**CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** April 15, 2021
**CASE:** 2020-00379N
**Citation:** Boodram v. Peel Standard Condominium Corporation No. 843, 2021 ONCAT 31

Order under section 1.44 of the *Condominium Act, 1998.*

**Member:** Michael Clifton, Vice-Chair

**The Applicant,**
Kavita Boodram
Self-Represented

**The Respondent,**
Peel Standard Condominium Corporation No. 843
Represented by Nathan Browne (Agent), Justin McLarty (Counsel)

**Hearing**: Written Online Hearing – January 23, 2021 to March 19, 2021

## REASONS FOR DECISION

## A. INTRODUCTION

[1] The Applicant has lived in her condominium unit for more than a decade. During that time she has had various visitors, but one in particular who is alleged to have visited very often over a period of several years, always driving the same Honda CRV identified in part by its license plate (the "Honda CRV"). Typically, the driver of the Honda CRV has used the visitor parking on site at the condominium, although the evidence is that many times the Honda CRV has been observed parked on the road near the condominium instead.

[2] Based on its evidence of the frequency of the driver's attendance at the unit, the Respondent concluded that the driver of the Honda CRV is not a visitor at all, but a resident of the unit, and is therefore not permitted to use visitor parking in accordance with section 17(a) of the Respondent's declaration, which states,

> The Visitor Parking located on Levels 1 and A shall be used only by invitees and guests of the Owners, the tenants, sub-tenants, and permitted occupants of the Residential Units in the Condominium, and by the servicemen, contractors, sub-contractors, mechanics, repairmen or other agents or

> employees of the Corporation, and each space shall be individually so designated by means of clearly visible markings, and such spaces shall not be assigned, leased or sold to any Unit Owner or otherwise.

[3] The Applicant disputes the Respondent's conclusion and disputes its authority to make that determination. The Respondent has also established practices relating to the issuing and enforcement of visitor parking permits, which the Respondent describes as policies, but that the Applicant asserts are improperly enacted – and therefore not valid or enforceable – rules of the condominium. The Applicant has also requested her costs and an award of compensation from the Respondent based on what are alleged to be improperly issued parking tickets.

## B. ISSUES AND ANALYSIS

[4] The following are the issues in this case:

1. Does the Respondent have reasonable grounds and authority to determine whether the driver of the Honda CRV is a bona fide guest or a resident of the unit for visitor parking purposes under section 17(a) of the Respondent's declaration?

2. Are the Respondent's visitor parking practices or policies better described as rules of the condominium and, as such, are they valid and enforceable?

3. Is the Applicant entitled to costs and/or compensation from the Respondent?

### Issue 1: Does the Respondent have reasonable grounds and authority to determine whether the driver of the Honda CRV is a bona fide guest or a resident of the unit for visitor parking purposes under section 17(a) of the Respondent's declaration?

[5] Although initially the Respondent submitted that its evidence was "overwhelming" that the driver of the Honda CRV is a resident of the condominium, the Respondent later acknowledged that this is not the case. In closing submissions, the Respondent's legal counsel stated:

> Absent Ms. Boodram's voluntary disclosure that the driver of the Honda CRV is a resident of the Property, there is no determinative evidence available to the Corporation to establish the same.

However, counsel asserted that it is reasonable for the Respondent, on the basis of "the evidence that is available to it… to have concluded that the driver is a resident of the Corporation."

[6] The Respondent's available evidence may be summarized as follows: The Honda CRV has been identified by the Respondent as being in the condominium's visitor parking spaces or parked on the road near the condominium many times for about seven years. During that time, the owner of the Honda CRV has been issued a number of warnings and tickets due to alleged violations of posted parking restrictions. The Respondent also submits that the vehicle has recently been parked on or near the property "on nearly a daily basis," although it provided records for only the month of June 2020 to establish that pattern. Such records indicate that the vehicle was present for 27 out of 30 days in June. The Respondent's security logs for the month of June 2020 also indicate that a security FOB and a remote garage door opener registered in the Applicant's name were used frequently during that month, in addition to the use of the Applicant's combined FOB/remote garage door opener. The usage shows "a different pattern of entering and leaving the garage and the interior of the property," suggesting "the 'coming and going' of two different individuals with two different schedules." The Respondent presumes that the second individual using the FOB and/or remote garage door opener is the driver of the Honda CRV, although the Respondent provided no other evidence to support this conjecture. In addition, no evidence was submitted to support the implication that this pattern existed prior to June 2020 or continued thereafter.

