

CITATION: Halton Condominium Corp. No. 77 v. Mitrovic, 2021 ONSC 2071
COURT FILE NO.: CV -21-00000673-0000
DATE: 2021-03-19

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: HALTON CONDOMINIUM CORPORATION NO. 77, Applicant

AND:

VILY MITROVIC and ZORAN ZUPANC, Respondents

BEFORE: Gibson J.

COUNSEL: Rodrigo Escayola, David Plotkin and Graeme Macpherson, for the Applicant

Antoine D'Ailly, for the Respondents

HEARD: March 5, 2021

ENDORSEMENT

Overview

[1] This is a case that reflects many of the societal tensions that attend current attempts to protect the residents of Ontario from the potentially deadly effects of the current COVID-19 pandemic. Its focus is the requirement to wear masks in public spaces.

[2] The Applicant Halton Condominium Corporation No. 77 (“HCC77”) is a high-rise residential condominium corporation, comprised of 169 units, located at 5250 Lakeshore Road, Burlington, Ontario.

[3] The Respondents Vily Mitrovic and Zoran Zupanc own and occupy unit 1106 (“the Unit”) in the Admirals Walk complex at this address.

[4] The Respondents decline to wear a mask while in the common elements of the condominium. They claim exemption from the requirement to wear a mask or face covering in a manner that covers their mouth, nose and chin due to what they say are their respective medical conditions. They also contend that they are not required to provide any proof of such a claim to exemption.

[5] The Applicant contends that the refusal of the Respondents to wear a mask is deliberate and defiant behaviour in breach of the *Reopening Ontario Act* regulations, the municipal by-laws and HCC77's Mask Policy. In support of this it has provided photographs from security cameras appearing to show Ms. Mitrovic not wearing a mask within the common elements of the building, exercising by walking on different floors where her unit is not located while not wearing a mask, wearing an anti-masking sign, and posting anti-masking posters within the building. More importantly, it submits, it puts at risk the health and safety of other occupants, many of whom are elderly and vulnerable.

[6] The Respondents resist the Applicant's characterization of their actions, submit that HCC77's Mask Policy is not consistent with applicable legislation as it does not contain required exemptions as prescribed by the applicable legislation, claim that in any event they qualify for exemption from the general requirement to wear a mask or face covering due to their respective medical conditions, and assert that they are not required to furnish proof of exemption.

[7] The Applicant seeks the following Orders from the Court:

- (a) A declaration that the Respondents' behaviours constitute a dangerous activity in breach of s.117 of the *Condominium Act*;
- (b) An interlocutory and permanent injunction enjoining the Respondents to:
 - i. Wear a securely fixed mask or face covering adequately covering their nose, mouth and chin, without gapping, at all times while on common interior elements at HCC77;
 - ii. Not transit or be on any floors other than the 11th floor, the elevator, the main lobby and mail room and parking garage levels P1 and P2;
 - iii. Only circulate on any interior common elements for the purpose of ingress and egress, by the most direct route from their unit to the main entrance of the building or to their parking spot at levels P1 and P2;

And this, for as long as HCC77 has in place its mask policy, or any other mask policy, or, alternatively, for as long as a mask or face covering is required under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*;

iv. Comply with any and all advice, recommendations and instructions of public health officials, including those issued by the Chief Medical Officer of Health of Ontario, or of the Halton Public Health Unit; and,

v. Comply with the Corporation's declaration, by-laws, rules and policies as they pertain to the current COVID pandemic and/or the safety, security and health of HCC77's occupants.

(c) A compliance order pursuant to s.134 of the *Condominium Act* enjoining them to comply with the above, with s.117 of the *Act* and with HCC77's Mask Policy; and

(d) Costs on a full indemnity basis.

[8] The Respondents seek an Order granting the following relief:

(a) A declaration that the Respondents are exempt from wearing a mask or face covering pursuant to s. 4(g) of O/Reg 263/20;

(b) A declaration that the Respondents are exempt from wearing a mask or face covering pursuant to s.11(1) of Burlington's municipal by-law 062-2020 as amended;

(c) A declaration that the Respondents are exempt from wearing a mask or face covering with respect to HCC77's Mask Policy;

(d) A declaration that the Applicant is in breach of the applicable regulations adopted under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*;

(e) A declaration that the Applicant is in breach of the City of Burlington By-Law 62-2020; and,

(f) Costs on a substantial indemnity basis.

