HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Michelle Pantoliano

Applicant

-and-

Metropolitan Toronto Condominium Corporation No. 570 and York Condominium Corporation No. 531

Respondents

DECISION

Adjudicator:	Naomi Overend
Date:	April 15, 2011
File Number:	2008-00036-I
Citation:	2011 HRTO 738
Indexed as:	**Pantoliano v. Metropolitan Condominium Corporation No. 570**

APPEARANCES

Michelle Pantoliano, Applicant	)	Self-represented
M.T.C.C. No. 570 and Y.C.C. No. 531, Respondents	)	Mark Arnold and Andrea Krywonis, Counsel

[1] In the summer of 2008, the applicant, Michelle Pantolianio, attempted to introduce her then 10-month old daughter to swimming by taking her into the outdoor pool at her condominium complex. She was advised by the lifeguard on duty that babies in diapers (even swim diapers) were not allowed in the pool and asked to leave. Thinking that the lifeguard was in error, she attempted to return to the pool on two further occasions, with the same result.

[2] On the last occasion she learned that the rules of the complex prohibited children under two, and persons in diapers, from entering either of the complex's two pools. She also learned that the rules prohibited children under the age of 16 from using the pools except during specified hours.

[3] The applicant filed this Application alleging that these rules constitute discrimination on the basis of family status, contrary to the *Human Rights Code*, R.S.O. 1990, C. H.19 as amended (the *"Code"*). The respondents defend the rules on the basis that they are necessary for the health and well-being of the residents, most of whom are senior citizens.

[4] For the reasons discussed below, I find that the respondents have failed to demonstrate that the rules prohibiting infants and restricting children from accessing the pools are reasonable and *bona fide*.

FACTS

[5] Altogether, eight witnesses testified: the applicant, five lay witnesses for the respondent and two persons called by the respondent to give opinion evidence on the health and safety issues raised by this case. Although the scientific evidence was vigorously challenged, the evidence with respect to underlying facts was largely not in dispute. Where there is conflict between the testimony of the witnesses, I have resolved it in light of the probabilities arising from the circumstances.

Background

[6] Metropolitan Toronto Condominium Corporation No. 570 ("MTCC 570") and York Condominium Corporation No. 531 ("YCC 531") operate residential condominiums at 2000 and 2010 Islington Avenue respectively. The two buildings share common recreational facilities, which include both the indoor and outdoor swimming pool at issue in this Application. A Joint Operation Committee, which is composed of members of the board for both MTCC 570 and YCC 531, oversees the management of the jointly held facilities.

[7] A property management company provides day-to-day management of the two properties and common facilities. Antonello Conforti is the property manager. Initially, he was named as a respondent to this Application, but at the hearing the parties acknowledged that he was acting solely in the course of his duties and that it was not necessary to proceed against him. Accordingly, he was removed as a party and the title of proceedings amended to reflect this change.

[8] The applicant, her husband and infant daughter lived in a unit at 2000 Islington until it was sold in the fall of 2008. As residents they were entitled to use the recreational facilities including the two pools, subject to the age restrictions set out in the rules. For the purposes of this proceeding, the relevant portions of the rules pertaining to the pools were as follows:

> **R-3.1 Pools - General**
> ...
> 3. A cleansing shower shall be taken before using the sauna, whirlpool, and the indoor and outdoor pools.
> 4. Each person entering the pool or pool enclosures must comply with the Ontario Health Regulations and all other cautionary signs posted in these facilities.
> 5. Children **under two** years of age, and **persons requiring diapers**, shall **not enter** the whirlpool or the swimming pools.
>
> **R-3.2 Indoor Pool & Whirlpool**
> ...
> 2. The indoor pool and whirlpool is open daily from 5:00 - 24:00 hours.

3. Children under 16 years of age, accompanied by an adult Resident, may use the indoor pools only during the following Children's Hours:

- MONDAY – FRIDAY: 13:00 – 17:00 hours
- SATURDAY, SUNDAY & HOLIDAYS: 9:00 – 13:00 hours

These **CHILDREN'S HOURS** may be modified from time to time by the Joint Operations Committee for short intervals (e.g. Christmas vacation, etc.).
4. Children **under 16** years of age **may not** be in the pool or within the pool *enclosure* at times other than those stipulated above.

R-3.3 Outdoor Pool

...
3. The outdoor pool is open daily from 0:500 - 23:00 hours, but is closed between 08:00 and 9:00 each morning for servicing
4. Children **under 16** years of age, accompanied by an adult Resident, may use the outdoor pool **only** during the following **CHILDREN'S HOURS:**

- MONDAY – FRIDAY: 12:00 – 16:00 hours
- SATURDAY, SUNDAY & HOLIDAYS: 9:00 – 13:00 hours

These **CHILDREN'S HOURS** may be modified from time to time by the Joint Operations Committee for short intervals (e.g. Christmas vacation, etc.).
5. Children **under 16** years of age **may not** be in the pool or within the pool *enclosure* at times other than those stipulated above.

[9] While the rules specify that persons requiring diapers are not permitted in the pools, a sign posted in the pool area specifies that children wearing diapers are not permitted in the pool.

[10] It was common ground between the parties that the residents of the two buildings were mostly older adults, over the age of 65. This appears to be the legacy of the fact that these buildings were formerly marketed and sold as adults-only residences. Many of the residents who bought during the adult-only era, including some of the witnesses in this proceeding, have lived there a long time and are now senior citizens. Neither building, however, has been designated a seniors' residence and it was acknowledged that younger people are purchasing the units being sold.

[11] The applicant's husband's family moved into the building when the applicant's husband was a teenager despite the adults-only designation. The applicant testified that for many years, his was the only family in the building, and that even in 2008, she was aware of only one other couple with a small child in the complex. To the extent that

children use the facilities it would appear that they are mostly visitors of residents in the building. There were several references in the evidence to grandchildren of residents using the pool facilities.

