

**CITATION:** Thunder Bay Condominium Corporation No. 15 v. Ewen, 2015 ONSC 6611  
**COURT FILE NO.:** CV-15-0397  
**DATE:** 2015-10-26

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** THUNDER BAY CONDOMINIUM CORPORATION NO. 15, Applicant, and  
BRUCE EWEN and JOAN EWEN, Respondents

**HEARD:** October 20, 2015

**BEFORE:** Fregeau J.

**COUNSEL:** *Jordan R.D. Lester*, for the Applicant

*David W. Dubinsky*, for the Respondents

**ENDORSEMENT ON APPLICATION**

*Nature of the Application*

[1] The applicant requests an order as follows:

1. Enforcing compliance with the By-Laws and Rules of Thunder Bay Condominium Corporation No. 15;
2. A declaration that the respondents immediately stop smoking within their condo unit pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. 43;
3. An order that the respondents pay the sum of \$1,925.00 within 30 days;
4. Costs of the application.

*Background*

[2] Thunder Bay Condominium Corporation No. 15 (the “**applicant**”) operates Boulevard Park Place Condominiums in Thunder Bay, a four storey condo complex comprising 72 residential units. Bruce and Joan Ewen (the “**respondents**”) have owned and resided in Unit #23

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for approximately 23 years. The respondents both smoke and have smoked in their condo for the entire time they have owned it.

[3] On or about April 15, 2009, the applicant passed the following By-Law #6 (the “By-Law”):

*Thunder Bay Condominium Corporation No. 15 will henceforth be a Smoke Free Building as of April 15, 2009. Grandfathered to this By-Law will be those unit owners as of April 15, 2009, who smoke in their unit. Any future Unit Owners, Tenants and or guests are not permitted to smoke in any units or common areas of the building.*

[4] This By-Law has never been amended or repealed.

[5] On or about March 1, 2015 the applicant also passed the following Rule (the “Rule”):

*In conjunction with By-Law #6 in becoming a smoke free building, individuals who were grandfathered to be allowed to smoke in their unit will be grandfathered until July 1, 2015 due to the health issues of second hand smoke. After July 1, 2015 individuals will have to smoke outside of the building...*

[6] The respondents continue to smoke in their unit. The applicant has fined the respondents a total of \$1,925.00 as a result. They have not paid these fines.

#### *Position of the Applicant*

[7] The applicant submits that the *Condominium Act*, 1998, SO 1998, c. 19 (the “Act”) authorizes it to enact by-laws by resolution of the board of directors and approved by 50% of the unit owners, which among other things, govern the management of the property.

[8] The applicant submits that the *Act* also allows the applicant’s Board of Directors to make Rules respecting the use of common elements and units in order to, among other things:

*s. 58(1)(a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or*

*(b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.*

[9] The applicant submits that both the Rule and By-law were validly enacted. Both prohibit smoking within the condo complex. The applicant submits that the Rule is neither inconsistent with nor subordinate to the By-Law. The Applicant submits that both have the same purpose – to make the condo complex smoke free. The applicant also submits that there is nothing in the *Condominium Act*, 1998, S.O. 1998, c. 19 (the “*Act*”) that characterizes rules as subordinate to by-laws.

[10] The applicant submits that pursuant to s. 119(3) of the *Act*, the condo corporation has the right to require the owners and the occupiers of units to comply with the by-laws and the rules.

***Position of the Respondent***

[11] The respondent submits that the applicant has attempted to amend the By-Law by enacting the Rule. The respondent submits that the By-Law permits the respondents and other owners who smoked in their units as of April 15, 2009 to continue to do so. The Rule purports to prohibit them from doing so after July 1, 2015.

[12] The respondent submits that a by-law may be amended only by resolution of the Board and is not effective until owners of a majority of the units of the corporation vote in favour of confirming it.

