CITATION: Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh, 2010 ONSC 4448
COURT FILE NO.: CV-09-383053
DATE: 20100817

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 747 Applicant	)	*Ryan Treleaven,* Counsel for the Applicant
	)	
- and -	)	
	)	
NATALIA KOROLEKH Respondent	)	*David Strashin* for the Respondent
	)	
	)	**HEARD:** July 26, 2010

REASONS FOR JUDGMENT

M.A. CODE J.

A. OVERVIEW

[1] This is an originating Application brought by Metropolitan Toronto Condominium Corporation No. 747 ("MTCC 747" or "the Applicant") pursuant to ss.117 and 134 of the *Condominium Act, 1998*, S.O. 1998, c.19 ("*the Act*"). The Applicant alleges that one of its unit holders, the Respondent Natalia Korolekh ("the Respondent" or "Ms. Korolekh") has repeatedly violated s.117 of *the Act* and should be ordered to sell and vacate her unit. In the alternative, the Applicant submits that a strict compliance order should be made pursuant to s. 134 requiring the Respondent to change her behavior and comply with s.117.

[2] The conduct alleged against the Respondent is serious and wide-ranging. It includes physical assaults on other unit holders, acts of mischief against their property, racist and homophobic slurs and threats repeatedly made against other unit holders, playing extremely loud music at night, watching and besetting other unit holders and using her large and aggressive dog

to frighten and intimidate other unit holders and their children, as well as failing to clean up the dog's feces.

[3] MTCC 747 is a relatively small thirty unit low rise town house development located in downtown Toronto near Bay and Bloor Streets. Half of the units are on the ground floor with gardens and half of the units are on the second floor with balconies. They all share a common courtyard. Prior to the Respondent's arrival in 2005, it is said that the courtyard was a vibrant gathering place for the residents. Since her arrival it is said to be desolate and deserted due in large part to the Respondent's activities.

[4] Section 117 of *the Act* prohibits conduct that is "likely to damage the property or cause injury to an individual" and s.134 enacts a broad remedial power to enforce "compliance" with "this Act, the declaration, the by-laws, [or] the rules". The Applicant has the onus of establishing that the Respondent has violated *the Act*, or the condominium rules, and that an order to sell and vacate her unit is necessary and appropriate to enforce compliance.

[5] The Respondent denies the factual allegations made against her. In the alternative, even if the allegations are made out , she submits that a lesser remedy requiring her to comply with s.117, is appropriate. Finally, the Respondent raises two technical or procedural issues. She submits that the Application cannot proceed without first attempting mediation pursuant to ss.132 and 134(2) of *the Act*. She further submits that there are "material facts in dispute" and that the Application should be referred to trial pursuant to Rules 14.05(3)(h) and 38.10(1)(b) of the *Rules of Civil Procedure*.

B. FACTS

[6] The factual record submitted by the Respondent can be easily summarized as it is little more than a bald conclusory denial of the Applicant's detailed and voluminous allegations. The Respondent swears in her four page double-spaced affidavit that she is a stockbroker with degrees from Moscow University and from Queens University. In cross-examination, it was put to her that she did not have a degree from Queens and she agreed that, in fact, she had only applied and been accepted to the Queens MBA program. Her affidavit recounts her upbringing in the Soviet Union where she "suffered innumerable incidents of blatant, overt anti-Semitism". In light of this background, she swears:

> I categorically state that I am neither a racist nor homophobic and I deny the allegations set forth in the affidavits with respect thereto.

[7] She goes on to acknowledge that she had a dispute with one neighbour over water damage and, as a result, they did not get along well. But the numerous allegations of misconduct are, again, met simply with a broad denial:

> My job, which involves trading foreign currencies requires my full-time attention. Moreover, it requires that I work evening sessions to co-ordinate with European and Asian markets. As such, I simply do not have the time or the

> energy to devote myself to the activities ascribed to me in the deponents' affidavits.

[8] Finally, she describes the reproductive fertility difficulties that she and her partner have had, including paying "in excess of $50,000" to doctors and clinics for "in vitro procedures". As a result of both her job pressures and these fertility treatments she swears that:

> I have neither the time nor the inclination to interact with the deponents and indeed have not done so in the manner described in their collective affidavits.

[9] She concludes her affidavit by asserting that her dog is well-trained and that any incidents involving it are due to "inherent fear of dogs" or "the dog being teased or otherwise provoked" by others. The entire Application is said to be "the manifestation of a campaign of harassment undertaken against me" by members of the Board of Directors. She alleges that the motive for this "campaign of harassment" is that she has asked the Board of Directors, without success, to replace defective windows in her unit.

[10] What is remarkable about the Respondent's brief affidavit is that it never addresses any of the specific incidents that are put against her. Her position appears to be that they are all inventions. No facts or documents and no corroborating evidence are set out in the Respondent's Record in support of her broad denials.

[11] The Applicant's lengthy two volume record is made up of nine affidavits from various unit holders, from neighbours who are not unit holders and from the property manager. They paint a consistent picture of the Respondent's behavior and of her impact on this small community. The affidavits are specific and detailed, they repeatedly corroborate each other and they are often supported by contemporaneous documentation.

[12] The first affidavit is from Mr. Borghiel who was the upstairs neighbour who the Respondent had a dispute with about water damage. He swears that he and his family were commonly subject to racist slurs, obscene remarks and threats from the Respondent such as: "stupid ugly Romanians"; "die Gypsies die"; "go fuck your fat Romanian"; "do you want to fuck". The Respondent also played very loud music at night and appeared to be intoxicated. Her large Rottweiler dog would be allowed to "roam the courtyard area without a leash" and was "allowed to defecate all over the courtyard". The Respondent once told Mr. Borghiel that she would never clean up after her dog.

[13] Mr. Borghiel sets out a detailed account of an incident on the weekend of September 19-21, 2008, when his family had guests arriving at their townhouse unit. As his wife Carmen went to the front door to greet the guests:

> Korolekh approached the group with her very large Rottweiler. Korolekh let the dog bound aggressively towards Carmen while yelling "Get it! Get it!" Carmen was petrified of the dog who lunged repeatedly at her. Korolekh held the dog back just enough so that it could not physically reach Carmen but the ferocity of the lunges and barks was enough to cause significant emotional distress to Carmen.

[14] The police were called and attended. Later that evening, Mr. Borghiel left his unit to meet his mother and his daughter, Naomi, who were both outside:

> As I left my unit to go meet Naomi and my mother, Korolekh yelled at me from the front porch, "Wanna fuck? Okay, let's fuck", and then burst out in laughter. After meeting Naomi and my mother, I accompanied them up the steps to our unit. As we were entering our unit, Korolekh yelled at us collectively, "you ugly Romanians", "fuck you" and other obscenities. My daughter was nine years old at the time.