Chronology of Events

[12] The first of the three incidents described in the Application occurred in mid-late June 2008. The applicant testified that her daughter was healthy at the time, and that she would not have attempted to take a sick child into the water. Prior to going to the pool, she bathed her daughter and put her in a swim diaper, over which she put a bathing suit, a protocol she followed each time she attempted to use the pool facilities.

[13] She entered the outdoor pool, carrying her daughter, via the stairs. Shortly after entering the water, the lifeguard on duty told the applicant that there was a prohibition against infants under two and asked her to exit the pool. The applicant testified she was not aware of this rule prior to entering the pool and, although she was sceptical, exited the pool when asked. She said she would check this with the property manager.

[14] The respondents cross-examined the applicant on the fact that Rule-3-1 was included in the package of material given to every person when they purchase a unit, but even if this is so, I cannot infer from that that the applicant had read and retained this information. I do not doubt the sincerity of the applicant's testimony that she was not aware of the rule prior to attempting to go in the pool with her daughter.

[15] The applicant phoned and left either one or two voice-mail messages with the property manager to clarify the situation, but did not receive a call back from him. The property manager testified that it was his practice to call residents back when they left messages for him, but could not be certain that the message was passed on to him by his assistant. Given the applicant's level of interest and timely conduct respecting this matter, I accept the applicant's testimony that she left at least one message for him.

[16] Having heard nothing from the property manager in response to her enquiries, the applicant attempted to use the outdoor pool again with her daughter on July 1, 2008. Sometime after 1:00 p.m., she went down to the pool area with her mother-in-law and daughter and entered the pool with her daughter. Shortly after getting in she was again asked to leave by the same lifeguard. She told this individual that she still had not heard back from the property manager.

[17] The applicant testified that usually the outdoor pool is pretty empty, but because it was a statutory holiday there were more people using it that day, including other children. The applicant observed the then President of the Board of YCC 531, Liesl Bandler, telling children to exit the pool as the hours for children on statutory holidays were from 9 to 1 and it was after 1:00 p.m.

[18] On July 7, 2008, the applicant attempted to enter the pool with her daughter one final time. There was another mother in the pool with a baby, but otherwise she testified the pool was largely empty, although there were individuals sitting on the deck chairs in the pool area. Once again, the lifeguard asked her to leave, which she did.

[19] The other mother, however, refused to comply with the lifeguard's request and remained in the pool. The lifeguard called the property manager, who came to the pool deck and asked the woman remaining in the water to please come out with her baby. The woman refused. A resident came over and a somewhat heated exchange ensued between the woman in the pool and the resident. The applicant described it as a sad afternoon.

[20] The applicant spoke to the property manager about the prohibition for the first time. He did not attempt to justify the rules, but told her that he had to enforce them. He suggested that she could petition the board to change the rules. She did not petition the board, as the property manager had suggested, thinking it would not make any difference.

[21] Instead of petitioning the board, the applicant filed her Application with this Tribunal the next day (i.e., July 8, 2008). She thought that this would resolve the matter quickly, which was important to her as the outdoor pool was only open during the warm weather. She also advised the property manager and board of the provision in the *Code* and the relevant portion of the Ontario Human Rights Commission's *Policy and Guidelines on Discrimination Because of Family Status* in response to a letter from the Joint Operations Committee.

[22] Following the incident on July 7, 2008, the property manager reported the issue to the Joint Operations Committee, which in turn sought legal advice regarding the restrictions on children and infants in the pools. Shortly afterwards, the Application was delivered to the respondents.

[23] On August 8, 2008, the Joint Operations Committee sent out a notice to the residents of MTCC 570 and YCC 531 advising them that, on the advice of counsel, it had unanimously voted to temporarily suspend Rule R-3.1-5, which prohibited infants and persons using diapers from using the indoor and outdoor pools. This notice went on to stipulate:

> ... despite the suspension of the Rule, all residents are advised that with respect to children who may not be toilet trained, they are required to wear appropriate swimming pants designed to prevent leakage of human waste into the pools.
>
> In addition, all residents shall be held liable and will be required to indemnify the Joint Operations Committee for any damage that might result or cost incurred arising from the usage of any of the components of the Recreation Facility. [Emphasis added.]

[24] The Joint Operations Committee, in concert with the Board of Directors of MCCC 570 and YCC 531, called a joint meeting of the unit owners of both buildings for September 23, 2008, to discuss changes to the rules of operation of the swimming pools recommended by their lawyer. On September 4, 2008, it sent out a notice which

enclosed an agenda, the existing rules and the proposed changes, the salient portion of which are as follows:

> **R-3.1 Pools – General**
> The existing Rule R-3.1–5 with respect to children under two years of age is repealed and replaced with the following:
>
> Any person under the age of 16 years may use the whirlpool or swimming pools provided that they are under the supervision of their parent, legal guardian or other resident or guest of a resident over the age of 18 years.
> Any person under the age of 16 years who requires diapers shall not enter the whirlpool or swimming pools unless:
> Their parent or guardian has signed and delivered to the Corporation the Waiver, Consent and Indemnity attached as Schedule A.
> The person is wearing disposable swimming pants such as Pampers ® Swimmers, Huggies Little Swimmers Swimpants ® or such other product designed to minimize the chances of defecating or urinating in the pool.
> In the event that person under the age of 18 years pollutes the swimming pool, their parent or guardian shall reimburse the Committee for all associated cleaning costs and expenses.
> No one shall pollute the swimming pool. Anyone who does do shall reimburse the Committee for all associated cleaning costs and expenses.
> ...
> **R-3.2 Indoor Pool and Whirlpool**
> The existing Rule R-3.2-3 and R-3.2–4 with respect to children's hours are repealed.
> **R-3.3 Outdoor Pool**
> The existing Rule R-3.3-4 and R-3.3–5 with respect to children's hours are repealed.

[25] The waiver referred to as Schedule A above was only for children, and was to be signed by the child's parent/guardian. In addition to agreeing to "closely" supervise their children and releasing the respondents from all liability for any harm their children might suffer when in the pool, the form required the parents/guardians to

> (...) confirm and agree to indemnity and save harmless the Joint Operations Committee and the Corporations from any and all costs, losses, liabilities and expenses, should [their] child/children pollute the pool while he/she/they are using it.