[13] The applicant also submits that the Rule is inconsistent with the By-law. Pursuant to s. 58(2) of the Act, rules must be “*reasonable and consistent with this Act...and the by-laws.*” The respondent concedes that the Rule is not unreasonable. The respondent submits that it is, however, inconsistent with the By-law and therefore, pursuant to s. 58(4) of the Act, it “*shall be deemed to be amended accordingly.*”

[14] The respondent submits that the logical amendment to the Rule in this case is to delete the portions of the Rule which are inconsistent with the By-law – that those owners who smoked in their units as of April 15, 2009 can no longer do so after July 1, 2015.

#### *Discussion*

[15] There is no suggestion that the By-Law is invalid. The respondent acknowledged that the Rule is not unreasonable. It was not suggested that the rule is inconsistent with the *Act*. The respondent did not dispute the applicant’s submission that second hand smoke is a serious health hazard.

[16] The only basis upon which the respondent suggested that the Rule is invalid is that it is inconsistent with the By-Law as it applies to unit owners who were grandfathered by the By-law. The single issue to be determined on this application is therefore whether the Rule is consistent with the By-Law.

[17] Section 56(1)(a) of the *Act* allows a condo board to make by-laws governing the management of the corporation, among other things. Section 58(1) of the *Act* allows a condo board to make rules promoting the safety, security or welfare of the owners and to prevent

unreasonable interference with the use and enjoyment of the common elements and units of the corporation. Section 117 of the Act provides that “no person shall...carry on an activity in a unit...if the ...activity is likely to....cause injury to an individual.”

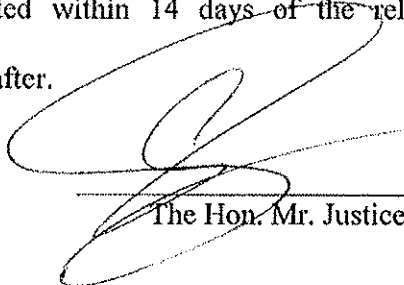
[18] Looked at together and in conjunction with sections 56, 58 and 117 of the *Act*, I am of the opinion that the intention and purpose of the impugned Rule and its general application are consistent with the By-Law – both the By-Law and Rule are intended to make the entire condo complex smoke free in order to promote the safety and welfare of the owners and to prevent unreasonable interference with the use and enjoyment of the common elements and units.

[19] Given this finding, the Rule is valid and applies to the respondents. An Order shall issue as follows:

1. The Respondents, Bruce Ewen and Joan Ewen shall forthwith comply with House Rule No. 27 of Thunder Bay Condominium Corporation No.15; and
2. The Respondents Bruce Ewen and Joan Ewen shall pay the sum of \$1,925.00 to Thunder Bay Condominium Corporation No. 15 within 30 days.

[20] If the parties cannot agree on the costs of this application they shall make written submissions as to costs, not to exceed 5 pages, exclusive of their respective Bills of Costs. The Applicant’s costs submissions shall be submitted within 14 days of the release of this endorsement; the respondent’s within 7 days thereafter.

DATE: October 26, 2015

  
The Hon. Mr. Justice J.S. Fregeau

**CITATION:** Thunder Bay Condominium Corporation No. 15 v. Ewen, 2015 ONSC 6611  
**COURT FILE NO.:** CV-15-0397  
**DATE:** 2015-10-26

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** THUNDER BAY  
CONDOMINIUM  
CORPORATION NO. 15,  
Applicant, and  
BRUCE EWEN and JOAN EWEN,  
Respondents

**HEARD:** October 20, 2015

**BEFORE:** Fregeau J.

**COUNSEL:** *Jordan R.D. Lester*, for the  
Applicant

*David W. Dubinsky*, for the  
Respondents

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**ENDORSEMENT**

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Fregeau J.

