Law Society of Ontario | Barreau de l'Ontario

TAB 19

The Six-Minute Real Estate Lawyer 2018

The Status of Status Certificates: An Analysis of the Appellate Court Decision in *MTCC#723 v. Reino*

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November 20, 2018

THE STATUS OF STATUS CERTIFICATES: AN ANALYSIS OF THE APPELLATE COURT DECISION IN *MTCC NO. 723 V. REINO*

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* For the Law Society of Ontario's Six-Minute Real Estate Lawyer Program 2018 --- November 20, 2018

1. INTRODUCTION

The *Condominium Act, 1998*, S.O. 1998, c.19, as amended (hereinafter referred to as the "**Act**") is, amongst other things, consumer protection legislation. The Act therefore contains unique features designed to safeguard the interests of both existing and future condominium unit owners alike. One of those features is contained in section 76 of the Act, which requires a condominium corporation to issue a status certificate, in the prescribed form, when so requested. This document is intended to ensure that unit purchasers and mortgagees are provided with sufficient information regarding a particular unit, as well as the overall condominium project, to help them make an informed buying or lending decision. A status certificate that is issued by the condominium corporation in connection with the purchase of a new condominium unit from the declarant (especially if the transaction is completed prior to turnover), will generally reveal little information over and above that already contained within the disclosure statement provided by the declarant, since there is not a lot of additional information to be disclosed about the general status of the condominium or its administration at such an embryonic stage in its existence. For example, there will typically not be any outstanding litigation involving the newly-registered condominium, nor any information about the sufficiency of the reserve fund, nor any increase in the common expenses or outstanding special assessments having been levied. However, in the context of a re-sale condominium unit, the status certificate is of critical importance to the unit purchaser, inasmuch as it will reveal vital information about the condominium, in terms of its physical and financial condition, as well as any outstanding claims that have embroiled the condominium in formal litigation. Accordingly, the purchaser of a unit in the context of a re-sale transaction should always insist on making the agreement of purchase and sale conditional on the purchaser's solicitor's review of a currently-dated status certificate, together with all of the

related condominium documents that must accompany the certificate pursuant to the Act and the regulations promulgated thereunder.

Pursuant to subsection 76(6) of the Act, the status certificate binds the condominium corporation as of the date that it is given (or deemed to have been given) with respect to the information that it contains (or is deemed to contain) as against a purchaser or mortgagee of a unit who relies upon the certificate. Accordingly, it is of the upmost importance that the status certificate be completed as carefully and as accurately as possible, inasmuch as the condominium corporation will be legally estopped and barred from denying anything that is contrary to the information contained (or deemed to be contained) therein. Recently, in the case of *Metropolitan Toronto Condominium Corporation No. 723 v. Reino*, 2018 ONCA 223 (hereinafter referred to as the "**Reino Case**"), the Ontario Court of Appeal was asked to determine whether a condominium corporation that had issued a prior "clean" status certificate in relation to a particular dwelling unit, and that subsequently discovered that unapproved alterations had been made to the dwelling unit in contravention of the declaration, is nevertheless bound or obliged to issue another "clean" status certificate to the purchaser of the subject unit, rather than a status certificate that expressly discloses the unapproved alterations, and the corresponding requirement to rectify same and restore the dwelling unit to its original condition.

The purpose of this paper is to revisit the provisions of section 76 of the Act, together with the recent changes thereto emanating from the *Protecting Condominium Owners Act, 2015*, S.O. 2015, c. 28, and to review and analyze the appellate Court's decision in the Reino Case.

2. WHO CAN REQUEST A STATUS CERTIFICATE AND WHO CAN RELY UPON ITS CONTENTS

Pursuant to subsection 76(1) of the Act, a condominium corporation must give a status certificate to each person who requests same, issued in the prescribed form that specifies the date on which it was made, and that contains the mandatory information more particularly described in the various subparagraphs of this subsection. The condominium corporation must issue the status certificate, together with all of the materials that are required to be attached thereto or included therein, within ten (10) days after its receipt of the request and the accompanying fee,[1] which fee cannot exceed $100.00 (inclusive of all applicable taxes).[2] A condominium corporation that does not deliver a status certificate within the requisite time is deemed to have given a certificate on the day immediately after the required time has expired, to the effect that as of such date: (i) no default in the payment of common expenses exists; (ii) the board has not declared an increase in the common expenses, since the date of the budget for the current fiscal year; and (iii) no assessment has been levied against the subject unit for the purposes of increasing the contributions to the reserve fund, since the date of the budget for the current fiscal year.[3] The Act further provides that if a status certificate issued by a condominium corporation omits material information that is otherwise required to be included therein, or appended thereto, or addressed thereby (as provided by section 76 of the Act, or the regulations promulgated thereunder), then the status certificate will be deemed to have stated that no such information exists.[4] These "deeming" provisions are intended to safeguard the interests of prospective unit

[1] Subsection 76(3) of the Act.