Issues

[9] This situation has given rise to strong emotions on both sides. But it is necessary to be clear-eyed and precise about the Court's proper role in this case. It is not to pronounce on ideology, or to give a judicial imprimatur in favour of one perspective or the other. The Court's role in this case does not entail an assessment of the various arguments put forward in the public square in the vigorous debate about the wisdom or necessity of wearing masks as a prophylactic measure to combat the spread of the COVID-19 pandemic. It is not a reference to determine the constitutionality, the legal validity or the wisdom of the Government of Ontario, the Regional Municipality of Halton or the City of Burlington's measures to combat the spread of the COVID-19 virus or to mitigate the effects of the pandemic currently being experienced in Ontario in general, and Halton Region in particular. The creation of legislative responses to the pandemic is the province of elected officials at various levels of government, and its implementation is the responsibility of public health and other officials. Absent a constitutional *Charter* dimension, which has not been advanced or argued in this case, it is not the role of the Court to make declarations about the various legislative instruments engaged in this case. Nor is it the role of the Court to substitute its own judgment for that of public officials in respect of policy or operational decisions.

[10] Rather, the role of the Court in the present case is narrow, and requires judicial restraint: it is to assess, on the particular facts placed in evidence before the Court in this case, in light of the current statutes, regulations, municipal by-laws and HCC77 Mask Policy, the actions of the Applicant HCC77 and the Respondents, and whether the relief sought by HCC77 in its Application is warranted. Distilled to its essence, the question is whether the Respondents should be required to wear a mask or other face covering while in the common areas of the condominium building, notwithstanding that they claim a medical exemption from doing so.

[11] The issues to be determined on this motion are:

- (a) Are the Respondents in breach of the *Reopening Ontario Act* mask requirements?;
- (b) Is the Respondents' behaviour a dangerous activity prohibited under s.117 of the *Condominium Act*?;

- (c) Are the Respondents in breach of HCC77's Mask Policy?;
- (d) Should a compliance order be issued to secure the Respondents' compliance pursuant to s. 134 of the *Condominium Act*?; and,
- (e) Should an interim and permanent injunction be issued to enjoin the Respondent's behaviour?

Evidence

[12] The Respondents are the owners and occupiers of Unit 1106 in HCC77. In order to access their apartment, they must traverse the common areas of the building, which include the lobby, elevator or stairs, and the hallways.

[13] Ms. Mitrovic, who is 71, has provided evidence for the purpose of this hearing in her affidavit dated March 4, 2021. Attached as an exhibit to her affidavit is a copy of a doctor's note from Dr. Krizaj-Kapljić Davorka dated February 4, 2021, which states that "Mrs. Mitrovic is unable to wear a mask or face shield due to health problems. She will vaccinate for Covid as soon as she can." There is no further explanation in the note as to the nature of Ms. Mitrovic's medical issue, or of any alternatives.

[14] Counsel for the Applicant confirmed in oral submissions that the Applicant does not contest the authenticity of this note, but does contest the veracity of the information provided by Ms. Mitrovic. He urged the Court to look behind the face of the doctor's note and invited the Court to make a negative finding regarding Ms. Mitrovic's credibility. This position seems at least in part to be driven by the Applicant's concern over the social media posts of Ms. Mitrovic expressing skepticism about the legitimacy of the requirement to wear masks, her posting of anti-mask items in the condominium building, and its assertion that many other residents of the condominium building object to Ms. Mitrovic exercising in the hallways on other floors than the one her apartment is located on.

[15] The Applicants urge in their Factum that the wording of the Red Zone Regulations "must be interpreted very narrowly as, if unchecked, it essentially allows unscrupulous individuals to

deliberately flout provincial health and safety regulations, putting at risk the life and health of the rest of the community.”

[16] Mr. Zupanc has provided evidence for the purpose of this hearing in his affidavit dated March 4, 2021. He asserts that he is exempt from mask requirements. In this regard, he has not provided a note from a doctor or other medical authority. However, at paras. 8 and 14 of his affidavit, he states that he has a medical condition such that he experiences severe difficulty breathing when his nose is covered, and that he feels like he is going to pass out if he has to wear a mask over his nose for more than a couple of minutes. He does not specify the medical condition, indicate a diagnosis from a medical practitioner, or elaborate what other options might be available to him.

