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Owners no longer in hot water over outdoor tub

A recent decision of the Ontario Court of Appeal has come down strongly in favour of the rights of individual condominium owners.

The case deals with Wentworth Condominium Corp. 198, a residential project in Waterdown, Ont. Each of its 31 condominium townhouse units has a backyard that forms part of the common elements of the corporation, and each owner has exclusive use of that backyard.

In late 2007, Jim McMahon, one of the unit owners, asked the condominium board for permission to install an above-ground hot tub on his back patio. The board refused.

Eventually, without the board's consent, McMahon installed the hot tub on the patio. The tub itself is 1.8 metres wide, two metres long and a little over one metre high. It is a one-piece unit that weighs about 136 kilograms empty.

It is filled by a garden hose and holds 1,000 litres of water weighing 1,000 kilograms. The tub occupies about 25 per cent of the backyard and its heater is hard-wired to the electrical panel in the McMahon unit.

Section 98 of the Condominium Act requires a unit owner to obtain the board's approval in order to "make an addition, alteration or improvement to the common elements" of the corporation.

After the tub was installed, the condominium corporation applied to court to order the removal of the hot tub. At the original hearing in March 2009, Justice Joseph R. Henderson dismissed the application. He ruled that the hot tub was neither an addition to the common elements, nor a permanent alteration or improvement, and that McMahon did not need board approval to place it in his backyard.

The board appealed the decision, and the case was heard by the Ontario Court of Appeal in November last year. Writing for a three-judge panel, Justice James C. MacPherson dismissed the appeal and again ruled in favour of McMahon.

In rejecting the board's case, the appeal court likened the hot tub to "barbecues, picnic tables, small inflatable swimming pools, children's toys and thousands of other ordinary articles that are regularly found on backyard patios ...

"If the approval of the board of directors is not required for the barbecue and picnic table, then it should not be required for the hot tub," the court wrote.

The three judges of the Court of Appeal agreed that the decision of the judge on the original application struck an appropriate balance between the rights of the individual owners and the rights of the group of all the owners speaking through their board of directors.

The court decision has received mixed reviews in the condominium community, with lawyers for individual owners welcoming it, and condo boards and their lawyers believing it went too far in favour of owner's rights.

Toronto condominium lawyer Audrey Loeb was disappointed in the outcome. She predicted that condominium boards across the province may be looking to revise their rules to clarify what is and what is not permitted on common elements such as patios, yards and balconies.

Condo manual

The third edition of *The Condominium Act: A User's Manual*, by Audrey Loeb, has been released by Carswell, a publishing arm of Thomson Reuters.

The new edition is a "must-have" for condominium boards, property managers and owners who want to be updated on their rights and obligations.

It features 40 comprehensive "how-to and what you need to know" checklists, the full annotated text of the Condominium Act, more than 200 summaries of court cases, a glossary of technical terms, and answers to key questions all condo owners and managers should know.

Written by one of Ontario's best-known condominium lawyers, the book sells for $89. Call 416-609-3800, or visit carswell.com and type Audrey Loeb into the catalogue search engine.

Wentworth Condominium Corporation No. 198 v. McMahon, 2009 ONCA 870 (CanLII)

Print: PDF Format
Date: 2009-12-09
Docket: C50328
URL: http://www.canlii.org/en/on/onca/doc/2009/2009onca870/2009onca870.html
Noteup: Search for decisions citing this decision
Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Superior Court of Justice**

  Wentworth Condominium Corporation No. 198 v. McMahon, 2009 CanLII 20716 (ON S.C.) - 2009-04-28
- Wentworth Condominium Corporation No. 198 v. McMahon, 2009 CanLII 9764 (ON S.C.) - 2009-03-10

Legislation cited (available on CanLII)

- Condominium Act, 1998, S.O., 1998, c. 19 1(1)

Decisions cited

- Carleton Condominium Corp. No. 279 and Rochon, 59 O.R. (2d) 545 38 D.L.R. (4th) 430 21 O.A.C. 249

CITATION: Wentworth Condominium Corporation No. 198 v. McMahon, 2009 ONCA 870
DATE: 20091209
DOCKET: C50328
COURT OF APPEAL FOR ONTARIO
Goudge, MacPherson and Blair JJ.A.
BETWEEN:
Wentworth Condominium Corporation No. 198
Applicant (Appellant)
and
Jim McMahon
Respondent (Respondent in Appeal)
Erik Savas, for the appellant
Harvin Pitch and Daniel Resnick, for the respondent
Heard: November 10, 2009
On appeal from the judgment of Justice J.R. Henderson of the Superior Court of Justice dated March 10, 2009.
MacPherson J.A.:

A. INTRODUCTION

[1] The essential feature of a condominium corporation is its mix of private residential units and common space. In the *Condominium Act*, S.O. 1998, c. 19, s. 1(1), the common space is called common elements which means all the property except the units .