[2] Subsection 18(2) of Ontario Regulation 48/01.

[3] Subsection 76(5) of the Act.

[4] Subsection 76(4) of the Act.

owners and their respective mortgagees who do not receive the status certificate, and have no other method of attaining the requisite information, and are therefore exposed financially to the undisclosed risks.

While subsection 76(1) of the Act does not limit who may request (and to whom the condominium corporation is obliged to give) a status certificate, subsection 76(6) limits the category of people to whom the corporation is bound, and against whom the corporation is correspondingly estopped from denying the veracity of the items contained (or deemed to be contained) in the status certificate. More specifically, a condominium corporation is only estopped against a purchaser or mortgagee who has requested the status certificate and has reasonably relied upon the information contained (or deemed to be contained) therein. As the Court of Appeal in the Reino Case recently confirmed, in *obiter*, it makes no difference whether the owner/vendor of the unit, or the purchaser thereof, requests the status certificate. An owner/vendor of a condominium unit may request and obtain a status certificate for ultimate delivery to his or her purchaser (as is frequently the case in purchase and sale transactions), but the condominium corporation will only be estopped against the purchaser (or the mortgagee) who relies upon same.[5]

3. RECENT CHANGES TO THE STATUS CERTIFICATE FORM

The provincial government's comprehensive review of the Act between 2012 and 2015 revealed the need for additional safeguards to support both current and future condominium unit

[5] By contrast, subsection 32(8) of the Act's predecessor, the *Condominium Act*, R.S.O. 1990, had explicitly provided that the status certificate binds the condominium corporation "as against the person requesting the certificate." Accordingly, in the decision of *Lucas v Durno & Shea* (1985), 39 R.P.R. 178 (Ont. Prov. Ct.) (decided under the predecessor Act), the Court held that where an estoppel certificate was requested by (and addressed to) the unit owner selling his or her unit to a third-party purchaser, the condominium corporation was not estopped against the purchaser, but only against the vendor to whom the certificate was addressed.

owners, and to help purchasers of units to make more informed decisions when entering the condominium market. Among the changes to the existing legislation, the *Protecting Condominium Owners Act,* 2015, S.O. 2015, c. 28 expanded the prescribed information that must be included in a status certificate. While substantially similar to its predecessor, in both its form and substance, the status certificate has been updated to address the recent regulatory changes pertaining to electric vehicle charging systems (hereinafter referred to as "**EVCS**"), which came into effect on May 1, 2018.[6] More specifically, paragraph 23 of the new form of status certificate addresses the possibility that the common elements may be modified by a unit owner to allow for the installation of an electric vehicle charging system, either through an agreement under subsection 98(1)(b) of the Act, or pursuant to the new section 24.6 of Ontario Regulation 48/01.[7] Likewise, paragraph 25 of the status certificate has been modified to require the condominium corporation to disclose whether any installations of EVCS have been implemented or contemplated by the condominium corporation in accordance with the new subsection 24.3(5) of Ontario Regulation 48/01. Finally, paragraph 33 of the status certificate now requires the condominium corporation to provide copies of any and all agreements entered into between the unit owner and the condominium corporation that bind the unit, pursuant to subsection 98(1)(b) of the Act or the new section 24.6 of Ontario Regulation 48/01.

[6] Earlier this year, the province released new regulations aimed at facilitating the installation of EVCS in existing condominium corporations. The new regulations allow condominium corporations and unit owners to install EVCS within the common elements of the condominium under certain circumstances, without having to comply with all of the requirements stipulated in sections 97 and 98 of the Act respectively.

