

Case Name:

Webb v. Metropolitan Toronto Condominium Corp. No. 979

Between

David Webb and Diann Webb, and
Metropolitan Toronto Condominium Corporation No. 979

[2003] O.J. No. 2581

Court File No. 03-CV-249538CM2

**Ontario Superior Court of Justice
Nordheimer J.**

Heard: June 3, 2003.

Judgment: June 4, 2003.

(15 paras.)

Counsel:

Timothy Pinos, for applicants.

Patricia M. Conway, for respondent.

¶ 1 **NORDHEIMER J.** (endorsement):— The applicants, who are unit owners in the respondent, seek an interlocutory injunction restraining the respondent from making a change to the television service provided to the unit owners in the condominium pending the hearing of the underlying application which challenges the process by which the respondent, or more specifically its Board of Directors, has pursued such a change.

¶ 2 The respondent is one of three condominium buildings in a complex known as Marina Del Ray located on Lakeshore Boulevard West in the City of Toronto. The respondent had a contract with Rogers Cable for the provision of television services to the building. That contract was due to expire on May 31, 2003. The Board of Directors, in anticipation of the end of that contract, asked Rogers Cable and Bell ExpressVu to make proposals for a new contract. As a result of those proposals, the respondent entered into discussions with Bell ExpressVu which it viewed as having made the better proposal. Eventually, the respondent entered into a letter of intent with Bell ExpressVu to provide the service.

¶ 3 A notice was sent to all unit owners in April 2003 advising of this proposed change. This notice was sent in purported compliance with section 97(3) of the Condominium Act, S.O. 1998, c. 19. However, it is the respondent's position that the change in the television service provider does not in fact fall within the matters covered by section 97(3).

¶ 4 Subsequent to this notice, a meeting was held with the unit owners. It is contended that at this meeting, the proposed service being offered by Bell ExpressVu was altered to address certain complaints that had been made regarding the loss of channels that would have arisen if the original Bell ExpressVu proposal had been accepted. The applicants contend that the change in the proposed service then took the matter outside of the scope of the original notice and that a new notice was then necessary under section 97(3). No fresh notice having been made, the applicants contend that the respondent has failed to honour its obligations under the Act.

¶ 5 The applicants launched the application which seeks an order under section 134 of the Act requiring the respondent to honour its obligations under the Act, specifically its obligations under sections 22(1) and 97(3). In the time period pending the hearing of the application, the applicants seek the aforementioned injunction.

¶ 6 Certain provisions of the Act are relevant to this motion. Sections 22(2) and 22(3) state:

- "(2) Despite subsection 21(1), a corporation may, by resolution of the board without a by-law,
- (a) make an agreement for a network upgrade to a telecommunications system that services the units of the corporation;
 - (b) make an agreement for a telecommunications system that is not connected to a telecommunications system that services the units of the corporation; or
 - (c) amend an agreement for a telecommunications system that services the units of the corporation to permit the other party to the agreement to supply and invoice part or all of the services directly to the unit owners.
- (3) Subsections 97(3), (4), (5) and (6) apply to an agreement described in subsection (2) as if it were a change in a service that a corporation provides to the owners."

¶ 7 Section 97(3) of the Act states:

"A corporation may make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

- (a) the corporation has sent a notice to the owners that,
 - (i) describes the proposed addition, alteration, improvement or change,
 - (ii) contains a statement of the estimated cost of the proposed addition, alteration, improvement or change indicating the manner in which the corporation proposes to pay the cost,
 - (iii) specifies that the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners, and
 - (iv) contains a copy of section 46 and this section; and
- (b) one of the following conditions has been met:
 1. The owners have not requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a).
 2. The owners have requisitioned a meeting in accordance with section 46

within 30 days of receiving a notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change at the meeting."

¶ 8 Finally, section 97(4) states:

"Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least 66 2/3 per cent of the units of the corporation vote in favour of approving it."