[2] Typically, the common elements of a condominium corporation are divided into two categories areas which can be used by all of the owners (for example, lobbies, driveways, garages and guest facilities) and areas reserved for the use of only one owner (for example, the patio or lawn area immediately contiguous to a unit).

[3] Section 98(1) of the *Condominium Act* requires that an owner obtain the approval of the condominium corporation s board of directors if the owner seeks to make an addition, alteration or improvement to the common elements of the corporation. The respondent, Jim McMahon (McMahon), the owner of a unit in the appellant condominium corporation, installed a hot tub on his backyard patio. He did not obtain the approval of the appellant s board. The appellant brought an application seeking the removal of the hot tub.

[4] The application judge agreed with McMahon. Justice Henderson concluded that a hot tub was not an addition, alteration or improvement within the meaning of s. 98(1) of the *Condominium Act*. The correctness of this interpretation is the principal issue posed by this appeal.

B. FACTS

(1) The parties and events

[5] The appellant, Wentworth Condominium Corporation No. 198, is a condominium corporation located in Waterdown and is comprised of 31 town-house style residential condominium units.

[6] The respondent, Jim McMahon, is a 73-year-old retiree who has owned unit 27 since 2001.

[7] Each unit in the condominium complex contains a back yard that forms part of the common elements of the corporation. Each owner has exclusive use of their common element back yard.

[8] In late 2007, McMahon applied for approval from the board of directors to install a hot tub on his back patio. The board did not grant the approval.

[9] On December 7, 2007, McMahon installed a hot tub on the back patio. The hot tub is six feet wide, seven feet long and four feet high. It is a one-piece unit that weighs about 300 lbs. without any water in it. It was installed by two delivery men. It is filled by a garden hose and holds 1000 litres of water weighing 1000 kilograms. The hot tub occupies about 25 per cent of the common element back yard of unit 27.

[10] The hot tub is hard-wired to unit 27. A three-wire electrical cable was installed that runs from the electrical panel located in McMahon s basement and outside to the hot tub, where it is connected to the hot tub with three screws.

(2) The application

[11] The condominium corporation made an application seeking, *inter alia*, the permanent removal of the hot tub. The application judge considered the matter in the context of s. 98(1) of the *Condominium Act*. He reviewed relevant case law and dictionary definitions of add , alter and improve . This led him to define the pivotal words of s. 98(1) in this fashion:

Therefore, I find that the word addition means something that is joined or connected to a structure, and the word alteration means something that changes the structure.

I find that the word improvement means the betterment of the property or enhancement of the value of the property. I also accept that an improvement refers to an improvement or betterment *of the property*. That is, to be an improvement there must be an increase in the value of the property. If the item increases the enjoyment of the property, but does not increase the value of the property, I find that the item is not an improvement. [Emphasis in original.]

[12] Applying these definitions to McMahon s hot tub, the application judge reached these conclusions:

The hot tub is not an addition as it is not something that sensibly can be seen as being joined to or connected to the structure. It is connected by an electrical cable, but the purpose of the electrical cable is to supply power to the hot tub, not to fix the hot tub to the structure. Furthermore, even though it may take a half-hour and two men to move, the hot tub is still designed to be removed from the property. It is not a permanent fixture on the property.

The hot tub is not an alteration as it does not change the structure of the property. The hot tub may alter the landscape, but any such alteration does not cause any permanent change to the structure.

The hot tub is not an improvement as it does not increase the value of the condominium unit. It is not a fixture that is so attached to the property that it becomes a part of the property. Thus, it cannot increase the value of the property.

[13] Accordingly, the application judge concluded that McMahon does not require the approval of the board to place the hot tub in the exclusive use common element area on his patio. He dismissed the condominium corporation s application.

[14] The condominium corporation appeals.