[7] Pursuant to section 24.6 of Ontario Regulation 48/01, if a unit owner's application for the proposed installation of an EVCS is accepted by the condominium corporation, then the parties must take all reasonable steps to enter into an agreement within 90 days (or within such other time period as may be agreed upon in writing) to facilitate the installation, use, and operation of the EVCS, which must be registered on title to the owner's unit (similar to agreements entered into between owners and condominium corporations under section 98 of the Act).

Although not yet in force, condominium corporations will also need to include in the status certificate a list of all current shared facilities agreements to which the condominium corporation is a party pursuant to section 21.1 of the Act.[8] Additionally, the status certificate will not only need to disclose all outstanding judgments against the condominium corporation, and the status of all legal actions to which the condominium corporation is a party, but also the financial implications (as may be prescribed) of any such judgements and legal actions.[9] It remains to be seen whether the impending amendments to the regulations will require further information to be included in status certificates.

The new status certificate form, dated March 23, 2018, is available on the Government of Ontario's website. Since the status certificate is a "prescribed form," condominium corporations must use the province's most current version.[10] Although deviations from the prescribed form will not invalidate its contents (provided that any such modifications do not affect the substance of the form, are unlikely to mislead, and the form is organized in the same or substantially similar way as the prescribed form),[11] it is nevertheless prudent to simply strike through the sections of the status certificate that do not apply, rather than remove such sections altogether, particularly in light of the fact that the form itself expressly indicates that sections may be struck out or added, as necessary. Condominium corporations should exercise great care when including information

[8] Section 21.1, although not yet in force, provides that if a proposed condominium will be sharing the use, maintenance, repair, insurance, operation or administration of any land, assets, facilities or services with another party, then it must enter into a shared facilities agreement that meets the prescribed requirements, and ensure that said agreement is registered on title. The regulations to the Act will prescribe provisions that must be included in such agreements, which likely will include clearly outlining or specifying the formula or basis upon which the shared facilities costs will be allocated between or amongst the contributing parties.

[9] Subsection 76(1)(h.1) of the Act.

[10] Subsection 18(1) of Ontario Regulation 48/01 provides that a status certificate shall be in English or French, and shall be in the form that is entitled "Status Certificate" in English or "Certificat d'information" in French, as the case may be.

[11] Section 84 of the *Legislation Act, 2006*, S.O. 2006, c. 21.

beyond what is required by the Act, as such statements may attach (or result in) additional liability on the part of the condominium corporation. Indeed, the Court of Appeal has held that a condominium corporation has an obligation to take reasonable steps to ensure that the content of the status certificate is accurate, even if the information is not statutorily mandated.[12] This duty flows from the common law of negligent misrepresentation, and not from the condominium legislation *per se.* In light of the condominium corporation's potential liability for issuing a false or misleading status certificate, it is critical that the status certificate be completed as diligently and as accurately as possible.

4. THE REINO CASE

I. THE FACTS OF THE CASE

In 2013, Dante Reino (hereinafter referred to as the "**Owner**") purchased a residential condominium unit from his mother who had owned the unit since 2004. At the time of her purchase, the Owner's mother had received a "clean" status certificate from the condominium corporation, Metropolitan Toronto Condominium Corporation No. 723 (hereinafter referred to as "**MTCC 723**"), confirming that the unit was not in violation of the condominium's declaration, by-laws or rules. Upon purchasing the unit, the Owner was also issued a clean status certificate.

When the Owner decided to sell his unit in 2016, he requested another status certificate from MTCC 723, which he intended to use in connection with his sale of the condominium unit. This time, the status certificate noted (at paragraph 12 thereof) that the unit was in breach of the condominium's declaration, since changes had been made to the unit's configuration without the

[12] *Orr v Metropolitan Toronto Condominium Corp. No. 1056*, 2014 ONCA 855 at para 55.

prior written consent of the board of directors. More specifically, a second bedroom had been added to the unit and the kitchen was relocated. The status certificate therefore indicated that the condominium corporation may take steps to remove the unauthorized alterations and restore the unit to its original configuration, the costs of which would be added to the common expenses attributable to the unit.

The Owner contended that, contrary to the status certificate, no alterations to the unit had been undertaken during the period that the unit was owned by him or his mother. Accordingly, if the configuration of the unit was changed from its original layout, such modifications must have been carried out by a previous owner prior to 2004. Moreover, despite the fact that representatives of MTCC 723 had visited the unit on numerous occasions over the course of the Owner's occupancy (primarily for the purpose of conducting fire safety inspections), no one had ever mentioned that the layout had been improperly altered.