**DATE:** October 26, 2015

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**CITATION:** Thunder Bay Condominium Corporation No. 15 v. Ewen, 2016 ONSC 1342  
**COURT FILE NO.:** CV-15-0397  
**DATE:** 2016-03-23

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** THUNDER BAY CONDOMINIUM CORPORATION NO. 15, Applicant, and  
BRUCE EWEN and JOAN EWEN, Respondents

**HEARD:** Via Written Submissions

**BEFORE:** Fregeau J.

**COUNSEL:** *Jordan R.D. Lester*, for the Applicant

*David W. Dubinsky*, for the Respondents

**REASONS ON COSTS**

[1] In paragraph 20 of my endorsement dated October 26, 2015, I indicated that if the parties could not agree on the costs of this application they were to file written submissions as to costs. The Applicant has now provided their costs submissions together with a costs outline. The Respondents have not filed any submissions as to costs.

[2] The Applicant is seeking full indemnity costs in the amount of \$9,032.66 including HST plus disbursements of \$426.94. The Applicant submits that condominium corporations are normally awarded full indemnity costs on successful applications based on the principle that other unit owners should not have to bear any portion of the cost resulting from the inappropriate actions of respondents.

[3] The Applicant further submits that the respondents were warned 14 times that proceedings would be commenced against them if they failed to comply with the rules against

smoking in their unit. The Applicant submits that the condo board also provided a very reasonable offer to settle to the respondents which was ignored. The offer provided that the condo corporation would purchase electronic cigarettes for the Respondents that they could use inside of their unit.

[4] In the alternative, the Applicant submits that it should be awarded costs on a substantial indemnity basis in the amount of \$8,556.34 including HST and disbursements.

[5] The Applicant's costs outline sets out the fees of Mr. Lester, called in 2013, at \$245.00/hr, of Mr. Mouck, an articling-student, at \$50.00/hr and of Ms. Wilson, a clerk with 2+ years' experience, at \$180.00/hr. Mr. Lester has docketed time of 19.8 hours, Mr. Mouck has docketed time of 8.7 hours and Ms. Wilson has docketed time of 14.2 hours.

[6] Given the simplicity of the Application, both in regard to facts and law, I find the total docketed time to be excessive in all the circumstances, particularly approximately \$2,500.00 in clerk time.

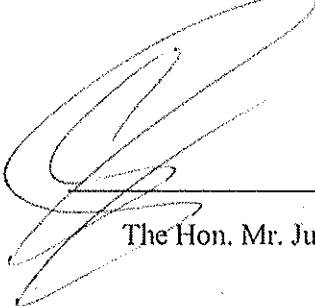
[7] In my opinion, the Applicant is entitled to costs on a full indemnity basis in an amount less than claimed by the Applicant. The Respondents ignored numerous warnings from the Applicant. The Respondents ignored a very reasonable offer to settle from the Applicant. The Respondents could have and should have avoided the hearing of this Application. The Respondents would have, or should have, been aware that they would bear the reasonable costs of unsuccessfully opposing the relief sought by the Applicant. The owners of other units should not be out of pocket as a result of the unreasonable behavior of the Respondents.



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[8] The Applicant's request for \$7,993.50 plus HST plus disbursements for full indemnity costs is excessive. The Applicant shall have their costs in the amount of \$7,000.00 plus HST plus disbursements in the amount of \$426.94. These costs shall be paid by the Respondents to the Applicant within 30 days of the release of this decision.

[9] Pursuant to s. 134(5) of the *Condominium Act* the Applicant shall add the amount of this cost award to the common expenses of the Respondent's unit and specify a time for payment by the owner. The Applicant is entitled to do so pursuant to the *Condominium Act*. It is not necessary that this be included as an order of the court within the costs decision.



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The Hon. Mr. Justice J.S. Fregeau

**DATE:** February 23, 2016

CITATION: Thunder Bay Condominium Corporation No. 15 v. Ewen, 2016 ONSC 1342  
COURT FILE NO.: CV-15-0397  
DATE: 2016-03-23

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** THUNDER BAY  
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**HEARD:** October 20, 2015

**BEFORE:** Fregeau J.

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*David W. Dubinsky*, for the  
Respondents

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**REASONS ON COSTS**

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Fregeau J.

**DATE:** February 23, 2016

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