[15] At the end of the weekend the cable television service to the Borghiel home was disconnected. The cable splitter box is located in the Respondent's unit. The Respondent's partner happens to be a Rogers cable technician. With considerable difficulty, Mr. Borghiel had his cable service provider attend and repair the connection. Afterwards, the Respondent called Mr. Borghiel "gypsy boy" and asked:

> ...sarcastically if I was enjoying my Rogers cable service again. She concluded by stating, "Not for long! This is just the beginning," and laughed maniacally.

[16] There was no cross-examination of Mr. Borghiel on his affidavit and Ms. Korolekh does not address the events of this September, 2008 weekend in her affidavit. I note that Mr. Borghiel's affidavit is supported by contemporaneous documentation and that the tone of his communications with the Respondent and with property management is mature, respectful and civil.

[17] The second affidavit is from Mr. Borghiel's wife, Carmen Borghiel. She corroborates her husband's account of the incident on the weekend of September 19-21, 2008, when the Respondent "yelled at her dog to 'get it, get it' [as] the dog lunged at me repeatedly and was barely held back by Korolekh". Mrs. Borghiel also provides a detailed account of an incident in June, 2008, when Mrs. Borghiel's mother was sweeping the balcony which has a border around it so that the sweepings do not fall below. The Respondent yelled, "Tell that fat Gypsy to stop, she is throwing dirt on us". Mrs. Borghiel tried to explain that the sweeping was not causing any dirt or gravel to fall below but the Respondent would not listen:

> The yelling was so fierce that it practically paralysed my mother who stood at the far corner of our balcony, virtually motionless. As Korolekh wound herself into a fury, she picked up a handful of gravel and dirt from her patio and threw it at us. The stones hit us both in the arms and some of the dirt landed in our hair and over our faces.

They retreated inside and when they returned later to finish the sweeping, "Korolekh began throwing more gravel at us". Again, the police were called.

[18] Mrs. Borghiel's affidavit also recounts two incidents involving the Respondent's dog barking and lunging while children were playing in the courtyard. These incidents were in the summers of 2006 and 2008 and on both occasions the Respondent was present.

[19] Again, there was no cross-examination on Mrs. Borghiel's affidavit and no response or explanation from the Respondent in relation to specific incidents such as the allegation of throwing gravel at Mrs. Borghiel and her mother in June, 2008.

[20] The third affidavit is from Anne MacDonald who has been a unit holder since 2003. Her affidavit, like others, asserts that the townhouse community was "safe, accepting and close knit", prior to Ms. Korolekh's arrival, and that the common areas have now become "virtually barren" as "neighbours go to great lengths to avoid Korolekh for fear of becoming a target of her abuse".

[21] Ms. MacDonald's affidavit confirms that the Respondent "is often highly intoxicated" and that she has witnessed the Respondent making aggressive and threatening comments such as: "death to faggots"; "fuck you faggot/homo"; "my Russian friends love to beat up fags"; "die gypsy die"; "dirty/ugly Paki". Ms. MacDonald specifically recounts an incident last winter when the Respondent shouted "countless obscenities" at Judy Satram's two sisters, while they were shoveling snow from the walkway, calling them "ugly Pakis". Judy Satram is another unit holder whose affidavit is set out below.

[22] Ms. MacDonald's affidavit also corroborates the account of a recent physical assault by the Respondent on Bill Bates, which will be set out below. Throughout this incident, at Mr. Bates' front door, Ms. Korolekh was "screaming obscenities, mostly about her disdain for homosexuals".

[23] Ms. MacDonald's affidavit asserts that the Respondent's dog "is a constant source of fear and tension", that she has "seen the dog lunge and snap at individuals", that Ms. Korolekh "allows the dog to roam the courtyard area without a leash" and that the dog is "allowed to defecate all over the courtyard" and Ms. Korolekh "rarely picks up after the dog".

[24] Finally, Ms. MacDonald's affidavit confirms that the respondent "often blares her music at unusual hours" and that Ms. MacDonald's windows have been "egged" on occasions shortly after she has made a complaint concerning the Respondent. On one occasion, when Ms. MacDonald was leaving her unit for a holiday, Ms. Korolekh saw her and "yelled, 'you go away', and then laughed loudly. When I returned to my unit days later, the plants in the front of my garden had been destroyed". This weak circumstantial evidence of mischief to property caused by the Respondent will have greater significance when considered in light of a subsequent affidavit from a nearby neighbour, Mr. Amrani.

[25] In light of the above incidents, Ms. MacDonald is fearful about having her elderly and infirm mother come and stay with her. She feels that the Respondent has "robbed me of the ability to care for my loved ones in the comfort of my own home".

[26] Again, there was no cross-examination on Ms. MacDonald's affidavit and no response from the Respondent to the specific incidents set out in detail in the affidavit.

[27] The fourth affidavit is from Judy Satram who has been a unit holder since 1999. She describes a physical assault by the Respondent on November 22, 2008, in the presence of Ms. Satram's three year old daughter. As Ms. Satram exited her unit, with her daughter, she discovered that someone had thrown garbage on her porch. The Respondent appeared and

accused Ms. Satram of "dumping garbage". Ms. Satram explained that she had been a resident for ten years and had never dumped garbage. She tried to leave, in order to avoid a confrontation, but the Respondent followed her, yelling various obscenities such as "nasty Indian bitch" and "dirty Paki". Ms. Korolekh was "screaming racial remarks", telling Ms. Satram "to go back to my country". This was all in the presence of Ms. Satram's small daughter:

> I finally screamed back at her to leave us alone, at which point she grabbed my arm and twisted my wrist. Korolekh is much larger than me and I felt helpless to defend myself. I continued to scream during the attack and, thankfully, a pedestrian who was walking by ran over to intervene. The gentleman pulled Korolekh off of me and told me I could go on my way.

[28] Ms. Satram eventually reported the incident to the police and was told that she could swear a private Information by attending at Old City Hall. She did not do this but she did provide a detailed account of the incident, in writing, to the property manager. It is appended to her affidavit.

[29] Ms. Satram's affidavit also swears that her daughter "is too terrified to play on our back balcony on account of the dog". She swears that the Respondent's large Rottweiler "growls, snarls, barks and lunges at people constantly". Ms. Satram shares a common landing area with the Respondent and she is "in constant fear of being attacked by the dog". She describes an incident last summer, when she was returning home with her daughter, and the dog "started to bark and began running directly towards us":

> The dog was on a leash but the strength of the animal was intense as it literally pulled Korolekh with it towards us. I was absolutely petrified at the display of strength and aggression by the dog so I grabbed my daughter and ran back to our house.

[30] Ms. Satram also describes how her unit has been "egged", how Ms. Korolekh "blares her music at unreasonable hours", and how she experienced problems with her cable television service shortly after the November, 2008 assault.