The Owner commenced an application against MTCC 723, seeking a declaration that the condominium corporation was bound by its previously-issued clean status certificates, and that the infractions cited in the most recent status certificate were not binding upon him, nor with respect to his unit. In April of 2017, the Superior Court of Justice ruled in his favour, holding that MTCC 723 was precluded from issuing the status certificate in its present form. The application judge ordered MTCC 723 to issue a clean status certificate in respect of the Owner's unit, pursuant to section 76 of the Act, without any reference whatsoever to the alleged violations of the condominium's declaration. Following the release of the Superior Court of Justice's decision, MTCC 723 successfully appealed to the Court of Appeal.

II. THE ISSUE ON APPEAL

The issue raised on appeal was whether a condominium corporation that has issued a prior clean status certificate in relation to a unit will, in the event that it later discovers matters that it believes should have been disclosed to unit purchasers or prospective mortgagees, be estopped and precluded from noting such matters or concerns in a subsequent status certificate requested by the owner/vendor or the purchaser of the unit.

III. THE APPELLATE COURT'S RULING

In its unanimous decision, the Court of Appeal held that the application judge had erred in concluding that the condominium corporation was unable to issue anything other than a clean status certificate in the circumstances of this case. At the outset, the appellate Court noted that section 76 of the Act must be considered in the context of the consumer protection purpose of the statute. The objective of a status certificate is to bring to the attention of unit purchasers and/or mortgagees matters that may be of concern to them when contemplating the purchase/financing of a condominium unit. Where a condominium corporation becomes aware, after issuing a clean certificate, of a circumstance or problem that is required to be disclosed by virtue of section 76 of the Act (or the regulations promulgated thereunder), it must include such information in the next status certificate that it issues in connection with the subject unit, irrespective of whether same could negatively impact the completion of the purchase and sale transaction involving the unit. Accordingly, as soon as MTCC 723 discovered that the unit layout had been altered without the board's approval, it was obliged to include such information in the very next status certificate so issued. To do otherwise, the Court observed, would be misleading to the unit purchaser, and would effectively perpetuate the infraction or contravention of the declaration.

The Court went on to note that notwithstanding MTCC 723's disclosure obligation vis-à-vis prospective unit owners and mortgagees, the Owner was (and continues to be) entitled to rely upon the status certificate that was issued to him when he acquired the unit in 2013, and the condominium corporation is correspondingly still bound by same. If the condominium corporation negligently issued the status certificate to the detriment of (or prejudice to) the Owner, then the Owner can sue the condominium corporation for damages reflecting the diminution in value (if any) of his unit so caused by the erroneous, inadequate or improper disclosure that may have occurred, provided that the Owner does so prior to the expiration of the applicable limitation period. Whether or not there was, in fact, negligence on the part of MTCC 723 would be determined in such an action. In the end, the appellate Court set aside the order of the application judge, and awarded costs in favour of the condominium corporation in the amount of $31,625, all inclusive.

IV. THE AUTHORS' ANALYSIS OF THE DECISION

The authors agree with the appellate Court's ruling that in circumstances where a condominium corporation becomes aware of a matter or issue that should be disclosed by virtue of section 76 of the Act (or the regulations promulgated thereunder), it must include such information in the next status certificate that it issues, regardless of whether the condominium corporation has previously delivered a clean status certificate in respect of the subject unit. If the Court had ruled otherwise, then in the authors' respectful opinion, such a decision would not only have undermined the very purpose of a status certificate (namely to ensure that unit purchasers and mortgagees have sufficient information to allow them to make an informed buying or lending decision), but would also have exposed the condominium corporation to

potential liability for a false or misleading status certificate, in those circumstances where the status certificate was reasonably relied upon to the detriment of the purchaser or mortgagee. For example, in the Reino Case, the unapproved alterations comprising the relocated kitchen and the additional bedroom may also constitute (or give rise to) a contravention of the Ontario Building Code, and/or may violate the health and safety standards or the property standards of the local municipality (particularly if a structural component, a gas vent or an electrical conduit is negatively impacted by the alterations), thereby substantiating the claim for damages that might be instituted by the unwitting purchaser or mortgagee who subsequently discovers the unapproved alterations independently, sometime after the completion of the purchase and sale transaction. Furthermore, a contrary ruling by the appellate Court would have had the effect of precluding the condominium corporation from ever insisting on the unit owner's rectification of the infraction or contravention, and thereby perpetuate the non-conforming status quo in perpetuity, unless the condominium corporation is ultimately compelled to do so (or chooses to do so on its own) at its sole cost, risk, and expense.

