**COURT FILE NO.:09-11193**
**DATE:2009-08-31**

2009 CanLII 44710 (ON SC)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Halton Condominium Corporation No. 59 v. Howard

**BEFORE:** J.A. Ramsay J.

**COUNSEL:** Mr E. Savas for applicant corporation; Mr Mark H. Arnold for respondent

## ENDORSEMENT

[1] The condominium corporation applies under s.10 of the *Arbitration Act* for the appointment of an arbitrator. The respondent unit owner moves under Rule 21.01(3) for a stay or dismissal of the application on the ground that another proceeding is pending between the same parties in respect of the same subject matter. The respondent's objection to the appointment of an arbitrator is based on her contention that the application should be stayed or dismissed. Accordingly it is convenient to start with her motion. I shall refer to the corporation as the applicant and the unit owner as the respondent for simplicity's sake.

[2] The respondent owns three units in a 110- unit condominium complex in Oakville, near Sheridan College. She has an interest in a fourth unit with her spouse.

[3] The corporation's declaration under the *Condominium Act*, which is registered on title, requires that each unit be occupied and used "only as a private single family residence and for no other purpose." The corporation has evidence that in her four units, there are 17 tenants in 12 bedrooms. The average rental for a unit in this complex is in the neighbourhood of $1325 per

month. If the corporation's evidence is accepted, the respondent could be earning an average of $2400 per unit. The corporation takes the position that the respondent is renting by the room, in effect operating boarding houses. The respondent says that she is renting by the unit. In the case of each unit, she is renting to several persons who are not necessarily related. She also says that by enforcing the declaration's restrictive term, the corporation is attempting to induce her to breach the *Human Rights Code*.

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[4] In Part I of the *Code*, s.2 provides,

**2.** (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of … age, marital status [or] family status… .

[5] Sections 8 and 9 of the *Code* provide,

**8.** Every person has a right … to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

**9.** No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

[6] The respondent has made an application to the Human Rights Tribunal under s.34 of the *Code*. The Tribunal will be asked to rule that the restrictive term of the declaration contravenes the *Code*. This is the other pending proceeding that is the basis of the respondent's motion to stay or dismiss the application under the *Arbitration Act*.

[7] The test for staying an action is summarized by McNair J. of the Federal Court in *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34:

A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of a judicial discretion in determining whether a stay should be ordered in the particular

circumstances of the case. The power to stay should be exercised sparingly, and a stay will only be ordered in the clearest cases. In an order to justify a stay of proceedings two conditions must be met, one positive, and the other negative: (1) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are not sufficient special circumstances in themselves for the granting of a stay.

[8] The respondent, then, must satisfy the court that the continuance of the action would be vexatious, oppressive or an abuse of process and that the stay would not cause injustice to the plaintiff.

[9] This is not the first time that a litigant has sought to stay an action pending a proceeding before a human rights tribunal. The cases support the proposition that the court, on a motion to stay, is required to balance litigation rights, analyze carefully the notion of prejudice and consider differences in procedure between courts and the tribunal. There is no single rule that fits all cases, and none should be expected. Courts have tended to disapprove of a litigant commencing multiple proceedings. Where, as here, the parties do not agree on which forum should decide the case, the courts have examined the timing of commencement of the respective proceedings, the subject-matter, the jurisdiction of the respective bodies and the procedural consequences to the parties of proceeding in one forum or the other.[1]

[10] In this case, the parties communicated about the matter before January 2008. On January 21, 2008, the respondent, through an agent, wrote to the corporation and told them that the restrictive term was in contravention of the *Human Rights Code*. The corporation did not agree.

[1] E.g., *Cirone v. Park Lawn Co.*, [2008] O.J. No. 506; *Bent v. Oympia Tile International Inc.*, [2008] O.J. No. 3947; *McKelvey v. D'Ercole*, [2003] O.J. No. 4172; *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227;

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By November 14, 2008, they had had enough. The corporation's lawyer wrote to the respondent, invoking the mediation mandated by s.132 of the *Condominium Act* and demanding, in accordance with the Act, that mediation take place on or before January 14, 2009, failing which the corporation would move to arbitration. On January 23, 2009, the respondent's lawyer replied, asking for time to review the file and confirming the corporation's agreement to take no further enforcement action for 14 days. On February 2, 2009, during this grace period, using other counsel, the respondent filed her complaint.