[17] Canada is currently confronted with a grave public health crisis without parallel in recent decades. Courts have taken judicial notice of this in a number of ways:

- (a) “There is currently a global pandemic which has resulted in a significant number of deaths and serious illness throughout Canada and the province of Ontario. The virus affects people of all ages and is particularly dangerous to older people and those with certain medical pre-conditions”: *Solanki v. Reilly*, 2020 ONSC 8031 at para. 4;
- (b) “The fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission”: *R. v. Morgan*, 2020 ONCA 279 at para. 8;
- (c) “The fact that COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus [and] that people who are infected with the virus can be asymptomatic yet still contagious”: *Manzon v. Carruthers*, 2020 ONSC 6511 at para. 18; and,
- (d) “The pandemic has wreaked untold death and destruction worldwide; COVID-19 is extremely infectious and can spread rapidly in any location; the main mitigatory steps recommended to “flatten the curve” of infection are i) social distancing, ii)

the wearing of personal protective equipment (PPE), and iii) regular testing of the population.: *R. v. Grant*, 2020 ONSC 3062 at para. 25.

[18] Mindful of the guidance of the Court of Appeal for Ontario recently given in *R. v. J.M.*, 2021 ONCA 150 that the criteria for the proper taking of judicial notice require notoriety or immediate demonstrability, I take judicial notice of the existence of the COVID-19 pandemic in the Province of Ontario, and more particularly in Halton Region, and repeat and adopt the findings of judicial notice referred to in the cases above.

Law

I. Red Zone Regulations

[19] Since November 16, 2020, the Halton Regional Health Unit is a “Stage 2 Area” under “Red (Control)” restrictions. As such, it is subjected to the orders, restrictions and regulations listed in O.Reg. 263/20 (“Red Zone Regulations”). These provide for certain exemptions. The mask requirement does not apply to individuals who fall within certain exceptions, the only applicable ones in this case potentially being: (i) individuals who have a medical condition that inhibits their ability to wear a mask; (ii) those being accommodated in accordance with the *Accessibility for Ontarians with Disabilities Act* or (iii) those being reasonably accommodated in accordance with the *Human Rights Code*: O.Reg. 263/20 Sched 1, Art 2(4)(g), (j) and (k).

[20] The Red Zone Regulations provide that “it is not necessary for a person to present evidence to the person responsible for a business or place that they are entitled to any of these exemptions”: O.Reg 263/20 Sched 1, Art 2(6).

II. Burlington By-Law 62-2020

[21] The City of Burlington By-Law 62-2020 has been amended several times. It originally came into force on July 20, 2020. It was amended on July 28, 2020, to, *inter alia*, change the age of exempted children from three to five years old. Another amendment came into force on August 20, 2020 to expand the application of the By-Law to include condominiums and apartment buildings. The By-Law was amended a third time on January 19, 2021, so that it would stay in force until December 31, 2021. In its most recent iteration currently in force, it applies to

condominium buildings, and requires Operators of condominiums to ensure that they adopt policies to ensure that no member of the public is permitted entry to, or otherwise remains within, any enclosed space unless the member of the public is wearing a mask or face covering, in a manner which covers their mouth, nose and chin.

[22] The By-law requires Operators to ensure that their policies contain exemptions from the requirement to wear a mask or face covering where, amongst other situations, the person has an underlying medical condition where wearing a mask or face covering would inhibit the person's ability to breathe in any way, or the person may experience a negative impact to their emotional well-being or mental health.

[23] At subsection 11(3) it provides: "Every Owner of an Apartment Building or condominium corporation responsible for a Condominium Building shall not require any person, including employees, to provide proof of any of these exemptions set out in subsection 11.(1)."

[24] The By-Law prescribes at s.12 the text of the wording of signage to be conspicuously posted at all entrances to the Condominium Building, which includes the exemptions mentioned above, as well as the following statement: "please be respectful of the rights of individuals who are exempt from wearing a mask in conformity with the exemptions provided in By-law 62-2020, as amended."

III. HCC77 Mask Policy

[25] On July 22, 2020, HCC77 adopted a Mask Policy, requiring all residents to wear a mask "that covers the nose, mouth and chin, without gapping," while in any enclosed common space such as the lobby, hallways, stairs, garage and elevators. The Mask Policy included an exemption for: children under two years of age; persons with an underlying medical condition which inhibits their ability to wear a mask; persons who are unable to place or remove a mask without assistance; and persons who reasonably needed to be accommodated in accordance with the *Ontario Human Rights Code*. The policy was circulated to all residents and many reminders were sent.

