CITATION.: Metropolitan Toronto Condominium Corporation No. 590 v. Registered Owners, 2019 ONSC 4484
COURT FILE NO.: CV-17-589011
DATE: 20190725

2019 ONSC 4484 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 590 Applicant	*Eli S. Lederman and Kelly Hayden*, for the Applicant
– and –	
THE REGISTERED OWNERS AND MORTGAGEES OF METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 590 Respondents	*Mark H. Arnold*, for the Respondent Registered Owners of MTCC No. 590, Brian Smith, Judy Wingham, Edwin Weir, Kevin Rohwer, Natasha Rohwer, Brian McElwain, Sheila McElwain, Edward Monteserin, George Gunnell, Ava Yaskiel, John Gate, Sylvia McLelland, Dorothea Penman and Joseph Barfett
	HEARD: May 16, 2019

REASONS FOR DECISION

SANFILIPPO J.

Overview

[1] The Applicant, Metropolitan Toronto Condominium Corporation No. 590 ("MTCC 590"), was created on November 26, 1982, upon the registration of the Declaration pertaining to the 21-storey high-rise tower known municipally as 30 Wellington Street East, Toronto, which I will refer to as the "Building". MTCC 590 is owned by, and has for almost 37 years managed the condominium interests of, the owners of the 120 residential condominium units housed in its 20 floors of living space – six condominium residences on each floor.

[2] MTCC 590 brings this Application for an Order to amend its Declaration, which is, in every respect, the Constitution that governs the operation of the condominium. This Application is brought on the basis of section 109 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Condominium Act*") by which a Court may, on Application, amend the Declaration where the amendment is "necessary or desirable to correct an error or inconsistency that appears in the declaration … or that arises out of the carrying out of the intent and purpose of the declaration".

[3] MTCC 590 seeks these amendments to address an issue that has divided the interests of the condominium owners largely into two groups: certain of those who own condominium residences on the top four floors of the Building, and; those who own units on the 16 floors below.

[4] The units on the top four floors of the Building have a unique feature that is not found in the units housed on the 16 floors below: they have wood-burning fireplace systems. These consist of two parts, which I will refer to as the "Fireplace" and the "Chimney Flue".

[5] The Fireplace consists of a wood-burning heat box, surrounded by a decorative mantel and cladding, containing a damper and related equipment all located within the condominium unit. To vent the heat and gasses generated by the operation of the Fireplace, each Fireplace has a dedicated Chimney Flue. The Chimney Flue projects upward from the unit to and through the roof of the building, piercing vertically through the floors and hugging the walls of the higher condominium units along its path to the roof, where it emerges and protrudes as a metal cylinder. Each chimney has within it two metal tubes, one inside the other. The chimney and the tubes within it, being the stack that is connected to the Fireplace, are the Chimney Flue.

[6] For some 30 years, the residents of the top four floors of the Building could use their Fireplaces to enjoy wood-burning fires. This ended on September 13, 2013, when MTCC 590 notified the condominium members that the Fireplaces and Chimney Flues were unsafe. The Fireplaces have not been usable since and cannot be used again until the fireplace systems are made safe. This inconveniences the units on the top four floors, but also poses to all the broader concerns of potential health and safety consequences and potential, as-yet unquantified, economic detriment. The condominium members all share a common interest in the resolution of this issue, but have different visions of the solution and who ought to be responsible to fund it.

[7] In this Application, MTCC 590 seeks amendments to the Declaration that, in its view, will make the unit owners on the top four floors responsible for the maintenance and repair of not only the Fireplace within their units, which they have throughout conceded, but also the Chimney Flues that connect their Fireplaces to the roof, which certain of them contest. The Applicant contends that it is fair that the Fireplace owners maintain and repair the common elements that exclusively serve their units. Certain of the owners disagree and submit that MTCC 590 should abide by the Declaration which, they state, obligates MTCC 590 to maintain and repair *all* common elements, including those over which owners have exclusive use.

[8] Alternatively, MTCC 590 seeks amendments to the legal description of the condominium units containing Fireplaces to give the unit owners on the top four floors ownership of the

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Chimney Flues. In essence, MTCC 590's alternative solution to the problem is to divest itself of the problem. MTCC 590 conceded in oral argument that there is no precedent in condominium law for unit owners to own arterial conduits, vents, shafts or pathways that pierce through the core of the building, traverse several floors and impact contiguous units, much less to confer to a few owners a direct freehold ownership interest in a portion of the Building roof.

[9] For the reasons that follow, I grant the Order sought to amend the Declaration to specify the Chimney Flues as exclusive use common elements. I dismiss the remainder of this Application.

I. BACKGROUND TO THIS APPLICATION

A. The Building

[10] The Building was constructed in the early 1980's and has 120 residential units on 20 floors. The Building contains 23 wood-burning Fireplaces.

[11] Each Fireplace is vented through a dedicated, individual Chimney Flue. On the roof of the Building, 24 Chimney Flues are grouped in six clusters, each bundling four stainless steel Chimney Flues laterally supported by steel bracing and cabling. One of the Chimney Flues does not connect to anything. Another has been decommissioned, leaving 22 Chimney Flues connected to Fireplaces in 22 residential units all located on the top four floors of the Building.

B. The Board's Discovery of a Problem

[12] In April 2013, MTCC 590's Board of Directors (the "Board") retained Baragar Mechanical Installations Limited ("Baragar Mechanical") to investigate the airflow for the combustion of the Fireplaces, as part of other renovations that affected the Building's air system. In a report dated April 22, 2013, Baragar Mechanical identified defects in the Chimney Flues. In a further report dated September 4, 2013, Baragar Mechanical concluded that none of the Fireplaces and Chimney Flues were properly operational.

[13] On September 13, 2013, the Board issued a Notice stating that the Fireplaces and Chimney Flues were unsafe, citing Baragar Mechanical's finding that "the existing wood burning fireplaces and accompanying stacks should not be used again as they may pose a health and safety hazard or even a fire."

[14] The Board retained Carleton Chimney Services Inc. ("Carleton") to inspect the Fireplaces and Chimney Flues. In a report to the Board dated September 25, 2013, Carleton concluded that the Chimney Flues had "all deteriorated to the point that they are no longer serviceable". The Board directed Carleton to seal the Fireplace dampers and to install a metal tag in each Fireplace stating that the Fireplace was unsafe for use. In completing this work, Carleton inspected each Fireplace, and noted damage. In a report dated November 15, 2013, Carleton stated its opinion that all the Fireplaces and Chimney Flues needed to be replaced or removed from service.

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[15] Since the Fireplaces were removed from use, the Board has obtained further reports pertaining to the condition of the Fireplaces and the Chimney Flues and recommendations to address their current condition, including the following:

(a) In 2014, the Board retained the engineering firm Halsall Associates Limited ("Halsall"), and received from them a report dated June 5, 2014 that outlined their assessment and their estimate of the cost required to replace or update the Fireplaces and Chimney Flues;

(b) In 2015, the Board retained T. Harris Environmental Management Inc. ("Harris Environmental") to conduct a study to determine whether any hazardous building materials were present in and around the Fireplaces and Chimney Flues. Harris Environmental delivered a report dated April 2, 2015, which identified asbestos-containing materials that could remain in place until system upgrading or renovations;

(c) In 2016, the Board retained WSP Global Inc. ("WSP") to complete a competitive bid process for removal and replacement of the Fireplaces and Chimney Flues. WSP's summary of the competitive bids is dated July 20, 2016. This bidding process produced a range of direct cost estimates associated with the Fireplaces and Chimney Flues, but did not include any broader consequence to the Building's heating, ventilation and air conditioning ("HVAC") system that could result from any updated Fireplace and Chimney Flue systems, or the cost of any changes that might be required in the configuration of the chimneys at roof level to meet current building standards, including possible roof reinforcement to support any additional weight.

(d) The Board investigated the feasibility of decommissioning the Fireplaces and Chimney Flues, by capping them and sealing them in place. The Board retained AIM Chimney Sweep and Stove Shop ("AIM Chimney") and received reports from them dated August 22, 2016; November 9, 2016 and March 9, 2017. The Board also retained building science engineers Brown & Beattie Ltd. ("Brown Engineering") to review the engineering aspects of the capping and decommissioning analysed by AIM Chimney. Brown Engineering delivered reports to the Board dated December 12, 2016; March 13, 2017 and June 8, 2017;

(e) In May 2017, the Board retained A1 Quality Chimney ("A1 Chimney") to conduct a wood energy technology transfer inspection of the Fireplaces. By report dated May 30, 2017, A1 Chimney provided its conclusion that all the Fireplaces in the Building were unsafe to use and its recommendation that the sections of the Chimney Flues above the roof line be removed and capped.

[16] Through these reports and reviews, which I will refer to collectively as the "Engineering & Remediation Reports", MTCC 590 identified a problem with the Fireplaces and Chimney Flues that affects the Fireplace owners and all other owners in the Building. Mr. Michael Ryall,

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the President of the Board of MTCC 590 since 2017, deposed that the Fireplaces and Chimney Flues must be replaced, removed or decommissioned. The Board of MTCC 590 has not yet chosen a solution, it says because of lack of clarity concerning who is financially responsible.

