

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 14, 2023

CASE: 2022-00546N

Citation: Peel Condominium Corporation No. 214 v. Zimmer et al., 2023 ONCAT 89

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

Member: Michael Clifton, Vice-Chair

The Applicant,

Peel Condominium Corporation No. 214

Represented by Bharat Kapoor, Counsel

The Respondents,

Rosa Zimmer

Self-Represented

Garth Zimmer

Represented by Rosa Zimmer, Agent

Hearing: Written Online Hearing – October 28, 2022 to July 10, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] This is a case in which, having reviewed the evidence and arguments of the parties and the applicable law, I find that the Respondents have technically breached the rules of the Applicant condominium corporation with respect to the occasional placement of their boat on the common elements of the condominium, but I have also determined that the Applicant cannot obtain the orders it has requested against because,

1. the rules in question do not satisfy the criteria in section 58 of the *Condominium Act, 1998* (the “Act”), and,
2. even if that was not the case, the combined facts of the Applicant’s long-term acquiescence to the Respondents’ conduct and the de minimis nature of the breach preclude the imposition of the Applicant’s requested consequences.

Instead, I order that the Respondents be allowed to continue to keep their boat on the common elements subject to measures already voluntarily undertaken by them to minimize the extent and impact of their breach. I award no costs to either party.

- [2] The Respondents have not had technology accessible to them to regularly use the Tribunal's online dispute resolution (ODR) system for this case. Therefore, this hearing was primarily conducted by telephone with some materials being submitted by email. This was a highly exceptional circumstance that is not preferred, nor will it generally be available in other cases. The Applicant's counsel, Mr. Kapoor, was highly cooperative in facilitating this process to ensure the Respondents could present their case in a full and fair manner.

B. BACKGROUND

- [3] Mr. and Mrs. Zimmer are the owners of a unit in the Applicant, Peel Condominium Corporation No. 214 (PCC 214). Mrs. Zimmer was the primary representative for herself and Mr. Zimmer in this case. She advised that Mr. Zimmer and their son have a long-standing (about 30 years) tradition of fishing together on weekends. This was described as a special bonding time for them as well as an opportunity to obtain some respite from worry or anxiety that Mrs. Zimmer stated is experienced in relation to a private family issue that was disclosed in confidence during these proceedings.
- [4] (Though significant to the Respondents personally, they prefer that the said private family issue does not factor into this decision. Therefore, I do not discuss it in any detail. However, I note that although the Respondents chose not to make it formally a basis for seeking accommodation from the Applicant, the Applicant's counsel thought otherwise. He requested, and I granted, a short – several weeks – pause in the proceedings to propose terms of a settlement arrangement to his client on account of the Respondents' situation. After this pause, the Applicant's counsel advised the Applicant was not receptive to this idea. Since the Respondents chose not to rely on this issue as grounds for seeking accommodation, it has not been considered further.)
- [5] For more than 30 years while they have lived at the condominium, the Zimmers' practice has been to bring their boat out of storage during the summer months on Friday and/or Saturday evenings before going fishing on the following day, and to park it in their unit driveway temporarily while its batteries are charged. Their unit driveway is a part of the common elements of the condominium designed for their exclusive use. The boat remains on site for a short time, starting in the late evening and ending before dawn the next day, and after their fishing trips it is returned to off-site storage for the balance of the week.

[6] Despite this long-standing seasonal practice, the condominium has recently sought to enforce against the Zimmers its rules that prohibit recreational vehicles, including boats, from being parked anywhere on the property. Because Mr. and Mrs. Zimmer have resisted these demands, the condominium has brought this application against them.

[7] The Zimmers have felt a degree of harassment in this regard and that the enforcement may be motivated by personal animus. This impression has been reinforced for them by the owner living across from them, who I understood to be a member of the Applicant's board, setting up a camera to engage in surveillance of their property and, when discovered, alleging that he did so due to the Zimmers' son throwing glass bottles on his unit grounds. The Applicant presented no evidence to counter the Zimmers' impression or to support the neighbour's allegations, which the Zimmers state are false. Though mentioned here to provide a fuller understanding of this case, these matters do not form part of the basis for my decision below.

