HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Janet Mitchell

Applicant

-and-

Halton Condominium Corporation #499, Alfred Roberts, Bill Bradford and Debra Leyhane

Respondents

INTERIM DECISION

Adjudicator: David A. Wright

Date: July 9, 2010

File Number: 2010-05055-I

Citation: 2010 HRTO 1507

Indexed as: **Mitchell v. Halton Condominium Corporation #499**

APPEARANCES

Janet Mitchell, applicant	)	Marlon Roefe, Counsel
Halton Condominium Corporation #499, Alfred Roberts, Bill Bradford and Debra Leyhane, respondents	)	Erik Savas, Counsel

[1] This is an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c.H.19, as amended. The applicant alleges that the respondents have discriminated against her on the basis of disability with respect to housing, contrary to s. 2 of the *Code*. A hearing was held on July 7, 2010 regarding Requests by the applicant for Interim Remedy and Expedited Proceedings and a Request by the respondents for deferral. At the conclusion of the hearing, the Tribunal deferred the Application on terms, with reasons to follow. These are those reasons.

[2] The dispute between the parties relates to the boundaries of the parking unit which the applicant owns in the condominium's parking garage. The applicant states that when she bought her unit in 2005 from the builder, she was shown painted lines on the floor and representations were made that suggested that the parking unit she purchased was next to an angle in the wall. This was important to the applicant because it gives her room to enter and exit her vehicle with a walker that she uses because of disabilities, and she can steady herself if needed against the wall. Since 2006, the applicant has parked in the space she understood she purchased and that is reflected in the lines painted on the garage floor. It was discovered by the respondent condominium corporation ("the corporation") in the fall of 2009 that the lines painted on the floor are not the boundaries reflected in the condominium declaration, and the respondents have sought to require her to park within the boundaries as registered in the declaration. These boundaries would not give her access to the angle in the wall that she states is necessary to accommodate her disabilities, as that portion of the garage is part of the common elements as set out in the declaration. The respondents have recently proposed a different manner of accommodating her disabilities, which the applicant says is not an appropriate accommodation.

HISTORY OF PROCEEDINGS

[3] Following various correspondence between counsel about the dispute, which included threats of various legal proceedings, the corporation commenced proceedings

under s. 132 of the *Condominium Act*, S.O. 1998, c. 19, as amended, on February 5, 2010, by issuing a Notice to Mediate to the applicant and her spouse. The dispute submitted to mediation and arbitration was:

> …to effect your compliance with respect to parking within the deeded boundaries of Unit 4 Level A, as you are currently parking on the common elements.

The Notice indicated that if mediation did not occur within 60 days or the applicant declined to mediate, the matter would be submitted to arbitration.

[4] Section 132 reads as follows:

> 132. (1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,
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> (a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and
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> (b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,
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> (i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or
>
> (ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. .
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> (2) Subsection (1) applies to the following agreements:
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> 1. An agreement between a declarant and a corporation.
>
> 2. An agreement between two or more corporations.
>
> 3. An agreement described in clause 98 (1) (b) between a corporation and an owner.
>
> 4. An agreement between a corporation and a person for the management of the property.

(3) The declarant and the board shall be deemed to have agreed in writing to submit a disagreement between the parties with respect to the budget statement described in subsection 72 (6) or the obligations of the declarant under section 75 to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

(5) A mediator appointed under clause (1) (a) shall confer with the parties and endeavour to obtain a settlement with respect to the disagreement submitted to mediation.

(6) Each party shall pay the share of the mediator's fees and expenses that,

(a) the settlement specifies, if a settlement is obtained; or

(b) the mediator specifies in the notice stating that the mediation has failed, if the mediation fails.

(7) Upon obtaining a settlement between the parties with respect to the disagreement submitted to mediation, the mediator shall make a written record of the settlement which shall form part of the agreement or matter that was the subject of the mediation.

[emphasis added]

[5] The applicant did not agree to the appointment of a mediator. On March 8, 2010, the applicant filed this Application with the Tribunal. The applicant's counsel provided a copy to the respondents on March 31, 2010.

[6] On April 9, 2010, counsel for the corporation wrote to the applicant with proposed arbitrators, as mediation had not occurred. The applicant did not agree to the appointment of an arbitrator.

[7] On April 19, 2010, the applicant filed the Request for Interim Remedy and Request to Expedite. The Request for Interim Remedy asks, among other things, for orders that the respondents be restrained from taking steps to interfere with the current

use of the parking unit including the commencement of any other proceedings about the unit.

[8] On April 22, 2010, the Tribunal delivered the Application and the Requests to Expedite and for Interim Remedy to the respondents.

[9] On April 23, 2010, the respondents filed a Response to the Requests for Interim Remedy and for Expedited Proceedings. The Response requested that the Application be deferred.