¶ 9 The principles to be applied in determining whether an interlocutory injunction should be granted are well-established. As set out in the decision of the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, it involves a three part test: (i) there must be a serious issue to be tried; (ii) there must be irreparable harm occasioned to the applicant, and (iii) the balance of convenience must favour the applicant.

¶ 10 Contrary to the respondent's submission, I do not accept that there are no material facts in dispute in this matter and therefore that the applicants must establish a strong prima facie case in order to obtain the relief which they seek. It seems evident that there are a number of material facts in dispute. Consequently, I consider the RJR test to be the proper test to apply to this motion. It is recognized that the threshold for establishing that there is a serious issue to be tried is a low one. It was also noted by Justices Sopinka and Cory in *RJR-Macdonald Inc. v. Canada (Attorney General)*, supra, at p. 338:

"A prolonged examination of the merits is generally neither necessary nor desirable."

¶ 11 In my view the applicants have established that there is a serious issue to be tried. It is not my role on this motion to determine that issue. I need simply find, as I do, that there is a serious issue as to whether the proposed change in the television service to the building involves a "network upgrade to a telecommunications system" such that the requirements of section 22 of the Act are triggered. I also find that there is an issue as to whether the notice provided in April 2003 is sufficient to comply with the requirements of section 97(3) given the subsequent change in the proposal offered by Bell ExpressVu as revealed in the meeting of May 7, 2003. Finally on this point, there is an issue as to whether the change being proposed can reasonably be characterized as "a substantial change in a service that the corporation provides to the owners" such as to fall within the requirements of section 97(4) given that the respondent itself, in communicating to the unit owners, referred to the change in service as a "significant change" and a matter that "has far reaching implications". If the requirements of section 97(4) are invoked, then a two-thirds vote of the unit owners is necessary to approve the change and, of course, no such vote has been held.

¶ 12 It is on the second and third factors in the test where I find that the applicants' motion flounders. I fail to see that there is any irreparable harm that will be occasioned to the applicants if the injunction is not granted. The Supreme Court in *RJR-Macdonald Inc. v. Canada (Attorney General)*, supra, defined irreparable harm in the following terms, at p. 341 (per Sopinka and Cory JJ.):

"'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228, 67 Sask. R. 123, 8 A.C.W.S. (3d) 380 (Q.B.)); where one party will

suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145 (C.A.)."

¶ 13 I do not accept the contention of the applicants that the inconvenience that will be suffered by them from having a new television system installed in their unit and the time spent learning how to operate that system constitutes irreparable harm simply because it is asserted that such damage cannot be quantified in monetary terms. In my view those problems are de minimis and cannot rise to the level required to sustain a finding of irreparable harm.

¶ 14 I am also not satisfied that the balance of convenience favours the applicants. The Board of Directors is, at this stage, presumed to be operating in good faith and in furtherance of its statutory duties and its decision is entitled to deference - see York Condominium Corp. No. 382 v. Dvorchik (1997), 12 R.P.R. (3d) 148 (Ont. C.A.). It may be, in the end result, that the Board will be found to have acted improperly but the court should not approach this motion assuming that result. Rather, the court should proceed on the basis that the decision of the Board is valid. The court should, consequently, be loathe to grant an order which would interfere with that decision unless it is clearly necessary to do so. If, at the end of the matter, the Board is found to have acted in contravention of its duties and obligations then there is nothing in the record before me that would suggest that the process by which Bell ExpressVu has gotten into the building to provide its service cannot be reversed and replaced with the service by Rogers Cable, or any other supplier, which the unit owners may decide to engage. While that would admittedly cause further inconvenience to the unit owners, that inconvenience is less substantial than the inconvenience that would be caused by the court interfering with the going operation of the building as determined by the Board of Directors.

¶ 15 For these reasons, the applicants' motion is dismissed. The applicants will pay to the respondent the costs of the motion fixed at \$2,500, being the amount agreed upon by counsel, within 30 days.

NORDHEIMER J.

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