

 **Hawkins v. Toronto Standard Condominium Corp. No. 1696, [2019] O.J. No. 6454**

Ontario Judgments

Ontario Superior Court of Justice

S. O'Brien J.

Heard: March 12, 2019.

Judgment: April 24, 2019.

Court File No.: CV-18-00605821

[2019] O.J. No. 6454 | 2019 ONSC 2560

RE: Lisa Hawkins, Applicant, and Toronto Standard **Condominium** Corporation 1696, Respondent

(43 paras.)

## Counsel

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*L. Hawkins*, Self-Represented.

*M. Mackey*, Counsel for the Respondent.

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## JUDGMENT

### S. O'BRIEN J.

1 The Applicant, Lisa Hawkins, is a unit owner and occupant of Toronto Standard **Condominium** Corporation 1696, a high rise **condominium** at 205 The Donway West (the "**Condominium**"). Ms. Hawkins brings this application pursuant to the oppression remedy in the **Condominium Act, 1998**, [S.O. 1998, c. 19](#) (the "**Act**"), claiming that the **Condominium** behaved toward her in a manner that was oppressive, unfairly prejudicial, and unfairly disregarding.

2 The dispute between the **Condominium** and Ms. Hawkins arises as a result of the **Condominium**'s decision to initiate a building-wide project to replace faulty Kitec plumbing in the building.

3 Ms. Hawkins took issue with the Kitec replacement project and, particularly, with being required to use the **Condominium**'s contractors or otherwise follow their requirements with respect to pipe replacement. Her position on the pipe replacement project is the genesis of the dispute between the parties.

4 For the reasons set out below, the application is dismissed. The **Condominium** acted reasonably in seeking to ensure the piping in Ms. Hawkins' unit was safe. I conclude that the **Condominium** did not act in a manner that was oppressive, unfairly prejudicial, or unfairly disregarding toward Ms. Hawkins.

## **Facts**

5 In 2016, the **Condominium** became aware that the building was constructed using Kitec piping in the units. The **Condominium**'s Board of Directors sent a notice to owners dated November 4, 2016, advising that they had discovered the building contained Kitec piping and explaining that Kitec piping and fittings will experience premature pipe failure. They emphasized that the pipes could burst, with the potential for flooding. Kitec apparently had been the subject of an international class action lawsuit.

6 The replacement of Kitec plumbing was the responsibility of the individual unit owners. This is because the pipes at issue serviced individual units and not the common elements of the building.

7 However, the **Condominium** concluded that it would be most economical for it to oversee the Kitec replacement in the units. The **Condominium** was able to negotiate a bulk rate with a contractor and spread the inspection and engineering costs over many units. Accordingly, by letters to unit owners (the letter to Ms. Hawkins was dated September 1, 2017), the Board of Directors advised that they had retained Jermark Plumbing & Mechanical Services Ltd. ("Jermark") to carry out the work. They also provided unit owners with the option of opting out of using Jermark and retaining their own contractor.

8 In particular, in the letter to unit owners, the Board of Directors wrote as follows:

"While the Board feels that carrying out the Kitec replacement using one coordinated contractor (Jermark) is the smoothest and safest way to proceed, owners who wish to carry out the work using their own contractor will be given that opportunity. In order to do so, you must complete the attached "Unit Owner Replacement Agreement" and return it to the management office by no later than October 6, 2017 and the work in your suite must be completed and inspected by no later than November 3, 2017. Please see the attached agreement for full details." (emphasis added)

9 The letter attached an agreement setting out the terms for unit owners to have the work completed by their own contractors

10 The evidence of Rudy Petershofer, who is a unit owner and member of the Board of Directors, was that no owners within the **Condominium** opted out of the Kitec replacement project except Ms. Hawkins. He indicated that "the board did not care one way or the other if any owners opted out of the Kitec replacement project." Further, the engineering firm retained by the **Condominium**, WSP, had completed Kitec replacements in many **condominium** buildings. It was in charge of supervising the project, including any owners who opted out. WSP advised that it was familiar with dealing with owners who opted out and it was not problematic for them. WSP came up with timelines for the opt-out process, which was necessary to ensure contractors did not run into each other and to ensure all units could be tested/inspected.