[7] The Applicant cited some apparent errors or inconsistencies in the security logs tendered as evidence by the Respondent, including that one of the FOB numbers referenced in the reports does not, in fact, belong to her. She alleged that such errors and inconsistencies undermine the credibility of the reports. However, the Applicant does not deny that the driver of the Honda CRV frequently visits the condominium. Although neither party specifically identified the driver of the Honda CRV, the Applicant provided redacted copies of the vehicle ownership, government issued identification and mail addressed to the driver of the Honda CRV which indicate a residential address other than the condominium building. The Respondent did not contest the validity of this evidence but stated only that "the fact that the driver of the Honda CRV has documents and records registered to another municipal address is in no way determinative of the driver's residency."

[8] I agree that neither party's evidence was ultimately conclusive regarding the key question of whether the driver of the Honda CRV is a guest or resident of the condominium. Nevertheless, the Respondent submits that the evidence it has is sufficient to demonstrate that the board's conclusion that the driver of the Honda CRV is a resident of the condominium and is therefore not allowed to use the condominium's visitor parking under section 17(a) of the Respondent's declaration, is reasonable.

[9] The Applicant submits that in making that determination, the Respondent has acted outside of the authority of its governing documents and is "making up its own rules" since there are no clear criteria for or definitions of either 'resident' or 'guest' in the Respondent's governing documents. For example, she notes that there is no indication in the Respondent's governing documents as to the maximum number of times a visitor may attend the condominium before being deemed to be a resident. The Applicant also submitted evidence of other circumstances in which the Respondent appears to have concluded that users of visitor parking were bona fide visitors by relying on the same kind of information that the Applicant had provided to show that the driver of the Honda CRV is not a resident.

[10] The Respondent argues that it is simply seeking to enforce section 17(a) of its declaration, which it has a statutory obligation to do. Indeed, it does have that obligation, and it certainly makes sense that, to properly enforce section 17(a), the Respondent must be able to make a determination as to whether or not a user of a visitor parking space is an invitee or guest of a unit occupant. The Applicant's contention, however, is not that such a determination might not need to be made, but that the Respondent has no authority to make that determination without the criteria for it being set out in its declaration, by-laws or rules. The Respondent argues that this is not required.

[11] The Applicant's basic argument is that where criteria or definitions supporting the board's enforcement of its governing documents are spelled out in those documents, "[t]his will ensure the unit owner and potential purchaser know exactly what they need to comply with." The Applicant submits that the meaning of key terms such as 'resident' and 'guest' "should not be [left to] the discretion of every new board member or property manager," noting that:

> When and if the board of directors and/or property managers are replaced, the governing documents and criteria set out will remain in place to govern the property with consistency and fairness. This avoids uncertainty and discrimination.

The Applicant cited some case law to support her position. Though none of the court decisions cited speaks exactly to the Applicant's situation, several express or demonstrate the application of principles that the Applicant asserts apply to her case.

[12] In Re Carleton Condominium Corp. No. 279 and Rochon et al., 1987 CanLII 4222 (ON CA), ("Rochon") the Ontario Court of Appeal refers to the importance and necessity of unit owners' obligations associated with the condominium property being clearly set out in the condominium's governing documents:

> It is … 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.
>
> … In addition to the declaration and description, the developer must register by-laws, notices of termination and other instruments respecting the land covered by the declaration and description. These by-laws and the rules contained therein govern, among other things, the rights of the unit owners in the common elements.
>
> …The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner.