[31] Again, there was no cross-examination of Ms. Satram on her affidavit and no response from Ms. Korolekh to specific incidents such as the alleged November, 2008 assault.

[32] The fifth and sixth affidavits are from Robert Jerome and Bill Bates. They are joint owners of one of the townhouse units and they live together as partners. They are long-time residents, having lived in their townhouse since 1998. They describe the community, prior to Ms. Korolekh's arrival, as "safe, open and accepting" with the courtyard "often filled with families and neighbours who would socialize together". Since her arrival, "the courtyard and surrounding area has become virtually barren".

[33] They describe being subjected to "abusive language on a near constant basis", usually when Ms. Korolekh "has been drinking heavily". She commonly "shouts" threatening or obscene epithets at them, such as: "death to faggots"; "fuck you faggot/homo"; "my Russian friends love to beat up fags"; "I'll fuck you up the ass fag". They have also witnessed others

being subjected to verbal abuse from Ms. Korolekh, including: "death to Pakis"; "ugly/dirty/filthy Paki"; "die Gypsy die"; "fucking Gypsies"; "nasty Indian bitch"; "dirty/filthy Romanians".

[34] They both provide detailed accounts of a physical assault by Ms. Korolekh on June 23, 2009. On that evening, they had guests visiting their house, including their neighbour Anne MacDonald. As their guests were leaving at the front door, Mr. Jerome saw the Respondent attempting to steal their garden hose. She insisted that it was her hose and Mr. Bates had to take it away from her. She responded "yelling obscenities...ranting about the evils of homosexuals and wanting to beat them...violently kicking and stomping on our slate walkway, eventually breaking a corner of the slate off". Mr. Jerome and Mr. Bates were trying to ignore her when:

> ...without warning, Korolekh darted towards me [Mr. Bates] and struck me in the throat on the left side of my body. It felt as though I was struck with an open hand, however, since I was not facing Korolekh at the time of the attack I am not certain. ...The attack resulted in my having a sore, slightly swollen and bruised throat for a few days, but thankfully I suffered no permanent damage.

The police were called and a supervisor attended. She advised that it was a busy night and that she attended only to ensure that everyone was safe and not to take statements.

[35] Both Mr. Jerome and Mr. Bates confirm that the Respondent's dog is large and aggressive and "is often let loose in the courtyard without being controlled by a leash". They describe hearing children screaming or crying on two occasions when the dog was in the courtyard. Mr. Jerome describes an incident where the dog had "cornered" a child and was then "allowed to run after the child again". Mr. Bates swears that the Respondent "will often allow the dog to lunge and snap at me when I am on my own front steps", for example, "when I am putting out the trash...Korolekh will either allow the dog to run towards me or is apparently unable to stop it". Mr. Jerome confirms that he has seen "Korolekh literally dragged down the street by the dog without the apparent ability to stop it". They estimate that the dog weighs approximately 150 pounds.

[36] Finally, both Mr. Jerome and Mr. Bates confirm that the Respondent "will often start blaring her music" in the early morning hours and that their house was "egged" two days after the June, 2009 assault. They also describe incidents of watching and besetting:

> Korolekh has been known to climb walls and position herself throughout the courtyard so that she can stare inside of units for extended periods of time. I [Mr. Jerome] have witnessed Korolekh behave in this manner on a number of occasions. One evening last year she sat outside drinking and watched us and our dinner guest all evening until he left hours later and we went to bed. This type of behavior has caused us to feel a total lack of privacy in our own home.

[37] Again, there was no cross-examination of Mr. Bates on his affidavit and no response from the Respondent to the specific incidents that he describes, such as the alleged June, 2009 assault.

[38] I am advised that the one Applicant's affiant who was cross-examined is Mr. Jerome. No transcript of that cross-examination was filed with the Court and no reference was made to it by the Respondent. I am advised by the Applicant that the cross-examination related mainly to Mr. Jerome's status as a member of the Board of Directors of MTCC 747.

[39] The seventh affidavit is from Sarah Smarrelli who has been the property manager for most of the relevant time period. She estimates that "approximately 50% of my time was spent dealing with issues created by or raised by Korolekh". Numerous contemporaneous documents are attached to her affidavit setting out the history of various complaints. Most importantly, she swears that:

> When Korolekh refused to comply with the Rules, the MTCC 747 Board of Directors declared the dog a nuisance under its Declaration and By-laws and sought the assistance of Toronto Animal Services.

[40] Numerous written complaints relating to the dog are appended to Ms. Smarrelli's affidavit. By-law No. 1 of MTCC 747 is a set of "House Rules" that bind all unit holders. Rule 20 states:

> ...no pet that is deemed by the board or the manager in its absolute discretion to be a nuisance shall be kept by any owner in any unit or in any part of the common elements.

[41] By letter dated May 13, 2009, the lawyer for MTCC 747 wrote to the Respondent and advised her of the Board of Director's decision concerning her dog:

> In accordance with the Rules and the Declaration, the Board of Directors of the Corporation have deemed your dog to be a nuisance. PLEASE BE ADVISED THAT YOU HAVE TWO WEEKS FROM THE DATE OF THIS LETTER TO REMOVE YOUR DOG FROM THE PROPERTY. Please be advised that should your dog not be removed on or before May 27, 2009, the Board of Directors will have no alternative but to commence legal proceedings. In our experience the costs for these types of proceedings can be in the range of $10,000 to $30,000 and the Corporation can claim these costs against you. These costs are deemed under the *Condominium Act, 1998* to be common expenses for which a lien may be registered against your unit. Property Management will be inspecting your unit on May 27, 2009 to determine if you have removed your dog from the unit. If the dog is still in your unit, legal proceedings will be commenced. We are also in receipt of reports concerning your abusive and threatening behavior towards other residents, including physical confrontations and following a resident up the street while yelling racial slurs. This type of behavior must cease immediately. The Corporation will be closely monitoring your behavior.

[42] The Respondent failed to comply with this Notice. The dog was not removed and is still present on the premises today. Furthermore, the incident involving an alleged assault on Bill

Bates and "yelling obscenities" about homosexuals in their front yard took place on June 23, 2009, that is, just over a month after the letter was sent. This Notice of Application then issued on July 15, 2009.

[43] There is no explanation in Ms. Korolekh's affidavit for her failure to respond to the May 13, 2009 Notice from the Board of Directors. There was no cross-examination of Ms. Smarrelli on her affidavit.

