2013 CarswellOnt 3112,

2013 CarswellOnt 3112

Toronto Standard **Condominium Corp**. No. 1498 v. Municipal Property Assessment Corp.

In the Matter of Sections 33 and 40 of the Assessment Act, R.S.O. 1990, c. A.31, as amended

In the Matter of appeals with respect to taxation years 2011 and 2012 on premises known municipally as set out in Schedule "A" attached

Toronto Standard **Condominium Corporation** No. 1498 et al, Toronto Standard **Condominium Corporation** No. 1961, and Toronto Standard **Condominium Corporation** Nos. 1722 and 1741, et al, Appellants and The Municipal Property Assessment Corporation and the City of Toronto et al, Respondents

Ontario Assessment Review Board

J. Wyger Member, A. Fenus Member

Heard: September 17, 2012; September 18, 2012
Judgment: March 15, **2013**
Docket: WR 117983

Counsel: J.R. Gardiner, D.G. Fleet, C.A. Dirks, for Appellants

D.G. Mitchell, for Municipal Property Assessment Corporation

No one for Municipalities

Subject: Property; Public; Tax — Miscellaneous

Municipal law

Real property

Cases considered:

Abdulmalek v. Municipal Property Assessment Corp., Region No. 7 (2008), 2008 CarswellOnt 7635, 61 O.M.B.R. 242 (Ont. Assess. Review Bd.) — followed

Basmadjian v. York ***Condominium Corp****. No. 52* (1981), 21 R.P.R. 111, 122 D.L.R. (3d) 117, 1981 CarswellOnt 534, 32 O.R. (2d) 523 (Ont. H.C.) — considered

BCE Place Ltd. v. Municipal Property Assessment Corp., Region No. 9 (2010), 66 O.M.B.R. 1, 325 D.L.R. (4th) 69, 2010 CarswellOnt 7721, 2010 ONCA 672, 77 M.P.L.R. (4th) 1, 99 R.P.R. (4th) 1, *(*sub nom. *Municipal Property Assessment Corp. v. BCE Place Ltd.)* 268 O.A.C. 258, *(*sub nom. *Municipal Property Assessment Corp. v. BCE Place Ltd.)* 103 O.R. (3d) 520 (Ont. C.A.) — considered

Carsons' Camp Ltd. v. Municipal Property Assessment Corp. (2008), 2008 ONCA 17, 40 M.P.L.R. (4th) 165, 232 O.A.C. 297, 58 O.M.B.R. 292, 2008 CarswellOnt 74, 63 R.P.R. (4th) 163, 88 O.R. (3d) 741 (Ont. C.A.) — considered

Eglinton Place Inc. v. Ontario (Ministry of Consumer & Commercial Relations) (2000), 47 O.R. (3d) 344, 2000 CarswellOnt 444, 31 R.P.R. (3d) 153 (Ont. S.C.J.) — considered

Ellenborough Park, Re (1955), [1956] Ch. 131 at 153, [1955] 3 All E.R. 667, [1955] 3 W.L.R. 892, 99 Sol. Jo. 870 (Eng. C.A.) — followed

Elliston v. Reacher (1908), [1908] 2 Ch. 374 (Eng. Ch. Div.) — followed

Lexington on the Green Inc. v. Toronto Standard ***Condominium Corp****. No. 1930* (2010), 327 D.L.R. (4th) 498, 270 O.A.C. 129, 102 O.R. (3d) 737, 2010 CarswellOnt 8602, 2010 ONCA 751, 97 R.P.R. (4th) 171 (Ont. C.A.) — considered

Metropolitan Toronto ***Condominium Corp****. No. 949 v. Irvine* (1992), 24 R.P.R. (2d) 140, 1992 CarswellOnt 584 (Ont. Gen. Div.) — considered

Metropolitan Toronto ***Condominium Corp****. No. 1172 v. Municipal Property Assessment Corp.* (July 7, 2006), Doc. 05-CV-300162PD2 (Ont. S.C.J.) — considered

Metropolitan Toronto ***Condominium Corp****. No. 1250 v. Mastercraft Group Inc.* (2009), 2009 ONCA 584, 2009 CarswellOnt 4281, 310 D.L.R. (4th) 256, 255 O.A.C. 253, 82 R.P.R. (4th) 1 (Ont. C.A.) — considered

Metropolitan Toronto & Region Conservation Authority v. Minister of National Revenue (1980), 11 O.M.B.R. 25, 1980 CarswellOnt 1607 (O.M.B.) — considered

Metropolitan Toronto & Region Conservation Authority v. Minister of National Revenue (1982), 135 D.L.R. (3d) 574, 1982 CarswellOnt 910, 13 O.M.B.R. 191 (Ont. H.C.) — referred to

Montreal (City) v. Sun Life Assurance Co. of Canada (1951), 1951 CarswellQue 268, [1952] 2 D.L.R. 81, [1951] W.N. 575 (Quebec P.C.) — considered

Schickedanz Bros. Ltd. v. Municipal Property Assessment Corp., Region No. 14 (2010), 67 O.M.B.R. 296, 2010 CarswellOnt 8741 (Ont. Assess. Review Bd.) — considered

Sunset Lake Owners Assn. v. Municipal Property Assessment Corp., Region No. 03 (2002), 2002 CarswellOnt 8481 (Ont. Assess. Review Bd.) — followed

Tulk v. Moxhay (1848), 41 E.R. 1143, 2 Ph. 774, [1843-1860] All E.R. Rep. 9 (Eng. Ch. Div.) — considered

Vancouver Assessor, Area No. 9 v. Bramalea Ltd. (1990), 3 M.P.L.R. (2d) 206, (sub nom. *Bramalea Ltd. v. British Columbia (Assessor of Area #09 - Vancouver))* 76 D.L.R. (4th) 53, 52 B.C.L.R. (2d) 218, 1990 CarswellBC 287, B.C. Stated Case 277 (B.C. C.A.) — considered

Statutes considered:

Assessment Act, R.S.O. 1990, c. A.31

Generally — referred to

s. 1(1) "current value" — considered

s. 3 — considered

s. 3(1) — considered

s. 9 — considered

s. 9(1) — considered

s. 9(3) — considered

s. 19(1) — considered

s. 33 — referred to

s. 40 — referred to

2013 CarswellOnt 3112,

s. 40(17) — considered

s. 40(19) — considered

s. 44(3) — considered

s. 44(3)(b) — considered

s. 45(1) — considered

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 1(1) "common interest" — considered

s. 1(1) "common elements" — referred to

s. 1(1) "property" — referred to

s. 7(4)(b) — considered

s. 7(4)(c) — considered

s. 8(1)(g) — considered

s. 11(1) — considered

s. 12 — considered

s. 12(1) — considered

s. 12(1) ¶ 1 — considered

s. 12(2) — considered

s. 15 — considered

s. 15(1) — considered

s. 17(3) — considered

s. 18 — considered

s. 18(2) — considered

s. 97 — considered

s. 107 — considered

s. 119(1) — considered

Decision of the Board:

1 These appeals came before the Assessment Review Board ("Board") on September 17 and 18, 2012 in the City of Toronto.

Introduction

2 The subject properties under appeal are superintendent's units ("Super's Units") which are owned by and situated in the various condominiums set out in Schedule "A".

3 All parties have agreed that each appellant counsel would select one Super's Unit to represent three distinguishing characteristics:

• a Super's Unit owned by a **condominium corporation** where the corporation's declaration requires it to be occupied by a live-in superintendent

• a Super's Unit owned by a **condominium corporation** which also owns a guest unit ("Guest Unit") subject to specific restrictions contained within the corporation's declaration

• a Super's Unit owned by a **condominium corporation** where the corporation's declaration refers to a superintendent's unit, but there is no specific provision contained in the declaration requiring occupancy of the Super's Unit by the superintendent

4 The parties submitted three Agreed Statements of Facts.

5 Finally, all parties agreed that quantum is not an issue. The issue is whether a nominal value should be given to the Super's Units owned by **condominium corporations** because of the unique considerations applicable to them.

6 The Municipal Property Assessment Corporation ("MPAC") has recognized that all of the Guest Units in these buildings meet the criteria for assessing them all for nominal values, but differentiates them from the Super's Units.

Issue

7 The issue is whether the assessments for the subject properties for the 2011 and 2012 taxation years should reflect their respective current values or nominal values only. The main question to be answered is whether the Super's Units can be characterized as constituting easements/servient tenements that fall within the ambit of s. 9 of the *Assessment Act* ("Act") allowing for them to be assessed at nominal values. Further questions involve determining whether these units are marketable and whether there is inequity in assessing them at full value when compared to similar properties in the vicinity.