[26] The Notice of Meeting referred to above, was followed up by a letter entitled "To All Residents" dated September 9, 2008. The stated purpose of this letter was to

provide background to the notice concerning the meeting that was scheduled for September 23, 2008. It stated that

> The meeting has been made necessary by a resident who contravened Rule R-3.1 (5) by using the pool with her 10 month old baby. She refused to exit the pool when asked to do so by the lifeguard.

As indicated above, the applicant, in fact, exited the pool when asked by the lifeguard and the information contained in this letter is incorrect.

[27] The letter went on to add that the applicant

> (...) registered a complaint with the Ontario Human Rights Tribunal on the basis that her rights were being violated by not being permitted to swim with her baby. She is also seeking monetary compensation.

[28] The letter explained that the respondents' lawyer had drafted the amendments, which "would satisfy the complaints, should you wish to pass them." It then went on to say:

> HOWEVER it is up to ALL owners to make decisions on rule changes. The meeting was called to ascertain whether the owners wish the original rules to be changed.

[29] The meeting took place as scheduled. The minutes of the meeting, entered into evidence, reveal that the vast majority of residents who spoke at the meeting expressed opposition to the proposed rule changes. This is reflected in the final votes with respect to the three proposed changes. On each of the votes, the residents of both buildings voted overwhelmingly to defeat them.

[30] The applicant, who attended the meeting, said that the minutes do not reflect the nasty tone taken by many of the residents or the fact that when the votes were announced, the audience cheered. She testified she felt so intimidated by the tone of the meeting that she just stood at the back of the room with her mother-in-law and said nothing.

[31] The applicant testified that in the period between when she filed her Application and the joint meeting, there was a dramatic change in other residents' attitudes towards her, which she attributed to the fact that she had filed the Application. She testified that word got out fairly quickly about the Application.

[32] Shortly after she filed her Application, she received an invitation to the "Directors Summer BBQ" to be held on July 22, 2008. Although it had a start time of 5:00 p.m., the invitation specified "Adult Residents Only!" The applicant said she and her husband attended with their daughter because she thought it was important to go and be a part of it. However, she said that many of the residents ignored them and she was extremely uncomfortable.

[33] She testified there was a veiled reference to her in the editorial of the August 1, 2008 newsletter for the two buildings called "Suite Talk." In a discussion about neighbourliness, the editor said:

> ...It also means, as President Bandler and Property Manager Antonello Conforti point out, adhering to – not ignoring and defying – the rules and regulations set out by the condominium to ensure that harmony is maintained and everyone continues to enjoy living her.
>
> .... It is rather harder but more important to observe the rules set out in the binder issued to each owner because those rules exist so that everyone has an equal opportunity to use and enjoy the amenities of our complex and to maintain the value of the property each of us owns.

[34] In the same newsletter, under the heading "Presidents' Report," Liesal Bandler wrote:

> ...A condominium is an example of a community of people who are guided by the declaration, the by-laws and the rules of the corporation, under the governance of the Board of Directors.
>
> ...As owners, we have the responsibility to conduct ourselves within the guidelines. Before taking ownership of our suites, we all signed a legal form stating that we had read the declaration, the rules and the by-laws and that we would abide by the governing documents.

> ...Unfortunately, there are a very few residents who are inconsiderate of their neighbours and who consistently break the rules. It is your Directors' fervent hope that these people will realize their anti-social behaviour and will change their attitude. [Emphasis added]

[35] The applicant testified that she assumed these remarks were about her, an assumption which the respondents did not contradict. Specifically, I heard no other evidence about other "anti-social behaviour" or people who "consistently break the rules" at the time, and I have no difficulty in finding that these remarks were made in reference to the applicant.

[36] In addition to the above, the applicant said there were verbal remarks for which she can provide no date. On one occasion she was talking with her cousin on the pool deck and one of the male residents told her to shut up. She said this made her so upset that she said to him "No, you shut up." In addition, one of the residents stopped her and told her that her complaint would affect how her in-laws were treated and reminded her that she was the one to stop it. The applicant said most of the verbal communications were whispers about her. Once she came by a group of people talking and they said "speak of the devil."

[37] Subsequent to the applicant moving out of the condo, the respondents investigated putting in a small pool specially designed for young children. Martyn Cooke, the president of YCC 531, testified that the three quotes from contractors to do this ranged from $60,000 to $100,000. Because it would be built outdoors, it would only address the problem for three to four months out of every year. The feedback from residents in the building was to the effect of "how can you justify that kind of expense when there are so few children in the building?" In the end, the respondents chose not to pursue this option.

Rationale for the Restrictions

The Lay Evidence

[38] Residents of the two respondent corporations testified in order to express their concern about the lifting of the impugned rules. Diane Smith testified that she had contracted *E. Coli* in 1992 or 1993, when she was approximately 54 or 55 years of age, and it was such an unpleasant experience that she is terrified of contracting it again.

[39] Her doctor advised her that the cause of it *could* have been organic vegetables or swimming in the pool at the respondent facility (where she has lived since the mid-80's). In any event, the rule prohibiting babies in diapers was in place at the time she contracted the illness, and there were very few children in the complex (and none in her building). She has continued to swim in the pool at least five times a week since then and has not contracted any further illnesses.

[40] Donna Ketteringham, who is 76 and another long-term resident of the building, testified that she uses the pool at least three times a week. She also testified about the fact that a congenital condition has made difficult for use the pool in recent years and, to accommodate her, the respondents have put in a chair lift. This evidence, however, has no probative value with respect to the issue before me.