C. ISSUES

[15] The appellant raises three issues:[1]

(1) Did the application judge err in his interpretation of s. 98(1) of the *Condominium Act*?

(2) Did the application judge err by not determining that the installation of the hot tub contravened s. 8(d) of the corporation s Declaration?

(3) Did the application judge err by not determining that the installation of the hot tub contravened ss. 116 and 117 of the *Condominium Act*?

D. ANALYSIS

(1) Section 98(1) of the *Condominium Act*

[16] This is the principal issue in this appeal.

[17] Section 98(1) of the *Condominium Act* provides:

98.(1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,

(a) the board, by resolution, has approved the proposed addition, alteration or improvement; .

[18] The application judge concluded that the hot tub was not an addition, alteration or improvement within the meaning of this section. The appellant contends that his interpretation is flawed for three reasons.

[19] First, the appellant submits that the application judge did not apply the grammatical and ordinary sense of the words addition , alteration and improvement .

[20] I disagree. The application judge s starting point for determining the meaning of these words was the dictionary. In my view, this is precisely where he should have started. Indeed, this is where Cory J.A. started his analysis when he had to define the words maintenance and repair in a previous version of the *Condominium Act*: see *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (C.A.), at p. 341.

[21] Second, the appellant contends that the words addition , alteration and improvement , at least as they are used in s. 98(1) of the *Act*, have a shared or common meaning namely, a change of the original condition of some physical thing or matter. As expressed in its factum: If one adds some thing to another thing or matter, the pre-existing condition of the latter is changed. If one alters some thing or matter, the pre-existing condition of the latter is changed. If one improves some thing or matter, the pre-existing condition of the latter is changed. The application judge, says the appellant, should have concluded that the legislature likely intended by its use of the words addition , alteration and improvement to signal that any act of an owner that changes the pre-existing condition of the common elements of the condominium property requires the consent of the board of directors.

[22] The application judge rejected this submission, saying that each of the three words has a separate and distinct meaning. I agree. In my view, the differences are readily apparent from the dictionary definitions cited by the application judge. An addition builds on or supplements what is already there. An alteration can add to or subtract from what is already there. And an improvement introduces a qualitative factor into the analysis, one not required by the words addition and alteration .

[23] There is another and, in my view, crucial flaw in the appellant s attempt to lump together the three words in s. 98(1) of the *Act*. The equation of addition , alteration and improvement with change creates a result that is far too broad. Barbecues, picnic tables, small inflatable swimming pools, children s toys and thousands of other ordinary articles that are regularly found on backyard patios would constitute changes to the common elements of the condominium property under the appellant s definition because they would make different the pre-existing condition of the common elements .

[24] Indeed the barbecue analogy relied on by the respondent strikes me as particularly apt. Both the barbecue and the hot tub are placed somewhere on the patio stones. Both are connected in a limited sense to the condominium unit, the barbecue by a gas line and the hot tub by an electrical cable. Yet, as the application judge observed, the condominium corporation has not required any owner to seek approval to install a barbecue on the patio common elements of the condominium property.

[25] The appellant s third submission is that the application judge did not examine the *Condominium Act* as a whole. If he had done this, says the appellant, he would have recognized that the Act focuses on the integrity and condition of the common elements and that these have primacy over what the appellant calls the whims of the individual owners to use them or change them as they might desire.

[26] I do not accept this submission. The application judge did not limit his analysis to just the dictionary definitions of the words addition , alteration and improvement . Rather, he stated that I must expand on each definition because each of the three key words in s. 98 must be interpreted in the context of the condominium property.

[27] It is true that the integrity of the common elements of a condominium complex is an important feature of the structure and content of the *Condominium Act*. However, an equally important feature of the *Act* is the rights of the owners. This twin focus of the *Act* was well-described by Finlayson J.A. of this court in *Re Carleton Condominium Corp. No. 279 and Rochon et al.* reflex, (1987), 59 O.R. (2d) 545 at 549-50:

The *Condominium Act* was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building. This means that they have disposable real property which is an investment and not simply an expense. Its purchase can be financed by mortgage or lien in the same manner as any piece of real estate. The unit owners are tenants in common and have all the rights of any owner of land within the description of their unit (s. 1(1)(*q*) and (*z*)). By the nature of the building, there are certain common elements which are defined by s. 1(1)(*g*) as all the property except the units . It is therefore necessary that there be detailed agreements with respect to the maintenance, operation and occupation of these common elements so that the responsibilities and privileges of each unit owner are clearly established.