Decision

8 The Board finds the Super's Units are servient tenements within the meaning of s. 9 of the Act. Because they are not marketable, nominal assessed values should be applied. The current value for each property is therefore reduced to $9 for the 2011 and 2012 taxation years, which is the nominal value selected by the parties for these appeals. This reduces the assessments returned under s. 40 to $9 and all assessments returned under s. 33 to NIL.

Reasons for Decision

The Legislation

Assessment Act

9 Section 1 of the Act states:

> **"current value"** means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer.

10 Section 3.(1) of the Act states:

> **3.(1) Property assessable and taxable.** — All real property in Ontario is liable to assessment and taxation.

11 Section 9.(1) of the Act states:

> **9.(1) Assessment of easements**. — Where an easement is appurtenant to any land, it shall be assessed in connection with and as part of the land at the added value it gives to the land as the dominant tenement, and the assessment of the land that, as servient tenement, is subject to the easement shall be reduced accordingly.

2013 CarswellOnt 3112,

12 Section 9.(3) of the Act states:

9.(3) Restrictive covenant. — A restrictive covenant running with the land shall be deemed to be an easement within the meaning of this section.

13 Section 19.(1) of the Act states:

19.(1) Assessment based on current value. — The assessment of land shall be based on its current value.

14 Section 40.(17) of the Act states:

40.(17) Burden of proof. — For 2009 and subsequent taxation years, where value is a ground of appeal, the burden of proof as to the correctness of the current value of the land rests with the assessment corporation.

15 Section 40.(19) of the Act states:

40.(19) Board to make determination. — After hearing the evidence and the submissions of the parties, the Board shall determine the matter.

16 Section 44.(3) of the Act states:

44.(3) Same, 2009 and subsequent year. — For 2009 and subsequent taxation years, in determining the value at which any land shall be assessed, the Board shall,

(a) determine the current value of the land; and

(b) have reference to the value at which similar lands in the vicinity are assessed and adjust the assessment of the land to make it equitable with that of similar lands in the vicinity if such an adjustment would result in a reduction of the assessment of the land.

17 Section 45.(1) of the Act states:

45.(1) Powers and functions of Assessment Review Board — Upon an appeal with respect to an assessment, the Assessment Review Board may review the assessment and, for the purpose of the review, has all the powers and functions of the assessment corporation in making an assessment, determination or decision under this Act, and any assessment, determination or decision made on review by the Assessment Review Board shall be deemed to be an assessment, determination or decision of the assessment corporation and has the same force and effect.

Condominium Act, 1998, S.O. 1998, c.19

2013 CarswellOnt 3112,

18 Section 11 of the *Condominium Act* states:

Ownership of property

11. (1) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of the owner's unit. 1998, c. 19, s. 11 (1).

19 Section 12 of the *Condominium Act* states:

Easements

12. (1) The following easements are appurtenant to each unit and shall be for the benefit of the owner of the unit and the corporation:

1. An easement for the provision of a service through the common elements or any other unit.

2. An easement for support by all buildings and structures necessary for providing support to the unit.

3. If a building or a part of a building moves after registration of the declaration and description or after having been damaged and repaired but has not been restored to the position occupied at the time of registration of the declaration and description, an easement for exclusive use and occupation over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration.

4. If a corporation is entitled to use a service or facility in common with another corporation, an easement for access to and for the installation and maintenance of the service or facility over the land of the other corporation, described in accordance with the regulations made under this Act. 1998, c. 19, s. 12 (1).

20 Section 15 of the *Condominium Act* states:

Assessment

15. (1) Each unit, together with its appurtenant common interest, constitutes a parcel for the purpose of municipal assessment and taxation. 1998, c. 19, s. 15 (1).

Common elements

(2) Subject to subsection (3), the common elements of a corporation that is not a common elements **condominium corporation** do not constitute a parcel for the purpose of municipal assessment and taxation. 1998, c. 19, s. 15 (2).

Exception

(3) A part of the common elements of a corporation that is not a common elements **condominium corporation** constitutes a separate parcel for the purpose of municipal assessment and taxation if it is leased for business purposes under section 21, the lessee carries on an undertaking for gain on it and it is in the commercial property class prescribed under the *Assessment Act*. 1998, c. 19, s. 15 (3).

Common elements condominium corporation

(4) The common elements of a common elements **condominium corporation** constitute a parcel for the purpose of municipal assessment and taxation within each municipality in which the common elements or a part of them are located and the municipal taxes levied on the parcel or parcels shall form part of the common expenses of the corporation. 1998, c. 19, s. 15 (4).

21 Section 18 of the *Condominium Act* states:

Assets

18. (1) The corporation may own, acquire, encumber and dispose of real and personal property only for purposes that are consistent with the objects and duties of the corporation. 1998, c. 19, s. 18 (1).

Interests in real property

(1.1) The assets of the corporation do not include any real property that the corporation does not own or any interest in real property where the corporation does not own the interest. 2000, c. 26, Sched. B, s. 7 (2).

Interest in assets

(2) The owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws. 1998, c. 19, s. 18 (2).

Validity of easement

(3) A grant or transfer of an easement to the corporation is valid even though the corporation does not own land capable of being benefited by the easement. 1998, c. 19, s. 18 (3).

The Appellants' Positions

22 Robert Gardiner, counsel for Toronto Standard **Condominium Corporation** No. 1498 and twenty-nine other appellant **condominium corporation** owners of superintendent's units, submitted that a Super's Unit should only be subject to nominal

assessment for the following seven reasons:

I. *Double Assessment/Taxation.* This arises when the Super's Unit is subject to full current value assessment when every residential unit and its appurtenant common interests is also subject to full current value assessment, because the Super's Units are part of the common interests.

II. *Section 12 Service Easements.* The type of service referred to in s. 12 of the *Condominium Act* refers to the use and benefit of the services provided by the Super's Unit to the other units and thereby creates an easement in favour of the individual units.

III. *Common Interests Easements.* The common interests appurtenant to each of the units run with the land in the manner of a common law easement, binding the Super's Unit as a servient tenement and the other units as dominant tenements.

IV. *Marketability.* The current value of the Super's Unit is nominal because a sale would be almost impossible.

V. *Added Value.* A Super's Unit's value should be deemed to constitute "added value" already within the full current value of each unit and its appurtenant interest, so its current value should therefore be nominal.

VI. *Equity.* It is inequitable under s. 44.(3)(b) to assess Guest Units at nominal value, but not Super's Units.

VII. *Restrictive Covenant.* The provision contained in the condominium's declaration requiring purchase of and occupancy of the Super's Unit by a live-in superintendent is a restrictive covenant and therefore an easement within the meaning of s. 9(1) and (3) of the *Assessment Act*.

23 Mr. Gardiner asserted that a condominium-owned common amenity service unit, such as a Super's Unit, constitutes real property liable to assessment and taxation, but its value should be nominal since it is akin to "common elements" which are free from assessment and taxation. When a **condominium corporation** owns a common amenity service unit for all unit owners the circumstances cannot be compared to other assessment scenarios.

24 David Fleet, counsel for Toronto Standard **Condominium Corporation** No. 1961, maintained that a condominium's declaration is tantamount to a constitutional document and has qualities similar to statutory power. A declaration has a higher legal status and is conceptually different than involuntary or voluntary agreements. Moreover, its provisions are restrictive. Thus, an easement is created in the spirit of s. 9(3) and s. (1) of the *Assessment Act*.

25 Mr. Fleet suggested that a provision in a declaration to supply a Super's Unit, or for that matter a Guest Unit, is binding upon the declarant and all the condominium unit owners, similar to the provisions for Guest Units. Since MPAC recognizes Guest Units as easements within the meaning of the Act and applies a nominal value to such units, equity demands that Super's Units should be treated in the same manner and assessed at a nominal value.

26 Carol Dirks, representing Toronto Standard **Condominium Corporations** Nos. 1722 and 1741, asserted that disclosure documents requiring a Super's Unit to be owned and operated by a **condominium corporation** are enough to create a restrictive

covenant, hence an easement, for the condominium units. She urged the Board not to restrict the finding of a restrictive covenant to only where it is contained in a condominium declaration, but to extend it also to cases where the restriction is only found in the disclosure documents. To do otherwise would result in the inequitable treatment of those latter Super's Units.