Analysis

[26] It is clear that the wording of the HCC77 Mask Policy is more restrictive than the Burlington By-Law. Rather than the two grounds of exemption at paragraph 11.1(1)(iii) of the Burlington By-Law that “the person has an underlying medical condition where wearing a Mask or Face Covering would inhibit the person’s ability to breathe in any way,” and at paragraph 11.1(1)(iv) that “the person may experience a negative impact to their emotional well-being or mental health,” the HCC77 Mask Policy only specifies by way of similar exemption at its paragraph 4(ii) “persons with an underlying medical condition which inhibits their ability to wear a mask.”

[27] The HCC77 Mask Policy does not contain an analogue to subsection 11.1(3) of the Burlington By-Law that “Every Owner of an Apartment Building or condominium corporation shall not require any person, including employees, to provide proof of any of the exemptions set out in subsection 11.1(1).”

[28] If the Burlington By-Law were the only source of authority for HCC77 to make a mask policy, it is clear that the HCC77 Mask Policy would be overly restrictive in not making provision for the separate ground of exemption of a person experiencing a negative impact to their emotional well-being or mental health, as well as containing no provision about not requiring any person to provide proof of exemption, and would not in compliance with the provisions of the By-Law.

[29] The Applicant submits in effect that, in addition to the provisions of Burlington By-Law 62-2020, as amended, which is cited in the recitals portion of the HCC77 Mask Policy, it has separate sources both of obligation and authority pursuant to the *Condominium Act*, the *Occupational Health and Safety Act*, and the Corporation’s governing documents.

[30] The recitals portion of the HCC77 Mask Policy states that the Corporation has the obligation to ensure that its property is reasonably safe pursuant to: s.17(2) of the *Condominium Act, 1998* under which it has a duty to control, manage and administer the common elements of the Corporation; s.26 of the *Condominium Act*, pursuant to which the Corporation is deemed to be the occupier of the common elements for the purpose of determining liability resulting from a breach of its duties as an occupier of land; pursuant to s.117 and s.119 of the *Condominium Act*, under which the Corporation has an obligation to ensure that no person permits a condition to exist or carries on an activity in the common elements that is likely to cause injury to an individual; and

pursuant to the *Occupational Health and Safety Act*, the Corporation has an obligation to maintain a safe and healthy workplace and take all necessary precautions to protect those who work on the Corporation's property.

[31] The Court has to balance the competing rights of the Respondents and the rest of the condominium community. The Applicants submit in their Factum that there is, on the one hand, "a real risk of serious illness or death to the other occupants of the Corporation if asymptomatic but infected individuals are allowed to roam around without a properly worn mask," balanced against "inconvenience" imposed on the Respondents if they must wear a mask. It submits that the "enormous risk that the Respondents' conduct poses to other residents outweighs this minimal impairment."

[32] The Applicant submits that the Respondents' ongoing refusals to wear a mask while on interior common elements during a global and deadly pandemic amounts to a dangerous activity prohibited under s.117 of the *Condominium Act*, which provides:

117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

It submits that "the Respondents are entitled to hold whatever views they wish, no matter how misguided they may be. However, their personal freedom stops where those views manifest themselves in actions and omissions that directly cause harm or could reasonably cause harm to other members of the community." The Applicant submits that the Respondents' ongoing behaviour is incompatible with condominium living during a pandemic and amounts to a dangerous activity under s.117 of the *Condominium Act*.

[33] Compliance Orders are a remedy set out in s.134 of the *Condominium Act*:

134(1). Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

[34] The HCC77 Board had authority to make and issue the Mask Policy. In conjunction with s.117 set out above, s.58 of the *Condominium Act* permits a condominium Board to make or amend rules to promote the health, safety and welfare of owners and residents:

58. (1) The Board may make, amend or repeal rules under this section respecting the use of the units, the common elements or the assets, if any, of the corporation to,
- (a) promote the safety, security or welfare of the owners and of the property and the assets, if any, of the corporation; or
 - (b) prevent unreasonable interference with the use and enjoyment of the units, the common elements or the assets, if any, or the corporation.
- (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

[35] Courts have recognized that living in a condominium community is a special context that requires a balancing of interests of those living there. As Stinson J. stated in *Metropolitan Toronto Condominium Corporation No 933 v. Lyn*, 2020 ONSC 196 at paras. 27-30:

27 Living in a condominium has been described as living in a small community, where the regulation of the community is more akin to the governance of a town than it is to the governance of a corporation. In *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.*, 2007 BCSC 1711, at para. 10, Justice Leask of the British Columbia Supreme Court wrote that:

[Living in a condo] combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a [condo] corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. [Condos] are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers.

