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1 of 2 DOCUMENTS

*Case Name:*

**Dellostritto v. York Region Condominium Corp. No. 688**

**Between**

**Ernie Dellostritto, Applicant, and  
York Region Condominium Corporation No. 688, Respondent**

**And between**

**Ernie Dellostritto, Applicant, and  
Comsec Property and Financial Management Ltd.,  
Respondent**

**And between**

**Ernie Dellostritto, Applicant, and  
York Region Condominium Corporation No. 705, Respondent**

[2009] O.H.R.T.D. No. 212

2009 HRTD 221

File Nos. T-0077-08; T-0078-08; T-0079-08

Ontario Human Rights Tribunal

**Panel: David Muir, Vice-chair**

Decision: March 2, 2009.

(35 paras.)

**Appearances:**

No appearances mentioned.

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**CASE RESOLUTION CONFERENCE DECISION**

**1** These are three Applications filed August 13, 2008 under section 53(3) of Part VI of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

2 A Case Resolution Conference in this Application was held on January 19, 2009 in accordance with the expectation, expressed in the *Code* and the Tribunal's Rules, that section 53(3) applications proceed in a highly expeditious manner. I heard from the applicant, his spouse, as well as several residents of the respondent condominium.

### **Background**

3 The applicant is a father of two teen age children and resides with his spouse and children in York Region Condominium Corporation No. 705 (YRCC 705) which shares recreational facilities with York Region Condominium Corporation No. 688 (YRCC 688). The respondent Comsec Property Management was the property manager of YRCC 705 and YRCC 688.

4 The human rights complaint underlying this Application (the complaint) arises out of what the applicant characterizes as a systemic pattern of discrimination in accommodation on the basis of age and family status, by the three respondents since the time that he and his wife moved into the building in 1989. A reprisal is also alleged.

5 When the condominium was built it was marketed as an adult only building. As time passed and in response to human rights challenges to adult only condominium and apartment type residential accommodations these kinds of facilities began to describe themselves as "adult lifestyle". Whether as a consequence of the manner in which these buildings were marketed when built, or for other reasons, there is no dispute that the residents of the two condominiums are overwhelmingly retired or near retired individuals and families whose children have long since left the family home. Many of the residents are elderly.

6 The complaint included allegations that the respondents distributed promotional materials describing the building as an "adult lifestyle" building, posted signs advertising the building as an adult lifestyle building, and excluded families with children from membership on the Recreation Committee which had the effect of preventing families with children from the full use of the shared recreational facilities.

7 The Delostritto's both gave evidence that for many years they felt unwelcome and unwanted when using the common areas of the condominium including the recreation facilities with their children. They confirmed the allegations set out in the complaint and testified that as a result of the unwelcoming atmosphere and the fact that their hours of access to the recreational facilities were more restricted at the time they often took their children elsewhere.

8 Many of the issues between the parties were resolved while the complaint was being investigated by the Ontario Human Rights Commission. As part of a proposed settlement at the Ontario Human Rights Commission it was agreed that all "adult lifestyle" signage would be removed, a Families Committee would be established, Code cards would be posted, and ant-discrimination training would be provided to the property manager and condominium Board members. It was also agreed that the hours that families with children could use the pools would be extended to allow greater access. For example, children had only been allowed into the pool between the hours of noon and 6 p.m. on weekdays. These hours were changed to allow access from 2 p.m. to 8 p.m. every weekday but Wednesday thus allowing working families greater access. Unfortunately the settlement fell apart because of the parties' misunderstanding of what one of its terms meant in practice. There was no disagreement that I could consider the proposed settlement as part of the context to this Application.

9 Despite the failure to resolve all of the issues, the applicant agreed that some progress had been made in resolving some of the systemic issues. For example, the "adult lifestyle" signage has been removed, Code cards are posted throughout the complex and other efforts are underway to integrate families with children into the condominium community. The respondents also state that training for property management and Board members has been arranged and a Policy on Family Status has been created and implemented.

10 In addition to these general and systemic allegations, the central thrust of the complaint, and the primary issue remaining unresolved in the Application, relates to the age restrictions affecting children's use of the recreational facilities, in particular the use of the swimming pools. It is argued that the age restrictions amount to discrimination against Mr. Dellostritto on the basis of age and family status in that they restrict his ability to use the facilities with his teenage children.

11 As noted above, the two respondent condominium corporations share a recreational facility which includes an indoor and outdoor pool, tennis courts, indoor racquet courts, a gym and weight room, etc. The Application relates to the use of all of the facilities in theory, although it was agreed at the outset that the parties would confine their evidence and argument to the use of the pools. Accordingly these reasons focus on use of the pools and the indoor pool in particular. It is clear however that similar issues arise with respect to all of the other shared use facilities in the recreational complex.