11 According to the evidence, the most likely reason a unit owner may choose to opt-out of Kitec replacement through a centralized process is if a unit owner is having their suite renovated and wants to complete all of the work on their own schedule. That is, they do not want to wait several months for the corporation's plumbing contractor to complete their suite.

12 After Ms. Hawkins received the letter from the Board of Directors advising that they had retained Jermark, but also offering the opt-out option, Ms. Hawkins wrote a plainly acrimonious email to the management office, in which she threatened to file a complaint against the board. The email, dated October 6, 2017, read:

Please be advised that I will not be opting in or opting out of the Kitec plumbing replacement project.

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Shortly after being notified by the Board of the possibility that suites of 205 Donway West contained Kitec piping and fittings, I opened the requisite walls widely, and found only copper piping, fittings and valves, all in good condition and functioning optimally.

That being said, there is a definite question as to where the Board derives their authority to institute this initiative and whether the Condominium Act of Ontario or the Declaration for The Hemingway Residences takes precedence [sic] and whether the Board has either misinterpreted or misapprehended their authority in this regard.

Consultations with the Condominium Authority of Ontario (or "CAO") indicate my concerns may have merit.

While the CAO has yet to establish the process for filing a complaint against a Board and Condominium Authority Tribunal (or "CAT") is not operational until November 1, 2017, I will be submitting a complaint regarding the Board's conduct in this matter, and directly to Armand Conant, Director of the CAT and will be requesting the matter be expedited.

Both the Board of Directors and Wilson Blanchard can expect a copy of same next week.

Lisa Hawkins, Suite [xxx]

**13** Ms. Hawkins' email caused management concern because her assertions about the pipes in her unit contradicted information management had received several months earlier. By email dated February 23, 2017, Nick Gikov had written to the management office about the piping in Ms. Hawkins' suite. Although there is no clear evidence about the relationship between Ms. Hawkins and Mr. Gikov, the email stated that Mr. Gikov was sharing the results of his findings about the piping "in our own suite." His email enclosed multiple photos of the piping in the suite, which was plastic and not copper.

**14** In view of this information, management wrote to Ms. Hawkins advising that it would need to inspect the pipes. The property manager, Tracy Herrington, wrote:

Thank you for your email.

As a starting point, the Corporation denies all of your allegations regarding the Condominium Act, the Declaration, the Condominium Authority of Ontario, etc. The Board is well within its authority to require the replacement of Kitec piping in the complex.

At the moment, the Corporation would like to focus on whether, as you indicate, the Kitec piping in your unit has been replaced with copper at all locations. Article 4.1(c) of the Corporation's Declaration states that the board's written consent must be obtained prior to the alteration of any plumbing installation contained in or forming part of a unit, such as the lines in question. The Corporation has no record on file of any such approval for your unit.

In order to confirm that the Kitec piping in your unit has been properly replaced with copper piping, the Corporation's engineers will need to attend at your unit in order to investigate the matter, including the making of test holes, if necessary. Please confirm which of the following dates you prefer for inspection:

- \* Thursday, October 19th, 2017 at 9:00 am
- \* Wednesday, October 25th 2017 at 9:00 am
- \* Friday, October 27th, 2017 at 10:00 am

If we do not hear from you by Monday, October 16, 2017, we will select one of the above dates and facilitate access to your unit on that date. Please take this as your formal notice of entry pursuant to the Corporation's right of entry pursuant to section 19 of the Condominium Act.

Please do not hesitate to contact me to discuss matters.

Sincerely,

Tracy Herrington

15 Ms. Hawkins subsequently emailed Tracy Herrington twice, on October 10, 2017, reiterating that when she opened her walls, she had found only copper piping and fittings. In her first email, she stated that there was "no replacement of Kitec piping with copper" (meaning that she was asserting that her suite had been constructed with copper and had never contained Kitec pipes) and therefore no need for an inspection. By her subsequent email, she indicated that she appreciated that the corporation might need confirmation that her suite only had copper piping, and offered to swear an affidavit by the end of the week. She considered this preferable to "an inspection on a date unilaterally and arbitrarily selected by the corporation." She did not respond regarding any of the dates previously provided.