C. The Board's Approach to Financial Responsibility for the Problem

[17] The evidence on this Application chronicled a lengthy debate within MTCC 590 regarding whether the cost of the maintenance and repair of the Chimney Flues is to be borne by MTCC 590, and through it all condominium unit owners, or by only those condominium unit owners who have Fireplaces, whom I will refer to as the "Fireplace Unit Owners". Within the group of Fireplace Unit Owners there is not unanimity in how to approach this issue. Some are content to seal and decommission their Fireplaces while others insist on a return to functionality.

[18] The Fireplace Unit Owners agree that they are financially responsible for the maintenance and repair of their Fireplaces.

[19] Mr. Ryall deposed that the first time that the Board realized that MTCC 590 might be responsible for the cost of maintenance and repair of the Chimney Flues was in 2003: some ten years before Baragar Mechanical stated that they needed repair. In a Reserve Fund Study Report prepared by Halsall dated November 21, 2003, Halsall listed the "Fireplaces and all pertinent equipment…including the portion of the flue within the boundaries of the unit" as "Unit Owned Elements", and "Fireplace flues … not within the boundaries of the unit that uses the fireplace" as "Common Element Components". Halsall recommended that MTCC 590 reserve $150,000 for the Chimney Flues as common elements.

[20] Halsall made a similar recommendation in its Reserve Study Reports of October 23, 2008, November 24, 2011 and May 21, 2015. In the most recent Reserve Study Report, Halsall forecast $490,000 for replacement of the Chimney Flues in 2015, with a further $307,360 forecasted for future expense by 2055.

[21] Mr. Brian J. Smith, who is one of the Fireplace Unit Owners, provided affidavit evidence. Mr. Smith deposed that he was a director of MTCC 590's Board from October 2011 to June 2015 and, in this capacity, received and considered the various reports received during his tenure, including those from Halsall. Mr. Smith was amongst those who directed WSP to prepare tenders for the work to be completed. He deposed that the Board did so based on legal opinions that they sought and obtained in the period from June 12, 2014 to January 8, 2016.

[22] Throughout the time that Mr. Smith was a director of the Board, indeed according to Mr. Ryall throughout the period from 2003 to 2017, the Board resolved to reserve funds for repair and maintenance of the Chimney Flues in the Reserve Fund for MTCC 590. This reserve amount increased through these years to the amount of $495,000. Mr. Smith tendered into evidence a Status Certificate issued by MTCC 590 on September 25, 2017, which communicated the following:

> The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit(s) except that the entire

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> fireplace system located in the Units on floors 19 to 22 has been deemed inoperable due to safety concerns and building code violations. The Corporation and the Unit owners share financial responsibility for maintaining and repairing the fireplace system, with the firebox and a portion of the flue being the Unit owner's responsibility and a portion of the flue and chimney being the Corporation's responsibility. …

[23] Weeks later, on October 17, 2017, the Board notified all unit owners of its determination that MTCC 590 was not financially responsible for the maintenance and repair of either the Fireplaces or the Chimney Flues stating, in pertinent part, as follows:

> As you may know, there are approximately 23 individual fireplaces located in a number of units within the building. The fireplaces and/or chimney flues require repair and/or maintenance in order to bring them up to Code and to ensure that they do not pose a safety or fire risk. …
>
> The financial burden associated with the repair and maintenance of the chimney flues has been a matter of some controversy over the years. ...
>
> …
>
> It is the unanimous decision of the Board that the Corporation is not responsible for the repair and maintenance of the fireplaces or the individual chimney flues which service the fireplaces.
>
> The chimney flues service and benefit only the fireplaces belonging to individual units. As such, neither the fireplaces nor the chimney flues are common elements and the Corporation is not responsible for their repair and maintenance in these circumstances. All repairs and maintenance of the fireplaces and all equipment which is pertinent thereto are the responsibility of the individual unit owner.

[24] Mr. Ryall deposed that MTCC 590 requires a clear understanding of who, as between MTCC 590 and the Fireplace Unit Owners, is responsible for the maintenance and repair of the Fireplaces and Chimney Flues: "It is very important for the Board to have a clear understanding of which of the Building's components are the responsibility of MTCC 590, and which are the responsibility of unit owners". This overstates the issue. There is no debate that the Fireplace Unit Owners are responsible for the maintenance and repair of their Fireplaces. The issue that confronts the Board is, "who is responsible for the maintenance and repair of the Chimney Flues?"

II. THE RELIEF SOUGHT IN THIS APPLICATION

A. The MTCC 590 Application

[25] On December 21, 2017, MTCC 590 brought this Application for the following relief:

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(a) An Order amending the Declaration to include a Schedule "F" which designates the Chimney Flues servicing each individual unit Fireplace as exclusive use common elements;

(b) In the alternative, an Order amending the description of MTCC 590 (the "Description") to clarify that the Chimney Flues servicing an individual unit Fireplace form part of the unit elements of that individual unit;

(c) In the further alternative, a declaration that the Chimney Flues servicing an individual unit Fireplace form part of the unit elements of that individual unit.

[26] MTCC 590 served its Application Record on all registered owners of units in MTCC No. 590 and all their mortgagees. Fourteen of the Fireplace Unit Owners responded, representing ownership of 9 of the 22 residential units housing Fireplaces. I will refer to this sub-set of the Fireplace Unit Owners as the "Responding Owners" as they are the only parties who have responded to MTCC 590's Application. And they went further. They initiated an Application of their own.

B. The Application by the Responding Owners

[27] On March 9, 2018, the Responding Owners issued a Notice of Application in this Court's file number CV-18-593674, (the "Related Application") wherein they seek the following relief:

(a) A declaration that the Chimney Flues that service the Fireplaces are located within and form part of the common elements of the Building;

(b) An order requiring MTCC 590 to repair or replace, at its cost, the Chimney Flues;

(c) Alternatively, an oppression remedy pursuant to section 135 of the *Condominium Act 1998*, requiring MTCC 590 to repair or replace the Chimney Flues, at its cost.

[28] The Responding Owners stated that they advanced the Related Application because the MTCC 590 Application was too narrow to allow for determination of the full scope of issues between the parties.

[29] A case conference was conducted on May 10, 2018 in this Application and the Related Application. The Responding Owners contended that the Related Application ought to be consolidated with the MTCC 590 Application and thereby heard together. MTCC 590 opposed, submitting that its Application should be heard first. Matheson J. ordered that this Application shall proceed first and, if its determination did not render the Related Application moot, it would be heard next by the same judge, if possible.

[30] This Application came before me on January 7, 2019.

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C. Preliminary Objections Raised at Initial Hearing

[31] On the initial return of this Application, the Responding Owners raised the following three preliminary issues:

(a) MTCC 590 had failed to establish proper authority to bring this Application as is required by sections 32 and 35 of the *Condominium Act*;

(b) MTCC 590 had failed to provide proper notice to Registered Owners and Mortgagees as is required by the *Condominium Act*;

(c) MTCC 590 had not properly pleaded certain of the amendments that it seeks to the Declaration such that all of the Registered Owners and Mortgagees entitled to notice have not been properly notified of the precise nature of the amendments sought to the Declaration.

[32] I adjourned the hearing on January 7, 2019, to allow MTCC 590 an opportunity to satisfy the Responding Owners on its authority to bring this Application and to ensure service on the Registered Owners and Mortgagees of an Amended Notice of Application that sets out in detail the precise wording of the amendment to the Declaration sought by MTCC 590, because the Notice of Application originally served sought an Order amending the Declaration *only* to the extent of the addition of a Schedule "F". Although no amendment to any section of the Declaration was pleaded in its Notice of Application, MTCC 590 proposed an amendment to section 22(a) of the Declaration in its factum. The proposed wording of this amendment was detailed in Appendix "A" to the factum but not in the Notice of Application, as follows (changes indicated by underlining) (the "Version #1 Section 22 Amendment"):

> 22(a): Each owner shall maintain and repair his unit, including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all ducts and services within the unit as well as maintaining any part of the common elements which he has exclusive use of, at his own expense. Each owner's obligation to maintain the common elements which he has exclusive use of (as specified in Schedule "F") shall include all maintenance and repair necessary to restore and keep the exclusive use common elements in good order and working condition.

[33] I ordered that any amendment sought by MTCC 590 to the Declaration must be set out in an Amended Notice of Application and the precise amendment sought must be detailed, on proper notice to the Respondents.

[34] These issues were cured by MTCC 590. The Responding Owners now concede that MTCC 590 has authority to bring its Application. MTCC 590 amended its Notice of Application to specify the precise amendments that it seeks and has established proper service of its Amended Notice of Application.

D. MTCC 590's Amended Notice of Application

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[35] In its Amended Notice of Application issued March 8, 2019, MTCC 590 expanded the relief sought from that pleaded in its initial Notice of Application. MTCC 590 seeks an Order to amend not only section 22 but also section 23 of the Declaration. The amendments proposed by MTCC 590 are as follows (additions indicated by underline and deletions by ~~strikethrough~~):

(a) Proposed Amendment to Section 22(a) of the Declaration:

> 22(a): Each owner shall maintain and repair his unit, including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all ducts and services within the unit as well as maintaining any part of the common elements which he has exclusive use of, at his own expense. For greater certainty, each owner's obligation to maintain the common elements which he has exclusive use of (as specified in Schedule "F") shall include repair after normal wear and tear and repair after damage.