12 Although not central to this dispute, the process by which rules for the use of the shared recreational facilities are developed has played an important part in the parties' attempts to deal with their disputes and has been a source of considerable frustration for the applicant. Because the two condominiums share facilities, special governance rules were adopted, in effect devolving decision-making with respect to some aspects of the management of the recreation facility to a joint Recreation Centre Committee.

13 It is agreed that when the applicant became a resident in the respondent condominium, there was a rule that prohibited persons under the age of 16 from entering the recreation center including the pools unless accompanied by a person over the age of 16. The issues underlying the complaint came to a head for the applicant when he became aware that the respondents had purported to raise the minimum age for the unaccompanied use of the condominium's recreation centre from 16 to 18 years of age. At the time this decision was made, the applicant's teenage son had just turned 16 and had been anticipating more extensive access to the recreation facility. It is agreed that this issue had been resolved in the settlement at the Commission - the age for unaccompanied access has been changed back to 16.

14 As well, there were, and continue to be, rules that restrict children under a prescribed age from entering the pools at all, except during specified hours which for ease of reference will be referred to as family swim hours. At the time that the human rights complaint was made, the hours of access to the pools for children under the prescribed age were limited to noon to 6 pm on weekdays and noon to 3 p.m. on weekends.

15 The parties disagree about what this prescribed age was. Although not material to this determination, it is the applicant's contention that the family swim rule as published had always been that children ages 12 to 15 were entitled to use the pools at any time, subject to the need for a chaperon over the age of 16, that is their access was not limited to family swim hours. The respondents disagree stating that the Rule, despite its clear wording, was always that children between the ages of

12 and 15 were restricted to family swim hours. The applicant does agree that despite the clear wording of the relevant rules the respondent's interpretation had prevailed in fact.

16 The applicant and his family challenged the rule change for unaccompanied access described in paragraph 13 above, and at the same time sought to have the family swim hours extended from what they were at the time. When unable to accomplish their goals after extensive efforts internally, including retaining counsel in an attempt to persuade the Boards of the condominium corporations, the applicant filed the complaint.

17 Although the broader issues described above continue to form an element of this Application, the focus of the dispute at the Case Resolution Conference was whether the family swim rule restricting children under the age of 16 to use the pools only during family swim hours has a discriminatory effect on Mr. Delostritto on the basis of age and family status. The respondent led no evidence with respect to the broader systemic issues other than to point out that they continue to implement the terms of the failed settlement.

18 The applicant's position at this point is simply put: that there should be no age restrictions on use of the facilities including the pools, that is, that the family swim hours regime is in violation of the *Human Rights Code*. The applicant states that there are rules respecting the conduct of individuals in the pool area which deal with issues of safety etc. and they can and should be enforced against everybody.

19 The respondents state that the use of the pools by children under the age of 16 during adult swim hours could create a safety hazard for older residents, and would detrimentally affect the quiet enjoyment of other adults who use the pool during those hours.

20 I heard from several residents of both respondent condominiums who testified that they are regular users of the pool for recreation and some health related issues. They each testified that the pools are quite small and when there are children playing and enjoying themselves in the pool area they did not feel that they could safely enjoy the use of the facility. Their concerns ranged from simply being unable to enjoy their swim or aquatic workout; to being precluded from doing so given the confined space; to feeling that their safety was compromised by rambunctious child's play. Such concerns were not confined to children necessarily misbehaving such that rigorous enforcement of the rules respecting appropriate conduct would be sufficient. Moreover the pool area is not supervised. I accept this evidence. I also accept the evidence of these residents that they are not opposed to children being able to use the pool, and several of them indicated that they were impacted by the restrictions when being visited by grand-children.

21 As a consequence of the settlement referred to above, the number of hours that children are able to use the pool was increased. Currently, of the roughly 119 hours the indoor pool is open, families with children under 16 are able to use it for 43 hours. At the case resolution conference, the respondents offered to extend these hours further on weekends. I encouraged the parties to continue these discussions regardless of the outcome of this Application.

**Has Mr. Delostritto been the subject of a reprisal for raising these human rights issues?**

22 No particulars for this allegation are provided in the complaint however it seems to relate to a meeting called by the Board of YRCC 705 to deal with requests for rule changes instigated in part by Mr. Delostritto's efforts to have the family swim hours extended. This part of the Application is

dismissed. There is no basis for concluding that a meeting to consider proposed rule changes related to the use of the recreation facility was a violation of the reprisal provisions of the *Code*.

**Have the respondents engaged in conduct, including the making of the family swim rule which had a discriminatory effect on the applicant on the basis of age?**

**23** The Application as it relates to an allegation of discrimination on the basis of age is dismissed. There is no evidence of any discrimination, direct or otherwise, experienced by the applicant because of or related to his age. The age issue if any, relates to the age of his children not that of the applicant.