The appellate Court decision in the Reino Case reinforces the importance of the status certificate as the vehicle through which the condominium corporation provides significant and relevant information to prospective owners and mortgagees. Almost four years earlier, the Court of Appeal in *Orr v Metropolitan Toronto Condominium Corp. No.* 1056, 2014 ONCA 855 (hereinafter referred to as the "**Orr Case**") formally recognized that condominium corporations owe a duty of care to unit purchasers in the preparation of a status certificate, and must exercise reasonable care and vigilance in the performance of their statutory duties under section 76 of the Act, and correspondingly ensure that the information included in a status certificate is accurate as of the date that same is issued.

With respect to the completion of paragraph 12 of the status certificate – the section of the status certificate that was in contention in the Reino Case – a condominium corporation is statutorily required to disclose whether it possesses knowledge of any circumstances that may result in an increase in the common expenses for the subject unit. If the condominium corporation does possess such knowledge, then it is obliged to ensure that the status certificate provides the particulars of any potential or anticipated increase, including any special assessment levied by the board of directors against the unit, and the reason for such assessment. As observed by Justice Lauwers in the case of *Durham Condominium Corp. No. 63 v On-Cite Solutions Ltd.*, 2010 ONSC 6342 (hereinafter referred to as the "**On-Cite Solutions Case**"), the language used in paragraph 12 of the status certificate is intended to compel a condominium corporation to disclose more, not less, information that could be financially material to the purchaser's decision to complete the transaction. In the On-Cite Solutions Case, the Court held that where the condominium corporation was aware (or ought to have been aware) that a 36-inch door of the commercial unit had been widened to ten feet, without the approval of the board of directors, but failed to disclose same in the status certificate so requested by the purchaser, then the condominium corporation will be precluded from requiring the purchaser to restore the door to its original configuration, after the purchaser acquires title to the commercial unit. The appellate Court's ruling in the Reino Case is therefore consistent with both the spirit of the legislation and the previous jurisprudence in the province, where the courts have consistently confirmed that the disclosure of outstanding problems, deficiencies, or issues affecting the purchased unit, or the common elements, which might ultimately give rise to potential increases in the common expenses, or potential expenses for the future owner of the unit, ought to be disclosed.

Although the appellate Court in the Reino Case did not make any findings as to whether the condominium corporation was negligent in the preparation of its earlier status certificates, this case serves as a reminder to condominium corporations of the potential liability that may arise if an inspection of a unit is performed, and an issue or problem that is patent (and reasonably ascertainable on a cursory inspection of the unit) is overlooked. In light of the fact that there is no statutory obligation to perform an inspection of a unit prior to the issuance of a status certificate, it is often recommended that condominium corporations should not undertake such an inspection, and/or should expressly confirm that no inspection of the subject unit has been undertaken by or on behalf of the condominium corporation in connection with the issuance of the status certificate, and that the representations contained therein are therefore qualified accordingly. It is not uncommon for condominium corporations to include a disclaimer in the status certificate that expressly confirms that:

1. it is the purchaser's responsibility to review the condominium's governing documents in order to determine whether the previous owner has carried out any structural changes to the unit, or has modified the common elements;
2. no inspection of the unit has been conducted in connection with the issuance of the status certificate, and therefore the condominium corporation cannot comment on matters of non-compliance that may be revealed by such an up-to-date inspection; and
3. unless an inspection is specifically requested (and any additional reasonable fees charged by the condominium corporation in connection therewith have been paid), the condominium corporation reserves its right to enforce any infraction or non-compliance with the condominium's governing documents against any subsequent

owner, notwithstanding that the non-compliance may have existed prior to the issuance of the status certificate.

The authors are unaware of any judicial commentary on the propriety or legal effect of such a disclaimer in a status certificate where no inspection of the unit has been undertaken, but firmly believe that the condominium corporation would not be prejudiced by including such a disclaimer in the status certificate, and it may very well protect it against a damage claim arising from (or in connection with) an unapproved alteration that was unknown by the condominium corporation at the time that it issued the status certificate to the unit purchaser or mortgagee.