[41] Mariam McGuire, having just retired in 2010, was one of the younger residents to testify. She said that she was part of an aquatics group that meets three times per week. This group mostly meets in the indoor pool. She also does laps, both in the indoor pool and the outdoor pool. Like Ms Smith, she is concerned about *E. coli*. Although formerly a nurse by profession, she was not qualified as having any particular scientific knowledge of infectious diseases, and I received her testimony as a lay witness

[42] The minutes of the joint meeting held concerning the amendment to the rules indicate that another resident, Elizabeth Kovac,

> (...) cited several sources that had indicated that these [pool diapers] are not leakproof and that the level of chlorine in the pool is not adequate to counteract ecoli (*sic*) bacteria.

[43] Another resident is reported in these minutes as asking whether "information had been obtained regarding the Health Department's stand on pool pants" and was apparently advised in response that "[p]ublic pools permit these special pants," although the person giving the response queried whether the pool at the respondents' site was a public pool.

[44] Martyn Cooke is also reported to have cited research at the meeting concerning the health risks to children under 2 who are exposed to swimming pools. His information came from doing internet research. It is fair to say that he, like the other residents, does not have any expertise on the topic.

[45] In cross-examination, Mr. Cooke testified that there were no health and safety problems brought to his attention during the two months when the rules were suspended. The pools did not require additional maintenance and no one became sick. However, it is not clear how many babies or non-toilet trained children used the pools during this period. The applicant did not attempt to take her daughter in after the incident on July 7, 2008.

[46] There was very little in the either the testimony or the minutes that addressed the rationale for the restricted children's hours. Martyn Cooke testified that some of the residents expressed to him a desire to have less restrictive times because they want to bring their grandchildren to the pool; particularly on Sunday when the children's hours are during the time that some residents attend church.

The Scientific Evidence

The Quality of the Scientific Evidence

[47] The respondents called two witnesses to provide scientific evidence on the risk attendant on allowing children in diapers into public swimming pools. The first, Colleen Densmore, is a public health nurse in Alberta. The second, Juanita House, is an occupational health and safety nurse, also in Alberta. Ms House is also a principal in a consulting firm that works with employers in the area of disability management.

[48] Neither witness had any expertise in the areas in which they were asked to provide opinion evidence. In particular, neither had expertise in health risks associated with recreational water or risk reduction. Neither had a background, nor any work experience in swimming pool design, maintenance or operations standards. And neither had any expertise in the legislative regime governing the operation of pools in Ontario (or elsewhere).

[49] To the extent that either witness could speak on these topics, it was as a result of doing a literature search. It was on this narrow basis that they were qualified to give evidence on these topics. The limitation with this approach is that they could not be cross-examined on anything that underlay the literature on which they relied. Where there were questions about the information contained in the literature they could not answer them.

[50] Beyond this, there were problems with each of these two witnesses' evidence. In her comprehensive cross-examination of Ms Densmore, the applicant was able to demonstrate that Ms Densmore had misinterpreted some of the information which she reviewed. As is discussed in greater detail below, Ms Densmore also relied on her experience as a nurse to reach conclusions that were beyond her sphere of expertise.

[51] Ms House was asked to provide testimony on the effectiveness of swim diapers as a means of reducing pool water contamination. She was also retained and provided

a written opinion on the legislative scheme governing health and safety in pools, an area well beyond her area of expertise. I have given no weight to her conclusions in this area. Indeed, unless discussed and specifically adopted in this Decision, I have not relied on the conclusions reached or opinions expressed by either Ms Densmore or Ms. House.

[52] In over-reaching their expertise, both witnesses gave the appearance of being advocates for the respondents rather than persons retained to assist the Tribunal understand the scientific facts. In particular, Ms House was argumentative during cross-examination and had to be reminded that she was there to answer questions, not debate with the applicant.

[53] At one point, Ms House testified that she had attended a one-hour mom and tot swim class and during that entire class had not observed one mother check on the state of her baby's diaper. She relied on this singular observation as "evidence" that people cannot be relied upon to act in a responsible fashion if allowed to bring their infants into public pools.

[54] For the reasons outlined above (and detailed below), I am not confident in the scientific evidence on which I am required to rule. It may be necessary to return to these issues in future litigation.

The Types of Contamination Humans Release in Recreational Water

[55] When humans enter a pool whatever happens to be on their skin or hair is released into the water. Despite regulations requiring people to take a cleansing shower before entering a public pool, it would appear that not everyone does, or at least does so adequately. Ms Densmore reported that her research revealed that "[o]n average, a person has approximately .14 grams of feces on and around their anus" which can "be rinsed away and easily contaminate recreational water." Skin products, such as soaps, lotions and sunscreen, and hair products, such as shampoos and conditioners, are

among the things that also contaminate the water. In addition, people slough off skin cells.

[56] In addition to these passive means of transmission, people also spit, blow their nose and urinate in pools, either intentionally or involuntarily. People also foul pools by means of fecal accidents or vomiting.

[57] Given that people contaminate pools when they use them, there is an element of risk when people swim communally which is unrelated to concerns about drowning. The factual question I must determine is the level of risk caused by allowing babies or other incontinent children into the pools at the respondents' facilities. By definition, the only two concerns caused by allowing individuals who are incontinent into a pool are the elevated risk of urine and/or fecal contamination.

Concerns about Urine Contamination

[58] The scientific literature relied on by Ms Densmore showed that there is little risk caused by the mere presence of urine in a pool as urine on its own is not a toxic substance. Urine in combination with chlorine produces chloramines. High concentrations of chloramines, caused by high concentrations of urine, can irritate eyes and lungs. Ms Densmore stated in her report that high levels of chloramines have been linked to asthma, but on cross-examination she acknowledged that the study she relied on said only that high levels of chloramines were "potentially linked" to asthma. Moreover, neither she nor Ms House had visited the pools in question and could not comment on the adequacy of the ventilation.

[59] Ms Densmore also stated in her report that high levels of chloramines were detected in pools after heavy use by children in diapers, but it was pointed out to her in cross-examination that the source she cited made no reference to children in diapers and she was unable to find any other support for this proposition. There was no evidence before me addressing whether the high levels of urine found in some pools

are caused by people who cannot control their bladders or by persons who chose not to.