(b) Proposed Amendment to section 23(a) of the Declaration:

> 23(a): The Corporation shall maintain and repair the common elements after damage. This duty to maintain and repair shall extend to all doors which provide access to the units, all windows (except maintenance to the interior surface thereof, the responsibility for which shall be left to the affected unit owner) ~~and all exclusive use portions of the common elements~~.

[36] I pause to observe that the proposed amendment now sought by MTCC 590 to section 22 is *different from* MTCC 590's Version #1 Section 22 Amendment. MTCC 590 relied on the same factum in arguing for the current version of its proposed amendment to section 22 as it did in arguing for the Version #1 Section 22 Amendment, without any submission on a comparative assessment of the two versions or the basis for the further modified wording.

[37] The overall effect of the amendments sought by MTCC 590 to sections 22 and 23 of the Declaration is to assign to the Fireplace Unit Owners the duty to maintain and repair the "common elements which he has exclusive use of", and to eliminate any duty on the part of MTCC 590 to maintain and repair the exclusive use common elements. MTCC 590 submitted that it is "necessary or desirable" to make these amendments to correct an "error or inconsistency" that appears in the Declaration or Description or that "arises out of the carrying out of the intent and purpose of the Declaration or Description".

[38] The Amended Notice of Application also detailed the amendment that MTCC 590 seeks to the Description of the unit boundaries. This amendment is designed to establish that the Chimney Flues are owned by the Fireplace Unit Owners.

III. ISSUES

[39] The issues requiring determination on this Application are as follows:

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1. Has MTCC 590 established a basis for amending the Declaration to identify the Chimney Flues as exclusive use common elements?

2. Has MTCC 590 established a basis for amending section 22 and/or section 23 of the Declaration to specify that the unit owners, and not MTCC 590, are responsible for the repair and maintenance of exclusive use common elements?

3. Has MTCC 590 established a basis for an amendment to MTCC 590's Description so that the Chimney Flues are owned by the Fireplace Unit Owners in which the corresponding Fireplaces are located?

[40] I will set out the legal principles that will guide my assessment of these issues.

IV. APPLICABLE PRINCIPLES

A. The Role of the Declaration in Condominium Ownership

[41] Condominium buildings might be built of bricks and mortar, glass and steel, but they are created by statute. In *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 59 O.R. (2d) 545 (C.A.), the Court of Appeal stated, at para. 37: "A condominium corporation is a creature of statute and has no greater authority than as set out in the *Condominium Act*."

[42] The *Condominium Act* creates a system of real estate ownership in multi-unit projects that allows each unit owner an individual, distinct freehold interest in the condominium unit purchased. Within their unit, the unit owner has all the rights of any owner of real estate. But the rights and duties of the individual condominium owner do not stop there: they are not limited to the boundary walls of the individual unit. Rather, each condominium unit owner is inextricably connected to their neighbor by the common elements that allow the condominium project to function.

[43] Everything in a condominium building that does not fall within the individual owner's unit forms part of the common elements. Section 1(1) of the *Condominium Act* states that "'common elements' means all the property except the units". The court in *Re Manton and York Condominium Corp. No. 461*, 49 OR (2d) 83 (Ont. Co. Ct.) confirmed, at para. 8, that: "It is common ground that that which does not fall within the definition of a "unit" forms part of the common elements."

[44] Common elements include the obvious shared-use elements: lobbies and corridors; amenity facilities such as swimming pools and fitness rooms; elevators and staircases. And it also includes the myriad areas that are not so obvious: conduits for pipes and cabling; vents; drains; shafts; and other mechanical elements that service the condominium units by supplying utilities, distributing and venting air and purging waste. The common elements are everything that allows the autonomous condominium suite to be accessible, viable, sustainable and operational within the much larger community that is the condominium building.

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[45] The individual unit owners are tenants in common of these common elements: *Condominium Act*, section 11(2): "The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner's unit". This is codified in the Declaration, section 4: "Each owner shall have an undivided interest in the common elements as a tenant in common with all other owners (and shall contribute to the common expenses) in the proportions set out in Schedule 'D'."

[46] The common elements are owned and managed by the condominium corporation, a corporation of which the unit owners are shareholders. "Thus, it is the owners and not the corporation who own the common elements": *Cheung v. York Region Condominium Corporation No. 759*, 2017 ONCA 633, 139 O.R. (3d) 254 at para. 70. Pursuant to section 17(1) of the *Condominium Act*, the "objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners". Section 17(2) of the *Condominium Act* provides that the corporation has the "duty to control, manage and administer the common elements".

[47] The delineation of the rights and duties of the unit owners in regard to their own units and to the common elements, the governing principles by which the unit owners share entitlements, obligations and expenses, in essence the code by which the owners cohabit and foster their security and the security of their capital investment in their condominium, is the registered Declaration. The Declaration is, in every sense, the "Constitution" of the condominium corporation. The condominium's Declaration sets out detailed rules with respect to the maintenance, operation and occupation of the common elements, so that the responsibilities of each unit owner are clearly established: *Carleton Condominium Corp. No. 279*, at paras. 15-17.

[48] The Declaration, Description and by-laws are vital to the integrity of the title acquired by the owner. The owner is not only bound to comply with their terms, but also has a right to insist on compliance by others: *Carleton Condominium Corp. No. 279*, at para. 27. Purchasers rely on the rights and interests contained in the Declaration in forming their decision to purchase their condominium units.

[49] The law is clear that there is a strong presumption of validity of the Declaration: *Walia Properties Ltd. v. York Condominium Corporation No. 478* (2007), 60 R.P.R. (4th) 203 (Ont. S.C.) at para. 10, varied 2008 ONCA 461, 67 R.P.R. (4th) 161: "Unit owners should be able to rely on the terms of declarations".

[50] The Declaration can be amended in only four ways, set out in sections 107 to 110 of the *Condominium Act*. Section 107 provides a mechanism for a condominium to amend its Declaration on its own and without recourse to the Court, but this would require the approval of a prescribed percentage of the unit owners. In this Application, MTCC 590 seeks to amend the Declaration without the requisite approval of the unit owners but rather by Court Order pursuant to section 109 of the *Condominium Act*.

B. Section 109 of the *Condominium Act*

[51] Section 109 of the *Condominium Act* provides as follows:

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(1) **Court order** - The corporation or an owner may make an application to the Superior Court of Justice for an order to amend the declaration or description;

(2) **Notice of Application** - The applicant shall give at least 15 days' notice of an application to the corporation and to every owner and mortgagee whose name, on the 30th day before the application is made, appears in the record of the corporation required by section 46.1 or is required by that section to appear in that record, but the applicant is not required to give notice to the applicant;

(3) **Grounds for Order** - The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description.

[52] MTCC 590 has established proper notice in accordance with section 109(2).

[53] To establish the requirements of section 109(3), MTCC 590 must prove that the amendment is "necessary or desirable" to correct either:

(a) an "error or inconsistency" that appears in the declaration or description; or

(b) an "[error or inconsistency] that arises out of the carrying out of the intent and purpose of the declaration or description".

[54] The foundational element of section 109(3) is that there must be an "error or inconsistency". If not, the Application fails. The error or inconsistency must be contained in either the Declaration or Description or must arise out of the carrying out of the Declaration or Description. If I find that there is an "error or inconsistency" of either nature, I must then be satisfied that it is "necessary or desirable" to correct it.

[55] The determination of whether the requirements of section 109 have been satisfied is fact-driven, and each case is different: *Caras & Callini Group Ltd. v. Peel Standard Condominium Corporation No. 837*, 2011 ONSC 7565, 15 R.P.R. (5th) 118 at para. 40.

C. The Letters of Opinion

[56] The evidentiary record in this Application contained letters of opinion, filed by both the Applicant and the Responding Owners. The Applicant filed undated letters of opinion from two-unit owners supporting the Application, Kenneth M. Smookler and David Hunter. The Responding Owners filed four opinion letters authored by three lawyers as follows: Patricia Elia dated June 12, 2014 and July 30, 2015; Audrey Loeb dated November 26, 2014; and Josh Milgram dated January 8, 2016.

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[57] Witnesses are to testify as to facts that they perceived, not opinions that they draw from them: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 14. For expert opinion evidence to be admissible, it must satisfy the two-part test set out in *R. v. Abbey,* 2017 ONCA 640, 140 O.R. (3d) 40, which draws on the tests set out by the Supreme Court in *R v. Mohan,* [1994] 2 S.C.R. 9 and *White Burgess,* and most recently applied by the Court of Appeal in *Imeson v. Maryvale,* 2018 ONCA 888, 143 O.R. (3d) 241. The parties did not attempt to qualify this opinion evidence for admission. None of the lawyers who authored the letters of opinion were tendered as experts. None even provided evidence on this Application, but rather the letters of opinion were attached as exhibits to the affidavits of others.

[58] The parties submitted that the letters of opinion were put forward as part of the factual narrative, to show why the parties acted as they did in relation to the Chimney Flue issue and to explain why the parties considered their Applications to be necessary. They were not required for this purpose. The witnesses deposed as to when they took advice from others and did not need to attach the opinion evidence as exhibits to explain this factual narrative.

[59] These letters of opinion are inadmissible as to the proof of their contents. I have disregarded entirely the content of the letters of opinion.

V. HAS MTCC 590 ESTABLISHED A BASIS FOR AMENDING THE DECLARATION TO IDENTIFY THE CHIMNEY FLUES AS EXCLUSIVE USE COMMON ELEMENTS?