[13] Ballingal v. Carleton Condominium Corporation No. 111., 2015 ONSC 2484, ("Ballingal") provides an example of a case in which a condominium appropriately made a rule to define the meaning of a term that was used (but not defined) in its declaration. The court also found that a part of the condominium's rule was not reasonable or consistent with the declaration, and stated that if the rule was not amended, "the Corporation must interpret and enforce… the Declaration… in a fashion consistent with current Ontario law regarding the meaning [of the relevant terms] in the condominium context".

[14] In both York Condominium Corp. No. 122 v. Sibblis (Dist. Ct.), 1989 CanLII 4098 (ON SC) and Rahman v. Peel Standard Condominium Corporation No. 779, 2021 ONCAT 13, the lack of specific provisions in governing documents prohibiting particular activities at the time they occurred resulted in the condominiums being unable to enforce the restrictions they sought to impose.

[15] The Respondent countered that it is not necessary for a condominium corporation's governing documents to define all their terms or the criteria on which enforcement of them can be carried out. The Respondent also cited case law in support of its position. In particular, the Respondent noted that in Chan v. Toronto Standard Condominium Corporation No. 1834, 2011 ONSC 108 (CanLII), ("Chan") the Ontario Superior Court of Justice affirmed the condominium's reliance on a definition of 'single family' that was not contained in its governing documents when enforcing a provision of the declaration restricting occupancy of the units for single family residential use only. The Respondent also referenced Nipissing Condominium Corporation No. 4 v. Kilfoyl, 2009 CanLII 46654 (ON SC), ("Kilfoyl") in this regard, stating:

> In the cases of Kilfoyl and Chan a Board formulated a definition of a term and/or determined additional criteria, such as the presence of locks on doors to bedrooms within a unit, for enforcement that was not specifically defined in its governing documents. In both cases, the Courts found that such determinations were within the powers of the Corporation and accepted and enforced the definition of a specific term that was adopted, despite not being set out in a Corporation's governing documents.

The Respondent's comments are not correct. In Chan, the restrictions relating to locks on doors within a unit were in the condominium's declaration and rules. In Kilfoyl, the definition of 'family' in question was clearly set out in the condominium's declaration. Kilfoyl is then cited as an authority in both Chan and Ballingal, where that definition is treated as appropriate for general use "in the condominium context". In short, these cases do not support the position that a condominium may simply define terms or criteria for enforcement absent underlying authority in their governing documents or other applicable law.

[16] Ultimately, the Respondent relies on the Business Judgement Rule to defend its determination that the driver of the Honda CRV is a resident of the condominium. It states that this rule provides "recognition of the fact that a Board must often determine a definition of a term or criteria for enforcement without those terms or criteria being set out in a Corporation's governing documents."

[17] The Respondent refers to 3716724 Canada Inc v Carleton Condominium Corp No. 375, 2016 ONCA 650, ("3716724") in which the Ontario Court of Appeal explains,

> This rule recognizes the autonomy and integrity of corporations, and the fact that directors and officers are in a far better position to make decisions affecting their corporations than a court reviewing a matter after the fact. …Therefore, where the rule applies, a court will not second-guess a decision rendered by a board as long as it acted fairly and reasonably.

[18] While I agree with the Respondent that the Business Judgment Rule applies to condominium corporations and requires that deference be given to the decisions of a condominium's board of directors, such deference would not be given, as the court states, where it is evident that the decision in question is either unfair or unreasonable. In reference to condominiums in particular, the court also indicates that the directors are expected to have met the standard set out in section 37 of the *Condominium Act, 1998* (the "Act"), when it states,

> …the first question for a court reviewing a condominium board's decision is whether the directors acted honestly and in good faith and exercised the care,

> diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[19] Having reviewed the evidence of both parties, I find that the Respondent's board has not met that standard, and that its determination that the driver of the Honda CRV is a resident of the condominium is not within a range of what is fair or reasonable in these circumstances. No evidence placed before me indicates that the Respondent has taken time to clearly and thoughtfully define the terms of, or establish consistent criteria based on which it will enforce, section 17(a) of its declaration. Some evidence suggests its criteria, if there are any, are inconsistently applied, or potentially have been defined solely to justify the way it has dealt with the owner of the Honda CRV.