[10] On April 28, 2010, the Tribunal scheduled a hearing of the Request to Expedite and the Request for Interim Remedy, which was subsequently rescheduled for May 26, 2010. On May 5, 2010, the Tribunal issued a Case Assessment Direction that included the following:

> The parties shall be prepared to make submissions during the hearing on the issue of whether the Application should be deferred, whether the requested Interim Remedy should be granted, and whether the Application should be expedited. As part of these submissions the parties shall be prepared to address the issue of whether an Interim Remedy can or should be ordered if the matter is deferred pending the completion of arbitration under the *Condominium Act, 1988*. In this regard, the parties' attention is directed to *Loranger v. Customs and Immigration Union*, 2008 HRTO 432 (CanLII).
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> I note that as of April 26, 2010, the parties had not agreed to an arbitrator under s. 132 of the *Condominium Act, 1998*, nor had either party brought an application to the Superior Court of Justice for the appointment of an arbitrator. The parties shall advise the Tribunal if this situation changes.

[11] On May 20, 2010, the corporation issued a Notice of Application in the Superior Court of Justice seeking the appointment of an arbitrator pursuant to s. 132 of the *Condominium Act*. The Application was returnable on June 10, 2010.

[12] On May 26, 2010, the Tribunal issued the following Interim Decision on consent of the parties (2010 HRTO 1194 (CanLII)):

> In all of the circumstances, including the Interim Minutes of Settlement, the parties' ongoing settlement negotiations and the offer presented by the respondents which the applicant wishes to consider, the Tribunal makes the following Interim Order on consent of the parties:
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> 1) The applicant's Requests for Interim Remedy and Expedited Proceedings shall be heard on July 7, 2010, commencing at 9:30 AM. A hearing notice from the Registrar will follow.
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> 2) The respondents shall, pending the hearing of the applicant's Requests for Interim Remedy and Expedited Proceedings, take no step to interfere with the applicant's use of her parking unit (unit 4 level A (garage) Halton Condominium #499) in its current location as shown by the demarcation lines as currently painted on the garage floor and shall immediately remove the red tape painted on the garage floor.
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> 3) This Interim Decision is without prejudice to any position either party may take in any issue in this Application.

[13] Since that hearing day, the respondents have made a proposal for accommodating the applicant, and the parties have obtained more expert reports about the issues. The Court date was rescheduled for July 20, 2010.

ANALYSIS

Deferral

[14] The Tribunal may defer consideration of an application, on such terms as it may determine (Rule 14.1). The Tribunal has stated that deferral is not automatically invoked simply because the parties are involved in other legal proceedings. It is a discretionary measure that the Tribunal exercises on the basis of the circumstances in each case. Absent good reason, applicants and respondents before the Tribunal are entitled to expect the Tribunal to take timely action to resolve complaints of discrimination brought before it.

[15] The Tribunal has generally deferred applications where there is an ongoing grievance under a collective agreement based on the same facts and human rights issues. In explaining this approach, the Tribunal has referred to the fact that the Supreme Court of Canada has affirmed that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII)).

[16] In *Halton Condominium Corporation No. 59 v. Howard*, 2009 CanLII 44710 (Ont. S.C.J.), the Court confirmed that the same principles apply under the *Condominium Act*. In an enforcement proceeding where the condominium owner was asserting that the rule or by-law being enforced violated the *Code*, the Court found that an arbitrator under the *Condominium Act* has the power to consider all questions of law that arise in the course of an arbitration. The Court made clear that an arbitrator has the power to decide whether an aspect of the declaration, by-laws or rules of a condominium results in discrimination contrary to the *Code*. Section 132(4) makes it clear that an arbitrator has jurisdiction to decide any dispute about the declaration, by-laws, and rules, including whether they are invalid because of the *Code* or whether the corporation must modify them in a particular case as a result of the duty to accommodate.

[17] Human rights tribunals, therefore, are not the only decision-makers that can decide human rights claims, including in the condominium context. Where the parties are already engaged in a concurrent legal proceeding in which they are raising the same human rights issues before a decision-making body with the authority to make determinations about those issues, the orderly administration of justice favours deferral to the other proceeding. In such a scenario, the Tribunal's normal approach is to defer. Indeed, in *Howard,* the Court urged the Tribunal to defer to the arbitrator. The Tribunal found that, in light of the confirmation by the Court that the arbitrator could apply the *Code,* the Application should be deferred: see 2009 HRTO 1919 (CanLII).

[18] The applicant states that the Tribunal should not defer on various grounds. She states that the parties are before the Tribunal, have prepared documents and expert reports, and that the process would have to be started again in court and in arbitration. She believes that the process would be more complicated and time-consuming in arbitration, and that the arbitration could not commence for a considerable period of time because she will be opposing the appointment of an arbitrator in these circumstances on the basis that issues regarding the correction of the declaration should be decided by the Court first.