A. The Requirement to Specify Exclusive Use Common Elements

[60] The *Condominium Act* provides, in section 7(2)(f), that a Declaration shall contain:

> "a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners".

[61] Ontario Regulation 48/01- General, enacted pursuant to the *Condominium Act*, prescribes, in section 5, the formal contents of the Declaration required for its registration. In regard to exclusive use common elements, section 5(7) states as follows:

> Schedule F shall contain a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all unit owners or shall indicate that there are no such parts if that is the case.

[62] MTCC 590's Declaration was registered on November 26, 1982, before the enactment of the *Condominium Act*, in accordance with the governing condominium statute then in place, the *Condominium Act*, R.S.O. 1980, c. 84 (the "*1980 Condominium Act*"). Section 3(1)(f) of the *1980 Condominium Act* required that the Declaration shall contain a specification of common elements that are not used by all owners:

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> 3(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains,
>
> …
>
> (f) a specification of any parts of the common elements that are used by the owners of one or more designated units and not by all the owners.

[63] Section 3(1)(f) of the *1980 Condominium Act* is substantively identical to section 7(2)(f) of the *Condominium Act*, except that the requirement in the *1980 Condominium Act* that "*any* parts of the common elements" that are exclusively used must be specified as such, was changed in the *Condominium Act* to the requirement that "*all* parts of the common elements" that are exclusively used must be specified accordingly.

[64] The term "exclusive use common elements" is not a defined term in the *1980 Condominium Act*. It is also not defined in the *Condominium Act*. "Exclusive use common elements can only be designated through the declaration": *Cheung* at para. 27. Weiler J.A. explained as follows, in *Cheung* at para. 71:

> "Exclusive use common elements" are not specifically defined in the [*Condominium Act*]. Section 7(2)(f) refers to space that is exclusively reserved for the use of "the owners of one or more designated units and not by all the owners." Exclusive use common elements are created where the declaration reserves common element space to designated unit owners. Even though the word "permanent" is not used, it is the allocation of common element space on a permanent basis which creates exclusive use: [Audrey Loeb, *Condominium Law and Administration*, loose-leaf (2016- Rel. 9), (Toronto: Thomson Reuters Canada Ltd., 1995)], at p. 6-9.

[65] The *1980 Condominium Act* did not require that the exclusive use common elements be listed in a Schedule "F", as does the current *Condominium Act*. However, the *1980 Condominium Act* did require that they be specified.

[66] The Declaration does not specify any exclusive use common elements.

B. Positions of the Parties

[67] The Responding Owners submitted that the Declaration does not specify any exclusive use common elements because there are none in the Building. Rather, they contend that the unit owners own all that is contained within their unit boundaries and everything else is common element, without specification as to exclusive use elements. The Responding Owners submitted that the declarant purposefully decided not to specify the Chimney Flues as exclusive use common elements because they are no different than any other vents or drains constructed as part

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of the common elements in the building. They contended that the drains and vents, conduits and shafts connecting sinks and toilets and HVAC systems in the units are not designated as exclusive use common elements and neither should the Chimney Flues venting the Fireplaces be so designated.

[68] MTCC 590 submitted that the declarant intended to designate exclusive use common elements but failed to do so. It contended that the reference to "exclusive use" portions of common elements in sections 22 and 23 of the Declaration evidences an intention on the part of the declarant to designate certain common elements as exclusive use. MTCC 590 submitted that the omission to specify exclusive use common elements was inconsistent with the requirement to do so pursuant to section 3(1)(f) of the *1980 Condominium Act* and must now be cured by an amendment to the Declaration to specify exclusive use common elements.

[69] I pause to observe that this issue is unlikely to arise for Declarations registered under the *Condominium Act* because of the form of Declaration mandated by Ontario Regulation 48/01-General, section 5(7). This provision requires that the Declaration contain a Schedule "F" which must either specify which parts of the common elements are designated as exclusive use common elements or expressly declare that there are none.

C. Analysis

[70] The Responding Owners have not provided any basis for their submission that the Declaration does not specify any exclusive use common elements because it was not intended that any of the common elements be classified in this manner. I have no evidence in the record that supports this submission.

[71] The Responding Owners stated that the Chimney Flues are common elements. They acknowledged and conceded that, *in fact*, each of the Chimney Flues is permanently dedicated to serve the individual Fireplace to which it is connected and, since the Chimney Flues serve no other function for any other unit owner, they are functionally exclusive use common elements. Their contention that the Chimney Flues are not exclusive use common elements for the purpose of the Declaration is predicated on the fact that the Declaration does not specify that they are exclusive use common elements.

[72] To analyse this issue, I must interpret and construct the Declaration and the MTCC 590 By-Laws. In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47, the Supreme Court set out the modern principles of interpretation and construction of a contract. The over-riding objective is to determine the intention of the parties by reading the contract as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The purpose of this contractual interpretation is to achieve "a fair and sensible commercial result": *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129.

[73] My analysis of the Declaration and By-Laws, giving the words their ordinary and grammatical meaning consistent with the surrounding circumstances, shows that the rights and duties set out in these documents make a clear distinction between common elements and

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exclusive use common elements in several circumstances, revealing an intention that some elements should be designated as exclusive use common elements.

[74] Section 11 of the Declaration grants to each owner the right to "make reasonable use of and have the right to make reasonable use of the whole or any part of the common elements". There is no limitation recognizing exclusive use by certain unit owners except that the unit owners may not carry on any activity in the common elements that will "unreasonably interfere with" the other units.

[75] Section 22 of the Declaration differentiates between common elements and exclusive use common elements in stating that each unit owner has the obligation of "maintaining any part of the common elements which he has exclusive use of, at his own expense". I will have more to say about this later, but for the present analysis it shows that the author of the Declaration expressed an intention that the unit owner should have financial responsibility for a component of the common elements. I note that the Responding Owners do not dispute that they have this obligation under the Declaration.

[76] As a corollary to section 22 of the Declaration, section 23 of the Declaration states that MTCC 590's duty to maintain and repair the common elements after damage "shall extend to … all exclusive use portions of the common elements". Again, I will have more to say about this later, but identify it now as part of this analysis of the role of permanently and exclusively dedicated common elements in the Declaration.

[77] Although sections 22 and 23 are the sections of the Declaration that are central to the issues raised by this Application, they are not the only sections that refer to exclusive use common elements. Sections 30(a) and 30(b) of the Declaration, titled "Rights of Entry", authorize the condominium corporation to enter upon an owner's unit as well as "any part of the common elements over which any owner has the exclusive use". By-Law No. 1, Schedule "A", sections 5, 8, and 14, impose limitations or restrictions on the unit owners' use of the common elements, and each of these sections specifies that the limitations or restrictions include "those parts of the common elements over which the owner has exclusive use".

[78] MTCC 590's By-Law No. 5 governs the leasing of common elements in the Building, and is titled: "A general by-law respecting the entering into of leases of Non-Exclusive Use Common Elements". This by-law authorizes the condominium corporation to enter into leases of any part of the common elements "except any part specified by the Declaration to be used by the owners of one or more designated units and not by all the owners, …"

[79] Similarly, MTCC 590's By-Law No. 7 governs the grant or transfer of an easement or licence. It authorizes the condominium corporation to lease or grant or transfer an easement or licence through any part of the common elements "which are not designated as exclusive use common elements or restricted as to use common elements…".

[80] I find that these nine references in the Declaration and By-Laws to exclusive use common elements show a recognition that certain of the common elements would be used permanently and exclusively by some unit owners but not all, and an intention that the Declaration would

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distinguish between the rights and duties attaching to all common elements as distinct from the rights and duties attaching to exclusive use common elements. I conclude, then, that the failure on the part of Declaration to specify "any parts of the common elements that are used by the owners of one or more designated units and not by all the owners", as required by section 3(1)(f) of the *1980 Condominium Act*, if there are such elements within the Building, would be an error or inconsistency in the Declaration. As the Court of Appeal stated in *Carleton Condominium Corporation No. 106 v. Mastercraft Development Corp*. (1985), 49 O.R. (2d) 638 (C.A.), at para. 18: "To designate certain common elements as being for the exclusive use of certain unit owners is not only rational but essential in the concept and operation of a condominium".

[81] The question then becomes whether the Chimney Flues are exclusive use common elements. I find that they are, based on their nature and on their historic use. The Chimney Flues are common elements in that they are not within unit boundaries. They are exclusive to the Fireplaces they serve as they are dedicated to a single Fireplace in a single unit. The exclusive dedication to the Fireplace Unit that the Chimney Flue serves is permanent. Each has, to this point for 37 years, served exclusively one Fireplace Owner without any involvement by any other owner.

[82] In making this finding I specifically reject the Responding Owners' submission that the Chimney Flues are no different than the multitude of drains and vents, conduits and shafts connecting other services in the building because unlike these other common elements, a Chimney Flue services *only* a single owner's unit and is incapable of serving any other owner. Only the Fireplace Unit Owners have a Fireplace and the Chimney Flues exist only to serve those individual Fireplaces in the designated units. This is different than the drains and vents, conduits and shafts that are required equally for each bathroom, kitchen and HVAC system in the Building and which routinely interconnect and combine to serve multiple units or floors.