[28] In my view, the application judge s interpretation of s. 98(1) of the *Act* strikes an appropriate balance between the rights of individual owners and the rights of the owners collectively speaking through their board of directors. The appellant s definition of the three key words of s. 98(1), anchored in the shared thread of change is, as discussed above, both semantically unpersuasive and overly broad. The application judge s interpretation, linking addition and alteration to connections or changes to the structure of the condominium unit and linking improvement to bettering the value, not just the enjoyment, of the property, strikes me as a balanced interpretation of the provision consistent with this court s description of the *Act* in *Rochon*.

[29] That is not to say that the application judge s definition of addition , alteration and improvement can resolve every case where a s. 98(1) issue arises. Indeed, the application judge recognized this: I note that it is possible for a large freestanding item to become an addition, alteration or improvement if it were so large and so difficult to move that it becomes a permanent part of the property, but that is not the case here.

[30] In my view, the application judge s definitions of the three key words in s. 98(1) of the *Act* provide a valuable starting point that should focus the inquiry and resolve most cases. It resolves this case both visually and legally, the hot tub is similar to the barbecue and picnic table. If the approval of the board of directors is not required for the barbecue and picnic table, then it should not be required for the hot tub.

[31] However, there will be cases where the application judge s definition will not work. The size and difficulty of moving an object, as mentioned by the application judge, might lead to a different result. To this I would add the possibility that a qualitative assessment of an object an owner might want to place on the patio might also lead to a different result for example, an owner could not hope to store scores of disused and ugly tires, or ugly rusting equipment or vehicles, or a giant ugly billboard of the New York Yankees World Series team on his patio without obtaining the approval of the board of directors of the condominium corporation.

[32] In the end, each case will have to be decided on its own facts. For now, though, I would say that the application judge s interpretation of the key words of s. 98(1) of the *Condominium Act* is a good one. It will resolve most, but not all, cases. It resolves this case.

(2) Section 8(d) of the condominium corporation s Declaration

[33] The appellant contends that the application judge erred in not finding that the installation of the hot tub was contrary to s. 8(d) of the corporation s Declaration, which provides:

8(d) No owner shall make any structural change or alteration in or to his unit including the removal and installation of toilet, bath tub, wash basin, sink, heating, air condition, plumbing or electrical installation contained in or part or his unit; or alter the exterior design or colour of part of his unit where such change, alteration, decoration or painting is normally visible from the exterior thereof or make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for the maintenance of those parts of the common elements which he has the duty to maintain without the prior consent in writing of the Board, which may attach any reasonable condition to its consent or which may in its discretion withhold its consent.

[34] The appellant submits that the installation of the hot tub was contrary to s. 8(d) of the Declaration in two respects: first, it caused an alteration of an electrical installation contained in McMahon s unit by hard-wiring the hot tub to the electrical panel in his basement; and second, it caused an alteration to his common element back yard.

[35] The application judge did not discuss this issue in his reasons. I suspect that is because the first argument was almost invisible at the hearing (it appears to have been mentioned only in a footnote in paragraph 71 of the appellant s factum) and because the second issue, anchored in the word alteration , traversed the same ground as the *Condominium Act* s. 98(1) issue.

[36] In any event, I do not accept the appellant s submissions on this issue. There is insufficient evidence to determine whether the very minor electrical adjustment necessary to hook up the hot tub amounts to a structural change or alteration of the electrical system in the unit. Moreover, the evidence was that barbecues are permitted, without the approval of the board of directors, in the condominium complex. Some of the barbecues would require minor adjustments to the unit to connect the gas line. I do not see a difference between this permitted alteration and the alteration required to hook up the hot tub. Finally, with respect to the appellant s second argument on this issue, I see no reason to interpret the phrase alter any part of the common elements in s. 8(d) of the Declaration different from the phrase alteration to the common elements in s. 98(1) of the *Condominium Act*.