[20] This is not intended as a finding of fact with respect to whether the driver of the Honda CRV is a guest or resident of the condominium. Based on the evidence presented by the parties, I cannot make that determination. The evidence of both parties is equally inconclusive. In such circumstances, I find that a reasonable person could not conclude one way or the other, nor consider it just or fair to take punitive or enforcement action until further careful and diligent investigation had been conducted.

[21] Regarding the Applicant's argument that the terms 'resident' and 'guest' need to be defined or criteria for their enforcement need to be set out in the Respondent's governing documents before a determination can be made, I agree that this would be the most fair and appropriate practice. As the case law cited by both parties indicates, there are circumstances where provisions in a declaration might not be defined; the corporation may then add definitions by way of amendment to the document in question, by creating a rule that further defines the terms of the declaration, or, as appears to be suggested by Chan, by relying on other definitions or criteria legally recognized (such as in prior judicial decisions) as applicable "in the condominium context". I note that the Respondent submitted that there are no such legally recognized definitions of 'guest' and 'resident' generally applicable in the condominium context at this time, stating there is "no bright line test for what constitutes a resident versus a guest."

[22] There might be other acceptable approaches as well, and in my view the Business Judgement Rule would require deference to be given to a board that decides reasonably amongst those various options for how it will address the lack of definition in its declaration or other governing documents; however, as explained above, I do not find that the Respondent has made such a reasonable decision in this case. As such, I find that the Respondent did not have reasonable grounds or

authority to determine that the driver of the Honda CRV is a resident of the unit for the purpose of restricting them from the use of visitor parking under section 17(a) of the Respondent's declaration. Therefore, until it can make such a decision on reasonable grounds and based on defensible authority, the vehicle in question should not be prohibited from making use of the visitor parking at the condominium, and I so order.

**Issue 2: Are the Respondent's visitor parking practices or policies better described as rules of the condominium and, as such, are they valid and enforceable?**

[23] The Respondent has established certain policies with respect to its visitor parking which it states are appropriate to allow it to enforce compliance with s. 17(a) of its declaration and to fulfill its duty to "control, manage and administer the common elements" (s. 17(2) of the Act). It requires that unit owners obtain permits for visitors who will use visitor parking. It further limits the number of visitor parking permits that a unit owner can obtain to eight per month. Neither of these or any other visitor parking policies (except for a brief description of the kinds of vehicles permitted) are set out in the declaration or rules of the condominium. The Respondent's witness, Alan J. Ruth – president of Security Advisors Group Inc., which provides parking control services to the Respondent – affirmed that such policies were recommended by him. The Respondent confirmed that it adopted such policies on Mr. Ruth's recommendation and never attempted to enact them as rules. The Respondent further states that it is sufficient for it to make, rely upon and enforce such restrictions as policies which need not be set out in its governing documents. The Respondent has (through Security Advisors Group Inc.) ticketed the Honda CRV based on alleged non-compliance with these policies from time to time. Based on such ticketing, the Respondent or the driver of the Honda CRV has had to pay fines to the municipality.

[24] The Applicant contends that the Respondent's visitor parking policies are (or are required to be) rules that, not having been duly enacted, are neither valid nor enforceable. The Applicant correctly identifies that the Act does not expressly support the Respondent's position regarding the enforcement of policies. It makes no reference to "policies" other than insurance policies and policies of the CAO, and further only authorizes condominiums to enforce compliance with the Act and "the declaration, the by-laws and the rules" of the condominium (s. 17(3) and s. 119 of the Act). The Respondent's submissions are not contrary to this, since it does not cite the Act as authority for its position but references only case law in which it argues a condominium's policies were treated and enforced like rules. However, its submissions in this regard are not persuasive.