[83] I find that the Chimney Flues are much more analogous to a private terrace that is contiguous to, and accessible to only a single unit. If each unit on the top four floors of the Building had a terrace instead of a Fireplace, each accessible only to the unit to which it is contiguous, permanently reserved to the private use of that unit owner, there would be no issue that the terrace would be an exclusive use common element. This was the case in *White Snow and Sunshine Holdings Inc. v. Metropolitan Toronto Condominium Corporation No. 561,* 2018 ONCA 196, at para. 4, where the Court of Appeal commented that exclusive use common elements under the *Condominium Act* would include those things "that are set aside for the exclusive use of particular units", such as private terraces. I find that the Chimney Flues are no different in character as exclusive use common elements.

[84] In *Caras*, Perell J. formulated a definition of "error" that was more expansive than the definition of "error" applied by Taliano J. in *York Condominium Corp. No. 344 v. Lorgate Ltd*., (1984) CarswellOnt 3542 (Co. Ct.), affirmed 1985 CarswellOnt 3300: something "incorrectly done though ignorance or inadvertence". I adopt the broader definition of "error" developed by Perell J. in *Caras* at paras. 36-38, which encompasses an error in opinion, a mistake, a malformation, a flaw or a miscarriage, in addition to something incorrectly done through ignorance or inadvertence. However, using either the definition of "error" applied by Taliano J.

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or the broader definition formulated by Perell J., I find that the failure to specify that the Chimney Flues are exclusive use common elements, in accordance with section 3(1)(f) of the *1980 Condominium Act*, was an error. It was "incorrectly done through ignorance or inadvertence" and it was a mistake, inadvertence or a flaw because the analysis set out above shows that the Declaration intended that exclusive use common elements should be addressed separately from common elements for certain discrete purposes. At least one such exclusive use common element existed, the Chimney Flues, yet none was specified.

[85] Having found then that there is an "error or inconsistency" in the Declaration in its omission to specify "any parts of the common elements that are used by the owners of one or more designated units and not by all the owners", as required by section 3(1)(f) of the *1980 Condominium Act*, and having found that the Chimney Flues are one such exclusive use common element, there is only one issue remaining to be determined to assess whether to order that the Declaration be amended to specify the Chimney Flues as exclusive use common elements: whether the amendment is "necessary or desirable".

[86] I find that amending the Declaration to specify the Chimney Flues as exclusive use common elements is both necessary and desirable in order to clarify the duties of unit owners as set out in section 22 of the Declaration, as well as to clarify the duties of MTCC 590 as set out in section 23 of the Declaration. Section 22(a) imposes on the unit owner the obligation of "maintaining any part of the common elements which he has exclusive use of, at his own expense". It is both necessary and desirable that the current owners, and any prospective purchaser, have clearly available a list of exclusive use common elements in order to understand the scope of their maintenance obligation in relation to such elements. The Declaration is vital to the integrity of title a unit owner acquires. The nature and extent of the unit owner's title in the common elements, and corresponding responsibilities, must be readily ascertainable: *Cheung*, at para. 111.

[87] Similarly, section 23(a) of the Declaration requires that MTCC 590 "maintain and repair … all exclusive use portions of the common elements". It is necessary and desirable that MTCC 590 have reference to a list of such exclusive use common elements, to provide it with certainty and predictability in carrying out its duties.

[88] Also, I find that the amendment is necessary and desirable because it is recording, or in the words of section 3(1)(f) of the Former *Act*, specifying, a permanent exclusive use that has existed since the formation of the condominium corporation. Each Chimney Flue has always been permanently and exclusively used by a single unit owner. In allowing an amendment to specify the Chimney Flues as exclusive use common elements, I would not be altering the substantive rights of the individual unit owners but merely clarifying existing rights recognized historically: *Carleton Condominium Corp. No. 26 v. Nagur*, 2009 CarswellOnt 2640 (S.C.), affirmed 2010 ONCA 80, at para. 21. As stated in *Carleton Condominium Corp. No. 26 v. Nagur* at para. 21: "The status quo should be preserved and the wording of the Declaration should be amended to ensure that this status quo is maintained".

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[89] In making this determination, I reject the Responding Owner's submission that any designation of the Chimney Flues as exclusive use common elements would have a profound impact on the broader condominium community, as each condominium corporation founded under the *1980 Condominium Act* would now be required to review its declaration and to implement a Schedule "F' where one does not currently exist. I make no such determination. My findings are specific to this Application.

D. Conclusion

[90] I conclude that MTCC 590 has established a basis for an Order, under section 109 of the *Condominium Act,* to amend its Declaration to specify the Chimney Flues as exclusive use common elements, without determination that they are the only exclusive use common elements in the Building. The Amended Notice of Application did not detail the specific wording of the amendment proposed by MTCC 590 to specify the Chimney Flue as exclusive use elements. Unless the parties can agree on the wording, the Applicant shall serve the Responding Owners with the precise wording of the amendment that it proposes to specify the Chimney Flues as exclusive use common elements and shall then schedule a hearing before me to settle the form of the amendment and with it the form of my Order.

VI. HAS MTCC 590 ESTABLISHED A BASIS FOR AMENDING THE DECLARATION TO SPECIFY THAT THE UNIT OWNERS, AND NOT MTCC 590, ARE RESPONSIBLE FOR THE REPAIR AND MAINTENANCE OF THE EXCLUSIVE USE COMMON ELEMENTS?

[91] In analysing whether MTCC 590 has established a basis for an amendment to the Declaration to specify that the unit owners, and not MTCC 590, are responsible for the repair and maintenance of the exclusive use common elements, I will analyse first whether there is an "error or inconsistency" that appears in the Declaration or whether there is an "error or inconsistency" that arises out of the carrying out of the intent and purpose of the Declaration. If I am satisfied that there is, I will then determine whether it is "necessary or desirable" to correct such an "error or inconsistency".

A. Interpreting Section 22(a) and Section 23(a) in the Context of the Declaration and By-laws

[92] Section 22(a) of the Declaration states as follows:

> 22(a): Each owner shall maintain and repair his unit, including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all ducts and services within the unit as well as **maintaining** any part of the **common elements which he has exclusive use of**, at his own expense. [Emphasis added]

[93] Section 23(a) of the Declaration states:

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> (a): The Corporation shall maintain and repair the common elements after damage. **This duty to maintain and repair shall extend to** all doors which provide access to the units, all windows (except maintenance to the interior surface thereof, the responsibility for which shall be left to the affected unit owner) and **all exclusive use portions of the common elements**. [Emphasis added]

[94] The portions of Sections 22(a) and 23(a) that I highlighted, above, show an intention to designate responsibility for the maintenance and repair of the exclusive use portions of the common elements. The Responding Owners submitted that the effect of these sections is to assign responsibility for the maintenance of the exclusive use common elements to the unit owners and to assign to MTCC 590 the duty to "maintain and repair" the exclusive use common elements. MTCC 590 contended that the intention of these sections is to make unit owners responsible for the maintenance and repair of the exclusive use common elements and to make MTCC 590 responsible for repair of the exclusive use common elements after damage.

[95] The Declaration must be consistent with the *Condominium Act*. Where the Declaration conflicts with the *Condominium Act*, the *Act* prevails: *York Region Vacant Land Condominium Corporation No. 968 v. Schickedanz Bros. Ltd*. (2006), 50 R.P.R. (4th) 79 (Ont. C.A.), at para. 7. Section 7(5) of the *Condominium Act* provides:

> If any provision in a declaration is inconsistent with the provisions of this *Act*, the provisions of this *Act* prevail and the declaration shall be deemed to be amended accordingly.

[96] Section 89(1) of the *Condominium Act* provides that, subject to sections 91 and 123, the corporation shall repair the common elements after damage:

> Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage.

[97] Section 90(1) provides that, subject to section 91, the corporation shall maintain the common elements:

> Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit.

[98] Section 91 of the *Condominium Act* permits the alteration of the obligations to maintain and repair set out in section 89(1) and 90(1) as follows:

> 91. The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that,
>
> (a) subject to section 123, each owner shall repair the owner's unit after damage;

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(b) the owners shall maintain the common elements or any part of them;

(c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and

(d) the corporation shall maintain the units or any part of them.

[99] To interpret sections 22(a) and 23(a), I must analyse them in the broader context of the Declaration and By-laws. Section 22(a) imposes on the unit owners two duties: the first is to "maintain and repair" her or his own unit. This is not in any manner in dispute. However, section 22(a) provides clarity concerning the scope of this duty:

> …including the maintenance and repair of the air conditioning and heating units from the shut off valve, and all services within the unit…

[100] Section 22(a) makes clear that the unit owners' duty to "maintain and repair" her or his unit includes everything within the unit boundaries. This would include then not only the Fireplace, but that small section of the Chimney Flue that enters the unit boundaries in order to connect with the Fireplace. This is part of "all services within the unit." The unit description set out in Schedule C of the Declaration further bolsters this conclusion, and I will have more to say about that later.