[37] I make one other comment on this issue. There is, potentially, a different route open to a condominium corporation to make some of the difficult balancing choices in a condominium complex. Section 58(1) of the *Condominium Act* provides:

58.(1) The board may make, amend or repeal rules respecting the use of common elements and units to,

(a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or

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

[38] Acting pursuant to this provision, the appellant has promulgated *Rules and Regulations respecting the Units*. These rules, in their current form, prohibit absolutely, or permit but only with the approval of the board of directors, the placement of a wide variety of items on the common elements of the condominium complex debris, refuse or garbage; coal or any combustible or offensive goods; motor vehicles (other than a private passenger automobile or station wagon), camper vans, trailers, boats, snowmobiles, mechanical toboggans, machinery or equipment of any kind; buildings, structures, tents or trailers; bicycles, tricycles, barbecues and toys when not in use; animals, livestock, fowl, birds, insects, reptiles or pets of any kind; fencing or landscaping. Without passing judgment on whether the prohibition of hot tubs from the common elements of a condominium complex would, if challenged, be held to come within s. 58(1) of the *Act*, I simply observe that s. 58(1) and a board of director s rule-making power provide a potential route to strike the desired balance with respect to usage of the common elements of a condominium complex.

(3) Sections 116 and 117 of the *Condominium Act*

[39] The appellant contends that the application judge erred by not concluding that the installation of the hot tub contravened ss. 116 and 117 of the *Condominium Act*, which provide:

116. An owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules.

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 activity is likely to damage the property or cause injury to an individual.

[40] The appellant submits that the installation of McMahon s hot tub was an unreasonable use of the common elements because there were no other hot tubs in the condominium complex. The appellant also submits that the installation was a dangerous activity because the hot tub was hard-wired to McMahon s electrical panel by a person who was not an electrician.

[41] The application judge did not discuss these submissions in his reasons. Again, I suspect that is because the submissions were almost invisible at the hearing, being raised in a single paragraph with one footnote containing unsubstantiated factual assertions.

[42] In any event, I do not accept the appellant s submissions on this issue. If it is not unreasonable to have barbecues or patio furniture on owners exclusive use common elements, then there is no reason why a hot tub should be regarded as unreasonable. There is also nothing in the record to support a contention that the installation of McMahon s hot tub created a dangerous condition or activity.

E. DISPOSITION

[43] I would dismiss the appeal.

[44] The parties agreed that the question of costs should be left until the result of the appeal was known. The respondent shall file his costs submission within seven days of the release of these reasons. The appellant shall file its response within a further seven days.

RELEASED: December 9, 2009

J.C. MacPherson J.A.

I agree S.T. Goudge J.A.

I agree R.A. Blair

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[1] In its factum, the appellant raised a fourth issue the application judge s costs award of $3400 to the respondent. The appellant, appropriately, did not pursue this issue at the appeal hearing.

Related decisions

- **Superior Court of Justice**

  Wentworth Condominium Corporation No. 198 v. McMahon, 2009 CanLII 20716 (ON S.C.) - 2009-04-28

Decisions cited

- Carleton Condominium Corp. No. 279 and Rochon, 59 O.R. (2d) 545 38 D.L.R. (4th) 430 21 O.A.C. 249

COURT FILE NO.: 08-6748

DATE: March 10, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WENTWORTH CONDOMINIUM CORPORATION NO. 198	)))	Erik Savas, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
JIM McMAHON	)))	Harvin D. Pitch and Daniel Resnick, for the Respondent
	)	
Respondent	))	
	)	
	)	**HEARD:** March 5, 2009

The Honourable Mr. Justice J.R. Henderson

REASONS FOR DECISION

INTRODUCTION

[1] This is an application by Wentworth Condominium Corporation No. 198 (hereinafter called "WCC") for an order requiring Jim McMahon (hereinafter called "McMahon") to remove from the rear yard common element area behind his condominium unit the following items: 1. hot tub, 2. privacy fence, 3. water fountain, and 4. metal trellis.

[2] WCC submits that the hot tub constitutes "an addition, alteration or improvement" in accordance with s.98 of the *Condominium Act* (hereinafter called the Act), and therefore the hot tub cannot be placed in the common element area without the approval of the board of directors of WCC (hereinafter called the board).

[3] WCC also submits that the rules of the condominium corporation prohibit the placement of the fence, fountain, and trellis in the common element area without the approval of the board.

[4] McMahon admits that he did not obtain the approval of the board for any of the aforementioned four items. Regarding the hot tub, McMahon submits that no approval was required as a hot tub does not constitute an addition, alteration or improvement.