16 By way of response, the **Condominium**'s lawyers wrote to Ms. Hawkins on October 17, 2017, advising, among other things, that her statement that her unit had copper piping, or had never had Kitec pipes replaced, contradicted the information previously provided by her "partner" (their reference to Mr. Gikov). They further advised that the **Condominium** would be entering her unit on October 27, 2017 to carry out an inspection.

17 Following these events, there was extensive further back-and-forth on this issue between the parties. The subsequent events included the following:

- (a) On October 27, 2017, the **Condominium**'s engineering firm, WSP, attended at Ms. Hawkins' suite for an inspection. Their inspection report concluded that the Kitec piping visible in the photos previously provided from Ms. Hawkins' unit had been replaced with copper. Further, they were of the view that the joints of the copper piping that had been added were "overfed with solder." They stated that this "is a condition which indicates poor workmanship and can lead to premature copper erosion and leaking overtime [sic]."
- (b) Ms. Hawkins provided a letter dated October 30, 2017 to the **Condominium**'s lawyers, responding to their October 17, 2017 letter and objecting to their characterization of her conduct and to their approach in scheduling an inspection. I note that Ms. Hawkins objected throughout the proceeding to the scheduling of the inspection, suggesting that a date was unilaterally chosen. However, she was offered three dates and was given a deadline to respond with respect to a date. She responded with two emails, but did not provide any agreement to any date, nor suggest any alternative date, by the deadline provided.
- (c) The **Condominium**'s lawyers responded by letter dated December 7, 2017, asking Ms. Hawkins to provide the following information: (1) the name and contact information of the plumber that carried out the piping replacement work, along with a copy of their license, liability insurance and, if applicable, WSIB clearance certificate; (2) a copy of the closed City of Toronto Building Permit for the piping replacement work in the unit; and (3) the signed report of a professional plumber showing a successful air or water pressure test following the piping replacement work.
- (d) Ms. Hawkins emailed Ms. Herrington on December 29, 2017 saying that she had contracted a plumber to perform an air pressure test. She stated that the air pressure test could be completed either by isolating the suite at the "main valve" (outside the suite) or by "doing the same with the valves within the suite." Ms. Hawkins acknowledged that the first option (using the main valve) required permission from the property manager.
- (e) On January 3, 2018, the **Condominium**'s lawyers responded, saying that Ms. Hawkins' plumber would not be granted access to valves to carry out a pressure test.
- (f) After making inquiries, the **Condominium** determined that its own plumbers and professional engineers were not willing to review and approve the work on Ms. Hawkins' unit, as they had no knowledge as to the nature of its installation and were not willing to assume the risk. They then advised that, instead, they would arrange for Jermark to attend at Ms. Hawkins' unit and remove the existing replacement piping and properly install it.

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- (g) On May 9, 2018, the **Condominium** wrote to the City seeking a permit to conduct work in Ms. Hawkins' unit. The City inspector then attended the unit and advised that Ms. Hawkins could retroactively take out a permit for the work done and should conduct pressure testing.
- (h) The **Condominium** then convinced its own contractor and engineer to conduct the pressure testing. Although Jermark and WSP initially were unwilling to pressure test an unknown plumber's work, they eventually agreed to do so once the **Condominium** signed an indemnity in their favour.
- (i) The pressure testing was finally completed on December 11, 2018. The plumbing passed the test. At the same time, the **Condominium** also replaced or installed a shut-off valve in Ms. Hawkins' laundry, kitchen, and bathroom, which was also done in all other units during the Kitec replacement work.

### **Issues**

**18** Ms. Hawkins has raised numerous issues with the manner in which the **Condominium** proceeded with respect to the pipes in her unit. She has summarized the issues in her factum as follows:

- (a) The **Condominium**'s extraordinary focus on securing compliance with the Kitec Replacement Project blinded them to the possibility, much less consideration of, other viable options that would balance their statutory obligations with that of the owner's.
- (b) The **Condominium** was so wedded to their position they initiated and maintained a campaign of questionable conduct over a fourteen month period from October 2017 to December 2018 for which they could eventually penalize Ms. Hawkins personally.
- (c) While Rule 2(3) was available to the **Condominium**, their reliance on this Rule rather than Rule 2(4) was oppressive, prejudicial and disregarding toward Ms. Hawkins.