[101] The second duty imposed on the unit owners by section 22(a) of the Declaration is the duty to maintain "any part of the common elements which he has exclusive use of". Section 22(a) is not the only provision in the Declaration that refers to this duty on the part of the unit owner. It is also addressed in section 11(b):

> No owner shall make any change or alteration to any installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, **except for maintaining those parts of the common elements which he has a duty to maintain**, without obtaining the approval of the Corporation in accordance with the *Act*. [Emphasis added]

[102] Section 11(b) is instructive in two ways: first, it contemplates that the unit owner has a duty to maintain certain "parts of the common elements" and does not require approval of MTCC 590 to do so. Second, it states that the unit owner may *not* maintain any other parts of the common elements without obtaining the approval of MTCC 590 and may *not* repair any common elements, of any nature, without the approval of MTCC 590. This recognizes the unit owner's duty to maintain those common elements over which she or he has exclusive use and also grants authority to MTCC 590 over the maintenance of all other common elements and over the repair of *all* common elements: even those for which the unit owner has a duty to maintain.

[103] Section 23(a) of the Declaration also contains two duties: first, it mandates that MTCC 590 "shall maintain and repair the common elements after damage". This duty is not challenged by MTCC 590 on this Application. The second duty is as follows:

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> **This duty to maintain and repair shall extend to** all doors which provide access to all units, all windows (except maintenance to the interior surface thereof, the responsibility for which shall be left to the affected unit owner), and **all exclusive use portions of the common elements**. [Emphasis added]

[104] The portion of section 23(a) that I have highlighted provides that MTCC 590's duty to maintain and repair after damage extends to "all exclusive use portions of the common elements". These are the words, and this is the duty that MTCC 590 seeks to eliminate by amendment. It must be noted that in making this submission, MTCC 590 is seeking to relieve itself of the duty to maintain and repair property that it *owns* on the basis that it is permanently and exclusively used only by the Fireplace Unit Owner.

[105] MTCC 590's By-law No. 1, Article V, imposes on MTCC 590 the duty to operate and "maintain" the common elements in a proper and fit manner, and to repair the common elements after damage:

> 1. Duties of the Corporation: The Duties of the Corporation shall include, but shall not be limited to the following:
>
> …
>
> (a) Operating and maintaining the common elements in a fit and proper condition;
>
> …
>
> f) Repairing after damage and restoring the units and the common elements in accordance with the provisions of the *Act*, the declaration and by-laws.

[106] Section 30 of the Declaration gives MTCC 590 the powers that it needs to enter any unit to carry out these duties:

> Section 30 – Rights of Entry
>
> (a) The corporation, or any insurer of the property or any part thereof, their respective agents, employees or authorized representatives or any other person authorized by the board, shall be entitled to enter any unit or any part of the common elements over which any owner has exclusive use, at all reasonable times and upon giving reasonable notice, for the purpose of making inspections … making repairs … remedying any condition which might result in damage to the property, or carrying out any duty imposed on the corporation.

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(b) In case of an emergency, any agent, employee or authorized representative of the Corporation may enter a unit at any time without notice, for the purpose of repairing the unit, common elements or any part of the common elements over which any owner has exclusive use, or for the purpose of correcting any condition which might result in damage or loss to the property or any assets of the Corporation.

[107] There are two references in the Declaration and Description to the condominium corporation being responsible for the services connecting to any heating system located with the individual units. Schedule "C" to the Declaration states that only the services within the unit are the responsibility of the unit owner, with the result that all services entering the unit are the responsibility of MTCC 590. Also, Schedule "E" to the Declaration, which details Common Expenses, states that heading and air conditioning expenses do not include fixtures that are within the unit, as these are not common elements, but that MTCC 590 "is responsible for services leading up to and including the shut off valve".

[108] Other provisions of the Declaration and By-laws that I have referenced as material to an interpretation and construction of section 22(a) and section 23(a) of the Declaration, recognize and foster the following:

(a) The exclusive use common elements, like all common elements, are owned by the condominium corporation, which in turn is owned by all unit owners. As owner of the common elements, the condominium corporation and through it all unit owners have obligations in relation to them. These obligations include taking steps to ensure that they are in proper and fit condition, for the benefit of all;

(b) As owner of the common elements, only the condominium corporation is able to purchase insurance to insure risks associated with their ownership, including their repair: section 26 and 27 of the Declaration;

(c) The Declaration and the *Condominium Act* provides authority and rights, in essence 'tools', for the condominium corporation to attend to the maintenance and repair of the common elements. These tools are not available to any single unit owner;

(d) The condominium corporation's authority over the repair of the common elements recognizes that their ongoing operational and structural integrity is central to the viability of the Building, and thereby of interest to all unit owners.

[109] My interpretation and construction of section 22(a) and section 23(a) of the Declaration, in the context of the Declaration and By-Laws, giving the words their ordinary and grammatical meaning consistent with the surrounding circumstances, and in the context of the *Condominium Act*, results in the following conclusions:

(a) The unit owner is responsible to maintain and repair her or his unit and is also responsible to maintain any exclusive use common elements that serve only her or his unit;

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(b) MTCC 590 has a duty to maintain and repair *all* common elements after damage, including exclusive use common elements.

[110] Having interpreted sections 22(a) and 23(a), I will now address the amendments sought by MTCC 590 in relation to them.

B. Positions of the Parties

[111] MTCC 590 submitted that an amendment is "necessary or desirable" to correct an "error or inconsistency" that is contained in section 22(a) and section 23(a) of the Declaration. The Applicant stated that section 22(a) of the Declaration provides that the unit owners have a duty to maintain *and* repair the common elements which she or he has exclusive use of. It contends further that this is inconsistent with section 23(a) of the Declaration, and thereby provides uncertainty and ambiguity which impedes MTCC 590's Board from addressing its obligations, including in relation to the Chimney Flues.

[112] MTCC 590 contends as well that sections 22(a) and 23(a) are ambiguous because they impose duties to maintain the exclusive use common elements on both the unit owner and the condominium corporation.

[113] MTCC 590 stated that the solution is to amend sections 22(a) and 23(a) to make clear that the unit owners are responsible for *both* the maintenance and repair of exclusive use common elements and that the condominium corporation is not responsible for either. MTCC 590 contends that this is in accordance with section 91(c) of the *Condominium Act*, which states that a declaration may alter the obligation to maintain or to repair after damage and may do so by specifying that the unit owner shall maintain and repair after damage those parts of the common elements of which the owner has exclusive use.

[114] MTCC 590 submitted that an amendment is "necessary or desirable" to correct an error or inconsistency that "arises out of the carrying out of the intent and purpose" of the Declaration because it is unfair that sections 22(a) and 23(a) impose on MTCC 590, and through it all unit owners, an obligation to repair a building component that is available to only Fireplace Unit Owners. In the way the proposed amendment has been framed, this would apply to all exclusive use common elements although, to this point, only the Chimney Flues have been so identified. The Applicant contended that the Fireplace Unit Owners alone ought to bear the cost of repairing the Chimney Flues as they alone derive the benefit from the use and operation of their Fireplaces.

[115] The Responding Owners submitted that sections 22(a) and 23(a) do not contain any "error or inconsistency" and thereby do not require amendment. They contend that the unfairness alleged by the Applicant is unfounded and, in any event, is not an error or inconsistency that "arises out of the carrying out of the intent and purpose" of the Declaration. As such, the Responding Owners state that it cannot form the basis for an amendment under section 109 of the *Condominium Act*.

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C. Analysis: Is There an "Error or Inconsistency" in Section 22(a) and/or Section 23(a) of the Declaration, or in Carrying out its Intent and Purpose?

(a) Is There an Error or Inconsistency in Sections 22(a) and/or 23(a)?

[116] A central mandate for the condominium corporation is to manage the Building and assets of the corporation on behalf of the owners: *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 (C.A.), at para. 10. I accept MTCC 590's submission that any ongoing ambiguity regarding responsibility for maintenance and repair obligations interferes with the discharge of this mandate and is thereby detrimental to the condominium corporation and its members: *Nagur*, at para. 18. However, I see no ambiguity, or error or inconsistency in sections 22(a) and 23(a), which create a mutual obligation for the unit owner and the condominium corporation to maintain exclusive use common elements, and which require the condominium corporation to repair after damage exclusive use common elements.

[117] I reject MTCC 590's submission that section 22(a) of the Declaration mandates the unit owners to repair those parts of the common elements of which the owner has exclusive use. Section 22(a) simply does not say this. Further, any such interpretation of section 22(a) would be inconsistent with the other provisions of the Declaration and By-laws that I referred to earlier that reference or frame the unit owner's duty to maintain, but not repair, the exclusive use common elements. I accept that section 91(c) of the *Condominium Act* allows for an "alteration of the obligations" for the unit owner to be responsible to both "maintain and repair after damage those parts of the common elements of which the owner has the exclusive use", but the condominium corporation must establish a basis for such an amendment.

[118] I also see no ambiguity in section 23(a). It clearly states that the condominium corporation has a duty to "maintain and repair the common elements after damage" and that "this duty to maintain and repair shall extend to … all exclusive use portions of the common elements".

[119] When section 22(a) and section 23(a) are read together, they impose on the unit owner a duty to maintain the common elements of which the owner has exclusive use and a corresponding duty on the condominium corporation to maintain and repair after damage these common elements. There is no ambiguity. I acknowledge that this creates a mutual obligation to maintain, shared on the part of both the unit owner and the condominium corporation but do not see how this constitutes an "error or inconsistency". No case authority was provided that supports MTCC 590's submission that it is. Even if I had found that the mutual maintenance obligation constituted an "error or inconsistency", I would not have cured it in the manner suggested by MTCC 590: namely, to assign both the maintenance and repair obligations of exclusive use common elements to the unit owners. The Declaration assigns the duty to repair the common elements after damage, which includes the exclusive use common elements, to only one entity: the condominium corporation.