MPAC's Position

27 Donald Mitchell, counsel for MPAC, maintained that the Super's Unit is not a common element of a **condominium corporation**. It is a marketable unit owned by the **condominium corporation** for the sole purpose of housing a superintendent. The condominium units do not benefit from its existence in the same way as they do from a Guest Unit. The Super's Unit is not accessible to condominium unit owners because there is no right for the residential unit owners to occupy the unit in the same way they would a Guest Unit. Mr. Mitchell asserted that since the Super's Unit was transferred by the declarant for consideration at a fixed cost to the **condominium corporation**, it has a current value.

28 Mr. Mitchell maintained that a Super's Unit has no special status within a **condominium corporation's** declaration. The restriction on its use is not enough to permit it to be considered any type of easement for the purposes of s. 9.(1) of the *Assessment Act*.

Double Assessment/Taxation

Appellants' Submissions

29 Mr. Gardiner submitted that a **condominium corporation** owns a Super's Unit as an asset on its balance sheet as an agent on behalf of each unit owner. The unit owners share ownership in proportion to the "common interest" appurtenant to each of their individual units. The full current value of each individual unit therefore includes the value of each of their appurtenant common interests in the shared assets of a **condominium corporation**. This includes a Super's Unit as one of a number of "common amenity service units", a convenient moniker used by Mr. Gardiner to describe the type of unit owned by the **condominium corporation** for the benefit of the owners.

30 The *Condominium Act* under s. 1(1) sets out two types of common interests: common interests applicable to common elements, and common interests with respect to shared assets. Section 18.(2) of the *Condominium Act* connects each unit owner's common interest to the assets of the **condominium corporation** which they share in accordance with their proportionate common interests. The proportions of the common interests appurtenant to all the units must add up to 100% of the common interests, and as such, unit holders are entitled to the benefits of all the common interests.

31 A common interest is appurtenant to the individual unit whether or not it relates to common elements or assets of the **condominium corporation**. The common interest inherently runs with the land since it is registered on title in the transfer/deed. The value of the common interest in all the assets and common elements of the **condominium corporation** constitutes a significant portion of the purchase price of an individual unit. These are tied into all units, and each unit bears a proportionate share of common expenses.

32 When MPAC assesses the value of an individual owner's unit, the common interests applicable to that unit inherently

form part of the price which a willing purchaser would pay. The purchaser would not make a distinction between a unit in a condominium having a common interest in a shared amenity space upon its common elements versus a unit having a common interest in a common amenity service unit of the same type. The current value of individually owned units includes all these common interests, and in this light, though a Super's Unit is not a common element of the **condominium corporation**, it is akin to one.

33 The appellants' counsel cited *Carsons' Camp Ltd. v. Municipal Property Assessment Corp.* (2008), 88 O.R. (3d) 741 (Ont. C.A.) where the Court of Appeal found that the term 'fee simple' is intended to capture the totality of all interests in an assessable parcel of land. For the purposes of current value as set out in s. 1 of the Act this has expanded the definitions of land, real property, and real estate. MPAC must take into consideration the full current value for the full fee simple, which is intended to capture the totality of all interests in the Super's Unit because purchasers are obligated to purchase the common interest appurtenant to each unit including shared asset values which cannot be severed from the unit. This gives rise to an unfair double taxation, if those shared asset values are assessed separately.

34 Mr. Gardiner submitted that the common interest appurtenant to each owner's unit is a legal right in fee simple appurtenant to each owner's unit. The shared interest in the Super's Unit pursuant to s. 18.(2) of the *Condominium Act* is a shared right of user benefits in favour of these owners. They are the end users who receive the benefit of having a Super's Unit in the building and the services it provides to house the superintendent on site. The values of the individual units are all enhanced by the value of the Super's Unit.

35 The appellants' counsel maintained that common interests are appurtenant. Owners who share a **condominium corporation's** assets in the proportions of common interests appurtenant to their individual units have the benefits derived from a Super's Unit which are appurtenant to ("appended to", "annexed to" and "belonging to") their individual units. A common interest is not just a personal right (*in personam*), but a right in property (*in rem*).

36 Mr. Gardiner emphasized that unit holders pay taxes on both types of units, their individually owned units including the appurtenant common interest in the assets of the corporation and for common amenity service units in proportion to the common expenses attributed to their individual units. The common amenity service unit should be accorded only nominal assessment, since its current value is automatically included in the value of each of the individually owned units as soon as the **condominium corporation** came into existence. When MPAC separately assesses at full current value the Super's Unit, the owners of the individual units suffer double taxation.

37 The appellants' counsel referred to *Schickedanz Bros. Ltd. v. Municipal Property Assessment Corp., Region No. 14*, [2010] O.A.R.B.D. No. 682 (Ont. Assess. Review Bd.) (Board File No. WR 92165) ("*Schickedanz")* where in answer to MPAC counsel's *de minimus non curat lex* argument that the individual amounts in issue were minimal, the Board found that "the prevailing principle is that there should be no double taxation, no matter how small."

MPAC's Submissions

38 Mr. Mitchell submitted that the common amenities service units referred to by the appellants' counsel have no special status in the *Assessment Act* or in the *Condominium Act* to allow them to not be assessed or to be treated differently. The Super's Unit is not a common element of a **condominium corporation**. It is a parcel of land within the meaning of the *Assessment Act*

which must be assessed. Though the **condominium corporation** cannot readily sell a Super's Unit, it can still be assessed for current value since it is not a common element of the corporation.

39 Mr. Mitchell cited *Eglinton Place Inc. v. Ontario (Ministry of Consumer & Commercial Relations)*, [2000] O.J. No. 498 (Ont. S.C.J.) which stated that although the terms "property" and "common elements" are defined in the *Condominium Act*, no definition is provided for the term "asset". Subsections 12(1) and 12(2) of the *Condominium Act* do however distinguish "assets" from "property" and "common elements". The *Condominium Act* and the *Assessment Act* should have included an exemption from assessment and taxation for assets such as Super's Units.

40 Mr. Mitchell referred to *Metropolitan Toronto **Condominium Corp**. No. 1172 v. Municipal Property Assessment Corp.* [(July 7, 2006), Doc. 05-CV-300162PD2 (Ont. S.C.J.)] (July 7, 2006), Doc. 05-CV-300162PD2 Court File No. 05-CV-300162PD2 (unreported) ("*MTCC 1172")* which dealt specifically with Guest Units. The Court found that the term "common amenity" has no legal significance, statutory or otherwise. It also categorically rejected the idea of double taxation being imposed on unit owners. The concept of an "appurtenant common interest" of a unit is limited to common elements, and as such, any assessment of the Guest Unit which was not a common element, should best be addressed with a s. 40 appeal to the Board in respect to settling the market value of the unit.

Analysis: Double Assessment

41 There is no question that Super's Units are separate parcels of land under s. 15.(1) of the *Condominium Act*, assessable under s. 3 of the Act. The issue is whether the Super's Units, as "assets" of the **condominium corporation** are part of the "appurtenant common interest" of the residential units and therefore already assessed within the values of those units.

42 The Superior Court in *MTCC 1172* dealt with the same question with respect to Guest Units. The Court stated that "the concept of an 'appurtenant common interest' of a unit is limited to the common elements..." and so each unit's assessment "excludes any interest in the Guest Unit." This conclusion rejects the appellant's submission that the assets of the Corporation are one of two types of common interests along with the common elements. The Court goes on to state that while a unit may be "treated substantively as a part of the common elements, I do not think there is any basis for finding that such treatment binds third parties to that relationship, such as the Respondent (MPAC)".

43 The Court rejected the double taxation argument for other reasons:

> 1. If there was any such double taxation because any part of the Guest Unit's value may be within the current value of the other units, it could be dealt with using a s. 40 appeal of the residential units' assessments.
>
> 2. Any market value of the Guest Unit will be for the right to put up guests on a short-term basis, and will be substantially less than the *pro rata* share of value of a Guest Unit were it to be sold on the open market. "Of course, if there is no value to the right to put up guests in the Guest Unit, there is no double taxation whatsoever."

44 The Board agrees with the Court that it is always open to unit owners to appeal their assessment, although as the Board pointed out in *Schickedanz*, it places an onerous evidentiary burden on appellants to prove the value, if any of a *pro rata* share

of the common amenity service in issue. *Schickedanz* was addressing assessment appeals for taxation years 2005 through 2008. It is arguable, since the passage of s. 40.(17), that the evidentiary burden now rests with MPAC on this issue, to show that a *pro rata* share of value is not included in the residential units' values.

45 On the main point of whether the Super's Units are a part of the appurtenant common interest, the Board is bound by the Court's decision that they are not, and so cannot be treated similarly to common elements for assessment purposes. The Court's comments on the marketing of Guest Units are interesting and will be referred to later on the marketability issue.