[44] The eighth and ninth affidavits are from two neighbours who are not unit holders. Gay O'Leary lives in the St. Nicholas Housing Co-Op which shares the courtyard with MTCC 747 "as a collective backyard". He swears that he has "observed Korolekh encourage the dog to act aggressively towards anyone it sees". In particular, he observed the dog "bark and lunge violently" at his sister as she was approaching the Co-Op. Ms. Korolekh would not move the dog, so that Mr. O'Leary's sister could pass safely, until after numerous residents intervened with her. Mr. O'Leary also observed Ms. Korolekh "release the dog on a group of children, with the result that one child injured her arm and foot while trying to escape". Mr. O'Leary confirms that the dog "is generally allowed to roam the courtyard unsupervised".

[45] The other neighbour, and final affiant, is Mr. Amrani who is the owner of the Matigon Restaurant which is situated directly across St. Nicholas Street from the subject townhouse units. He spends long hours in the community at work and is familiar with it. He swears as follows:

> Korolekh is a very aggressive and abrasive figure in the community. She often yells and screams at her neighbours and others who pass by. I often hear her yell some very offensive things based on individuals' sexual orientation or race. Korolekh also has a very large dog that she brings onto her front porch to bark and snarl at anyone who walks past. Korolekh treats anyone who comes near her unit in this way and has often allowed or encouraged her dog to act aggressively towards innocent bystanders. I have also witnessed Korolekh carry out acts of vandalism on MTCC 747 property. Earlier this summer I saw Korolekh come out of her unit with what appeared to be a green and white spray bottle. I watched as Korolekh walked over to the flower bed just beside her unit and sprayed the contents of the bottle all over the plants. Within days the plants were very badly damaged or dead.

[46] There was no cross-examination of either Mr. O'Leary or Mr. Amrani nor did the Respondent offer any explanation for specific incidents such as the act of mischief described by Mr. Amrani. That incident, of course, is direct evidence of mischief committed by Ms. Korolekh and it is similar to the circumstantial account provided by Ms. MacDonald in her affidavit. It is noteworthy that the incident described by Mr. Amrani in the summer of 2009 would have occurred after the May 13, 2009 Notice from the Board of Directors.

C. THE LAW

i. Preliminary Procedural Issues

[47] As noted in the introduction to this Judgment, the Respondent raises two preliminary objections to the present proceedings. First, she submits that ss.132 and 134(2) of *the Act* require that mediation must be attempted, before bringing this Application in court. The Applicant concedes there has been no mediation. Second, she submits that her affidavit puts "material facts in dispute" and that the Application should be converted into a trial pursuant to Rules 14.05(3)(h) and 38.10(1) of the *Rules of Civil Procedure.*

[48] The first argument, concerning mandatory mediation, can be easily disposed of. The scheme of *the Act* on this point, as set out in s.132, is to require mediation where there is "a disagreement between the parties with respect to" four particular instruments, namely, agreements, declarations, by-laws or rules relating to the condominium unit. However s. 134 of *the Act* enacts the remedial power to bring an Application to this Court in somewhat different terms:

> 134.(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.
>
> (2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

[49] Two points are noteworthy about the statutory scheme. First, the right to bring court proceedings pursuant to s. 134 is broader than the duty to attempt mediation under s. 132. An Application to this Court can be brought to enforce "compliance with any provision of this Act" whereas the duty to mediate applies only to lesser disputes concerning "the declaration, the by-laws, the rules or an agreement". Second, s. 134(2) contemplates the existence of circumstances where mediation is not attempted, prior to bringing court proceedings, as it begins with the conditional conjunction "if" in relation to the mediation that is available under s. 132. As already noted, s. 132 has no application to breaches of *the Act*, itself.

[50] In *McKinstry and Dempster v. York Condominium Corporation No. 472 and Verrier* (2003), 68 O.R. (3d) 557 at para. 19 (S.C.J.), Juriansz J., as he then was, made this point:

> It must be noted that s. 132(4) does not require owners and condominium corporations to submit disagreements with respect to *the Act* to mediation and arbitration.

Also see: *Peel Condominium Corporation No. 283 v. Genik* 2007 CanLII 23915 at para. 9 (Ont. S.C.J.)

[51] I am satisfied that the present Application substantially concerns alleged breaches of s. 117 of *the Act*, that the mandatory duty to attempt mediation under s. 132 does not apply and that

it was reasonable for MTCC 747 to avoid mediation in this case. Ms. Korolekh's failure to respond to the Board's May 13, 2009 letter and her bald denials of all the allegations make it unlikely that further expenditures on mediation would be fruitful.

[52] I also note that the request to mediate was raised for the first time in the Respondent's factum dated July 22, 2010, that is, a mere four days before the hearing of this Application. As already noted, the Application was brought over a year earlier, on July 19, 2009. In these circumstances, the case is similar to *Nipissing Condominium Corporation No. 4 v. Kilfoyl et al,* [2009] O.J. No. 3718 at para. 3 (S.C.J.); aff'd. 160 O.A.C. 94 (C.A.), where Stong J. held:

> The Respondents have proceeded with cross-examinations in this Application, and have not brought a motion for a stay of the Application and therefore are deemed to have elected the method of process chosen by the Applicant and have waived their right to mediation and arbitration.

Similarly, in *McKinstry, supra* at para. 44, Juriansz J. held:

> In this case, the Defendants must be taken to have waived the application of s. 132(4) as they raised it for the first time in their Amended Statement of Defence, amended February 2003, after all examinations for discovery had been completed. That was too late for the Defendants to raise the issue.

[53] If necessary, I would find that the Respondent waived any requirement to attempt mediation pursuant to s. 132 by delaying for over a year before raising the matter. It would be unfair to MTCC 747, after they have gone to all the expense of perfecting their Application, to now require that they revert to mediation.

[54] The second preliminary objection concerns whether to convert the present Application to a trial because Ms. Korolekh has put "material facts in dispute". The Respondent relies on both Rule 14.05(3)(h) and Rule 38.10(1)(b). In my opinion, the former rule has no application. The structure of Rule 14.05 is to permit proceedings to be commenced by way of Notice of Application, rather than by Statement of Claim and action, in four broad circumstances:

- First, pursuant to Rule 14.05(2), where "a statute so authorizes";
- Second, pursuant to Rule 14.05(3), where "these rules authorize…proceeding by application";
- Third, pursuant to Rule 14.05(3)(a) to (g.1), in relation to the eight specific forms of relief listed such as directions concerning an estate (sub. (a), (b) and (c)), interpretation of a deed, will, contract, statute, regulation or by-law (sub. (d)), declarations concerning land, purchase, sale, mortgage, lease or trust (sub. (e) and (f)), certain ancillary remedies (sub. (g)), and *Charter of Rights and Freedoms* remedies (sub. (g.1));
- Fourth, if none of the above specific provisions apply, sub. (h) enacts a broad basket clause permitting proceedings by way of Application in "any

matter" provided that "it is unlikely there will be any material facts in dispute".