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[11] The application is not vexatious. There is a serious issue to be determined. Nothing in the history of the proceedings suggests to me that the corporation has acted oppressively or abusively. To the contrary, the respondent, through counsel, asked for time to review the file and then during that time filed alternate proceedings. At the very least, that was somewhat sharp.

[12] The corporation was required by the *Condominium Act* to enforce the declaration. Section 132 of the *Condominium Act* requires any disagreement between the corporation and the owner of a unit to be resolved first by mediation and then by arbitration.[2] The resort by the corporation to the means of enforcement mandated by the *Condominium Act* cannot be considered remarkable, much less oppressive or abusive, in the present circumstances. The respondent cites the primacy of the *Human Rights Code* over other legislation, as provided by s.47(2) of the *Code*. Nothing in s.132 of the *Condominium Act* "purports to require or authorize conduct that is a contravention of Part I [of the *Code*]."

[2] *McKinstry v. York Condo. Corp. No. 472*, 2003 CanLii 22436 (Juriansz J.), *Metro. Condo. Corp. No. 1143 v. Peng*, 2008 CanLII 1951 (Patillo J.); *contra: Nipissing Condo. Corp. No. 4 v. Simard et al.* (unreported, Howden J., April 8, 2009). I share the view of Juriansz and Patillo JJ.

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[13] The respondent cites as prejudice the fact that in the *Human Rights Code* proceedings, as opposed to civil proceedings, she has the benefit of counsel funded by the Legislature under Part IV.1 of the *Code*. The jurisprudence dealing with Rule 21.01(3) has not recognized expense and inconvenience as determinative. To the extent that it is relevant, I feel compelled to observe that it difficult to ignore the corporation's contention that it is being treated unfairly by the human rights legislation. The corporation is essentially a group of neighbours and homeowners. The respondent is also a homeowner, albeit one who is in the business of renting out her homes. The distinguishing criterion which gives one the right to funded counsel and denies it to the other is simply the fact of which one is alleging a breach of human rights. The complexity of the issues and the financial condition of the parties do not seem to enter into it, as they would in Legal Aid applications, for example. If the respondent is required to play on a level playing field in this regard, I do not see that as unfair to her, and certainly not as oppressive or abusive conduct by the corporation.

[14] If the respondent succeeds before the Tribunal, under s.45.3 of the Code the Tribunal may order the corporation to desist from enforcing the restrictive term, and may make directions with respect to future practices. If the corporation succeeds before the Tribunal, the Tribunal will have no jurisdiction to order the respondent to comply with the restrictive term. (The Tribunal can make an order against any party in the proceedings, but only if that party has infringed a right in Part I of the *Code*.) On the other hand, if the arbitration proceeds, the arbitrator will have jurisdiction to enforce compliance by the respondent, or to order the corporation to desist from compliance if he or she finds that the term contravenes the *Human Rights Code*. I find that it would be prejudicial to the corporation to require it, before continuing arbitration, to submit to a

forum in which the respondent pays no costs and risks no adverse finding, and then, if they succeed there, to start all over again.

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[15] The corporation has asked the Tribunal to stay the human rights proceeding. The Tribunal declined. In a ruling dated July 3, 2009 the adjudicator recognized that human rights tribunals do not have exclusive jurisdiction over human rights claims (as, indeed, ss.46.1 of the *Code* puts beyond question), but doubted the ability of the arbitrator to deal squarely with the human rights issues arising out of the application. That was erroneous. As a matter of law, the arbitrator will have jurisdiction to deal with all questions of law that arise in the arbitration. Sections 6, 17, 31 and 45 of the *Arbitration Act* leave no room for doubt on this question. I hope that the Tribunal will reconsider. If not, two parallel proceedings may take place more or less at the same time.

[16] I recognize that human rights in accommodation is an issue with public importance beyond the dispute between the parties. The respondent has brought to my attention that the Chief Commissioner, Barbara Hall, in a letter to the corporation dated July 16, 2009, has pronounced the impugned declaration to be in contravention of the *Code*, and demanded its amendment. If the Commission, in its discretion, judges that the public interest favours an expeditious resolution of the general question, Part III of the *Code* gives it various means to pursue this end without involving this particular corporation.

[17] The motion to stay the application is dismissed. The application to appoint an arbitrator is not seriously opposed beyond the request for a stay. The materials filed by the applicant meet the statutory test. I appoint Mr John Deacon to arbitrate the disagreement.

[18] The parties may make brief written submissions to costs by 4 pm on Friday, September 12, 2009.

J.A. Ramsay J.

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**ENDORSEMENT**

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