Section 12 Service Easement

Appellants' Submissions

46 The service easement reflected in s. 12 of the *Condominium Act* provides an existing statutory easement which ties a common amenity service unit such as a Super's Unit to each of the individual units. Section 12 of the *Condominium Act* provides that an easement for the provision of a service through any unit or the common elements is appurtenant to each unit and shall be for the benefit of the owner of the unit and the **condominium corporation**. Each type of common amenity service unit provides a service appropriate to its type, nature, and characteristics benefitting the individual owners of all the residential units.

47 Mr. Gardiner submitted that the word "service" in s. 12 of the *Condominium Act* is used as a noun rather than as a verb, adjective or adverb and its definition best connotes the following meanings: (a) work done by one person or group that benefits another, (b) employment in or work for another, (c) the use that can be made of a machine, or (d) a system supplying a public need, such as transport, communications, or utilities such as electricity or water. The nature of the "service" is provided by a Super's Unit where a superintendent will reside and will perform the services for the owners of the residential units in the condominium.

48 Mr. Gardiner highlighted the English case of *Regina v. Paddington, North and St. Marylebone Rent Tribunal [1951] 1 QV 1956 (p.236, paras.3 and 4)* where the Court accepted a broader definition of the concept of "service" than was argued by the tenants. It extended beyond the nature of provision of a service by a utility to a service provided by common areas and facilities as well as the types of services rendered by a superintendent, being amenities benefitting the tenants. A superintendent residing in a Super's Unit provides these extended services and more (See Exhibit 1: TSCC 1498 Agreed Statement of Facts, Tab 27).

49 Mr. Gardiner emphasized that the s. 12 service easement concept reflects the reality of the condominium regime as envisaged overall by the *Condominium Act, 1998* and the actual practicalities of condominium living. This exemplifies the "reality of condo world" whereby such common amenity service units are actually treated by boards of directors, property managers, and unit owners as if they were common elements for the benefit of the owners.

MPAC's Submissions1

50 Mr. Mitchell submitted that s. 12 of the *Condominium Act* speaks of benefits and interests but these have nothing to do with easements. Whatever service easements are contemplated within the *Condominium Act*, they are operational in nature, and

relate to utilities like pipes and wires. The *Condominium Act* does not consider that unit owners should derive benefit from other "services" as a form of easement. The definitions of service as contemplated by the appellants is too far reaching and outside the scope of the *Condominium Act.*

Analysis: Service Easement

51 Mr. Mitchell submitted that s. 12 refers to utility easements only. If this was true then the question arises as to why the phrase "utility easements" was not used? The definition of "service" certainly encompasses a broader array of items than "utilities" would. An interpretation of "service easement" should begin with an inquiry as to whether the easement in question is of some "service" to the unit holders. There is no question that the pipes providing water to the units is of service to them. Do the other types of commonly owned amenity service units such as guest units, parking units, recreational units, mechanical units and even a putting green unit provide a service to the residential units? A broad interpretation of the word "service" suggests the answer is that they do. The Board accepts the interpretation of the Court in *Regina v. Paddington*, *supra* in this respect. Such an interpretation of service provides that the easement arises from the owners' right to enforce the provision of the particular service over or through that unit.

52 It is arguable as well that the services of an on-site superintendant are operational in nature, as much as the provision of water and hydro. The easement arises from the legally enforceable right or benefit to the owners of having those services provided from on-site. The easement that the owners have over the Super's Unit is that it guarantees and secures the positive obligation of the Super's Unit being used only to house a superintendent. This is no different from the easement that MPAC recognizes over the Guest Units securing the positive obligation of those units being used only to house invitees.

53 Mr. Gardiner submitted that casting all of these common amenity service units under the s. 12 definition of service easement was an elegant solution to the problem. These units used to be part of the common elements and are treated as such by everyone in "condo world". The problem was created when developers began to unitize them and force the sale of them to the **condominium corporations** to squeeze more dollars from them. Once they started to make them legal parcels of land, MPAC was duty bound to assess them separately. Their similarity to common elements remained the same, except it opened up the question as to the marketability of common amenity service units. There is no debate that there would be little third party interest in buying a condominium building's mechanical room or putting green, but MPAC differentiates the Super's Units alone as being fully assessable at market.

54 The Board is mindful of the rules of statutory interpretation requiring it to have reference to the ordinary meaning of words in context, to be read harmoniously with the scheme and purpose of the Act. This requires that a decision-maker step back and take a broad look at the actual practical effect of the interpretation, such that an absurdity does not result. The Board doubts that the intention of the Legislature was to fully tax the value of parcels of land that were once within the common elements, the values of which, if any were necessarily within the residential unit values. The Board understands that these common amenity service units as Mr. Gardiner has dubbed them have no legal standing, but they continue to share the characteristics of the common elements they once were, and there is no question that they are very much different from ordinary residential units. The practical effect of interpreting "service easement" in this way would see such common amenity service units as the Super's Units, that are for the benefit and service of a group of common owners, assessed in the same fashion, in the spirit of the *Schickedanz* decision and the jurisprudence considered in that case. It is the Board's view that accepting appellants' counsel's interpretation of service easement as a solution to this issue is in keeping with the scheme and purpose of both the

Condominium Act and the *Assessment Act*.

Common Interest Easement

Appellants' Submissions

55 Mr. Gardiner submitted that a Super's Unit is an easement which falls within the ambit of s.9 (1) of the *Assessment Act*. A Super's Unit meets the elements of an easement as set out in the leading English case *Ellenborough Park, Re* (1955), [1956] Ch. 131, [1955] 3 All E.R. 667 (Eng. C.A.).

56 The Super's Unit is a servient tenement, separately owned by the **condominium corporation**, which accommodates the interests of the dominant tenement individual unit owners by providing the benefits of the Super's Unit to the individual units' common elements and owners of the building. The dominant and servient owners are different persons because the definition of an owner in the *Condominium Act* relates to the registered owner of a unit. The **condominium corporation** in the case of the common amenity service units and common elements on one hand and the individual unit owners with respect to their residential, parking, and locker storage units on the other hand.

57 The individual owners have rights over the land amounting to an easement. The portion of each common interest appurtenant to each individually owned unit inevitably applies to assets such as the common amenity service units and that common interest irrevocably cannot be severed from, but must be sold with, each of the individual units. When a unit is sold, it must necessarily include its inherent common interest in the **condominium corporation's** assets (including the Super's Unit) and common elements.

58 The easement criteria are achieved because the Super's Unit is a service asset as a common amenity for the mutual benefit of, and shared by, the unit owners within the same **condominium corporation**. The Super's Unit is intended for the shared benefit of both the corporation and individual owners as common property in accordance with the criteria set out in the case of *Sunset Lake Owners Assn. v. Municipal Property Assessment Corp., Region No. 03*, [2002] O.A.R.B.D. No. 659 (Ont. Assess. Review Bd.). The Board determined the common areas as servient tenements because the intent was to use these two common blocks for the shared use of the owners as common property.

59 The present situation regarding Super's Units is analogous in substance and spirit to the following Board decisions. In *Metropolitan Toronto* ***Condominium Corp****. No. 1250 v. Mastercraft Group Inc.*, [2009] O.J. No. 3104, 2009 ONCA 584 (Ont. C.A.) at paragraphs [64] — [81] the Board adopted the Court of Appeal's findings that a parking unit is an easement appurtenant to each residential unit. In the *Schickedanz* decision, the Board rendered the recreation centre a servient tenement subject to an easement and governed by s. 9 of the *Assessment Act*.

MPAC's Submissions

60 Mr. Mitchell submitted that unlike Guest Units, individual unit owners do not have a right to use the Super's Unit, and as such, whatever benefit and interest that may exist in a Super's Unit has nothing to do with easements.

Analysis: Common Interest Easement

61 The basis for MPAC determining that Guest Units and not Super's Units are easements that are subject to s. 9 of the Act is that the unit owners have a right to occupy Guest Units, but have no right to occupy the Super's Units. The Board is not persuaded that the distinction is that clear. With respect to the Guest Units one of the typical declarations in evidence provides that "The Guest Suite Units shall only be used to provide overnight accommodation for the guests of the Owners and tenants of the Residential Units in this Corporation..."