28 As with living in any community, condominium owners and their guests must enter a social contract which relinquishes their absolute interests to do as they please with their real property, and instead balance their interests with those of the other owners and tenants. In an early and much-quoted condominium case (*Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975) at p. 181-182), a court in Florida described these restrictions to the liberty which an owner of private property otherwise enjoys as follows:

[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up

a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property.

29 More recently, in *Ciddio v. York Region Condominium Corp. No. 730*, [2002] O.J. No. 553 (at para. 33), Justice Stong of this court reflected that the *Condominium Act* exists to regulate the smooth interaction between the owners of units seeking to live together in a co-operative lifestyle:

It is a trite observation that the *Condominium Act* exists to make for smooth interaction between the owners of units in a condominium project. Such a project is based on a co-operative life style, and the *Act* sets out procedures designed to assure that owner's concerns are addressed. No one owner can run amok or impose his designs unilaterally on an unwary or ill informed ownership.

30 To summarize the foregoing principles, where someone chooses to live in a condominium community - whether as an owner or a tenant - they do not enjoy unlimited freedom to do as they please. Rather, they must conduct themselves in accordance with the rules of the community and with due respect and consideration for their neighbours and fellow residents. Further, they must govern and limit their personal activities taking into account the impact of those activities upon other residents, as regulated by the condominium rules. Examples of limits that govern all residents include refraining from playing loud music or television shows or otherwise creating noise that may disturb fellow residents during times in the late evening and night when most residents would be expected to be enjoying peace and quiet and be resting or asleep.

[36] In a recent case where an owner challenged a policy preventing non-essential work in condominium units during the pandemic, *Toronto Standard Condominium Corporation 1704 v. Fraser*, 2020 ONSC 5430, the Court held at paras. 19-20 that the enactment of health-related policies during the COVID-19 pandemic is an appropriate exercise of the Corporation's authority:

I conclude that the Policy was well within the range of reasonable responses to the global pandemic. The Court of Appeal stated in *Dvorchik*, at para. 6, "The threshold for overturning a board's rules reasonably made in the interests of unit owners is a high one." In May of 2020, the Corporation gave notice of the Policy to all unit-holders of its decision to limit access to the building from contractors as part of its measures against COVID-19, both to reduce the potential spread of the virus, and to respond to the fact that many residents needed to work from home. The Board implemented the Policy after educating itself on health and safety responses in condominiums and reviewing public health information. The Policy was repeated and explained in greater detail in July to all residents. The context of the Policy is the unprecedented societal response to a virus which is contagious and fatal to those in high-risk categories...

[37] Condominium corporations indeed constitute a form of micro-community, in which the residents partake in a form of social contract. As with living in any community, condominium owners and their guests must enter a social contract which relinquishes their absolute interests to do as they please with their real property, and instead balance their interests with those of the other owners and tenants. Condominium corporations are mandated to be self-regulated. Condominium boards have a duty to control, manage and administer their community. In doing so, they may make rules and policies that are more restrictive than the general law applicable to all persons and premises in the province or in a particular municipality by operation of provincial statutes or regulations, or municipal by-laws: for example, restricting the sorts of pets that residents may keep, or restricting the access of contractors to do non-essential work during the pandemic, as in *TSCC 1704 v. Fraser, supra*.

[38] The efforts of the HCC77 board to develop and promulgate a mask policy were not only reasonable, but necessary in the circumstances. But, in respect of the interplay between provincial and municipal legislation and condominium policy, a condominium board may not promulgate policies that are contrary to law of general application in the province or municipality. They may make policies that are more restrictive in areas where the law of general application has not already occupied the field, but they cannot be inconsistent.

[39] The Applicant in this case is, rightly, concerned about the risk of serious illness or death to which members of the condominium community may be exposed by persons who do not wear masks in the common elements. This is their home. In many, if not most, instances, they have nowhere else to go.

[40] The Respondents submit that they ought not to be subject to what they describe as a callous and unreasonable adherence to a draconian policy. The building is also their home.

[41] The Respondents have a substantial, although not absolute or unbounded, right to privacy in respect of their medical information.