[55] The above four bases for proceeding by way of Notice of Application, rather than by action, are all stated in the disjunctive. The present Application has been brought pursuant to Rule 14.05(2), on the basis that s. 134 of the *Condominium Act, 1998* expressly provides for making "an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act." Accordingly, jurisdiction to proceed by way of Application does not depend on Rule 14.05(3)(h) with its limitation concerning the likelihood of "material facts [being] in dispute". As Steele J. put it in *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 at 514 (S.C.J.); aff'd. 6 O.R. (3d) 519 (C.A.), in response to a similar argument:

> On the jurisdictional issue, counsel for Kenneth McKay argued that the power given under all of the paragraphs in Rule 14.05(3) should not be exercised where there were material facts in dispute. In my opinion, that would impose para. (h) as a condition to hear any matter under the preceding paragraphs. This would be clearly contrary to the disjunctive wording of subs. (3). I believe that the court has power to hear an Application under paras (a) to (g) inclusive, even if there are material facts in dispute. This does not mean that in an appropriate case the court may decide to direct the trial of an issue, or otherwise deal with the Application.

[56] Given that the Application was properly commenced pursuant to Rule 14.05(2), as authorized by statute, the real issue is whether it should now be converted to a trial pursuant to Rule 38.10, which provides as follows:

> (1) On the hearing of an application the presiding judge may,
>
> a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
>
> b) order that the whole application or an issue proceed to trial and give such directions as are just.
>
> (2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial.
>
> (3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge.

[57] The Rule 38.10 discretion, to direct a trial of the alleged breaches of s. 117 of *the Act,* ought not to be exercised in the particular circumstances of this case. As Steele J. stated in *McKay Estate, supra,* an Application under one of the specific heads in Rule 14.05 can be heard "even if there are material facts in dispute". The presumptive form of evidence on an

Application is by way of affidavit, pursuant to Rule 39.01. For sound policy reasons, the Legislature has concluded that enforcement proceedings under *the Act* should generally take this summary form. The issue under Rule 38.10 is whether any disputed material facts can be resolved fairly, on the basis of the affidavit evidence and cross-examination thereon filed in the Application Record and Responding Record, without the benefit of seeing the witnesses testify *viva voce*. In *Collins v. A-G Canada* (2005), 76 O.R. (3d) 228 at paras. 29-32 (S.C.J.), G.P. Smith J. reviewed the authorities under Rule 38.10 and framed the issue in the following terms:

> An application proceeding will not be converted into an action unless there is a good reason to do so, such as when the judge who will hear the matter cannot make a proper determination of the issues on the application record.
>
> When issues of credibility are involved or when *vica voce* evidence is required, a matter should proceed as an action (*Gordon Glaves Holdings Ltd. v. Care Corp. of Canada Ltd.* (2000), 48 O.R. (3d) 737, [2000] O.J. No. 1989 (C.A.); *Cunningham v. Front of Yonge (Township)* (2004), 73 O.R. (3d) 721, [2004] O.J. No. 4104 (C.A.)).
>
> When a factual dispute *simpliciter* is involved, this by itself is not sufficient to convert an application into an action. The fact(s) in dispute must be material to the issues before the court. (*Niagara Air Bus Inc. v. Camerman* (1989), 69 O.R. (2d) 717, [1989] O.J. No. 1425 (H.C.J.); *BPCO Inc. v. Imperial Oil Ltd.*, [1993] O.J. No. 420, 17 C.P.C. (3d) 130 (Gen. Div.)).
>
> The legislature has clearly designed the rules to allow for certain cases to proceed expeditiously by way of application. Whenever this can be accomplished without jeopardizing the hearing of the matter, a proceeding should not be converted into an action.

Also see: *Poersch v. Aetna*, [2000] O.J. No. 270 at para. 86 (S.C.J.) where Cameron J. stated that the Rule 38.10 discretion depends on whether there are "material facts in dispute which turn on credibility and cannot fairly be determined by the summary process of affidavits and cross-examinations".

[58] The recent decision of Lauwers J. in *A.M. Machining Inc. v. Silverstone Marble & Granite Inc.* (2010), 89 R.P.R. (4th) 113 at paras. 9 and 13 (S.C.J.) is also helpful. In that case, a landlord brought an Application seeking to terminate a commercial tenancy and the tenant sought to convert the proceedings into a trial. Lauwers J. proceeded with the Application and made the following useful point:

> I note that if the matter were converted into an action, the landlord would be entitled to bring a motion for summary judgment on the same material filed in this application under rule 20.04 as amended by subparagraph (2.1), which permits the court to weigh the evidence, to evaluate the credibility of a deponent, and to draw any reasonable inference from the evidence. In short, rule 20.04(1)

> (a) obliges the court to grant summary judgment if "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."
>
> ...
>
> The hearing process under Part III of the *Commercial Tenancies Act* is intended to be summary and can be expanded into a *viva voce* hearing if the judge considers it necessary. In many respects, the principles involved are similar to those now in place under rule 20.04 for summary judgment and I will take that approach here. There is no doubt that the tenant has had a full opportunity to put its best foot forward in these Part III proceedings and in the application.

As to the analogy between the discretion under Rule 38.10 and the power to grant Rule 20 summary judgment, see also: *TKS Holdings Inc. v. Ottawa* (2009), 80 C.P.C. (6th) 365 at paras. 9-14 (Ont. S.C. Master); *Huhtamaki Co. Manufacturing v. CKF Inc.*, [2008] O.J. No. 4838 at para. 25 (Ont. S.C. Master).

[59] The most relevant circumstances applicable to the Rule 38.10 discretion in the present case, are the following:

- The Applicant filed an overwhelming record full of detailed allegations that were often corroborated by other sworn evidence and supported by contemporaneous documentation. The Respondent, although represented by counsel, did not even attempt to cross-examine the Applicant's affiants pursuant to Rule 39.02 in order to show that there were live issues as to the affiants' credibility that required a trial;

- The Respondent's affidavit does not join issue on any of the specific allegations. Instead, bald conclusory denials are made, unsupported by any details or facts or corroborating evidence. In these circumstances, it cannot be said that seeing the witnesses testify *viva voce* is necessary to the resolution of some specific factual dispute;

- The only particulars advanced in the Respondent's affidavit concern the history of discrimination that she suffered in Russia, her busy and important professional life here in Toronto and the reproductive fertility difficulties that she and her partner have suffered. None of these particular facts are in dispute, nor do they require a trial. They can all be accepted on the basis of the existing record;