[19] I find that the Application should be deferred. The mediation and arbitration process has the power to deal with all issues in this Application, including the alleged violation of the *Code* by the respondents and the alleged contravention of the rules and declaration by the applicant. At the time this Application was commenced, the *Condominium Act* process was already underway. The arbitrator has the full power to determine whether the *Code* has been violated, including to order an interim injunction (see s. 8 (1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended). If the parties cooperate with a view to moving the arbitration process forward quickly, they can do so, and all of the materials produced in this process can be used in that process. I note that the respondents have agreed that they will cooperate in obtaining early dates and will work to select an arbitrator with expertise in the *Code* and condominium law.

[20] While the applicant argues that the process before the Tribunal is more advanced, this is because of her own actions in refusing to participate in the arbitration process and in filing urgent requests at the Tribunal that could have been dealt with in that process. As a result, in the circumstances of this case, I do not find it appropriate to take into account the stage of each proceeding, particularly when the materials and expert reports used in this process can be used in the arbitration process.

[21] Accordingly, the Application is deferred pending the completion of the *Condominium Act* proceedings. The Tribunal directs the parties' attention to Rules 14.3 and 14.4 which outline the process by which the Application may be brought back on

after the arbitration proceedings have concluded.

Interim Remedy

[22] In *Loranger v. Customs and Immigration Union*, 2008 HRTO 432 (CanLII) at paras. 7-8, the Tribunal dealt with a circumstance where it deferred but there was an outstanding Request for Interim Remedy as follows:

> In my view, given the ongoing grievance and possibility of expedited arbitration proceedings, the Application should be deferred, as this will avoid "the prospect of concurrent overlapping proceedings and the potential for conflicting findings of fact or law" (*Baghdasserians v. 674469 Ontario*, 2008 HRTO 404 (CanLII) at para. 20), which is the reason the Tribunal generally defers to arbitration proceedings. At this stage, there is no reason to believe that the ongoing grievance process cannot determine the substantive issues raised in the Application in an expedited manner.
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> Accordingly, the Tribunal will defer the Application pending the completion of the grievance process. In light of the reasons favouring deferral, in the circumstances of this case, it would not be appropriate for the Tribunal to determine the request for interim remedy under Rule 23. Interim remedies are generally awarded in anticipation of a hearing on the merits by the Tribunal, and in this case it would be inappropriate for the Tribunal to award interim relief where the application is being deferred while another proceeding is dealing with the merits of the issue.

[23] For similar reasons, given the deferral, any request for an interim remedy should be decided by the arbitrator. However, one of the significant factors in determining the issue of interim relief may well be that the current boundaries of the parking unit are the *status quo*: the applicant has been parking there for several years. In my view, the balance of harm or convenience and the interests of justice, the relevant factors in Rule 23.2 governing interim remedies, favour maintaining that *status quo* for a limited time until the arbitrator can hear and determine the applicant's request for interim remedy. The respondents concede that the Application appears to have merit, the first factor in Rule 23.2.

[24] Accordingly, the Tribunal has made it a term of the deferral pursuant to Rule 14.1 that the applicant be allowed to park as she has been for 60 days. The Tribunal is prepared to consider an extension of the 60 day term of its order but only if the applicant cooperates in moving forward expeditiously under the *Condominium Act*.

ORDER

[25] The Application is deferred, pending the conclusion of the proceedings commenced by the respondents under s. 132 of the *Condominium Act*, on the following term:

> For a period of 60 days from July 7, 2010, the respondents shall take no step to interfere with the applicant's use of her parking unit (unit 4 level A (garage) Halton Condominium #499) in its current location as shown by the demarcation lines as currently painted on the garage floor.

[26] The applicant may request an extension of the period the term applies through a letter sent to the Tribunal and copied to the respondents, made no later than 40 days from July 7, 2010. Any request for an extension shall include full submissions in support of the request, including submissions on the issue of whether the parties have both cooperated in either: (i) having a *Condominium Act* arbitrator appointed and a hearing process determined in as expeditious a manner as possible or; (ii) having the issue of whether an arbitrator should be appointed decided by the Court in as expeditious a manner as possible. The respondents shall respond to any such submissions within 10 days of the date of the applicant's submissions, and shall include full submissions on the same issues. The applicant may reply to the respondents' submissions within three days. The parties' efforts in moving the matter forward in the courts and/or before the arbitrator will be an important factor in whether any extension request is granted.

Dated at Toronto, this 9th day of July, 2010.

"*Signed by*"

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David A. Wright
Interim Chair