62 Mr. Mitchell presumes that an owner can take up residence in a Guest Unit if the need arises. A strict reading of this provision suggests that only guests may occupy the units and that owners/tenants themselves are implicitly excluded, because by definition they are the only persons who cannot be defined as guests. While it may be that owners occasionally occupy Guest Units on an *ad hoc* basis, they do not have the legal right to do so and so do not possess an easement over them in the ordinary sense. In a contest over occupation privileges between a unit owner and another owner's invitee, the invitee should win on a strict interpretation of the provision.

63 While Mr. Mitchell would not characterize it as such, the easement that the owners have over the Guest Units is again the enforceable right to the service and benefit that it provides to the owners in accommodating their guests for the night. This is similar to the easement they have over the Super's Unit to the service of having an on-site superintendent. While it may not bear all of the elements of a common-law easement over the common interests, the Board has determined that it qualifies as an easement under s. 12 of the *Condominium Act*.

Marketability

Appellants' Submissions

64 When a **condominium corporation** purchases the Super's Unit from the declarant, there is no actual negotiation by a willing buyer. The declarant imposes all the criteria applicable to its sale of the Super's Unit on to the **condominium corporation** effectively dictating the price to be paid.

65 The declarant imposes a duty upon the **condominium corporation** to purchase the Super's Unit when it was specifically stated in its declaration or description. The **condominium corporation** would be in breach of its duty pursuant to s. 17.(3) and 119.(1) of the *Condominium Act* if it sold the Super's Unit. Moreover, no reasonable purchaser would purchase such a unit given the restrictions set out in the **condominium corporation's** declaration or description. The purchaser would not obtain good and clear title, but instead would obtain a clouded, litigious title to the Super's Unit.

66 A **condominium corporation** cannot sell a Super's Unit without amending its declaration, or description, pursuant to the difficult criteria imposed by s. 107 of the *Condominium Act*. With respect to Mr. Gardiner's appellants' declarations, the criterion to approve an amendment is that it is required that 80% of the unit owners must consent in writing. This is a high threshold. Ms. Dirks submitted that s. 97 of the *Condominium Act* requires at least 66.67% benchmark and this also constitutes a significant benchmark to achieve.

67 The appellants' counsels did agree that if such a speculative contingency did take place, then MPAC would be entitled to assess that unit as a typical residential unit. However, this is highly improbable and unrealistic within the "condo world". They emphasized that one would expect that current value should apply to a realistic measure of current circumstances, rather than some future possibility. They further stated that they were not aware of any case where a **condominium corporation** was able to amend the declaration to sell a Super's Unit.

68 Mr. Fleet submitted that the heart of valuation is set in both *Vancouver Assessor, Area No. 9 v. Bramalea Ltd.*, [1990] B.C.J. No. 2730 (B.C. C.A.) ("*Bramalea Ltd.")* and in *BCE Place Ltd. v. Municipal Property Assessment Corp., Region No. 9*, [2010] O.J. No. 4357, 2010 ONCA 672 (Ont. C.A.) ("*BCE Place").* In *Bramalea Ltd.* the British Columbia Court of Appeal stipulated that an unfettered market transaction must take place between informed parties "...free from duress and influenced neither by speculative considerations nor by any special value which the property might have to a particular purchaser, which it would not otherwise have". Similar reasoning exists in the *BCE Place* decision where the Ontario Court of Appeal ruled that assessed valuations should be based on the practical application of market realities rather than on some incredible situation that has no basis in practicality or reality. In other words, MPAC should not establish hypothetical scenarios of valuation based on subjective elements of valuation or on speculative future market transactions involving possible changes in a property's permitted use.

69 The appellants' legal counsel cited *Abdulmalek v. Municipal Property Assessment Corp., Region No. 7*, [2008] O.A.R.B.D. No. 279 (Ont. Assess. Review Bd.) ("*Jamal*") where the Board decided that the tax payer should not have to pay taxes based on a full value which could never be realized in the market because the property was bound by an agreement which was originally governed by zoning criteria restricting the property so that 50% would have to be exclusively used for student housing. They submitted that the *Jamal* case confirms that current value assessment should not be based upon some speculative possibility that a declaration might be amended, but should be governed by existing circumstances.

70 Mr. Gardiner maintained that the residential units do not have restrictions placed upon them, and the owners may sell at any time at their option, unlike a **condominium corporation** which cannot do so without due diligence and meeting stringent requirements set out in its declarations and provisions and the *Condominium Act*.

MPAC's Submissions

71 Mr. Mitchell submitted that a Super's Unit is not a common element but a discrete residential unit with a special purpose. It is within the unit owners' control to do what they wish with assets owned by the **condominium corporation**. The provisions in the declaration are not encumbrances that deter the true owners from disposing of an asset. Mr. Mitchell relied on *Metropolitan Toronto & Region Conservation Authority v. Minister of National Revenue* (1980), 11 O.M.B.R. 25 (O.M.B.); affirmed, (1982), 13 O.M.B.R. 191 (Ont. H.C.) *p.29 ("MTRCA")* which held that lands which may not be offered for sale or that an Order in Council would be required to do so, does not mean that the lands should be valued at less than similar lands in the area. Their value is as great as the value of similar lands owned by a private individual, and if indeed they were to be sold, they would command a similar value. An Order in Council stipulation, and in this matter before the Board, a provision in a declaration, is not an impediment to a sale although the Order in Council or an amendment to the declaration would have to be obtained before a sale could be made. Mr. Mitchell emphasized that no adjustment to the current value of the Super's Unit should be made.

72 Mr. Mitchell submitted that the legal possibility exists for the **condominium corporation**, and its true owners, the unit holders, to sell the Super's Unit at their option. The Super's Unit has a current value relative to other condominium units because it can always be put on the market. The threshold amounts put forward by the appellants' counsel are irrelevant and their concerns about the probable outcomes are not insurmountable. MPAC has the responsibility to assess all lands, and this is what it has done in compliance with *MTRCA* case.

73 In respect to *Jamal*, Mr. Mitchell submitted that this decision deals with a matter of leave. It is instructive, but not binding on the Board.

Analysis: Marketability

74 All of Mr. Mitchell's submissions on marketability apply equally to the Guest Units which MPAC values at $9 each. Even though MPAC has recognized them as easements for the purposes of s. 9, the easement could be extinguished and they could also be sold for full value if 80% of the owners approved. This is a very unlikely scenario, just as it is for the Super's Units. The Board accepts the position of appellants' counsel that the positive benefits provided by the Super's Units and Guest Units to the owners make it exceedingly difficult to obtain a large majority of owners to give them up.

75 The Court in *MTCC 1172* talks about this difficulty: "It is agreed that there is no possibility of the Guest Unit being sold because of the 90% approval requirement..." Presumably MPAC counsel in that case agreed that 90% was impossible, but for these subject condos, counsel submits that 80% is achievable. The Court found that since there was no realistic possibility of a sale at market value, it was unlikely that market value was reflected *pro rata* in purchase prices of the residential units. "If the purchase price reflects any amount in respect of the Guest Unit, conceptually it will be the value of the right to put up guests..."; and this value would be "substantially less than the *pro rata* share of the market value" or have "no value".

76 Despite this analysis, the Court goes on to find that the "Guest Unit is a marketable unit in the condominium" and concludes it should be assessed at full market value. This Board, with respect, must arrive at a different conclusion. The Board agrees with the Court's analysis that suggests that whatever lesser amount, if any, that the Guest Unit or by extension a Super's Unit is worth to the owners because it is unsellable to others, may be reflected in their purchase prices. However, the conclusion that we draw from this analysis is that the assessed values of these Super's Units should mirror the lesser or no value of the right to an on-site superintendent that results from the improbability of an open market sale, and not the full market value that cannot reasonably be realized.

77 The Court in *MTCC 1172* continues to find that the substantially less *than pro rata* market value means that "the issue of double taxation pertains to a smaller amount than is envisaged by the unit owners." The Board infers that this could only be the case where the units in issue are assessed at the smaller amount and not at full market value. In any event, this Board reiterates its view expressed in *Schickendanz* that any amount of double taxation is wrong, no matter how small.

78 This guessing game on marketability and possible values evidently dependant on degrees of necessary approval, from 66.67% to 90% to determine the relative improbability of a sale, illustrates how the valuation has entered the realm of speculation. There is the additional speculation on which of the myriad of common amenity service areas that have been unitized should be isolated for full market valuation treatment. The Board agrees with the cases that hold that current value should not be based on some contingency or future occurrence. If the balance of probabilities is the test, the Board is persuaded that it is not

likely that 67% or more of condominium owners would willingly give up the benefits of either the Super's Units or Guest Units. To value them based on the fact that they can, is to base the valuation on a speculative improbability. The test should not be whether it is minimally possible, but whether it is reasonably probable.

