfied me that it accommodated the respondent to the point of undue hardship since June 23, 2004. In the exercise of my discretion it is fair, equitable and proper to grant the applicant's motion. In order to effect a sale, I am satisfied that it is

necessary to require the respondent to vacate the unit and to remove the very large volume of belongings and contents.

[109] The following orders shall take effect on Friday, January 30, 2009, to permit the respondent a reasonable opportunity to find suitable alternate accommodation:

> 1) The respondent shall, by February 10, 2009, cause her unit and its appurtenant common interest (hereinafter referred to as her "unit") to be listed for sale with a realtor, and shall not cause the said listing to end, other than by sale of the unit, without leave of the Court.
>
> 2) The respondent shall make all reasonable efforts to effect the sale of the unit, including listing the unit for sale at a reasonable price and permitting unimpeded entry into the unit for the purpose of listing or showing, and accepting any reasonable offer to purchase the unit.
>
> 3) The respondent shall, forthwith upon this order taking effect, vacate the said unit and remove from it all of her belongings and contents.
>
> 4) On or after January 31, 2009, the respondent shall not enter or occupy the unit except with leave of the Court, or with the applicant's prior written consent.
>
> 5) If the respondent does not comply with any of the aforesaid terms, or if the said unit has not been sold and transferred to a *bona fide* purchaser for value by August 10, 2009, the applicant may apply for one or both of an order for possession of the unit, and the appointment of a receiver and manager to effect sale of the unit pursuant to this order.
>
> 6) The respondent shall pay to the applicant its costs of this application. These costs, as subsequently agreed, fixed or assessed, are deemed to be a common expense of the respondent's unit and collectible as such.
>
> 7) All other costs claimed in the motion form dated January 21, 2008 are adjourned for subsequent consideration, as are any costs arising from the order of Klowak J over which I have jurisdiction pursuant to her order.
>
> 8) If the parties cannot agree on the applicant's costs of this application, the applicant's brief written submissions shall be delivered by February 13, 2009 and the respondent's brief written submissions shall be delivered by February 27, 2009.

[110] The following Order takes effect on the date of these reasons for decision:

> 1) If the respondent damages, or attempts to damage any of the applicant's property, the common elements of the condominium or her unit, the applicant may move before any judge of this Court for relief, which may include variation of the terms of this Order.

Dated at Toronto this 29th day of December 2008

Mr. Justice J. Macdonald

Released: 29 December 2008

COURT FILE NO.: 04-CV-264649 CM1
DATE: 20081229

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 946

Applicant

- and -

J.V.M. by her litigation guardian, the Public Guardian and Trustee

Respondent

REASONS FOR DECISION

J. Macdonald, J.

Released: December 29, 2008