**19** By way of remedy, Ms. Hawkins seeks:

- (a) An order returning the amount charged to her by the **Condominium**.
- (b) An order directing the Board of Directors to develop and institute a Code of Ethics.
- (c) An order directing the Board of Directors to participate in training on general conflict resolution.
- (d) An order directing the Board of Directors to draft a rule requiring mediation for disputes with unit owners.

### **Legal Analysis**

**20** Ms. Hawkins claims that the conduct of the **Condominium** was oppressive, unfairly prejudicial and unfairly disregarding. Section 135 of the *Act* provides:

135(1) An owner, a corporation, a declarant or a mortgagee of any unit may make an application to the Superior Court of Justice for an order under this section.

- (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
- (3) On an application, the judge may make any order the judge deems proper including,
  - (a) an order prohibiting the conduct referred to in the application; and
  - (b) an order requiring the payment of compensation.

**21** The test for oppression under the *Act* is two-pronged. The claimant must first demonstrate that there has been a breach of her reasonable expectations. If that is established, the court must consider whether the conduct complained of amounts to "oppression," "unfair prejudice," or "unfair disregard.": *B.C.E. Incorporated v. 1976 Debentureholders*, [2008 SCC 69](#), [\[2008\] 3 S.C.R. 560](#) at para. 56; *Hakim v. Toronto Standard Condominium Corporation No. 1737*, [2012 ONSC 404](#), [1 B.L.R. \(5th\) 159](#) at para. 42.

**22** The courts have not drawn clear lines between any of the three statutory tests and have often found that conduct may fit into one or more of the categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression: *Niedermeier v. York Condominium Corporation No. 50* [\(2006\), 45 R.P.R. \(4th\) 182](#) (Ont. S.C.J.) at para. 4; *Hakim* at para 32.

**23** Oppression is conduct that is coercive or abusive. It also has been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted. Unfair prejudice means a limitation on or injury to a complainant's rights that are unfair or inequitable. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance: *Hakim* at paras. 33-35.

**24** The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. Section 135 protects legitimate expectations, not "individual wish lists." The court must balance the objectively reasonable expectations of the owner with the **condominium** board's ability to exercise judgment and secure the safety, security and welfare of all owners and the **condominium's** property assets: *McKinstry v. York Condominium Corp. No. 472* [\(2003\), 68 O.R. \(3d\) 557](#) (S.C.J.) at para. 33.

### **Application to This Case**

**25** I will address the issues as identified by Ms. Hawkins in her factum. Then I will apply the test under the oppression remedy to the circumstances of this case.

#### *Issues Raised by Ms. Hawkins*

**26** I find the first two issues raised by Ms. Hawkins to be intertwined and will address them together.

- (a) Did the **Condominium's** focus on securing compliance with the Kitec Replacement Project blind them to other options?
- (b) Was the **Condominium** so wedded to their position that they initiated and maintained a campaign of questionable conduct from October 2017 to December 2018?

**27** In my view, the **Condominium** was not "extraordinarily" focused on securing compliance with the Kitec Replacement Project as alleged, although no doubt they considered it to be the best option. They also did not initiate and maintain a campaign of questionable conduct.

**28** First, the **Condominium** initially offered Ms. Hawkins an option to opt-out of the project. Subsequently, they were motivated to determine the status of the piping in her unit and, if it had been replaced without authorization, to ensure it was properly tested for safety. Ms. Hawkins was responsible for initiating the hostile tone between the parties. She initially denied that the piping in her unit had been replaced, even though the **Condominium** had evidence that this was not the case. Further, she refused to opt-in or opt-out of the project and threatened to make complaints about the Board of Directors. In my view, in spite of Ms. Hawkins' inflammatory tone, the property manager, Ms. Herrington, struck a reasonable tone in her response. However, when asked to provide access to her unit for an inspection, Ms. Hawkins failed to respond with agreement to one of the dates provided. In these circumstances, it is not surprising that the **Condominium** lost some patience in their dealings with her, but this did

not reflect a determination to secure her compliance with the Kitec replacement project, nor a course of questionable dealings.