[5] Regarding the fence, fountain, and trellis, McMahon submits that the WCC has engaged in selective enforcement of its own rules, and therefore he should be permitted to place these items in the common element area without the approval of the board.

THE ISSUES

[6] This application gives rise to two issues that can be defined by the following two questions:

1. Does the hot tub constitute an addition, alteration or improvement as set out in s.98 of the Act? And,

2. Has WCC engaged in selective enforcement of its own rules regarding the fence, fountain and trellis?

IS THE HOT TUB AN ADDITION, ALTERATION OR IMPROVEMENT?

[7] There are 31 townhouse condominium units in WCC; McMahon owns unit number 27. The rear yards of the units form part of the common element area of the condominium complex. Each owner has exclusive use over that part of the rear yard common element area that is behind the owner s condominium unit. This area can be described as a patio area.

[8] The hot tub was installed on McMahon's exclusive use patio area on December 7, 2007; approximately 18 days after the property manager had informed McMahon in writing that the board had declined his request for approval of a hot tub.

[9] The hot tub is approximately 6 feet wide by 7 feet long by 4 feet high and is equipped with a locking lid. It is comprised of one piece that weighs approximately 300 pounds. Two delivery men carried and placed the hot tub unit on the patio stones in McMahon's exclusive use patio area. It takes up approximately 25% of that space.

[10] The hot tub is filled with water by way of a hose. It holds approximately 1000 litres of water that weigh approximately 1000 kilograms. The hot tub has not been moved since it was put in place in December 2007. It is movable, but it is estimated that it would take approximately one half-hour and two men to move it. Most of that half-hour would be the time needed to drain the water.

[11] The hot tub is hardwired to McMahon's condominium unit. There is a three-wire electrical cable that runs from the electrical panel in the basement of McMahon's unit outside to the hot tub where it is connected to the hot tub with three screws.

[12] There are no other hot tubs at WCC, and therefore there is no precedent that can be used for comparison purposes.

[13] Section 98(1)(a) and (b) of the Act reads as follows:

> **98.** (1) An owner may make *an addition, alteration or improvement* to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
>
> (b) the owner and the corporation have entered into an agreement ... [Emphasis added.]

[14] There is no case law as to whether a hot tub is covered by s.98. There are three cases that provide some assistance. In *Peel Condominium Corporation No. 283 v. Genik*, [2007] CanLII 23915 (ON S.C.), it was held that a satellite dish that was attached to a condominium unit fell within the meaning of the words "an addition, alteration or improvement". However, in that case there was no analysis as to whether the satellite dish was an addition, or an alteration, or an improvement, or all of the above.

[15] In the case of *Carleton Condominium Corporation No. 279 v. Rochon* reflex, (1987), 59 O.R. (2d) 545, at para. 36 the Ontario Court of Appeal described a large satellite dish that was attached to the roof of a penthouse condominium unit as a substantial addition .

[16] In the *Halton Condominium Corporation No. 315 v. Gucciardi*, delivered April 15, 2004, unreported, it was held that ceramic tiles installed on a concrete porch constituted both an alteration and an addition .

[17] Counsel for McMahon submits that I should read the three words, addition , alteration , and improvement , in s.98 conjunctively to determine the meaning of the phrase. In my view I may only do so if the three words are susceptible of analogous meanings. In this case each of the three words has a separate and distinct meaning. Therefore, I find that the words are to be read disjunctively.

[18] Having reviewed the Oxford Encyclopedic English Dictionary, and considered the common usage of these words, I find that the root words for these three key words have the following definitions:

> The word, add , means to join, to supplement, or to connect.
>
> The word, alter , means to change or to make different.

The word, improve , means to make better, or to add value.

[19] In the present case, I must expand on each definition because each of the three key words in s.98 must be interpreted in the context of the condominium property. In that respect I find the case of *Boychuk v. Essex Condominium Corp. No. 2* (1987), 23 C.L.R. 161, to be useful.

[20] At para. 14 of the *Boychuk* case the presiding judge wrote:

> *The words addition and alteration in s.38(1) connote something added to the structure or some changes in the structure. Improvement carries with it the idea of betterment of an existing facility or enhancement in value, not merely replacement of something which was already there and worn out.*

[21] Even though the *Boychuk* case dealt with an earlier version of the Act, in my view this statement from the *Boychuk* case continues to be valid and I adopt it for the purposes of this decision.