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[120] As such, I do not accept that MTCC 590 has established that there is an "error or inconsistency" in either section 22(a) or section 23(a) of the Declaration.

[121] I now turn to MTCC 590's submission that an amendment to section 22(a) and section 23(a) is required to correct an error or inconsistency that "arises out of the carrying out of the intent and purpose of the Declaration".

(b) Is There an Error or Inconsistency That Arises Out of the Carrying Out of the Intent and Purpose of the Declaration?

[122] MTCC 590 contends that it is unfair and inequitable to require all the unit owners to contribute toward the cost of repair of Fireplaces that are used exclusively by only their owners. It submits that there are other common elements that are used to varying degrees by the owners, some more and some less, in circumstances where all contribute, but in these instances each owner can use the common element. Not so in the case of the Fireplaces. At the core of this submission is the premise that only the Fireplace Unit Owners benefit from repair of the Chimney Flues. MTCC thereby contended that it is "necessary and desirable" to correct the "error or inconsistency" that results from an interpretation of the Declaration that causes all unit owners to bear the cost of repair of the Chimney Flues proportionately when only a few unit owners benefit, as the intent and purpose of the Declarations is that the common expenses be attributed to the unit owners in a fair and equitable manner.

[123] MTCC 590 relied on *York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.* (1993), 12 O.R. (3d) 641 (C.A.), at para. 23, where the Ontario Court of Appeal held that "the intent of a declaration is to apportion common expenses amongst unit holders in percentages as close as possible to the percentage of use made and enjoyment received by each unit holder from the services and charges included in the common expenses." MTCC 590 asserted that the unit owners of residences without Fireplaces would derive no benefit from the repair of the Chimney Flues, and it would be unfair and inequitable, and contrary to the "intent of a declaration" to apportion part of this expense to them through the common expenses, which would result if MTCC 590 continued to be responsible for repair of exclusive use common elements.

[124] MTCC 590 also relied on the principle set out in *Winnipeg Condominium Corp. No. 12 v. Edwardian Estates Ltd.* (1995), 123 D.L.R. (4th) 16 (Man. C.A.), at para. 15, where the Manitoba Court of Appeal stated that "the condominium scheme as a whole (that is the Act, declaration and by-laws) is to be interpreted in a fair and equitable way, and that considerable latitude should be given to achieve such a result". The Manitoba Court applied the decision of the Ontario Court of Appeal in *York Condominium Corp. No. 59*, where the court addressed the concept of "repair". Cory J.A. wrote, in para. 13, that there are several pertinent factors that must be taken into consideration to achieve a fair and equitable result:

> The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the

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> parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

[125] I am assisted by the reasoning in *Winnipeg Condominium Corp. No. 12*, and I am guided by the principles set out by Cory J.A. in *York Condominium Corp. No. 59*¸ but in applying these principles I come to a different conclusion than that urged upon me by MTCC 590. I will explain why.

[126] This is not a case like *Winnipeg Condominium Corp. No. 12*, which dealt with whether unit owners who have parking entitlements should pay more than those who do not. This is not a case like *York Region Condominium Corp. No. 771*, which addressed whether a commercial unit owner who paid 6% of all common expenses should be ordered to pay more when found to consistently consume 70% of the total water consumption of all units. Those decisions, applying *York Condominium Corp. No. 59*, affirm the principle that the declaration must be interpreted "in order to obtain a fair and equitable result": *York Region Condominium Corp. No. 771*, at p. 301. However, those cases dealt simply with reconciling the expenses of common elements used in greater quantity by some. The courts thereby re-apportioned common expenses in a manner designed to achieve fairness.

[127] This case deals with a maintenance or repair issue affecting the Building. Indeed, the Engineering & Remediation Reports state that the problems with the Chimney Flues could impact the integrity of the Building's roof and the multiple shafts through which the Chimney Flues pass. The Harris Environmental report found that there are asbestos-containing materials in the proximity of the Chimney Flues. There is a debate in the Application Record regarding whether it would be acceptable, from the standpoint of internal air quality, to seal the Chimney Flues in place or whether they must be removed to ensure the integrity of the interior environment. There are structural and environmental issues associated with the Chimney Flues that affect all unit owners.

[128] While only the Fireplace Unit Owners benefit from the use of the Fireplace in their units, all unit owners have an interest in how the issue pertaining to the Chimney Flues is addressed. To illustrate this point, I will analogize again to private terraces located on only the top four floors of the building, all designated as exclusive use common space accessible only by the units to which they are contiguous. If they were to develop leaks, or structural defects, if they were to crumble, the potential harm would be to the integrity of the Building and thereby to all owners.

[129] Returning then to an analysis of the factors set out by Cory J.A. in *York Condominium Corp. No. 59*, in assessing whether an amendment to the Declaration would achieve a fair and equitable result:

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(a) The Relationship of the Parties: All unit owners are co-owners of MTCC 590 and thereby co-owners of the common elements. They are all co-owners of the Chimney Flues, regardless that they serve only the units on the top four floors. This is no different than a first-floor unit owner who is co-owner of the elevator even though the owner has no use of it for unit access, or an owner who is a co-owner of another's terrace even though she or he has no right to use it;

(b) The Wording of the Contractual Obligations: I have determined that the wording of the Declaration imposes the obligation to maintain and repair all common elements after damage on MTCC 590 and, through it, on all unit owners. This is different than in *Condominium Plan 85R64012 v. Youck*, (1998) 21 R.P.R. (3d) 284 (Sask. Q.B.), where the unit owners were required to pay for maintenance and repair of their exclusive use balconies because in that case, the Declaration stated that the unit owners had a duty to "maintain *and repair*" the common areas in which the unit owner had the exclusive right of use and enjoyment;

(c) The Cost of the Repair: The evidence on this Application suggests that the cost of repair could be significant, if removal and replacement is required, or could be considerably more modest if the Chimney Flues are capped, sealed and contained. This issue was not presented for determination on this Application;

(d) The Nature of the Work: The task of repairing the Chimney Flues, regardless of the construction procedure implemented, requires the ability to enter upon the premises of others and onto the roof, and to perform construction and possibly remediation work both within the Building and on the roof. Products, supplies, construction equipment and debris would have to be carried through the Building. The operation of the Building would be disrupted. The Declaration provides MTCC 590 with the authority and tools by which to perform and manage these tasks. The Declaration does not similarly empower or authorize the unit owners.

(e) Balancing of Benefit and Detriment. Last, the balancing of the benefit that may be acquired by all owners if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs weighs in favour of MTCC 590's continued duty to repair all common elements, including the exclusive use common element Chimney Flues. Despite the financial cost to MTCC 590, none benefit from the continued existence of this problem or from 22 possible solutions. All benefit from a concerted and final resolution.

[130] I conclude that MTCC 590 has failed to establish that an amendment to section 22(a) and section 23(a) is "necessary or desirable" to correct an error or inconsistency that "arises out of the carrying out of the intent and purpose of the Declaration".

D. Analysis: Is an Amendment to Section 22(a) or Section 23(a) "Necessary or Desirable"?

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[131] Having determined that there is no "error or inconsistency" in the Declaration, and having found that there is no error or inconsistency that "arises out of the carrying out of the intent and purpose" of the Declaration, the amendment sought by MTCC 590 to section 22(a) and section 23(a) of the Declaration fails. As such, there is no need to assess separately whether it is "necessary or desirable" to correct any such error or inconsistency.

[132] In submission, MTCC 590 stated that section 109 of the *Condominium Act* involves a two-stage test: first, to determine whether there is an "error or inconsistency" in the Declaration or Description or that arises out of carrying out their intent and purpose; second, to determine if an amendment is "necessary or desirable" in any event, regardless of whether an error or inconsistency exists. I respectfully disagree. An amendment can only be "necessary or desirable" if there is an "error or inconsistency" in the Declaration or in carrying out its intent and purpose.

[133] I have nonetheless considered fully the submissions made by MTCC 590 regarding whether an amendment is "necessary or desirable", incorporating this assessment as part of my analysis of whether there is an error or inconsistency arising out of the carrying out of the intent and purpose of the Declaration, above.

E. Conclusion

[134] MTCC 590 has failed to establish the basis for an amendment to section 22(a) or to section 23(a) of the Declaration. I dismiss MTCC 590's application for amendments to these sections of the Declaration.

VII. HAS MTCC 590 ESTABLISHED A BASIS FOR AN AMENDMENT TO MTCC 590's DESCRIPTION SO THAT THE CHIMNEY FLUES ARE OWNED BY THE FIREPLACE UNIT OWNERS IN WHICH THE CORRESPONDING FIREPLACES ARE LOCATED?