[25] The Respondent referred to 3716724 (noted earlier in this decision), Durham Condominium Corporation No. 90 v. Carol Moore and Keith Wallace, 2010 ONSC 5301 (“Durham”), and McKinstry et al. v. York Condominium Corporation No. 472 et al., 2003 O.J. No. 506, (“McKinstry”). Both 3716724 and Durham are about decisions by condominium boards under section 98 of the Act, relating to a unit owner’s proposal to modify a part of the common elements. McKinstry also relates to board approval of unit owner renovations, but in this case, the renovations are to a unit.

[26] When interpreting and applying statements made in judicial decisions, context is important, and it is in this regard that the Respondent’s use of both 3716724 and Durham falls short. The Respondent submitted that 3716724 is a case in which “the Ontario Court of Appeal held that parking requirements instituted by a Board were reasonable and enforceable, on the basis that the Board is in the best position to make decisions for the operation of the Corporation.” However, as noted, 3716724 is about section 98 decision making and not the condominium’s enforcement of parking requirements. The court does not deliver the holding that the Respondent claims. Likewise, though the Respondent quotes the following statement from Durham to suggest that rules and policies are functionally equivalent –

> The question of whether something is to be a rule or a policy is ultimately a political question to be democratically determined under the Condominium Act.

– I do not believe the court intended this meaning. The court’s statement and the related reasoning support the view that where the Act gives the board a discretionary, approval-granting authority, such as under section 98, its decision can be based on considerations that could but do not need to be set out in its rules. I find no basis in Durham for extending this reasoning to allow a condominium to by-pass the mandatory, democratic process for enacting rules under section 58 of the Act, and to establish by fiat – as policies, without any sort of democratic notice or review – the sorts of conditions and restrictions the Act indicates are the proper subject matter of rules made under section 58.

[27] The Respondent referred to McKinstry for the principle that the board of a condominium has “power… to ‘stiffen’ provisions found in a corporation’s governing documents in order to ensure compliance,” which stiffening, the Respondent states, “can include instituting certain policies or procedures to ensure compliance.” I do not find that McKinstry supports that position. In that case, the unit owner plaintiff had commenced renovations to their unit which were not approved by the condominium board, contrary to the rules of the condominium.

They relied in part upon the fact that the condominium had previously been lax in the enforcement of that rule. What the court says (at par. 71) is that the board of directors in that case had given “notice of an intention to stiffen the enforcement of the house rules”. This act of stiffening enforcement appears to refer only to an undertaking by the board to actually enforce its existing rules, rather than be lax or lenient about them; it is not an indication that the board would create and enforce, by way of ad hoc “policies or procedures,” provisions that were not already clearly established in its governing documents.

[28] I do not wish to state, as a finding, that there is no place within condominium governance for policies. For example, in each of the cases cited by the Respondent, it is evident the courts approve the notion that a board may have in place policies that provide a consistent and reliable framework to guide its conduct and conclusions in a decision-making process. One can imagine, as well, that when a board is required to enforce compliance with unit owners’ obligations, it may, as a matter of policy and to the extent that the Act grants discretion for it to do so, decide on such things as the degree of strictness it will employ and the steps it will take (such as when and whether to engage legal counsel or commence legal proceedings). None of these policies are the same in character as rules as contemplated by s. 58 of the Act, and support for them does not represent authorization to side-step the formal requirements of that section, which the Respondent appeared to assume, in this case, that it is entitled to do.

[29] Based on the evidence and submissions of the parties and my analysis set out above, I find that what the Respondent calls its visitor parking polices are improperly enacted rules of the condominium and, as such, are invalid and unenforceable. The Respondent may repair this situation by seeking to enact such policies properly as rules in accordance with s. 58 of the Act. Until it does so, however, such policies ought not to have been, and hereafter should not be, enforced against the Respondent or any other person.

**Issue 3: Is the Applicant entitled to costs and/or compensation from the Respondent?**

[30] The Applicant also requests the following:

a. Costs, in the amount of $200, representing the fees paid by the Applicant for the Tribunal process;

b. additional costs up to the “maximum penalty” for the allegedly unreasonable behaviour of the Respondent during the Tribunal process;

c. compensation in the amount of $180 for parking ticket fines paid by the Applicant or the driver of the Honda CRV; and

d. compensation for damages allegedly incurred on account of the Respondent's "non-compliance" in the amount of $25,000.