**29** One of the major points of contention between the parties was whether and how the parties could have satisfied themselves sooner or more easily about the safety of the plumbing replacement in Ms. Hawkins' unit. Ms. Hawkins contends that if they had allowed her own plumber to complete the pressure testing in early 2018, all would have been resolved then. However, I do not find this position convincing. The Condominium was not willing to let Ms. Hawkins' plumber complete the pressure test because it would have involved shutting off a main valve, which would impact other units in the building. I consider it reasonable that the Condominium would only allow its own contractors to do this. Alternatively, Ms. Hawkins has said that her plumber could have properly conducted the test without access to this valve. If this was indeed possible, I am not aware of any evidence that Ms. Hawkins' plumber completed this test, nor provided any evidence to the Condominium that a pressure test had been properly and successfully completed.

**30** The Condominium contends that if Ms. Hawkins had provided them with the information they sought in their letter of December 7, 2017 (that is, the name of the plumber who did the work, the city permit, a successful pressure test), all could have been resolved then. However, that, of course, could not happen because the work had been completed without a permit and Ms. Hawkins had not completed, or did not have record of, a pressure test. In other words, the unauthorized replacement of Ms. Hawkins' pipes from the outset created a situation in which the only realistic resolution was testing by the Condominium's contractors.

**31** In fairness, the Condominium's decision to threaten to replace the pipes itself and to contact the city for a permit did not assist the situation. Counsel acknowledged that, in hindsight, the Condominium might have done things differently in this regard. Ultimately, the Condominium was able to convince its own professionals to conduct the pressure testing, after providing an indemnity, and this might have been a better course initially than contacting the city. Still, in the totality of the circumstances, contacting the city appears to me an attempt by the Condominium to resolve the situation when they were becoming increasingly frustrated, with good reason.

(c) Should the Condominium have relied on Rule 2(4) rather than Rule 2(3)?

**32** Ms. Hawkins also argued that the Condominium should have relied on Rule 2(4) rather than 2(3) of its General Rules and Regulations. Rule 2(3) provides:

Any and all losses costs or damages incurred by the Corporation by reason of a breach of any provision in the documentation of the Corporation in force from time to time, by any Owner, shall be borne and/or paid for by such Owner and may be recovered on a solicitor and client basis by the Corporation against such Owner in the same manner as common expenses or as may be provided in the Condominium Act or in any other lawful manner.

**33** Ms. Hawkins is correct that the Condominium relied on Rule 2(3), as well as provisions in its general By-law No. 1 to recover legal fees and inspection expenses from her that it incurred as a result of the dispute between the parties. These were charged back to her as common expenses.

**34** Ms. Hawkins says she would have liked the Condominium to rely on Rule 2(4) instead. Without reproducing the entire rule, Rule 2(4) permits the Board of Directors "in addition to any other enforcement proceedings," to provide notice to an offending owner of a first violation and the opportunity to rectify the violation. It then provides further steps for a second and third violation, after which on any further violation the board is permitted to suspend the owner from further use of the Condominium's facilities.

**35** The problem with Ms. Hawkins' position is that Rule 2(4) is not relevant to the nature of her dispute with the Condominium. Her dispute did not pertain to a violation that needed to be rectified but, rather, an issue regarding the piping in her unit that the board needed to ensure was safe.

*Section 135 of the Act*

**36** In my view, the conduct of the **Condominium** in this case does not meet the test under s. 135 for oppression. The conduct of the **Condominium** did not breach Ms. Hawkins' reasonable expectations. Further, its conduct was not oppressive or unfairly prejudicial. It did not show an unfair disregard toward Ms. Hawkins.