[22] Therefore, I find that the word "addition" means something that is joined or connected to a structure, and the word "alteration" means something that changes the structure.

[23] I find that the word "improvement" means the betterment of the property or enhancement of the value of the property. I also accept that an improvement refers to an improvement or betterment *of the property*. That is, to be an improvement there must be an increase in the value of the property. If the item increases the enjoyment of the property, but does not increase the value of the property, I find that the item is not an improvement.

[24] Given these definitions, does the hot tub in this case constitute an addition, alteration or improvement?

[25] The hot tub is not an addition as it is not something that sensibly can be seen as being joined to or connected to the structure. It is connected by an electrical cable, but the purpose of the electrical cable is to supply power to the hot tub, not to affix the hot tub to the structure. Furthermore, even though it may take a half-hour and two men to move, the hot tub is still designed to be removed from the property. It is not a permanent fixture on the property.

[26] The hot tub is not an alteration as it does not change the structure of the property. The hot tub may alter the landscape, but any such alteration does not cause any permanent change to the structure.

[27] The hot tub is not an improvement as it does not increase the value of the condominium unit. It is not a fixture that is so attached to the property that becomes a part of the property. Thus, it cannot increase the value of the property.

[28] I note that it is possible for a large freestanding item to become an addition, alteration or improvement if it were so large and so difficult to move that it becomes a permanent part of the property, but that is not the case here.

[29] I also note that several unit owners at WCC have gas barbecues that are connected to their units by a gas line. The WCC has not required any of those owners to seek the approval of the board. In my view McMahon s hot tub is very similar to a gas barbecue that is connected to the unit by a gas line. The purpose of the gas line is to supply power, not to affix the barbeque to the property.

[30] For these reasons I find that the hot tub in this case is not an addition, alteration or improvement within the meaning of s.98. Therefore, McMahon does not require the approval of the board to place the hot tub in the exclusive use common element area on his patio.

SELECTIVE ENFORCEMENT OF THE CONDOMINIUM RULES

[31] McMahon admits that he is bound to comply with the Act, the declaration, and the rules of the corporation pursuant to s.119 of the Act. McMahon also admits that the rules of WCC that deal with fencing and landscaping require him to obtain the approval of the board for the fence, fountain, and trellis in question, and that he did not do so.

[32] However, McMahon submits that there are many other fences and landscaping items installed by other unit owners without the approval of the board, including such items as gargoyles, outdoor lights, benches, gardens, and birdfeeders, and that WCC has not required the approval of the board with respect to these other items.

[33] Therefore, McMahon says that he had a reasonable expectation that he would not require the approval of the board for his fence, fountain, or trellis.

[34] The case of *Metropolitan Toronto Condominium Corporation v. Hadbavny* (2001), 48 R.P.R. (3d) 159, is authority for the proposition that a condominium rule is not enforceable if a board does not regularly enforce the rule, or capriciously enforces the rule, so that the unit owner has a reasonable expectation that the board would not enforce the rule against him. See paras. 21 and 23 of *Hadbavny*.

[35] However, the present case is unlike the situation in *Hadbavny*. That case dealt with a rule that prohibited more than one pet per unit owner. That rule clearly was not being enforced at the time that the unit owner purchased a second dog. In the present case, such is not the case.

[36] I accept the submission that the board reasonably considers the fencing and landscaping of each unit owner at WCC on an individual basis. But, there is no rear yard patio in WCC that is comparable to McMahon's rear yard patio. McMahon has chosen to add a hot tub to his patio, which I found he is entitled to do. McMahon then added to the hot tub a privacy fence, a water fountain, and a large metal trellis. There is no other combination of items at the condominium complex that is similar to

McMahon s combination. Thus, it is impossible to show that the board has treated McMahon differently from other unit owners.

[37] Given that there is a lack of similarity with any other unit owner, McMahon is unable to prove that the board is selectively enforcing the rule against McMahon alone. Rather, the board seems to be dealing with each patio area on a case-by-case basis. This is an acceptable approach.

[38] Therefore, I find that the fence, fountain, and trellis all require approval by the board. Since there has been no such approval, the fence, fountain, and trellis must be removed, unless the board decides to approve same.

SUMMARY AND CONCLUSION

[39] I will not order the immediate removal of the fence, fountain, and trellis because the board may wish to consider a request for approval, now that the parties have this decision with respect to the hot tub.