79 Mr. Mitchell relies on the decision in *MTRCA* where the Court found that conservation land in the Township of Uxbridge should be valued at full market value even though an Order in Council would be required to allow a sale. The Board agrees that not every potential sale that is subject to some pre-condition would affect the value. Indeed in the MTRCA case the Court states that "Order in Council is not an impediment to a sale..." This is in contrast to the subject Super's Units where the Board finds that obtaining a two thirds majority of owners to sell property from which they all derive a benefit is a substantial impediment to a sale.

80 The Board finds the reasoning in *Bramalea Ltd.* to be more applicable to the present situation: that current value should not be influenced by "speculative considerations" or "future changes in permitted use..." The Board echoes the endorsement of the Divisional Court in *Jamal* that an owner should not "pay taxes based on a full value which can never be realized in the market." The Board follows the reasoning from the Court of Appeal and Divisional Court in *BCE Place* that valuation ought not to be based on an "entirely hypothetical scenario". The Board accepts Mr. Gardiner's submission that the sale of a Super's Unit is not based on any real (condo) world experience, and that renders it both hypothetical and speculative.

81 Current value should be just that. Currently, the Super's Unit could not sell for any amount of money because its occupancy is restricted to a miniscule segment of the population: superintendants. In the improbable event that the owners elect in sufficient numbers to remove that restriction, its market value and thus current value assessment should rise to the same levels as all the other condominiums not so restricted. Until such time its value is nominal.

Added Value

Appellants' Submissions

82 Mr. Gardiner submitted that the evidence that the Super's Unit, as a servient tenement, has conferred an "added value" upon the dominant tenement residential units is confirmed by the fact that each and all of the unit owners have agreed to purchase their units in full knowledge that they would have to pay the common expenses to purchase the Super's Unit including all expenses related to the mortgage, realty taxes, insurance and repair costs. Such added value in the residential units has existed since the moment the declaration and description were registered and a parcel register was opened for each unit. Subsequent purchasers would be deemed in practice and in law to be aware that to have the benefit of sharing the Super's Unit asset in accordance to the common interest applicable to the owner's unit, they would be liable for all the expenses attributed to it.

83 The obligation of all units to pay expenses applicable to the Super's Unit confirms that owners and purchasers of residential units recognize the value of the Super's Unit as forming an added value inherent in each individually owned unit of the **condominium corporation**.

84 Although the Super's Unit must be assessed for some amount as required in s. 15.(1) of the *Assessment Act*, that assessment should be assessed to the nominal amount of $9. The current value assessments of all the other units should not be increased in dollar amounts because the current value assessments of the other individual units already take into account sale

prices of similar units and their appurtenant common interests in all common amenity assets of the corporation as assessed by willing purchasers in the free market.

85 Finally, the added value of Guest Units is already included in the current value of the owners' units because MPAC has allocated a $9 assessed value to over one hundred Guest Units including ones in the appellants' condominiums. MPAC recognizes that nominal assessment of a Guest Unit is reflected as $9 with reference to s. 9 of the *Assessment Act* on the basis of an easement in favour of the owners of the other units. The same criteria should be applicable to the Super's Units.

MPAC's Submission

86 Mr. Mitchell submitted that the two leading cases *Montreal (City) v. Sun Life Assurance Co. of Canada* (1951), [1952] 2 D.L.R. 81 (Quebec P.C.) and *Ontario (Assessment Commr York) v. Office Speciality Ltd*; *Ontario (Commission À L'Évaluation York) v. Office Speciality Ltd*; *Ontario (Reg Assessment Commr Reg 14) v. Office Speciality Ltd* [1974] require that lands be assessed as to their market values. The Super's Unit needs to be assessed since it is not a common element of the **condominium corporation** but an asset which does not run with the land. It is not an easement but a marketable piece of property that may legally be sold for market value. The added value concept is not available to the individual unit owners because they do not use the Super's Unit. It stands alone, as opposed to Guest Units which may be used by the unit owners. The common law does not recognize or enforce positive covenants which do not run with the land. The Super's Unit is such an entity.

Analysis: Added Value

87 The Board has determined that the Super's Units do not have an exchange value in the market. The Board agrees with the Court in *MTCC 1172* that the value that they have to the residential unit owners lies in the benefit that is provided to those owners. The Court suggested that for Guest Units, this was a much lesser value than *pro rata* market value or possibly of no value at all. As this Board stated in *Schickendanz*, if the property is of no value to anyone else, then whatever value it has is necessarily found within the aggregate values of all the other units. The Board adopts that reasoning here and determines that such added value is within those unit values and also determines that it not necessary to specifically quantify the added value to each such unit.

Inequitable with Respect to Guest Units

Appellants' Submissions

88 Both Guest Units and Super's Units are common amenity assets owned by the **condominium corporation** on behalf of the individual unit owners. Though the owners derive benefit from the services attached to these two types of units and are obligated to pay all required common expenses to acquire and operate the Guest Units or Super's Units, owners are not entitled to occupy the Guest Units or the Super's Units. There are insignificant distinguishing differences between the Guest Units and Super's Units. Both units are unlike residential units which are subject to free and open market transactions. The onerous restrictions placed on the Guest Units and Super's Units are not insubstantial with respect to placing the units on the market.

89 It would be unfair and discriminatory to assess the Super's Units at full current value when a substantial number of Guest Units have been assessed by MPAC at nominal value. MPAC has allocated a $9 assessed value to four Guest Units at TSCC 1498 alone. Mr. Fleet emphasized that "equity trumps": Super's Units should be treated in the same way as Guest Units since they are significantly similar to each other. Only in the "MPAC world" would such a discrepancy in treatment among similar types of units continue to exist despite the reality of the situation.

MPAC's Submissions

90 Mr. Mitchell maintained that the Super's Units are equitably assessed at full current value because they are no different from the residential units. They are not like the Guest Units which he asserts the unit owners have a right to use and this makes the Guest Units different. He submitted that the Super's Units should be assessed equitably with the residential units because they are more similar.

Analysis: Equity

91 Section 44.(3)(b) of the *Assessment Act* requires the Board to make the assessment of the subject properties equitable with those of similar properties in the vicinity. The candidates for similar properties in this vicinity are:

- residential units which are owned by individuals and occupied by them, and trade freely on the real estate market for $300,000 and more

- Guest Units which are owned by **condominium corporations** that restrict occupancy to a select few people, and cannot be sold unless an improbable contingency occurs

92 The Super's Units are owned by **condominium corporations** that restrict occupancy to a select few people, and cannot be sold unless an improbable contingency occurs. The Super's Units are physically similar to both the residential units and the Guest Units, but the Super's Units clearly are more similar to the Guest Units. The Board has rejected Mr. Mitchell's argument that Guest Units are different because owners can use them. If the Guest Units are assessed for $9, then the Board determines that it is inequitable that the Super's Units are assessed at the same level of values as the residential units. The assessments of the Super's Units should be adjusted to make them equitable with those of the Guest Units at nominal values.

Is a Declaration Restriction a Restrictive Covenant?

Appellants' Submissions

93 Mr. Gardiner submitted that when a **condominium corporation's** declaration contains a provision listing a superintendent's unit or where there is a more specific restriction requiring the corporation owned common amenity service unit to be occupied by a superintendent, or any other person, any such declaration provision is a restrictive covenant as referred to in s. 9(3) of the *Assessment Act*. Similar types of restrictions may apply to visitor parking units, to guest units, recreational units or mechanical units, for example. Moreover, when a restrictive covenant in a declaration binds a unit owned by the **condominium corporation**, s. 9(1) of the *Assessment Act* becomes applicable.

94 Mr. Gardiner cited *Tulk v. Moxhay* (1848), 2 Ph. 774 (Eng. Ch. Div.) which established the doctrine that both the benefit and the burden of the restrictive covenant would run with the land, so that any successive owner of the dominant tenement could sue the owner of the servient tenement if the owner of the servient tenement lands breached the restrictive covenant. The person suing to enforce the covenant must own the dominant tenement and must establish that the benefit has in fact passed to him. The restrictive covenant should clearly set out the restrictions for the benefit of the described dominant tenement lands. In the case of the Super's Unit referred to in a declaration, its use and occupancy is restricted to the superintendent. It is not a normal residential unit, but a unique employment/residential unit restricted in use and occupancy for a superintendent in order to provide services to the buildings' common elements, units, and individual owners.