- The motive to fabricate, apparently alleged against all of the Applicant's affiants, is that they are engaged in a broad conspiracy arising from the Respondent's "efforts to require the Board of Directors to address repair issues in my unit, specifically with respect to having the Corporation replace the defective windows in my unit". The suggestion that nine affiants would all fabricate detailed allegations of serious misconduct against the Respondent, in order to save the costs to the corporation of replacing her windows, is inherently implausible. It is

particularly implausible when two of the nine affiants are not even members of the condominium. Furthermore, no facts are set out in support of the allegation of such a conspiracy. It is simply asserted in conclusory form. Finally, if this was a serious theory of the defence it would have been easy to advance it through cross-examination of the affiants. Nine separate liars, involved in a single conspiracy to commit perjury and obstruct justice, are unlikely to keep their stories straight when faced with an effective cross-examiner. No cross-examination was even attempted;

- Finally, the suggestion that a trial is required was raised for the first time in the Respondent's July 22, 2010 factum, four days before the second hearing date for this Application and more than a year after the Application was commenced on July 19, 2009. The parties had agreed on a timetable for filing affidavits and for cross-examinations. The Respondent's affidavit was sworn on April 20th, 2010. For three more months, the Respondent allowed the Application to proceed as scheduled. The Respondent was cross-examined, one of the Applicant's affiants was cross-examined, the Applicant filed a Supplementary Application Record and the Applicant filed a lengthy factum. The Application came on for hearing on May 19, 2010 and was adjourned on consent to July 26, 2010, in order to convenience the Respondent's counsel who had a family commitment on the May 19th 2010 date. All of these steps in furtherance of the Application proceeded, at considerable cost, without any suggestion that a trial was required.

[60] In all of the above circumstances, I am not persuaded that it would be fair or just to exercise the discretion granted in Rule 38.10. I am also not satisfied that there are any genuine issues concerning the facts, or any issues of credibility, that have been joined and that require a trial.

[61] Bald conclusory denials and broad unsupported assertions of conspiracy, accompanied by a complete failure to utilize the right to cross-examine under Rule 39.02, would far too easily defeat the Legislature's direction in s. 134 of *the Act* that these disputes are generally to be resolved by way of an originating Application. It cannot be that Rule 38.10 was designed to make it this easy to circumvent the statutory provision and obtain a trial, especially when the request is made at the last minute.

[62] In the result, the Respondent's two preliminary objections to proceeding with the Application are both dismissed.

ii. The Alleged Breaches of s. 117 of *the Act*

[63] Section 117 of the *Condominium Act, 1998* provides as follows:

> 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.

[64] The Applicant condominium corporation is under a statutory duty to "ensure" compliance with *the Act,* including with s. 117, as s. 17(3) of *the Act* provides:

> The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the Corporation comply with this Act, the declaration, the by-laws and the rules.

[65] Nor surprisingly, s. 119(1) of *the Act* imposes a statutory duty on all occupiers of a unit to "comply with this Act, the declaration, the by-laws and the rules". As already set out above, s. 134 of *the Act* then provides the enforcement mechanism for these provisions, by way of an Application to this Court, when there has been non-compliance.

[66] The broad s. 117 prohibition against activities "likely to damage the property or cause injury" is repeated in s. 17 of the Applicant condominium corporation's Declaration and is expanded to prohibit any unreasonable interference with use and enjoyment. Section 17 of the Declaration provides as follows:

> No unit shall be occupied or used by anyone in such a manner as is likely to damage or injure any person or property (including any other units or any portion of the common elements) or that will unreasonably interfere with the use or enjoyment by other unit owners of the common elements or the other units.

[67] The Ontario Court of Appeal has held that "the integrity of the title" acquired by a condominium owner is subject to compliance with the terms of the Declaration, as well as the by-laws and rules. In *Re. Carleton Condominium Corporation No. 279 v. Rochon et al* (1987), 59 O.R. (2d) 545 at p. 552 (C.A.), Finlayson J.A. stated:

> The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner.

[68] There is little case law interpreting and applying the s. 117 statutory duty concerning likely damage to property or injury to persons. Most of the *Condominium Act* enforcement case law, either under s. 134 of the present *Act* or under s. 49 of the predecessor *Act*, has dealt with compliance orders concerning less serious matters such as prohibitions against pets, the installation of satellite dishes, the building of decks, the planting of trees or the removal of mould from ducts. See, for example: *York Condominium Corporation No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.); *Metro Toronto Condominium Corporation No. 545 v. Stein et al* 2006 CanLII 20838 (Ont. C.A.); *Metropolitan Toronto Condominium Corporation No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.); *Peel Condominium Corporation No. 338 v. Young et al,* [1996] O.J. No. 1201 (S.C.J.); *Peel Condominium Corporation No. 283 v. Genik, supra; Re. Carleton Condominium Corporation No. 279 v. Rochon et al, supra; Marafioti v. Metropolitan Toronto Condominium Corporation No. 775* (1997) 10 R.P.R. (3d)

109 (Ont. C.A.); *Re. Peel Condominium Corporation No. 73 v. Rogers et al* (1978), 21 O.R. (2d) 521 (C.A.).

[69] The one particularly helpful decision is *York Condominium Corporation No. 136 v. Roth* 2006 CanLII 29286 (Ont. S.C.J.) where Perell J. had no difficulty concluding that *the Act* was violated when the Respondent Roth committed a single physical assault against the president of the condominium corporation at an owners' meeting. In addition, Roth was generally "rude, aggressive, abusive, and dismissive...in his relations with his neighbours". I will return to Perell J.'s reasons in *Roth* when discussing the appropriate remedy in this case.

[70] The evidence submitted by the Applicant in the case at bar includes a number of physical assaults by the Respondent in the one year period immediately prior to this Application: throwing gravel at Carmen Borghiel and her mother in June, 2008; letting the large Rottweiler dog lunge at Carmen Borghiel, while yelling "get it, get it", in September, 2008; grabbing Judy Satram by the arm and twisting her wrist in November, 2008; and finally, striking Bill Bates in the throat in June, 2009. All four of these incidents, if proved, would constitute common assaults within the meaning of s. 265 of the *Criminal Code*. See: *R. v. Judge* (1957), 118 C.C.C. 410 (Ont. C.A.); *R. v. Horncastle* (1972), 8 C.C.C. (2d) 253 (N.B.C.A.).

[71] In addition, there is a great deal of evidence of racist and homophobic slurs, some of which include shouted threats of "bodily harm" that fall within the meaning of s. 264.1 of the *Criminal Code*. It is noteworthy that "bodily harm" has been held to mean "any hurt or injury" and "to include psychological harm", provided it is more than "transient or trifling". See: *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 at para. 524 (S.C.C.). In the *McCraw* case, Cory J. gave the unanimous judgment of the Court and described the nature of criminally threatening behavior (at pp. 524-5, C.C.C.):

> Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.

The nature of Ms. Korolekh's threats, especially when combined with the use of her large aggressive dog, is to intimidate and instill fear.