[60] In any event, it would appear that chloramines are not a major health concern. Ms Densmore was only able to point to one example (occurring in Nebraska in 2006) where chloramines were suspected of causing an outbreak of respiratory illness affecting 24 individuals.

Concerns about Fecal Contamination

Pathogens

[61] Although the presence of any feces in a pool may invoke a level of disgust, the literature relied on by Ms Densmore suggests that fecal contamination is a much greater concern when it is diarrhea rather than a fully-formed stool. That is, diarrhea is much more likely to come from a person who is infected with a communicable disease that can be transmitted via ingestion of fecal matter.

[62] The communicable diseases identified in the literature and reported in Ms Densmore's report as being of concern are as follows: *Cryptosporidium, Giardia, Campylabacter jejuni, Shingella sonnei, Escherichia coli (E. coli),* norovirus and *Hepatitis A*

[63] *Hepatitis A* is described in the literature as a rare disease in North America. Ms Densmore's report was only able to point to one outbreak attributed to a swimming pool, and that was in 1989, at a Louisiana campground pool.

[64] Similarly, Ms Densmore was only able to attribute one outbreak, occurring in California in 2006 and involving 9 people, to the *Shingella sonnei* bacterium. On cross-examination, Ms Densmore acknowledged that, although the outbreak was attributed to heavy usage by diaper-aged children, it occurred in what is known in common parlance

as a "kiddie pool." This is the type of small, shallow backyard pool that individuals fill with their hose and drain. Ms Densmore acknowledged that such pools are not comparable to a large pool which would be chlorinated and are not properly included in any survey of risk.

[65] The only outbreak caused by *Campylobater jejuni* bacterium identified in the literature, occurred in July 2005 in Wyoming, and involved 6 individuals. As with the *Shingella* outbreak, Ms Densmore acknowledged on cross-examination that the outbreak took place at "fill and drain" pool at a private residence.

[66] She also acknowledged that she was not clear on what kind of diapers the children were wearing or whether the persons responsible for the pool were implementing "appropriate pool practices" as this information was not included in the report on which she relied. In any event, she does not have professional expertise in the area of appropriate pool practises.

[67] With respect to the norovirus, Ms Densmore noted that it was attributed to two more recent outbreaks. The first of these occurred in Vermont in 2004 and involved 53 swimmers. On cross-examination, Ms Densmore acknowledged that the study discussing that outbreak did not attribute it to diaper-aged children, but rather to a mechanical failure.

[68] The second of the two outbreaks involving the norovirus occurred in Wisconsin in 2006 and involved 18 swimmers. No cause was attributed to this particular outbreak. Ms. Densmore agreed with the suggestion put to her in cross that the norovirus is spread by both vomit and diarrhea. She also acknowledged in her report that the norovirus is "rapidly inactivated by chlorine."

[69] Although Ms Densmore said that *E. coli* outbreaks have occurred in swimming pools, wading pools and play fountains, she only cited one outbreak, occurring in 1993 in London, England, involving six children. No information is included in her report about whether the incident involved a pool, a wading pool or a play fountain. Since the latter

two facilities have entirely different set of risks associated with them, the nature of the facility is essential in determining risk.

[70] As with the norovirus, *E. coli* is sensitive to chlorine and is "killed quickly when in contact with chlorine."

[71] Ms Densmore wrote in her report that it took *Giardia* 45 minutes to be killed in properly disinfected water. However, the Centre for Disease Control ("CDC") stated in its survey of waterborne-disease outbreaks in the United States associated with recreational water for 2005 and 2006 (relied on by Ms Densmore in her report) that *Giardia*, like *E. coli*, is a "chlorine-sensitive agent."

[72] The CDC noted that only one outbreak of *Giardia* occurred during this two-year time frame in the United States (in Massachusetts in 2005) and that investigation of the outbreak revealed that the chlorine levels of the pool were "below the recommended level" and that, despite that, chlorine was not added or the pool closed. It further noted:

> Previous outbreak investigations have demonstrated that the implementation of appropriate pool operation practices (e.g., adequate disinfection) effectively stops the transmission of chlorine-sensitive pathogens.

[73] From the literature entered into evidence, it would appear that the sole pathogen of concern to the CDC with respect to properly maintained swimming pools is *Cryptosporidium*, a parasite which is not chlorine-sensitive.

[74] In Ms Densmore's report, she noted that *Cryptosporidium* was responsible for 29 outbreaks in the United States, involving 3,718 people in 2005 and 2006. In response to questioning from me and on cross-examination, Ms Densmore acknowledged that she had inappropriately included an outbreak at an "interactive fountain" involving an estimated 2,307 individuals. When this number is removed, there were 871 individuals in the United States who are believed to have contracted *Cryptosporidium* from pools in

2005 and 340 in 2006. It is not clear from the report how sick these individuals got, but there were no deaths attributed to these outbreaks.

[75] In Canada, Ms Densmore only identified one outbreak attributed to *Cryptosporidium* in a pool, and that was in Manitoba in 2001. Of the 59 individuals affected by that outbreak, 10 had not been swimming, or otherwise been exposed to the sick individuals. Ms Densmore was not aware of any outbreak in Ontario associated with a pool, although she did allude to an outbreak of *Cryptosporidium* at a splash pad. As noted above, the risks associated with these facilities are entirely different risks than pools and so are not relevant to the issues in this instant case.

Causes of Cryptosporidium Contamination

[76] Ms Densmore attempted to address the question of who or what causes outbreaks in swimming pools, by referring to data collected by the CDC on outbreaks of waterborne illnesses in the United States during the period between 1971 and 2000. The CDC was able to obtain information on "sources of contamination and contributing factors" for about half the outbreaks during this 30-year period.

[77] The data is broken down by whether it occurred in untreated water or in a treated water venue, but is not further broken down by type of venue (e.g., swimming pool vs. splash pad), which limits its use in this case.

[78] In any event, the data for this period showed that diaper-aged children were viewed as the source of contamination in about 18% of outbreaks (of all types, not just *Cryptosporidium*) in treated water venues. Other sources of contamination and/or contributing factors included "feces in water or ill bathers" (36%), poor maintenance or operation (54%) and bather "overloading" (13%). (The numbers add up to more than 100% because in some cases there were multiple causes/factors.)