**37** The **Condominium** introduced the Kitec replacement project to the entirety of the **Condominium**. It needed to co-ordinate the work throughout the entire building and it needed to protect the safety and security of the property. Ms. Hawkins' expectations appeared to have been that she could dictate a process designed entirely according to her terms, including using only her own plumber, even though she did not provide confirmation of the plumber's qualifications or of air pressure testing on the work completed. These expectations were not reasonable, considering the need for the Board of Directors to ensure the safety and quality of the work completed, for the benefit of the whole building. In addition, these expectations were not reasonable, given that Ms. Hawkins had not been forthright from the outset about the fact that the pipes had been replaced in her unit, and given that WSP's initial inspection of her replaced pipes concluded that the completed work raised some quality concerns. Although Ms. Hawkins emphasized in these proceedings that those concerns ultimately were unfounded (in that the plumbing ultimately passed the air pressure test), it was reasonable for the board to rely on the expert advice of its engineering firm, and to expect confirmation of the quality and safety of the work.

**38** Although the oppression remedy is designed to protect individuals from actions that, while technically legal, are surprising and oppressive, reasonable expectations in the context of the oppression remedy will be informed largely by the law and the formal legal documents or agreements that govern the relationship between the parties: *Couture v. TSCC No. 2187*, [2015 ONSC 7596](#) at para. 59; *BCE* at paras. 79-80. In this case, it is important that s. 117 of the Act prohibits conditions that are likely to cause damage to property or assets. It reads:

No person shall, through an act or omission, cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity, as the case may be, is likely to damage the property or assets or to cause an injury or an illness to an individual.

**39** In addition, under s. 117(3), the board has a duty to take all reasonable steps to ensure that owners comply with the Act, the by-laws, the declaration and the rules. Here, the **Condominium** had an obligation to ensure dangerous conditions did not exist in the building. Once the board learned that Kitec plumbing was in the building, it had a duty to take steps to eliminate this potentially harmful condition. Ms. Hawkins should have reasonably expected that the **Condominium** would need to take steps to assure itself of the safety of the work in her unit.

**40** Further, the **Condominium**'s conduct was not oppressive, unfairly prejudicial or unfairly disregarding. It was not unfair or disrespectful to Ms. Hawkins' interests for the **Condominium** to insist on confirming the safety of the piping in her unit. Ms. Hawkins had failed to co-operate and could not provide assurance about the quality of the work done in her unit. Although the **Condominium**'s decision to contact the city may not have assisted in resolving the dispute, in the entirety of the circumstances, including Ms. Hawkins' failure to co-operate, it was reasonable for the **Condominium** to seek other solutions.

**Remedy**

**41** Given my conclusion that Ms. Hawkins has not satisfied the test under s. 135, I do not need to address her request for various remedies against the board. However, I do wish to comment on the fact that the board has charged Ms. Hawkins \$11,346.68 in her fees' assessments, for legal and engineering fees as a result of this matter. They say there is a further amount owing of \$2,178.08. Counsel for the **Condominium** advised at the hearing that she would recommend to her client not to charge Ms. Hawkins an additional \$1,672.57 the board also says is owing in an effort to minimize any further dispute between the parties. It is very unfortunate that Ms. Hawkins now owes the **condominium** over \$13,500.08. However, the board is entitled to charge for these fees, pursuant both to Rule 2(3), excerpted above, as well as pursuant to Article 9 of the **Condominium**'s Declaration. Moreover, if a



**Condominium** does not charge these types of fees back to a non-compliant owner, the fees must be absorbed by the rest of the owners. Finally, it is important to be aware that, if Ms. Hawkins had participated in the replacement of Kitec pipes using the **Condominium**'s contractors, the cost to her would have been significantly less, approximately \$2,500.

**42** As Ms. Hawkins has not met the test for an oppression remedy against the **Condominium**, she is not entitled to the return of the fees charged to her.

**43** The application is dismissed. Counsel for the Respondent provided me with a costs outline, but indicated that she would have further submissions on costs related to offers to settle exchanged between the parties. Those further submissions (of no more than two pages, not including attachments) may be provided to me within 15 days. Ms. Hawkins then will have 15 days to respond with any submissions (of no more than three pages, not including attachments) to address the Respondents' costs outline and further submissions on costs. The submissions on costs may be emailed to my judicial assistant, Anna Maria Tiberio at [annamaria.tiberio@ontario.ca](mailto:annamaria.tiberio@ontario.ca)

S. O'BRIEN J.