[72] Finally, there is evidence of repeated incidents of mischief to property such as killing garden plants, "egging" the other units and interfering with cable television services, all of which generally occur after some altercation involving Ms. Korolekh. These incidents could potentially constitute the offence of mischief contrary to s. 430 of the *Criminal Code*. Indeed, the incidents involving loud music being played at night and the incidents of watching and besetting could also potentially amount to the criminal offence of mischief. See: *R. v.*

Maddeaux (1997), 115 C.C.C. (3d) 122 (Ont. C.A.); *R. v. Nicol* (2002), 170 C.C.C. (3d) 59 (Man. C.A.). It should be noted that the criminal offence of mischief is broader than mere "damage" to property, as prohibited by s. 117 of the *Condominium Act*, and includes interference with "use, enjoyment or operation of property". This latter aspect of mischief is reflected in s. 17 of the Applicant condominium's Declaration.

[73] There is no serious issue that the totality of the conduct alleged against the Respondent, if proved, is "likely" to both "damage" property and "cause injury" to a person and, therefore, violates s. 117 of *the Act*. Indeed, the conduct in question has actually caused injury and damage. The Respondent's counsel made no submissions to the effect that if the misconduct was proved it would, nevertheless, not violate s. 117. This is a clear case of repeated non-compliance with *the Act*.

[74] If there was any doubt on the point, then s. 17 of the Declaration was violated, in any event, as the totality of the conduct alleged interfered with "use and enjoyment" of the property. In addition, the condominium rules were violated by the failure to comply with the Board's order, when notified of it by letter dated May 13, 2009, finding that the Respondent's dog was a nuisance and that it was to be removed from the property.

[75] In short, the real issue is not whether the Respondent's conduct violates s. 117 of *the Act*, or whether it violates the Declaration and the condominium rules. The issue is simply whether that conduct has been proved, to the requisite civil standard, given that Ms. Korolekh has broadly denied any misconduct in her affidavit.

[76] I am satisfied that the Applicant has proved the various forms of misconduct, as summarized above, on a balance of probabilities. The Applicant's affidavits are detailed and compelling, they corroborate each other in many instances and they are often supported by contemporaneous documentation. Furthermore, they have not been diminished by any cross-examination. In their totality, they easily establish the facts asserted to a civil standard of proof.

[77] As against the Applicant's affidavits, the Respondent's brief affidavit, with its bald conclusory denials of any misconduct, is entitled to little or no weight. I accept that Ms. Korolekh suffered discrimination in Russia, that she now has a busy and important job in Toronto and that she and her partner are experiencing difficulties with reproductive fertility. None of this assists in rebutting the detailed facts set out in the Applicant's affidavits concerning numerous specific incidents on specific dates. The Respondent's self-serving global denials of any wrongdoing, unsupported by any facts or any detail, would be entitled to no weight if presented in *viva voce* testimony and are entitled to no weight in affidavit form. They also fail to disclose any genuine issue for trial. See: *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 at para. 31 (S.C.C.); *Rozin v. Ilitchev* (2003), 66 O.R. (3d) 410 at para. 8 (C.A.); *Bank of Montreal v. Abdel-Messih* (2006), 148 A.C.W.S. (3d) 380 (Ont. C.A.). If this case had proceeded as an action, I would have granted summary judgment in favour of the Applicant on the present record.

[78] In all these circumstances, I am satisfied that the Applicant has proved that the Respondent has been repeatedly in violation of s. 117 of *the Act*. She has also violated the Declaration and the condominium rules.

iii. The Appropriate Remedy Pursuant to s. 134

[79] The purpose of the remedial power in s. 134 is to "enforce compliance with ... this Act", or with the Declaration, by-laws and rules. It is clearly a discretionary power. See: *Rogers, supra; Rochon, supra; Marafioti, supra.*

[80] No basis was submitted by counsel for the Respondent for declining to grant some remedial order under s. 134, once the breaches of s. 117 have been established. The only issue at this stage is to determine what particular order is appropriate and necessary. The Applicant submits that an order requiring Ms. Korolekh to sell her unit and vacate the condominium premises is justified. The Respondent submits that a lesser remedy, ordering her to change her behavior and comply with *the Act*, is sufficient.

[81] In *Roth, supra*, Perell J. described the remedy of a forced sale of the Respondent's condominium unit as "extraordinary relief" and "draconian". He noted, however, that there is precedent for such an order (at para. 20):

> The Condominium Corporation sought the extreme order of requiring Mr. Roth to sell his unit. I have not been able to find any reported cases where such an order has been made, but Mr. Fine provided me with two orders that include this type of relief. The orders were made in *York Condominium Corporation No. 202 and Redican*, June 3, 1994, court file no. RE3905/94 (Gen. Div., O'Brien, J.) and *Peel Condominium Corporation No. 148 and Patrick*, July 18, 1997, court file no. A5053/97 (Gen. Div., Webber, J.)

[82] Counsel for both parties agreed that there have been other "extreme cases" where the order of a forced sale has been granted, and I have certainly seen them in the Toronto Motions Court. They do not appear to have been reported. This is perhaps because the order was unopposed or is made in a brief handwritten endorsement.

[83] On the particular facts of *Roth, supra,* Perell J. was persuaded that the "extreme order" was not justified and that a lesser compliance order would suffice. In particular, he stressed the following four features of that case: only one physical assault was proved; the other incidents alleged were either "trivial" or "happened many years ago"; much of the evidence was "of doubtful quality", either because it was based on hearsay or because of the lack of objectivity of the "chief complainant"; and the Respondent Roth was entitled to "an opportunity to show that he can abide by the rules that govern in his community." I note that none of these four features are present in the case at bar, as will be further developed below.

[84] One of the precedents cited by Perell J. in *Roth, supra*, where an order to sell and vacate was granted, is O'Brien J.'s decision in *Redican*, unreported, June 3, 1994. Neither counsel nor I

have been able to obtain a copy of O'Brien J.'s reasons but the Order that he made is available. That Order gave the Respondent Redican six months to list and sell her unit, failing which the Applicant condominium corporation could apply for possession of the unit. In the six month interim period, while Ms. Redican was permitted to remain in possession of her unit, O'Brien J. made a series of orders concerning her behavior, including:

- That she "cease creating or permitting ... any noise or excessive sound" in her unit, "whether by yelling, shouting, physical movement, by the playing of music ... or however caused, which noise or excessive sound may, or does, annoy, interfere with or disturb the comfort or quiet enjoyment" of any other unit holder;

- That she "permanently remove" from her unit "the dog kept in the said unit" and "she is hereby restrained from keeping any other dog" in her unit;

- That she is "restrained from causing or permitting any object or bodily substance to be thrown out of or ejected from the windows or doors of or off the balcony of" her unit;

- That she is "restrained from causing or permitting any bicycle to be taken into any elevator" on the property;

- That she is "restrained from causing, permitting or encouraging physical damage to any part of the common elements" of the property;

- That she is "restrained from harassing or permitting or encouraging the harassing of any resident ... threatening any resident ... telephoning any ... resident ... with intent to harass ... using profanity directed at any person [on the property] which profanity is disturbing or intimidating to any such person";

- That she is "restrained from causing or permitting odours to emanate" from her unit;

- That she pay for the damage caused to a door.