[79] This report notes that during this 30 year period, diaper-aged children were the suspected source of contamination in 25 outbreaks in the United States. This would be

in all recreational water venues, including lakes, rivers, wading pools and pools. The report noted that in some of these outbreaks, individuals were seen rinsing out diapers in water, later describing one of these incidents occurring at a reservoir (i.e., an untreated water venue). Of those 25, *Cryptosporidium* was identified as being the cause in seven outbreaks (six on its own and one in concert with *Shigella*).

[80] Unfortunately, this data does not tell the reader how many people became ill in each outbreak. That is, diaper-aged children were believed to be the source of 18% of all *outbreaks,* not all *illnesses.* As indicated above, one outbreak at a splash pad involved over 2,000 individuals, whereas other outbreaks involved as few as six illnesses. Ms Densmore noted during her testimony that by eliminating diaper-aged children from pools, one could reduce the number of illnesses by 18%, but one cannot draw that inference from the data as reported.

[81] Moreover, the data reflects the period from 1971-2000 and may not reflect current realities in terms of pool operation, diapers, public awareness or types of illness. Certainly, the data for the 2005-2006 (on which there was no breakdown for causation) reflected a much higher percentage of outbreaks attributed to *Cryptosporidium.*

Risk Reduction

[82] Ms House, the second witness to testify about the scientific literature, was asked to investigate whether swim diapers reduce the level of contamination in a swimming pool. As noted above, she has no expertise in swimming pool safety or diapers, and her conclusions were drawn from a single study referred to in the literature, a brief email from one swim diaper manufacturer and a review of another manufacturer's website.

[83] In 2009, a researcher with the CDC, in conjunction with a professor and aquatics director from the University of North Carolina, conducted a study on the ability of swim diapers to contain *Cryptosporidium* oocysts (the microscopic means of transmission of this parasite) and found them to be not particularly effective. In the test environment,

this study found that 25% to 70% of the oocyst-sized particles used in the study were released into the water within two minutes.

[84] It would appear from the evidence that swim diapers are effective at containing what is known in the industry as "fully formed stools," which are in any event unlikely to release *Cryptosporidium*. However, they cannot effectively prevent *Cryptosporidium* from getting into the water when the child has an episode of diarrhea. A press release put out by the foundation that funded the research contained the following quote from the foundation's CEO:

> It seems common sense that people who have diarrhea should not go into a public pool – nor should they let their children. This study confirms that parental restraint is the key to prevent Crypto outbreaks – not swim diapers. Swimming with diarrhea is irresponsible because it places other people's health at risk.

[85] This recommendation is consistent with the other literature before me, which emphasizes the importance of keeping persons suffering from diarrhea out of pools. Ms House's report does not make that recommendation, but instead concludes, "[i]n the case of pool fouling, the only guaranteed measure of keeping fecal contaminants out of the pool is keeping incontinent individuals out of the pool."

[86] In her testimony, Ms House suggested that the only individuals who have fecal accidents are those who would normally use diapers. However, there is nothing in the literature before me that supports her contention that the sole source of "fecal accidents" is persons who normally wear diapers. The fact that the CDC literature separates out contamination caused by "diaper-aged children" from that caused by "fecal accidents" suggests that the latter happens to individuals who are at least nominally toilet-trained.

[87] The study that measured whether swim diapers could effectively contain *Cryptosporidium* also examined the effectiveness of various pool filtration methods for removing *Cryptosporidium* from the water. It concluded that "precoat filters" were far

more effective at removal than other types of filters, such as sand and cartridge filters. The study reported success with the precoat filters at removing in excess of 99% of the *Cryptosporidium* in the contaminated water.

[88] Ms House's report makes no mention of these findings or even this aspect of the study. She did not examine the literature on the use of filtration, and so it is not clear whether these findings are idiosyncratic or reflective of the current thinking on pool safety. Moreover, without any further investigation, I have no way of knowing whether these methods of filtration are commercially available or still at the prototype stage. Perhaps, more fundamentally, it is not clear how effective filtration is at preventing exposure to a contaminant (i.e., how long a contaminant is in the water before it reaches a filter).

[89] Indeed, neither Ms Densmore nor Ms House were apparently asked to investigate other possible means of risk reduction – technological or otherwise – and so I am left with little meaningful evidence on other harm reduction strategies.

Risk based on Age of Pool User

[90] Ms Densmore prepared a supplementary report for the respondents that talked about the effect of aging on the body's ability to ward off and respond to infection once present. While I accept her basic premise that, as we age, our bodies are at an increased risk for infection and illness, I found much of her evidence on this topic to be over-stated.

[91] Ms Densmore illustrated her point by reference to her experience in nursing homes. While a large percentage of the individuals living in the two respondent buildings are senior citizens, those that testified before me were not only living independently, but also in sufficiently good shape to use the respondents' recreational facilities. It is not clear to me that these two populations are comparable.

[92] Ms Densmore's report speaks about this population's vulnerability to bacterial and viral illnesses, but the evidence suggests that these particular illnesses are rare or non-existent in a well-maintained pool. There was no specific evidence about the impact of *Cryptosporidium* on someone whose immune system is weakened.

[93] The CDC's survey of waterborne illnesses for 2005 and 2006 – the only evidence before me in which this information was collected – showed no deaths associated with the 3,714 cases of *Cryptosporidium*. This information does not reveal whether there were long term health implications for those whom became ill from this parasite.

[94] Residents who are immunocompromised by illness or medical treatment may choose not to engage in high-risk activities. In the review of the Manitoba *Cryptosporidium* outbreak, one of the public health recommendations made by the authors was as follows: "Public education should reinforce that high-risk activities (i.e., swallowing water from recreational water sources) may increase the risk of gastrointestinal illnesses."