**Have the respondents engaged in conduct, including the making of the family swim rule, which had a discriminatory effect on the applicant on the basis of family status?**

**24** Both parties referred to a previous decision of an Ontario Human Rights Board of Inquiry involving somewhat similar facts - *John Leonis and Ontario Human Rights Commission v. Metropolitan Toronto Condominium Corporation No. 742* (1998) 33 C.H.R.R. D/479. The Board of Inquiry held that the alleged discrimination in relation to the use of shared recreational facilities in a condominium related to the complainant's occupancy of accommodation. I agree with that conclusion and in that regard the circumstances of this case are identical.

**25** In the *Leonis* case the hours that children could access the recreational facilities were quite limited, much more limited than even those in place when this complaint was first made. In that case the Board of Inquiry concluded that the restricted hours effectively precluded a family with children from accessing the facility and therefore had a discriminatory effect on families with children. The Board of Inquiry also concluded that the restrictions on children's access to the recreational facilities in place at the time were not reasonable; however the Board of Inquiry also agreed with the respondents that no restrictions at all would impose an undue hardship on the other residents who wished to use the facilities as well. I agree with that result and see no reason not to come to similar conclusions in this case.

**26** Turning to the instant facts, whether the number of hours that children under the age of 16 are able to use the pools is the right number is not for the Tribunal to decide. The question must be whether the applicant's rights under the *Code* have been violated by a rule which restricts his ability to visit the pools with his daughter (who was under the age of 16 at all material times) at any time that he chooses. Mr. Dellostritto did not argue that the rules in place were so restrictive that they effectively deprived him from using the pools or other recreational facilities with his daughter, rather he takes the position that any restriction on the ability of his daughter to use the pools at any time that they choose is a violation of his right to be free from discrimination in accommodation on the basis of family status. It is not.

**27** I find that the family swim hours in effect at the time of the Case Resolution Conference are not unduly restrictive and do not constitute discrimination on the basis of family status

**28** The family swim hours in effect at the time of the complaint were more restrictive and could have had a discriminatory impact on working families with children as they effectively precluded use of the pool during the week. Mrs. Delostritto testified that she sometimes took her children elsewhere as a result of the restricted hours as well as her perception that families were merely tolerated. Mr. Delostritto did not use the pools.

29 These more restrictive rules governing access as well as the change in the minimum age for unaccompanied access from 16 to 18 years of age, the posting of "adult lifestyle" signage and the promotion of the buildings as "adult lifestyle" contributed to the atmosphere that the Dellostrittos described as unwelcoming to them as a family with children. I also accept their evidence that this sense of feeling unwelcome caused them to not use the condominium's shared facilities on occasion prior to the complaint and instead took their children elsewhere. I also accept their evidence that this was a significant inconvenience for them and would have involved some out of pocket expenses although they could not quantify the financial impact this had on the family.

30 While the respondents' witnesses did not perceive the effect of these things in the same way as the Dellostrittos, that is not surprising. As well the respondents, while not expressly conceding these issues, did not seriously dispute the fact that some of their practices at the time the complaint was filed were not in conformity with the *Code* and could be found to be in violation of section 2.1 of the *Code*.

31 For these reasons I find that the respondents were, at the time that this complaint was made, in violation of section 2.1 and 9 of the *Code*.

#### **Remedies**

32 The applicant sought a number of remedies, for the most part related to the family swim rules. Most of the other remedies initially requested in the complaint have been agreed to and are being implemented by the respondents.

33 I find that the respondents have violated the *Human Rights Code* for the reasons set out above. The Applicant sought general damages in the amount of \$4,000, representing the bulk of the legal fees paid to challenge the rules made by the Recreation Committee, under the *Condominium Act*. The Application as it relates to those issues has been dismissed.

34 I do find that an award of general damages in the amount of \$1,000 is appropriate for the violations of the *Code* found to have taken place. In assessing this amount I have taken into account the fact that the parties largely settled this complaint some time ago and despite the settlement falling apart the respondents have taken good faith steps to implement most of what was agreed to. On the other hand I have also considered that the only substantive issue unresolved by the parties at that time - the allegation that any age restrictions on access to the pools is a violation of the *Code* - has been dismissed.

#### **Order**

35 The respondents shall pay to Ernie Delostritto \$1,000 as general damages for the violation of the *Human Rights Code*. This amount to be paid within 30 days of the date of this decision failing which it will attract post-judgement interest in accordance with the *Courts of Justice Act*.

Dated at Toronto, this 2nd day of March, 2009.

David Muir  
Vice-chair

cp/e/qlqs