[85] It can be inferred from the terms of the interim order in *Redican, supra*, pending sale of the unit, that the conduct of the Respondent in that case was somewhat similar to the conduct of Ms. Korolekh in the present case. There is no mention in the order of anything equivalent to the four physical assaults against various unit holders, as exhibited by Ms. Korolekh in the case at bar. If anything, it therefore appears that the misconduct in the present case is more serious than that exhibited in *Redican, supra.* In any event, the *Redican* case bears out the common sense proposition that the most serious remedies available under s. 134 are appropriate in the most serious cases.

[86] I am persuaded that an order requiring Ms. Korolekh to sell her unit and vacate, within three months, is justified in the unusual circumstances of this case. In particular, I rely on the following:

- The community in question is relatively small, made up of thirty units located in two storey townhouses;

- The units all share a single courtyard which is their common backyard;

- The courtyard was a vibrant communal centre, prior to Ms. Korolekh's arrival, and she has effectively destroyed its utility;

- Ms. Korolekh's behavior is extreme in a number of senses. It includes physical violence, use of a large aggressive dog to frighten and intimidate, extraordinary verbal abuse of residents, interference with enjoyment of property as well as actual damage to property. This broad array of misconduct is carried out in a devious, persistent and vindictive manner. It has been continuous throughout the year leading up to the present Application;

- Ms. Korolekh was ordered by the Board of Directors to "cease" her misconduct, by letter dated May 13, 2009. She was also ordered to "remove your dog from the property". She was warned that the corporation was "closely monitoring your behavior" and that court proceedings would be commenced, at considerable cost, if she persisted. Instead of being chastened by this warning, and taking the opportunity to comply with her statutory duties, she continued with the same course of conduct. The assault on Bill Bates and the killing of a neighbour's garden, as observed by Mr. Amrani, both post-date the May, 2009 warning letter and the Board's order to comply;

- The launching of the present Application has not led to any offer or undertaking by Ms. Korolekh to change her ways. She is clearly "in denial", and cannot begin to reform, given her broad and absolute refusal to acknowledge any wrongdoing;

- Given the breadth of her misconduct, any compliance order would involve the Court in managing every aspect of Ms. Korolekh's life from her manner of speech, her music, her dog, her gestures and her menacing presence in the courtyard, as well as the more obvious need to enjoin any physical assaults or mischief to property. Such an order may be necessary in the interim, pending a sale of Ms. Korolekh's unit, but the Court ought not to become involved in any long term attempt to oversee, manage and reform the broad array of extreme behavior at issue in this case.

[87] In short, this case is a "perfect storm" where the misconduct is serious and persistent, where its impact on a small community has been exceptional and where the Respondent appears to be incorrigible or unmanageable. It must have been difficult to obtain the nine affidavits as some of the affiants are vulnerable and fear reprisals. They are entitled to the security of an order that removes Ms. Korolekh from their condominium corporation. She has been given opportunities, since May, 2009, to reform her ways or even to offer to reform her ways. There is no sign from her that she is willing or able to change.

[88] In all these circumstances, it would be unwise to try to reintegrate Ms. Korolekh into a community that fears her and that she has persistently tried to intimidate. People join condominium corporations voluntarily on the basis that they agree to share certain collective property and to abide by a set of rules and obligations that protect the collectivity. There is no right to continue membership in this corporation or this community, once a clear intention to harm it and a persistent refusal to abide by its rules have been exhibited in the extreme ways seen in this case. Ms. Korolekh has irreparably broken the bond with her community and an effective order cannot be made that would force these parties to now join together again.

[89] The necessary and appropriate remedy in this case is as follows:

a. Ms. Korolekh shall list and sell her unit and her interest in MTCC 747 within three months of service of this Order;

b. Failing such sale, or if the Respondent breaches any term of this Order, the Applicant may apply for an Order for possession;

c. Ms. Korolekh shall not purchase, lease or reside in any other unit of MTCC 747;

d. In the interim, Ms. Korolekh shall abide by *the Act*, the Declaration, the by-laws and the rules of MTCC 747 and, in particular, she is restrained from assaulting, threatening, using profane, racist or homophobic language and committing any acts of mischief in relation to any members of MTCC 747 or their property;

e. Ms. Korolekh shall permanently remove her dog from her unit and from MTCC 747 property within ten days of service of this Order and shall not keep any other dog on the premises;

f. Should Ms. Korolekh fail to comply with any term of this Order, the Applicant may move to enforce it on two days' notice or as the Court deems just.

D. CONCLUSION AND COSTS

[90] In the result, the Application is granted. The Applicant has achieved complete success and is entitled to its costs. Section 134(3)(b) of *the Act* expressly authorizes an order to pay "the costs incurred by the Applicant in obtaining the order". In addition, s. 28 of the Declaration provides that each owner "shall indemnify" the Applicant corporation for any "costs ... resulting from or caused by any act or omission of such owner" or caused by "any breach of any rule". Unless the Respondent pays the Applicant's costs they will have to be borne collectively by the other twenty-nine unit holders through their common expenses.

[91] The Applicant's Bill of Costs essentially claims for 160 hours of work by Mr. Treleaven, a 2008 call, at a full indemnity rate of $280 per hour. Minor amounts of work totaling 20 hours were done by others. There are $1,200 in disbursements. The total account, including taxes, is $54,768. On a partial indemnity basis, the account totals $33,000.

[92] Mr. Strashin submits that the account is excessive, that 180 hours of work cannot be justified and that costs fixed at $15,000 would be appropriate.

[93] Given the significant nature of the order being sought and given its importance to the client, I am satisfied that a considerable amount of work was required to thoroughly prepare the nine affidavits, the large two volume Application Record, and a lengthy factum. The May 13, 2009 letter to Ms. Korolekh from the Applicant's lawyer clearly warned her that enforcement proceedings in court could cost up to $30,000 and could be charged against her as common expenses. However, 180 hours of work is somewhat excessive and should be reduced. I do not say this to be critical, in any way, of Mr. Treleaven. He is a young lawyer and he was undoubtedly proceeding slowly and carefully in order to ensure that his work was of a high standard.

[94] In all these circumstances, the Respondent shall pay the Applicant's costs which are fixed at $35,000, inclusive of HST and disbursements. The costs should be paid within 30 days.

M.A. Code J.

Dated: August 17, 2010