DECISION AND ANALYSIS

[95] This Tribunal has found on two previous occasions that age restrictions in condominium complex recreational facilities are discriminatory on the basis of family status: See *Leonis v. Metropolitan Toronto Condominium Corp. No. 74,* [1998] O.H.R.B.I.D. No. 12 and *Dellostritto v. York Condominium Corporation No. 688*, 2009 HRTO 221 (CanLII). The respondents concede that the ban and restrictions in place at their facilities constitutes a *prima facie* case of adverse effect discrimination on the basis of family status contrary to s.11.

[96] Section 11, which sets out the prohibition against adverse effect discrimination, also contains a defence:

> (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that result in the exclusion, restriction or preference of a group

> of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
> ...
> (2) The Commission, the Tribunal or a court shall not find that requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[97] I am required to determine whether the prohibition in place concerning children under two and those wearing diapers is reasonable and *bona fide* in the circumstances. (Although the prohibition was against persons in diapers, the aim of it, as evidenced by the sign at the pool, appeared to be to restrict children in diapers. In any event, this case does not involve the prohibition as it impacts on adults who wear incontinence products.)

[98] I must likewise determine whether the restriction in hours during which children under the age of 16 can swim is reasonable and *bona fide* in the circumstances.

[99] The respondents bear the burden of that these prohibitions and/or restrictions are reasonable and *bona fide* and lifting them would impose an undue hardship on them. The evidence they marshal to address this burden must not be "impressionistic" or "speculative." Hardship is measured only after the respondents have made efforts to minimize the risk to health and safety.

The Prohibition against Children under Two and Those in Diapers

Undue Hardship: Measuring the Level of Risk

[100] In its *Policy and Guidelines on Disability and the Duty to Accommodate* the Ontario Human Rights Commission discusses a methodology for measuring risk:

In determining the serious or significance of a risk, the following factors should be considered:

- the nature of the risk
  - what could happen that would be harmful?
- the severity of the risk
  - how serious would the harm be if it occurred?
- the probability of the risk
  - how likely is it that the potential harm will actually occur?
- is it a real risk, or merely hypothetical or speculative?
  - could it occur frequently?
- the scope of the risk
  - who will be affected by the event if it occurs?

...

The seriousness of the risk is to be determined after accommodation and on the assumption that suitable precautions have been taken to reduce the risk.

[101] I adopt this methodology, and specifically adopt the statement that one can only determine the seriousness of the risk assuming *that suitable precautions have been taken to reduce the risk.* I note at the outset that there was a dearth of evidence from the respondents about the other precautions they took to reduce the risk of health problems at their pool facilities.

[102] It was clear that the respondents had a lifeguard, but it appeared that the lifeguard might have been on duty only during a portion of the period the pools were open. Moreover, it appeared, although again it was not clear from the evidence, that the lifeguard may only have supervised the outdoor pool. There was no evidence about what, if any, protocols the lifeguard(s) followed to ensure that the people who came to swim were adequately showered and not suffering from a communicable illness.

[103] The respondents did maintain the pool, but I heard no evidence about the level of maintenance or the updating of equipment, such as filters. Given the dictate that an undue hardship analysis starts from the assumption that all precautions have been taken to reduce risk, I presume that the respondents' pools are well maintained, properly ventilated, that all chemicals are at the appropriate levels and that these levels are checked at the recommended intervals.

[104] The literature suggests that the only contaminant of concern for pools in which these precautions have been taken would be *Cryptosporidium*. That is, the literature suggests that maintaining appropriate chlorine levels takes care of the other contaminants raised as concerns by Ms Densmore and Ms House in their reports. While some of the residents expressed a concern that they could contract a case of *E.coli* from a pool fouling, this concern was not borne out by the scientific literature before me, which suggests that this particular pathogen in very chlorine sensitive.

[105] The symptoms caused by *Cryptosporidium* are diarrhea, abdominal cramps, nausea, vomiting, headaches and low-grade fevers. Ms Densmore reports that for someone with a healthy immune system the symptoms could be minor, even non-existent; for someone with a "compromised immune system" the symptoms could be severe and possibly even life-threatening.

[106] Other than this vague assertion, however, we have no information about how likely it is that the infection would be life-threatening. Of the over 3,700 cases of *Cryptosporidium* associated with recreational water in the United States that were reported in 2005 and 2006, there were no reported deaths.

[107] With respect to the probability of the risk, it would appear to be exceptionally low. On the evidence before me, there have been no outbreaks of *Cryptosporidium* attributed to pools in Ontario. Given the large number of pools in operation in Ontario, including large community pools, the absence thus far of a *Cryptosporidium* outbreak is significant.

[108] In summary, the evidence reveals that the risk caused by allowing children in diapers (particularly those who wear swim diapers covered by tight-fitting plastic pants) to use the respondents' swimming pools is extremely small.

Goal of the Respondents

[109] In order to determine the reasonableness of the rule, it is necessary to first determine the respondents' overall health and safety goal with respect to their pool facilities. To paraphrase the Supreme Court of Canada, did the respondents set the goal of "absolute" health and safety, show no concern with respect to health and safety or had they set the goal of "reasonable" health and safety? See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 25-27 and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at paras. 45 and 48.

[110] The respondents, like other public pool operators, are governed by Reg. 565 of the *Health Protection and Promotion Act*, R.R.O 1990. Subsection 7(1) of that regulation states:

> Every owner and every operator shall ensure that the clean water and the make-up water are free from contamination that may be injurious to the health of bathers.

[111] This regulation does not mandate that public pool operators must ban diaper-aged children from their facilities. Section 15 of Reg. 565 does require that swimmers take a "cleansing" shower, and s. 19 requires that operators post a sign prohibiting people from "polluting" the water, but Reg. 565 does not, apparently, require these facilities to hire staff to ensure that these precautions are followed.

[112] Unfortunately, as with many other elements of their defence, the respondents led little evidence on this point and it would appear that they had no real clear goal with respect to the health and safety of their residents and guests who might use the pool facilities. It would appear that they largely allowed the persons using these facilities to self-regulate their cleansing activities and degree of health before entering the pools.