Will such a disclaimer protect the condominium corporation in those circumstances where the condominium corporation knew, or ought reasonably to have known, about an unauthorized alteration (i.e. because of one or more visits to the dwelling unit made by a representative of the board of directors), and thereafter the condominium corporation seeks to impose responsibility on the new owner? Representatives of condominium corporations sometimes enter units to carry out the "objects and duties" of the corporation,[13] such as inspecting the smoke detectors or the heating and cooling system or filters, or investigating any damage caused to the unit. In the Reino Case, the Owner cited a minimum of 16 instances in which board members had entered his unit, primarily for fire inspection purposes. The inference, here, appears to be that the condominium corporation possessed knowledge, or ought reasonably to have known, of the unauthorized alterations, but failed to address any concerns regarding same to the Owner. If such a disclaimer is rendered inoperative or ineffective because of the knowledge or "deemed knowledge" of one of the directors of the condominium corporation

[13] Section 19 of the Act.

regarding unapproved alterations, then the counsel of perfection would dictate that condominium corporations should be proactive and always undertake an inspection of the subject unit to confirm the existence of unapproved alterations, whenever a request for a status certificate is received. However, it may well be too impractical, costly or administratively burdensome to undertake an inspection of each and every unit that is the subject of a status certificate request. Condominium corporations may also draw some comfort from the appellate Court decision in the Orr Case, which confirmed the Court's reluctance to impute the knowledge of one director to the entire board of directors, as a general matter or principle, because doing so would vastly increase the liability exposure of condominium corporations and would make risk management on the part of the board all but impossible.[14]

Finally, it is worth noting that the condominium corporation in the Reino Case could arguably have considered granting retroactive approval to the alterations made to the dwelling unit, in an effort to avoid being embroiled in costly and protracted litigation. Given the nature of the unauthorized alterations in the Reino Case, a prudent condominium corporation would undertake certain due diligence measures (such as endeavouring to procure copies of all drawings, permits and engineering reports regarding the alterations, and retaining an architect or engineer to inspect the premises and to correspondingly certify that the alterations do not impact the structural integrity of the condominium building, nor negatively affect any of the condominium's mechanical, electrical, heating, cooling, plumbing and/or drainage systems), prior to granting retroactive approval to the unit owner. As the Ontario Superior Court of Justice observed in the case of *Muskoka Condominium Corp. No. 39 v. Kreutzweiser* (2010), 2010 ONSC 2463, while a board of directors is duty-bound to enforce its declaration, by-laws, and

[14] *Orr v Metropolitan Toronto Condominium Corp. No.* 1056, 2014 ONCA 855 at para 126.

rules where the violation or contravention of same is causing a problem, not every minor violation of a declaration provision must be met with an enforcement procedure. It is for the board to exercise its discretion, in the best interests of the respective owners and residents of the condominium.[15] In the Reino Case, the trial judge had accepted, as a fact, that the Owner's unit had been modified prior to his mother's occupancy thereof over 14 years ago. While the policy of the board of directors in the Reino Case was to disapprove of any alterations that tended to add to the occupant load factor within the condominium building,[16] the condominium corporation could nevertheless have decided that it would not take enforcement measures (i.e. against the Owner or the unit purchaser following the completion of the purchase and sale transaction) to require the removal of the unauthorized alterations and the restoration of the unit to its original configuration. As confirmed by the Ontario Superior Court of Justice in the case of *Peel Condominium Corporation No. 108 v Young*, 2011 ONSC 1786, the condominium corporation would still be entitled to enforce its policy as against other unit owners, notwithstanding a prior history of spotty or selective enforcement by the board of directors against transgressors. Had the board of directors in the Reino Case retroactively authorized the alterations to the unit, no reference to unapproved alterations would then have to be included in the status certificate, since a purchaser need only be warned of those circumstances that may result in an increase in the common expenses attributable to the purchased unit. Neither the trial decision, nor the appellate Court's decision, indicate whether the board of directors for MTCC 723 had considered this option.

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[15] *Muskoka Condominium Corp. No. 39 v. Kreutzweiser* (2010), 2010 ONSC 2463 at para 11.

[16] *Metropolitan Toronto Condominium Corporation No. 723 v. Reino*, 2018 ONCA 223 at para 3.