[8] The rules cited by the Applicant are the following:

VEHICLES AND PARKING

1. *No motor vehicle other than those defined in paragraph 3 shall be parked on any part of the common elements including any part thereof of which the Owner may have exclusive use (e.g., unit driveways).*
3. *The term "motor vehicle" shall include passenger automobiles, station wagons, family minivans and sports utility vehicles but specifically exclude tow trucks, recreational vehicles as well as commercial vehicles, service vans and trucks exceeding a one ton rating.*
4. *No camper van, trailer, boat, motorized watercraft, snowmobile, machinery, equipment of any kind, tents and/or trailers either with or without living, sleeping or eating accommodation shall be placed, located, or kept upon the common elements.*

[9] In addition to copies of demand letters sent by the condominium's legal counsel to the Respondents, the Applicant submitted as evidence in this case a single, redacted complaint, the contents of which were determined to be of dubious accuracy, stating facts that, upon hearing, the Respondents instantly, fervently, and credibly contradicted. The letter also appeared to have been crafted by the writer on request for the express purpose of being used as evidence in this case.

[10] For their part, the Respondents submitted letters from a number of the other unit

owners, some of whom have known the Respondents, and the situation, for most of the years the boat has been kept on the property. Those other owners' letters uniformly express support for the Respondents' desire to continue parking their boat overnight on summer weekends in order to continue their family fishing tradition.

- [11] The Applicant seeks both an order for compliance by the Respondents and for full indemnification of its costs of seeking enforcement.

C. ISSUES & ANALYSIS

- [12] Not all of the parties' respective evidence or arguments will be set out in these reasons, but all of them have been considered. The primary issues in this case are whether the Respondents are in breach of the Applicant's rules, and, if they are, what consequences should follow. However, a preliminary issue relating to the Tribunal's jurisdiction must also be addressed.

Preliminary Issue: Section 117 (1) of the Act

- [13] In its submissions, the Applicant sets out as its primary concern that the presence on the property of the Respondents' boat "may cause an accident," because its trailer extends partly into the common element road beyond the limits of the Respondents' driveway. The Applicant states that this is a breach of subsection 117 (1) of the Act, which provides,

No person shall, through an act or omission, cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity, as the case may be, is likely to damage the property or the assets or to cause an injury or an illness to an individual.

- [14] The Applicant acknowledges in its submissions that "any activity in contravention of section 117 is beyond the jurisdiction of the Tribunal," but argues that "the same is a pertinent factor which must be considered while deciding upon this matter." I disagree.
- [15] Firstly, the Applicant errs in referring to section 117 of the Act, rather than only subsection 117 (1) of the Act. Ontario Regulation 179/17 expressly brings subsection 117 (2) of the Act into the range of the Tribunal's jurisdiction. Secondly, however, that regulation also clearly states that the jurisdiction of the Tribunal to deal with provisions in a condominium's declaration, by-laws, or rules that prohibit, restrict, or otherwise governing parking or vehicles, amongst other things, does not apply "to a dispute that is also with respect to subsection 117 (1) of the Act". So, if

the Applicant's counsel was correct that the subject matter of subsection 117 (1) of the Act is a pertinent factor in this case, the result could be that I should rather dismiss the case than decide upon it.

[16] Having carefully considered this, I conclude that the Applicant has erred in citing subsection 117 (1) of the Act in relation to this case. The submissions of both the Applicant and the Respondent indicate that there is no basis for concluding that the presence of the Respondent's boat on the condominium property is "likely to damage the property or the assets or to cause an injury or an illness to an individual." In fact, the Applicant does not provide evidence of any condition or even one incident in the more than three decades that the Respondents' boat has been kept from time to time on the property in which any damage or injury occurred or was likely to occur as a result of it being there. As such, the submissions of both parties cause me to conclude that the dispute in this case is not a dispute with respect to subsection 117 (1) of the Act, despite the Applicant's suggestion that it could be.

Main Issues: Breach of the Rules and Consequences

[17] On the face of it, there may be little need for analysis of whether the presence of the Respondent's boat on the condominium property is contrary to the Applicant's rules. Rule 4, cited above, specifies that boats are not to be "placed, located, or kept upon the common elements." Rules 1 and 3, also cited by the Applicant, are consistent with this requirement in so far as they prohibit vehicles other than the narrow range of types listed in Rule 3 from being kept on the property. The presence of the Respondents' boat on their common element driveway of the Respondents' unit, for even a short, overnight period, is, prima facie, contrary to the plain wording of these rules.

[18] However, a determination of whether a condominium rule has been breached does not rely solely on evidence that there has been conduct that is contrary to the rule, but also, as an initial step, it needs to be apparent that the rule itself is valid and enforceable. In many cases, the validity of a rule will be obvious or implicit either on the face of the rule or from the facts and arguments presented by the parties, and no formal analysis of its validity will be needed to render a fair and just decision. This case is not like that.