[113] The respondents did not have any protocol in place for reducing the number of "fecal accidents" not attributable to persons in diapers. They led no evidence of efforts

to educate their residents about pool hygiene. Given that they already distribute newsletters and notices to the residents on what appears to be a regular basis, this type of education would be easily undertaken.

[114] Moreover, even when confronted with the challenge to their current rules, they did not undertake a scientific study to determine whether the ban was justified and what would be best practises, but rather retained persons with dubious qualifications to justify their rules after the fact.

[115] I infer from the above factors that the respondents did not aspire to a goal of absolute safety in their pools. In any event, the goal of eliminating all risk is not realistic given that compliance with rules is imperfect and accidents do happen. As noted by Ms Densmore in her nursing opinion: "As swimming is essentially communal bathing, the transmission of infectious diseases can never be totally eliminated."

[116] While the respondents do not explicitly acknowledge it, their overall goal with respect to their pools appears to be reasonable health and safety. That is, they operate on the principle that some risk is acceptable. As noted above, the risk caused by allowing children in diapers to use the pools is extremely low and, therefore, well within this range of acceptable risk.

[117] Using the language of the *Code,* I find that the needs of the group (i.e., families with children in diapers) can be accommodated without undue hardship on the respondents. The respondents have not met their burden to establish that a total ban on children in diapers is reasonable and *bona fide* in the circumstances.

The Restriction of Children Under Sixteen to "Children's Hours"

[118] There was no direct evidence from the respondents that to lift the restrictions which prevent children under 16 from using the facilities outside of the specified "children's hours" would result in undue hardship. One witness talked about the fact that she liked to use the pools for lane swimming and that she attended an aquatics class in

the pool three days a week.

[119] Boisterous play from small children may or may not interfere with this activity. Unlike in *Leonis, supra*, where there was evidence about the inability to block off a portion of the pool for more disciplined activities such as classes or lane swimming, no such evidence of incompatibility was led in this case. At any rate, it is not clear why the pools could not be restricted to these activities at certain hours without restricting the use by age. A child under the age of 16, for example, may be interested in participating in lane swimming.

[120] As it stands now, the outdoor pool can only be used by children between the hours of 12-4 on weekdays. Children's hours for the indoor pool are 1-5 on weekdays. A parent who worked during these hours would not be able to swim with their child because of this restriction. Similarly, a child in school would not be able to use the pool for most or all of these hours. Indeed, these hours seemed designed to minimize access to the pools by children.

[121] In the absence of any evidence of undue hardship I find that the rules concerning children's hours are not reasonable and *bona fide*.

REMEDY

Future Compliance Remedies

[122] As noted above, the following rules have been found to be discriminatory on the basis of family status:

- The rule prohibiting children under the age of two and all persons wearing diapers (inasmuch as it concerns children) from entering the swimming pools. (N.B. This Decision does not address the restriction vis-à-vis the whirlpool.)
- The rules prohibiting children under the age of 16 from entering the indoor and outdoor pools and pool enclosures except during the specified children's hours.

[123] To ensure future compliance with the *Code*, the respondents are directed to revise and/or repeal R-3.1-5; R-3.2-3, R-3.2-4, R-3.3-4 and R-3.3–5 to remove the offending prohibitions.

[124] By way of guidance, the respondents can, in good faith, create rules restricting persons with communicable diseases from entering the pools. If necessary, they can also, in good faith, restrict pool use by activity where such restrictions are reasonable and *bona fide*. However, requirements on the basis of age (e.g., the requirement that was temporarily in place in the summer of 2008 requiring parents of children under the age of 16 to sign a "Waiver, Consent and Indemnity" to the respondents before their children were allowed to use the pool facilities) are inherently problematic.

Compensation for Loss Arising from the Infringement

[125] In her Application, the applicant sought $12,000.00 on the basis of payment of past condominium fees. At the hearing, the applicant dispensed with this request, but asked for compensation for the injury to her dignity, feelings and self-respect.

[126] On the date she had filed her Application, the applicant had been asked to leave the pool on three occasions. Except on the last occasion, when she witnessed a resident berating another woman with a baby who had refused to leave the pool, these requests were carried out respectfully and without further incident. If this was the sum total of the conduct, a small amount of compensation would have been appropriate.

[127] However, subsequent to the applicant filing her Application and attempting to change the rules concerning pool usage, she testified that the environment in complex became poisoned and she was subject to slights, innuendo and abuse. The written communications that were sent to the residents wrongfully accused the applicant of having refused to leave the pool, and implied that she was inconsiderate to her neighbours, consistently broke the condominium rules and engaged in anti-social

behaviour. She was subject to this environment for a period of approximately three months.

[128] The applicant quite reasonably felt distressed by this change in attitude. Given that she was at home with her infant daughter, it was more difficult to escape these verbal and written comments. Moreover, she was concerned that this behaviour would be directed at her in-laws who also lived in the building.

[129] Considering the objective seriousness of the conduct and the subjective effect of the conduct on the applicant, an award of $10,000.00 as compensation for the injury to her dignity, feelings and self-respect is appropriate. This amount is payable jointly and severally by the two respondents.

ORDER

[130] I make the following orders:

> 1) The respondents shall revise and/or repeal R-3.1–5 to remove the prohibitions concerning children under the age of two and children requiring diapers entering the respondents' indoor and outdoor pools.
> 2) The respondents shall revise and/or repeal R-3.2-3, R-3.2-4, R-3.3-4 and R-3.3–5 concerning the use of the indoor and outdoor pools by children under the age of 16 outside of "children's hours."
> 3) The respondents shall jointly and severally pay to Michelle Pantoliano $10,000.00 as compensation for injury to her dignity, feelings and self-respect, inclusive of pre-judgment interest;
> 4) In the event that the respondents fail to make the payment described above within 30 days of the date of this Decision, the respondents shall jointly and severally pay postjudgment interest in accordance with the *Courts of Justice Act*.

Dated at Toronto, this 15th day of April, 2011.

"Signed by"

Naomi Overend
Vice-chair