95 Each of the units, including the Super's Unit, is the equivalent of lots on a plan of subdivision. The original purchasers would have derived their title to their respective Super's Unit and individual units from the declarant. The declarant intended to confer the benefit of the Super's Unit upon the **condominium corporation**, its common elements, units, and unit owners. The purchasers acknowledged that benefit by purchasing their units having had notice of those restrictions upon the Super's Unit set out in the **condominium corporation's** disclosure statement, declaration, first year budget and ongoing budgets. The geographic area of the **condominium corporation** is always well defined in its description.

96 Mr. Gardiner argued that a building scheme is the most common type of restrictive covenant. He cited a passage from the text *Conveyancer's Guide to Real Estate Practice in Ontario* to highlight this point. Mr. Gardiner also referred to the five requisites of a building scheme which were established by the English case of *Elliston v. Reacher*, [1908] 2 Ch. 374 (Eng. Ch. Div.), 385. These five requisites have been met.

97 The appellants' counsel submitted that restrictive covenants are akin to building restrictions since the declaration and description must be registered on title. Section 7 (4) (b) and (c) and s. 8 (1) (g) of the *Condominium Act* permit a declaration and a description to have restrictive provisions. The declaration and description restrictions are of a superior nature similar to mandatory statutory obligations. The **condominium corporation** cannot deviate from any of these restrictions because the corporation would be in breach of s. 7. (4) (b) and (c), 8.(1) (g), 17.(3) and 119. (1) of the *Condominium Act*.

98 A restriction in a **condominium corporation's** declaration or description is more difficult to revoke or change than a zoning by-law which just requires a vote of city council members. But a declaration or description requires a high threshold vote of its unit owners anywhere from 66.67% as stipulated in the *Condominium Act* to 80% within the declarations filed in evidence with the Board.

99 A **condominium corporation** and its unit owners have no choice but to comply with the declaration. The declaration is not like a voluntary agreement. Several precedent cases buttress the constitutional strength of a declaration in contrast to a voluntary agreement: *Basmadjian v. York* ***Condominium Corp****. No. 52*, [1981] O.J. No. 2973, 32 O.R. (2d) 523 (Ont. H.C.); *Lexington on the Green Inc. v. Toronto Standard* ***Condominium Corp****. No. 1930*, [2010] O.J. No. 4853, 2010 ONCA 751 (Ont. C.A.), and *Metropolitan Toronto* ***Condominium Corp****. No. 949 v. Irvine*, [1992] O.J. No. 1598 (Ont. Gen. Div.) ("*MTTC 949")* was upheld by the Ontario Court of Appeal.

MPAC's Submissions

100 Mr. Mitchell maintained that the provisions in the declaration and description of a **condominium corporation** establishing a Super's Unit or for that matter a Guest Unit do not meet the requisites set out in *Elliston v. Reacher* *supra* to be restrictive covenants. His main contention was that the Super's Unit is an asset of the corporation and the restriction that is upon it can be undone by the owners who are supposedly restricted by it. It is within their absolute control to change the declaration and remove the restriction on the Super's Unit. Therefore there is no restrictive covenant in existence.

Analysis: Restrictive Covenant

101 If the provision in the declaration requiring the Super's Units to be used only to house a superintendent can be characterized as a restrictive covenant, then it can be deemed to be an easement pursuant to s. 9.(3) of the *Assessment Act*, and assessed in accordance with that section.

102 The positions on both sides of this interesting legal issue were ably argued by all counsel. Extending the ambit of the legal concept of a restrictive covenant to cover restrictions found in condominium declarations or disclosure statements is a novel approach that one day may require a determination. Such a determination is not required on the particular facts before it in this case. The appellants succeed on three of their issues, and a finding on the issue of restrictive covenant is not necessary for the Board's conclusion.

Conclusion

103 The Board concludes:

- The Super's Units constitute an easement within the meaning of s. 12.(1) 1. of the *Condominium Act* and should be assessed pursuant to s. 9 of the *Assessment Act* as a servient tenement. The units currently have no market value to any third parties and so any value they may possess is to the owners and is necessarily already within the aggregate assessed values of the residential units, in accordance with the reasoning in *Schickedanz* and the jurisprudence considered in that case. This transfer of added value reduces the values of the Super's Units to the nominal amount of $9 for the 2011 and 2012 taxation years.

- In the alternative, the Board in following the reasoning in the *Bramalea Ltd.*, *BCE Place* and *Jamal* decisions, concludes that there is currently no willing seller and there are no willing buyers for the Super's Units. As they are not marketable, they have no market value. The Board therefore determines the current values of these units to be $9 for the 2011 and 2012 taxation years.

- In the alternative, the Board determines that a valuation of the Super's Units at the same level as the assessed values of the residential units is inequitable. The Board finds the most similar properties in the vicinity to be the Guest Units. The Board has made reference to the assessments of those units pursuant to s. 44.(3)(b) and hereby adjusts the value of the Super's Units to $9 for the 2011 and 2012 taxation years to make them equitable with similar properties in the vicinity.

- Any assessments returned under s. 33 are reduced to NIL.

2013 CarswellOnt 3112,

Schedule A

Written Reason No	*Request Type*	*Release Date*	*Hearing No*
117363	Hearing	March 15, 2013	526796

Appeal No	*Roll Number*	*Property Address*	*Region*	*Assessed Person*	*Unit*	*Year*	*Decision*
2896398	1801 020 025 42010 0000	1210 to 0 RADOM ST	13	DURHAM CONDO-MINIUM COI	UNIT	2011	CHANGE TOTAL VALUE FROM $143,000 TO $9
2909677	1801 020 025 42010 0000	1210 to 0 RADOM ST	13	DURHAM CONDO-MINIUM COI	UNIT	2012	CHANGE TOTAL VALUE FROM $143,000 TO $9
2853060	1904 041 080 02202 0000	600 to 0 FLEET ST	09	TORONTO STANDARD COND	sum	2011	CHANGE TOTAL VALUE FROM $285,000 TO $9
2909035	1904 041 080 02202 0000	600 to 0 FLEET ST	09	TORONTO STANDARD COND	sum	2012	CHANGE TOTAL VALUE FROM $285,000 TO $9
2924411	1904 062200 00505 0000	55 to D STEWART ST	09	TORONTO STANDARD COND	sum	2011	CHANGE TOTAL VALUE FROM $353,000 TO $0
2926560	1904 062200 00505 0000	55 to D STEWART ST	09	TORONTO STANDARD COND	sum	2012	CHANGE TOTAL VALUE FROM $353,000 TO $9
2883672	1904 066750 00314 0000	763 to 0 BAY ST	09	TORONTO STANDARD COND	UNIT	2011	CHANGE TOTAL VALUE FROM $285,000 TO $9
2607913	1904 066 750 00314 0000	763 to 0 BAY ST	09	TORONTO STANDARD COND	UNIT	2012	CHANGE TOTAL VALUE FROM $285,000 TO $9
2884352	1904 066750 01000 0000	761 to 0 BAY ST	09	TORONTO STANDARD COND	sum	2011	CHANGE TOTAL VALUE FROM $388,000 TO $9
2906267	1904 066750 01000 0000	761 to 0 BAY ST	09	TORONTO STANDARD COND	sum	2012	CHANGE TOTAL VALUE FROM $388,000 TO $9
2883666	1904068020 00976 0000	77 to 0 MAITLAND PLACE	09	METROPOLITAN TORONTO C	103	2011	CHANGE TOTAL VALUE FROM $266,000 TO $9
2907904	1904 068 020 00976 0000	77 to 0 MAITLAND PLACE	09	METROPOLITAN TORONTO C	103	2012	CHANGE TOTAL VALUE FROM $266,000 TO $9
2883665	1904 068 020 01040 0000	77 to 0 MAITLAND PLACE	09	METROPOLITAN TORONTO C	224	2011	CHANGE TOTAL VALUE FROM $264,000 TO $9
2906939	1904 068 020 01040 0000	77 to 0 MAITLAND PL	09	METROPOLITAN TORONTO C	UNIT	2012	CHANGE TOTAL VALUE FROM $264,000 TO $9