Some of the Applicant's requests are excessive in the circumstances.

[31] The Applicant has been successful in asserting her positions that (a) the driver of the Honda CRV was not reasonably determined to be a resident of the condominium, and (b) the Respondent failed to enact as rules the visitor parking policies it has sought to enforce against her and the driver of the Honda CRV. The Applicant is therefore entitled to a costs award of $200 representing her fees paid to the Tribunal pursuant to s. 1.44(1)4 of the Act and the Tribunal's rules.

[32] The reasons for additional costs requested by the Applicant are not persuasive. She states that the Respondent wished to by-pass the Tribunal's Stage 2 – Mediation and enter immediately into Stage 3 – Tribunal Decision. Given that the parties were unable to resolve the issues at Stage 2, this does not seem to have been unreasonable, nor is it clear how the suggestion contributed to the Applicant's costs in these proceedings. The Applicant also complains of some delays caused by the Respondent. I find each delay to have been sufficiently minor so as not to attract costs. While I understand the Applicant's complaint that some of these situations caused her to use more "time and energy" than might otherwise have been the case, I do not find these to be more than the 'cost of doing business', so to speak, of participation in Tribunal proceedings. I find no basis for any additional costs to be awarded.

[33] Since I have determined that the Respondent's visitor parking policies are improperly enacted rules of the condominium that are therefore invalid and unenforceable, tickets issued against the driver of the Honda CRV cannot be viewed as justified. However, on careful review of the Applicant's submissions, I do not find evidence that the Applicant herself paid any of the fines or other costs incurred in relation to those tickets. Therefore, there is no basis for awarding compensation for the same to the Applicant.

[34] The Applicant sets out a litany of other reasons for requesting compensation up to $25,000 for damages incurred as a result of an act of non-compliance under s. 1.44(1)3 of the Act, including the following:

a. That the Respondent changed certain visitor parking policies midstream and sought to enforce them against the Applicant or her guest before notifying owners of the changes;

b. that certain of the decisions and actions of the Respondent's board toward her or her guest are not supported by resolutions made in a duly constituted meeting of the directors as required by the Act;

c. that the Respondent has in effect denied the Applicant the use of the common elements to which she is entitled; and

d. that the Applicant has suffered on account of the Respondent's conduct and has required medication to cope, particularly based on some of the evidence provided by the Respondent that suggests to the Applicant that she or her guest have been being secretly surveilled.

The Applicant also states that the Tribunal "must fine [the Respondent] the maximum penalty to deter this corporation from repeating these egregious actions." For clarity, the Tribunal has no authority to impose a "fine" in these circumstances.

[35] While the Applicant's frustration with the Respondent's conduct and attitudes is evident, there is insufficient evidence of genuine damages for the award of compensation demanded. I note, for example, the Applicant provided no medical documentation, prescriptions or receipts, to establish anxiety related symptoms or treatment or that these are due to the conduct of the Respondent. Further, the Applicant did not conclusively establish that the owner of the Honda CRV is not actually a resident of the condominium and in breach of section 17(a) of the Respondent's declaration, so I am unable to disregard the possibility that the Applicant and the owner of the Honda CRV might be at least partly responsible for their circumstances.

## C. ORDER

[36] The Tribunal orders as follows:

a. The Respondent shall permit the driver of the Honda CRV to use its visitor parking, unless and until the Respondent determines and can demonstrate conclusively that the said driver is not a guest but a resident of the condominium for the purposes of section 17(a) of the Respondent's declaration.

b. The Respondent shall cease treating as enforceable its current policies relating to visitor parking, unless and until the same are duly enacted as rules of the condominium in accordance with section 58 of the Act.

c. Within 30 days of the date of this Order, the Respondent shall pay to the Applicant costs in the amount of $200 pursuant to s. 1.44(1)4 of the Act and the rules of the Tribunal.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: April 15, 2021