[19] The Applicant itself raised the issue of validity in its submissions when taking the position that deference needed to be given to the Applicant with respect to the rules in so far as they satisfy the purposes for rules set out in subsection 58 (1) of the Act, which purposes are reiterated in the condominium's declaration.

[20] The Act sets out both formal and substantive criteria for rules. Formal criteria deal with the way rules are made, while substantive criteria relate to their purposes and contents. There are no grounds in this case for doubting that the rules in question satisfy the formal criteria of the Act. However, the Applicant's assertion that the rules satisfy the substantive criteria set out in subsection 58 (1) of the Act is not self-evident.

[21] The whole of the substantive criteria for rules is set out in both subsections 58 (1) and 58 (2) of the Act, as follows:

(1) The board may make, amend or repeal rules under this section respecting the use of the units, the common elements or the assets, if any, of the corporation to,

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

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

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

[22] Each of these criteria is separate from and not dependent on the others. For example, if a rule is made for either purpose set out under subsection 58 (1) of the Act but does not meet the criteria set out in subsection 58 (2) of the Act – i.e., if it is not consistent with the declaration or by-laws of the condominium or is unreasonable – it would not be a valid rule. Likewise, even if a rule is reasonable in and of itself, if it does not also address one of the purposes set out in subsection 58 (1) of the Act or is inconsistent with the declaration or by-laws of the corporation, it could not be enforced.

[23] In this case, the Applicant expressly cited promotion of safety as justification for the enforcement of the rules in question; however, I cannot, on a plain reading of them, conclude that safety is their primary or essential purpose. Further, if it is their purpose, then I find that the rules are overbroad, and are thus unreasonable in so far as they impose restrictions that reach well beyond what is needed to accomplish their objective.

[24] That is, the rules impose a global prohibition against camper vans, trailers, boats, motorized watercraft, snowmobiles, machinery, equipment, tents and/or trailers, but identify nothing inherently unsafe about them or their presence on the

condominium property. Certainly, such vehicles and equipment could be unsafe if they have unsafe traits or conditions, such as being of an excessive size, or insecurely parked or stored, or improperly maintained; but not only do the rules not cite these kinds of characteristics, they are also not characteristics that any of the said items necessarily possess. Further, every type of vehicle that the same rules expressly permit to be on the property – namely, passenger automobiles, station wagons, family minivans and sports utility vehicles – is equally susceptible of possessing all or some of those unsafe characteristics, but nevertheless are not prohibited. The rules cannot, therefore, be said to have been enacted for that purpose; or, again, if they were, they are not reasonable in their scope.

- [25] I conclude that this analysis applies even if there are some imaginable circumstances in which the application or enforcement of the rules could occasionally result in outcomes that would protect or promote safety, security, or welfare, as the Applicant here sought to suggest. Such would appear to arise only as a matter of accident rather than design; and, as already noted, the Applicant did not, in fact, provide evidence of any actually unsafe condition or circumstance that would warrant such enforcement in this case.
- [26] To complete this analysis, I note that it is likewise not evident that the rules in question in this case are intended for the other purpose for which rules can be made, to prevent unreasonable interference with the use and enjoyment of the units, common elements, or assets of the corporation, nor did the Applicant make any argument that this was their purpose. Even if this purpose was alleged, the analysis found in the recent Tribunal decision in *Simcoe Condominium Corporation No. 104 v. Leary*, 2023 ONCAT 52, could apply, in which the Tribunal found that a rule prohibiting commercial vehicles did not satisfy this purpose since such a vehicle would not interfere in any way, let alone an unreasonable one, with any person's ability to use or enjoy the units, common elements, or assets of the condominium. I find the situation is the same with respect to the presence of the Respondents' boat, as it also would be true for at least the majority of other vehicles prohibited by the Applicant's said rules.
- [27] Based on the foregoing, I find the Applicant's assertion that the rules in question satisfy the substantive criteria set out in subsection 58 (1) of the Act, and the Applicant's declaration, to be incorrect. As a result, while I note that the placement of the Respondent's boat on their common element driveway is contrary to the rules as drafted, I cannot order that the rules be enforced against them.
- [28] Should I be incorrect in the foregoing analysis, I find there are at least two other reasons not to grant the orders requested by the Applicant.