2883 664	1904 068 210 00275 0000	887 to 0 BAY ST	09	EAST OF BAY DEVELOPMEN	2011	CHANGE TOTAL VALUE FROM $20,000 TO $9
2907 276	1904 068210 00275 0000	887 to 0 BAY ST	09	EAST OF BAY DEVELOPMEN	2012	CHANGE TOTAL VALUE FROM $20.000 TO $9
2930 655	1906 041080 00110 0000	11 to 0 THORNCLIFFE PADI	09	METROPOLITAN TORONTO C	UN IT 2012	CHANGE TOTAL VALUE FROM $184.000 TO $9
2930 252	1908 072200 05002 0000	153 to 0 BEECROFT RD	09	TORONTO STANDARD COND	UN IT 2012	CHANGE TOTAL VALUE FROM $315,000 TO $9
2889 196	1908 072200 06002 0000	4978 to 0 YONGE ST	09	TORONTO STANDARD COND	UN IT 2011	CHANGE TOTAL VALUE FROM $247,000 TO $9
2903 369	1908 072200 06002 0000	4978 to 0 YONGE ST	09	TORONTO STANDARD COND	UN IT 2012	CHANGE TOTAL VALUE FROM $247,000 TO $9
2889 202	1908 072200 06990 0000	4968 to 0 YONGE ST	09	TORONTO STANDARD COND	UN IT 2011	CHANGE TOTAL VALUE FROM $346,000 TO $9
2908 517	1908 072200 06990 0000	4968 to 0 YONGE ST	09	TORONTO STANDARD COND	UN IT 2012	CHANGE TOTAL VALUE FROM $346,000 TO $9
2926 957	1908 092 540 00903 0000	33 to 0 EMPRESS AVE	09	METROPOLITAN TORONTO C	UN IT 2012	CHANGE TOTAL VALUE FROM $260,000 TO $9
2930 253	1908 092720 00902 0000	28 to 0 EMPRESS AVE	09	METROPOLITAN TORONTO C	UN IT 2012	CHANGE TOTAL VALUE FROM $274,000 TO $9
2888 538	1908 102270 00708 0000	255 to 0 THE DONWAY W	09	METRO TORONTO CONDO C	122 2011	CHANGE TOTAL VALUE FROM $286,000 TO $9
2908 203	1908 102270 00708 0000	255 to 0 THE DONWAY W	09	METRO TORONTO CONDO C	122 2012	CHANGE TOTAL VALUE FROM $286,000 TO $9
2889 152	1908 113050 01118 0000	12 to 0 REAN DR	09	TORONTO STANDARD COND	UN IT 2011	CHANGE TOTAL VALUE FROM $257,000 TO $9
2901 958	1908 113 050 01118 0000	12 to 0 REAN DR	09	TORONTO STANDARD COND	UN IT 2012	CHANGE TOTAL VALUE FROM $257,000 TO $9
2889 149	1908 113050 07142 0000	17 to 0 BAR-BERRY PLACE	09	TORONTO STANDARD COND	UN IT 2011	CHANGE TOTAL VALUE FROM $243,000 TO $9
2906 590	1908 113050 07142 0000	17 to 0 BAR-BERRY PLACE	09	TORONTO STANDARD COND	UN IT 2012	CHANGE TOTAL VALUE FROM $243,000 TO $9
2889 586	1908 113050 14329 0000	2 to 0 REAN DR	09	TORONTO STANDARD COND	2011	CHANGE TOTAL VALUE FROM $303,000 TO 39
2909 326	1908 113050 14329 0000	2 to 0 REAN DR	09	TORONTO STANDARD COND	2012	CHANGE TOTAL VALUE FROM $303.000 TO 39
2889 148	1908 113050 14448 0000	18 to 0 KENASTON	IB	TORONTO STANDARD COND	UN IT 2011	CHANGE TOTAL VALUE FROM $360.000 TO 39

		GDNS				
2909 327	1908 113050 14448 0000	18 to 0 KENASTON GDNS	09 TORONTO STANDARD COND	UNIT	2012	CHANGE TOTAL VALUE FROM $360,000 TO 39
2930 657	1908 11305015674 0000	3 to 0 REAN DR	09 TORONTO STANDARD COND		2012	CHANGE TOTAL VALUE FROM $361.000 TO 39
2930 656	1908 113050 15675 0000	1 to 0 REAN DR	09 TORONTO STANDARD COND		2012	CHANGE TOTAL VALUE FROM $361,000 TO 39
2883 663	1919 054 015 00100 0000	2045 to 0 LAKE SHORE BLV	09 YORK **CONDOMINIUM CORP**	101	2011	CHANGE TOTAL VALUE FROM $287,000 TO 39
2903 556	1919 054015 00100 0000	2045 to 0 LAKE SHORE BLV 09	YORK **CONDOMINIUM CORP**	101	2012	CHANGE TOTAL VALUE FROM $287,000 TO 39
2853 260	1936 020 110 98099 0000	302 to 0 JOHN ST	1- YORK REGION STANDARD C	UNIT	2011	CHANGE TOTAL VALUE FROM $244,000 TO 39
2911 860	1936 020 110 98099 0000	302 to 0 JOHN ST	14 YORK REGION STANDARD C	UNIT	2012	CHANGE TOTAL VALUE FROM $194,000 TO 39
2930 251	2105 040 154 01549 0000	4080 to 0 LIVING ARTS DR	15 PEEL STANDARD CONDOMIN	406	2012	CHANGE TOTAL VALUE FROM $254,000 TO 39
2930 343	2105 040 154 98000 0000	360 to 0 PRINCESS ROYAL	15 PEEL STANDARD CONDOMIN	101	2012	CHANGE TOTAL VALUE FROM $252,000 TO 39
2930 547	2105 040 156 59130 0000	335 to 0 RATHBURN RD W	15 PEEL STANDARD CONDOMIN	117	2012	CHANGE TOTAL VALUE FROM $236,000 TO 39
2930 254	2105 060 200 44300 0000	2177 to 0 BURNHAMTHORP 15	PEEL CONDOMINI	103	2012	CHANGE TOTAL VALUE FRO

			U M CO RP C			M $224, 000 TO 39	
2930 342	2105 060 200 46406 0000	1900 to 0 THE COLLEGEWA	15	PEEL STANDARD CONDOMIN	207	2012	CHANGE TOTAL VALUE FROM $446,000 TO 39
2889 576	2110 010200 01106 0000	1 to 0 BELVE-DERE CRT	15	PEEL CONDOMINIUM CORPC	sum	2011	CHANGE TOTAL VALUE FROM $225,000 TO $9
2896 250	2124 100 008 00287 0000	60 to 0 ANN ST	15	PEEL STANDARD CONDOMIN	sum	2011	CHANGE TOTAL VALUE FROM $214,000 TO $9
2930 549	2308 030011 02208 0000	19 to 0 WOODLAWN RD E	22	WELLINGTON CONDOMINIUN	108	2012	CHANGE TOTAL VALUE FROM $176,000 TO $9
2890 738	2401 010 030 08329 0000	2391 to 0 CEN-TRAL PARK D	15	BATTENWAY DE-VELOPMENT	sum	2011	CHANGE TOTAL VALUE FROM $255,000 TO $9
2930 340	2402 090900 36007 0000	5090 to 0 PINEDALE AVE	15	HALTON CONDO-MINIUM COR	108	2012	CHANGE TOTAL VALUE FROM $233,000 TO $9
2930 548	2402 090 900 36206 0000	5080 to 0 PINEDALE AVE	15	HALTON CONDO-MINIUM COR	107	2012	CHANGE TOTAL VALUE FROM $239,000 TO $9
2930 341	2402 090 900 36407 0000	5070 to 0 PINEDALE AVE	15	HALTON CONDO-MINIUM COR	108	2012	CHANGE TOTAL VALUE FROM $229,000 TO $9
2930 344	2402 090 904 03000 0000	1998 to 0 IRON-STONE DR	15	HALTON STANDARD CONDOI	sum	2012	CHANGE TOTAL VALUE FROM $276,000 TO $9
2930 654	2906 030 018 88802 0000	640 to 0 WEST ST	20	BRANT CONDOMIN-IUM CORF	UNIT	2012	CHANGE TOTAL VALUE FROM $130,000 TO $9
2930 658	2906 03002241108 0000	9 to 0 BONHEUR CRT	20	BRANT CONDOMINUM CORP	UNIT	2012	CHANGE TOTAL VALUE FROM $146,000 TO $9
2930 683	3936 050 010 10962 0000	323 to 0 COLBORNE ST	23	MIDDLESEX CONDOMINUM C	UNIT	2012	CHANGE TOTAL VALUE FROM $143,000 TO $9
2896 251	4364 010 011 19856 0000	827 to 0 RIVER RD W	16	SIMCOE STANDARD CONDOI		2011	CHANGE TOTAL VALUE FROM $119,000 TO $9
2916 624	4364 010 011 19856 0000	827 to 0 RIVER RD W	16	SIMCOE STANDARD CONDOI		2012	CHANGE TOTAL VALUE FROM $49,500 TO $9

END OF DOCUMENT