[135] The boundaries of the residential units contained in the Building are set out in Schedule "C" of the Declaration, in pertinent part as follows:

> 1. Boundaries of Residential Units being Units 1, 2, 3, 4, 5 and 6, levels 2 to 21, inclusive.
>
>   Each residential unit shall comprise the area within the heavy lines shown on Part 2, Sheet 1 of the Description with respect to the unit numbers indicated thereon.
>
>   The monuments controlling the extent of the units are the physical surfaces referred to immediately below and are illustrated on Part 2, Sheet 1 of the Description, and all dimensions shall have reference to them.
>
>   Without limiting the generality of the foregoing the boundaries of each unit are as follows:

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> Vertically:
>
> …
>
> (d) Fireplaces and **all equipment pertinent thereto** shall form part of the unit, **including that portion of the flue within the boundaries defined therein**. [Emphasis added]

[136] MTCC 590 submitted that this Schedule "C" Declaration ought to be amended, pursuant to section 109 of the *Condominium Act*, as follows (proposed additions indicated by underline):

> Vertically:
>
> …
>
> (d) Fireplaces and all equipment pertinent thereto shall form part of the unit, including that portion of the flue within the boundaries defined therein. For greater certainty, the "boundaries defined therein" include the entire length of the chimney flue.

[137] MTCC 590 contended that the existing description is ambiguous, and thereby erroneous and inconsistent because the first component of the Schedule "C" description is at odds with its second component. The first part of the Schedule "C" definition of the vertical boundaries of the unit (i.e. the vertical "walls" that bound the unit) includes "fireplaces and all equipment pertinent thereto". MTCC 590 submitted that the entire length of the Chimney Flues is "equipment pertinent thereto", and therefore part of the unit. MTCC 590 stated that this is inconsistent with the second part, "including that portion of the flue within the boundaries defined therein", which limits the unit ownership of the Chimney Flue to only that portion that is physically located within the unit boundaries, specifically, that small segment of the Chimney Flue that connects to the Fireplace within the unit.

[138] I disagree. I do not find the description to be ambiguous or inconsistent. The description states that the Fireplace, including "all equipment pertinent thereto", shall form part of the unit. This means that the wood-burning heat box, surrounded by mantel and cladding, the damper and pertinent equipment related to the Fireplace forms part of the unit. All of these components are physically located within the unit. The Description goes on to make clear that the portion of the Chimney Flue that connects to the Fireplace, and thereby is physically located "within the boundaries defined there", also forms part of the unit.

[139] I find that this Description is unambiguous in stating that all the elements of the Fireplace and the Chimney Flue that are "within the boundaries" of the unit are part of the unit. The second part of the Description, "including that portion of the flue within the boundaries defined therein", clarifies that the Chimney Flue is constituted "equipment pertinent" to the Fireplace to the extent that it is physically "within the boundaries" of the unit.

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[140] By operation of section 1(1) of the *Condominium Act*, that portion of the Chimney Flue that is outside the unit is a common element because it would form part of: "all property except the units".

[141] My interpretation is bolstered by a later provision in Schedule C of the Declaration that states as follows:

> Notwithstanding the foregoing, no residential unit … shall include:
>
> …
>
> Any pipe, wire, cable, conduit, ducts, **flue**, **shaft**, or public utility line used for power, cable television, water, heating, air conditioning or drainage which is within any … wall or floor of any residential unit and provides any service or utility to another unit or units; **but the unit shall include** any fixture outlet or other facility with respect to any such service or utility **which is within the boundaries of the unit and which services the unit only**. [Emphasis added]

[142] This provision provides that any specified fixture outlet or facility, which includes "flue" and "shaft", shall form part of the unit when it is "within the boundaries of the unit" and "services the unit only". This applies directly to that segment of the Chimney Flue that is *inside* the boundaries of the unit, excluding from unit ownership any segment of the Chimney Flue that is *outside* the boundaries of the unit.

[143] I conclude that the amendment sought by MTCC 590 (namely, "For greater certainty, the 'boundaries defined therein' include the entire length of the chimney flue") is contrary to my interpretation of the meaning and effect of the Schedule "C" vertical boundary definition.

[144] MTCC 590 advanced a further submission in support of its contention that the Chimney Flues are intended to be within the ownership of the Fireplace Unit Owners. According to Schedule "C" of the Declaration, the horizontal boundary lines for the units (i.e. the top and bottom boundaries of the units) are the upper surfaces of the concrete slabs, as follows:

> Horizontally:
>
> (a) The upper surfaces of the concrete floor slabs.
>
> (b) The under surfaces of concrete ceiling slab with the exception of Level 21 where the upper limits are the upper surfaces of the suspended drywall ceiling.

[145] The concrete floor slabs have a circular opening drilled through them to allow the Chimney Flue to penetrate through the concrete ceiling slabs to continue to the roof. MTCC 590 contends that to the extent of this circular opening, there is no horizontal boundary to the unit,

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such that the unit boundary continues unimpeded through the entire length of the Chimney Flue, infinitely into the air space above the Building.

[146] The Plan of Survey of Units 1 to 6, inclusive, of levels 2 to 21, inclusive, of the Building, annexed to the registered Declaration illustrates, in Sheet 1 of 3, that the horizontal boundary lines of the units are solid for all condominium units in the Building, including those with Fireplaces. Specifically, the registered Plan of Survey does not depict any break or opening in the unit boundaries to account for the Chimney Flue to pass through from any of the individual Fireplace Units to the roof.

[147] MTCC 590 submitted that there is an inconsistency between the horizontal boundaries shown on the Plan of Survey, which are solid notwithstanding the presence of circular openings for the Chimney Flues, and the Description in Schedule "C" that defines the horizontal boundaries by the presence of a solid concrete slab without any cut away to allow for the Chimney Flue. As such, MTCC 590 seeks the following amendment (proposed additions indicated by underline):

> The heavy lines contained in Part 2, Sheet 1 of 3 of the Description which denote the unit boundaries and boundaries of the common elements shall be considered to depict openings at the location of the chimney flues.

[148] MTCC 590 seeks to amend the Description to depict openings into the concrete slabs and then redefine the horizontal boundaries of the units to include ownership of the space through the openings.

[149] The Responding Unit Owners contend that there is no inconsistency or error in the Description of the horizontal boundary to the units. There is no opening depicted on the horizontal boundary lines because the horizontal boundaries of the units are formed by the concrete slabs, and when there are openings in the concrete slabs, both above to account for the Chimney Flues and below to account for the plumbing stack and other utility conduits and shafts servicing the units, the boundary is the plane of the concrete slab, without interruption for openings for fixture outlets or other facilities.

[150] I agree. The Plan of Survey and the Schedule "C" description are consistent that the horizontal boundaries of the units are defined by the concrete slabs. Where there are holes in the slabs to allow for services, Chimney Flues above, plumbing stacks and electrical conduits below, the boundaries are defined by the plane of the slab. Similarly, where exhaust vents and HVAC ventilation openings are on the side walls of the units, the vertical boundary is defined by the wall regardless of whether there may be an opening.

[151] I dismiss MTCC 590's application for an amendment to the Description of the unit boundaries because I have concluded that there is no "error or inconsistency" in the Description, and no error or inconsistency that "arises out of the carrying out of the intent and purpose" of the Description.

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VIII. CONCLUSIONS

[152] There is a strong presumption of validity of the Declaration: *Walia,* at para. 10. I have concluded that MTCC 590 has established a basis for an Order amending the Declaration to specify the Chimney Flues as exclusive use common elements. This will clarify existing rights and duties based on the historic use of each Chimney Flue to permanently and exclusively service the Fireplace to which it is attached.

[153] The Applicant has not established a basis for any other amendment to the Declaration. I am not satisfied, on the record before me, that there is any other "error or inconsistency" in the Declaration or Description, or any error or inconsistency that "arises out of the carrying out of the intent and purpose of the Declaration or Description" that is necessary or desirable to be corrected.

[154] The Responding Owners initiated the Related Application because they considered that this Application was framed too narrowly to allow for determination of the full scope of issues between the parties. This Application was limited to determining whether the Declaration should be amended. To the extent that the parties require determination of the issues raised by the Related Application, they may now bring it forward, in accordance with the Order of Matheson J. of May 10, 2018.

IX. DISPOSITION

[155] I order that the amendment to the Declaration sought in paragraph 1(a) of the Application is granted only to amend the Declaration to specify the chimney flues servicing each individual unit fireplace as exclusive use common elements. The remainder of the Application is dismissed.

[156] The Applicant shall serve the Responding Owners with the precise wording of the amendment that it proposes to specify the Chimney Flues as exclusive use common elements and shall then schedule a hearing before me to settle the form of the amendment and with it the form of my Order, barring agreement.

[157] The parties may schedule a Chambers Appointment before me to address the scheduling of the Related Application.

X. COSTS

[158] I encourage the parties to discuss and agree on the issue of costs of this Application.

[159] If the parties are not able to agree on the issue of costs by August 16, 2019, the Applicant may serve on the Responding Owners and deliver to me no later than August 30, 2019, written submissions on costs of no more than four pages in length, plus its cost outline, any offer to settle and authorities relied on. The Responding Owners shall then serve on the Applicant and deliver

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to me, within 15 days of receipt of the Applicant's cost submissions or by September 16, 2019, whichever is earlier, its written submissions of a similar length on the issue of costs.

[160] If neither party delivers written costs submissions by September 16, 2019, I will deem the issue of costs to have been settled or reserved by the parties to the determination of the Related Application.

Sanfilippo J.

Released: July 25, 2019

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CITATION.: Metropolitan Toronto Condominium Corporation No. 590 v. Registered Owners, 2019 ONSC 4484
COURT FILE NO.: CV-17-589011
DATE: 20190725

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 590

Applicant

– and –

THE REGISTERED OWNERS AND MORTGAGEES OF METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 590

Respondents

REASONS FOR DECISION

Sanfilippo J.

Released: July 25, 2019