[29] First, the Respondents' evidence is that for more than 30 years they have been allowed to have their boat on the property during their summer weekend fishing trips. This should mitigate the Applicant's desire for enforcement. Although the Applicant's counsel makes the correct argument that a condominium corporation is entitled to "stiffen up" prior lax enforcement of its rules (citing *Essex Condominium Corporation No. 25 v. Ferrari et al.*, 2021 ONCAT 79), a 30-plus-year period of open and obvious acquiescence clearly can create a reasonable expectation of permission that cannot lightly be disregarded. One must also wonder what has changed recently that triggered the Applicant's fervor for enforcement. The Applicant simply argues that unit owners must comply with the rules. After 30-plus years without enforcement, incident, or actual complaint, it is understandable that the Respondents have felt the Applicant might be motivated by personal animus rather than the legitimate needs or interests of the condominium.

[30] Second, the evidence of both parties in this case is that the Respondents' breach of the Applicant's rules is both merely technical and so minor in extent and effect as to invoke the *de minimis* principle by which I must avoid imposing consequences that are disproportionate to the harms caused. In this case, the Applicant has in fact cited no harms that are caused by the Respondents' breach whatsoever, but only offers the speculative concern that (as noted above), the presence on the property of the Applicant's boat "may cause an accident." Given that no accident has occurred in excess of 30 years, and that the Respondents also indicate they have recently minimized the amount of time the boat is on the property by reducing it to only Friday nights, I am hard-pressed to conclude that this concern is significant.

D. CONCLUSION

[31] Considering the foregoing analysis and all of the evidence and submissions of the parties, I will order that Applicant shall not enforce its Vehicles and Parking Rules 1, 3, and 4, with respect to the occasional parking of the Respondents' boat on the common elements, and, accordingly, that the Respondents be permitted to continue to park their boat on the common element driveway of their unit on Friday nights during the summer months while engaged in their usual fishing activities, but subject to the following conditions or provisos:

1. That they continue to ensure that the boat is present for the overnight hours – I will specify between sunset and dawn, though the Respondents have suggested they usually require a shorter period of time than this and should try not to substantially exceed the time required to charge the boat's batteries; and

2. That they continue to take steps to minimize any risk of harm or accident arising on account of the slight projection of the boat's trailer into the common element road (including that they use such things as reflective strips, brightly coloured pilons, cloths and ribbons, and so forth, to help ensure that cyclists, pedestrians, and drivers of other vehicles can easily see and avoid it).

[32] I recommend to the parties that they also consider entering into the kind of indemnity arrangement that the Respondents offered during these proceedings, when they stated that they would be prepared to offer indemnification if any harm or accident ever occurred on account of the boat's presence on the property. And I further recommend that the Applicant consider reviewing its rules in view of my findings relating to them in this case, to ensure that they are revised to satisfy the criteria in the Act and the corporation's declaration.

[33] The Respondents requested no costs in this case, and I award none. The Applicant requested reimbursement of its full costs in the amount of about \$6,000. However, although I acknowledge that the Applicant's legal counsel went somewhat above and beyond the norm in ensuring a fair hearing could take place, I find no basis for awarding costs in its favour either since the Applicant has been successful only to the extent that the Respondents' technical and de minimis breach of its rules is acknowledged, but otherwise has been found to be seeking to enforce rules that do not satisfy the requirements of the Act and, in any event, should not have been strictly enforced in this case based on the additional two reasons I explained above.

E. ORDER

[34] The Tribunal therefore orders that:

1. Pursuant to section 1.44 (1) 2 of the Act, the Applicant shall not enforce its Vehicle and Parking Rules 1, 3, and 4, with respect to the occasional parking of the Respondents' boat on the common elements of the condominium, subject to the following provisos which are also ordered pursuant to section 1.44 (1) 2 of the Act:
 - i. That the Respondents are permitted to continue to park their boat on the common element driveway of their unit on Friday nights during the summer months while engaged in their usual fishing activities;

- ii. That the boat shall not present on the condominium property for longer than the overnight hours (i.e., sunset to sunrise) or any longer than is reasonably required to charge its batteries; and
- iii. That the Respondents shall take steps to minimize the risk of harm or accident arising on account of the projection of the boat's trailer into the common element road, such as the use of such things as reflective strips, brightly coloured pilons, cloths and ribbons, and so forth, to help ensure that cyclists, pedestrians, and drivers of other vehicles can easily see and avoid it.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: July 14, 2023