[40] Therefore it is ordered:

1. The application for an order that McMahon remove the hot tub is dismissed;
2. McMahon will be allowed 30 days to make a written application to the board for approval of the fence, fountain, and trellis, failing which McMahon will forthwith remove the fence, fountain, and trellis at his own expense;
3. If McMahon makes an application for approval of the fence, fountain, and trellis, McMahon will comply with any reasonable decision of the board with respect to that application.

[41] If either party wishes to make submissions with respect to costs of this application, they may do so in writing to the Trial Coordinator at Welland within 14 days of this decision.

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Justice J.R. Henderson

Released: March 10, 2009

Wentworth Condominium Corporation No. 198 v. McMahon, 2009 CanLII 20716 (ON S.C.)

COURT FILE NO.: 08-6748

DATE: 2009/04/28

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WENTWORTH CONDOMINIUM CORPORATION NO. 198	)))	Erik Savas, for the Applicant
Applicant	)	
	)	
- and -	)	
	)	

	)	
JIM McMAHON	)))	Harvin D. Pitch and Daniel Resnick, for the Respondent
	)	
Respondent	))	
	)	**HEARD:** Written Submissions

The Honourable Mr. Justice J. R. Henderson

COSTS ENDORSEMENT

[1] The main issue in this application was whether the respondent, McMahon, required the approval of the board of the applicant to place a hot tub in the exclusive use common element area behind McMahon s condominium unit. I found that no approval was required and the hot tub need not be removed. McMahon was successful with respect to that part of the application.

[2] However, there were three other items that formed the subject of this application, namely the fence, fountain, and trellis. Regarding those three items, the applicant had requested an order that McMahon remove the items from the common element area because no board approval had been obtained or sought. McMahon took the position that he did not require the approval of the board because the applicant had engaged in selective enforcement of its own rules.

[3] In my written decision I found that there had been no selective enforcement of the rules by the board and that board approval was required for these three items. However, instead of ordering that McMahon forthwith remove the items, I gave McMahon 30 days to apply for board approval. In my view, the applicant was successful on the application with respect to these three other items.

[4] Oral argument on this application took approximately two and one half hours, and approximately 70% to 75% of that time was devoted to the hot tub issue. Considering the relative success of the parties, and the time spent on each issue, in my view McMahon is entitled to one-half of his costs on a partial indemnity basis.

[5] Regarding the quantum of costs, I find that the issues before me were narrow, and not particularly complex. However, both sides acknowledged that there was no precedent precisely on point, and thus some of the oral and written argument was devoted to analysis of other circumstances and decisions.

[6] I also find that both the written and oral arguments in this case were presented in a well-organized and coherent manner by all counsel. In my view there was no time wasted on frivolous or repetitious issues.

[7] In written submissions McMahon s counsel has requested costs in excess of $35,000.00 for the entire application on a partial indemnity basis. I find that amount to be far greater than what would be fair and reasonable in this case. A succinct focused application on fairly narrow issues should not generate legal fees in that range. Therefore, I will apply more conventional figures in my calculation of the costs payable.

[8] Before reducing the costs by 50% for the reasons set out above, I will calculate a conventional award for partial indemnity costs of a routine half day application. In that respect I would allow counsel fee for one senior counsel at the application hearing at $1,500.00. I would also allow preparation time for all pleadings, cross-examinations, factums, and other preparation in the amount of $3,500.00, for a total of $5,000.00 for fees.

[9] Regarding disbursements, I will reduce some of the disbursements requested by McMahon s counsel as some of the charges for paralegal services, couriers, and photocopies would seem to go beyond that which should properly be called partial indemnity costs. Therefore, I will round the disbursements down to $1,800.00.

[10] Therefore, before the aforementioned reduction, the fees and disbursements would total $6,800.00. For reasons aforementioned, I will reduce that amount to $3,400.00 plus the appropriate G.S.T.

[11] In summary, the applicant will pay to the respondent his costs fixed at $3,400.00 plus applicable G.S.T., payable within 30 days.

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Henderson, J.

Released: April 28, 2009

COURT FILE NO.: 08-6748

DATE: 2009/04/28

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

WENTWORTH CONDOMINIUM CORPORATION NO. 198

Applicant

- and

JIM McMAHON

Respondent

COSTS ENDORSEMENT

Henderson, J.

Released: April 28, 2009