[42] As submitted by the parties, in this case the Court is called upon to balance competing rights. The issues are complex and profound. There is some merit to the argument of both sides.

It is a difficult balancing act. It is not one susceptible to being reduced to simplistic analysis aligned with partisan positions in which each side seeks to caricature the other side in the debate.

[43] The law of general application in this instance (Red Zone Regulations and Burlington By-Law 62-2020), provide for certain exemptions to the requirement to wear a mask, and stipulate that no one is to be required to provide proof of the legitimacy of their exemption. As I stated at the outset, this is a policy decision which has been made and enacted by elected officials in the Province of Ontario, the Region of Halton, and the City of Burlington, in seeking to balance competing considerations. It is not my role in this case to opine on the wisdom or scope of those policy choices, and I do not do so.

[44] The Respondents in this case have provided evidence by way of affidavit that they will experience distress if required to wear a mask. The Applicant rightly protests that their evidence in this regard is very thin. However, the law of general application in this case does not require the Respondents to further substantiate their assertions. In these circumstances, I make no findings as to the credibility of their assertions. Even if I were inclined to do so, there is no evidentiary basis in medical terms before me to gainsay the veracity of their health claims, notwithstanding their partisan activities to promote their particular ideological beliefs in respect of vaccinations and the wearing of masks, however selfish, misguided or misplaced these may be.

[45] On the other hand, the HCC77 Board has the right, and indeed the obligation, to insist upon conduct by residents that does not place the other residents at undue risk. No person is an island. To echo the words of Justice Stinson, where someone chooses to live in a condominium community – whether as an owner or a tenant – they do not enjoy unlimited freedom to do as they please. Rather, they must conduct themselves in accordance with the rules of the community and with due respect and consideration for their neighbours and fellow residents. Further, they must govern and limit their personal activities taking into account the impact of those activities upon other residents, as regulated by the condominium rules.

[46] This necessity is particularly acute in the context of the current pandemic, where not wearing a mask may potentially have serious or deadly consequences for one's neighbours.

[47] As stated, in this case the Court is required to balance competing rights. Its decision must be tailored to the particular circumstances of this case. The Respondents live in the Admiral's Walk complex. It is their home. They must transit through the common elements to enter and exit the building. This is just a simple factual reality.

[48] However, they do not have to wander other floors in the building without wearing a mask for exercise, to visit other residents, for social activities or to post posters in support of their anti-mask beliefs.

[49] The Court will not make an Order in the face of the Respondents' claim for an exemption for health reasons requiring the Respondents to wear a mask or other face covering while in the common elements of the building while transiting for the purpose of ingress and egress, by the most direct route from their unit to the main entrance of the building, or to their parking spot at levels P1 and P2.

[50] However, the Court will make a declaration that any behaviour by the Respondents in exercising on or visiting other floors of the building other than the one their unit is located on, while not wearing a mask or face covering, would constitute a dangerous activity in breach of s.117 of the *Condominium Act*. Such selfish acts of individual defiance in the face of an ongoing pandemic have direct and potentially dire consequences for their neighbours. A compliance order pursuant to s.134 of the *Condominium Act*, and a permanent injunction pursuant to s.101 of the *Courts of Justice Act*, will issue enjoining them to comply with this.

Order

[51] The Court Orders that:

1. The temporary Order made in my Endorsement of March 2, 2021, and continued in my Endorsement of March 5, 2021, is vacated;
2. The Respondents Vily Mitrovic and Zoran Zupanc, for as long as HCC77 has in place its Mask Policy, or any other mask policy, or for as long as a mask or face covering is required under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, or by Burlington By-Law 62-2020, shall not transit or be on any floors other

than the 11th Floor, the elevator, the main lobby and mail room and parking garage levels P1 and P2 of the HCC77 building at 5250 Lakeshore Road, Burlington, Ontario, without wearing a securely fixed mask or face covering adequately covering their nose, mouth and chin, without gapping; and,

3. The Respondents may only circulate on any interior common elements without a mask or face covering for the purpose of ingress and egress, by the most direct route from their unit to the main entrance of the building or to their parking spot at levels P1 and P2.

[52] In the present circumstances of the COVID-19 pandemic, this Endorsement is deemed to be an Order of the Court that is operative and enforceable in its present form, without a formal typed Order. Approval of the form and content of this Order by the Respondents is dispensed with.

Costs

[53] As success is divided, there will be no Order as to costs.



M. Gibson J.

Date: March 19, 2021