

Indexed as:

Niagara North Condominium Corp. No. 46 v. Chassie

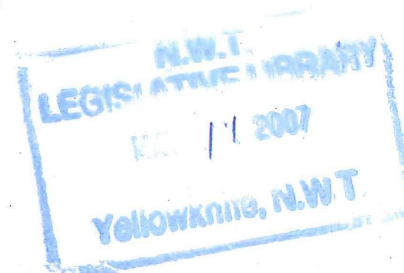
Between

Niagara North Condominium Corporation No. 46, applicant, and
Raymond Chassie and Muriel Chassie, respondents

[1999] O.J. No. 1201
Court File No. 40,448/98

Ontario Court of Justice (General Division)
St. Catharines, Ontario
MacDonald J.

Heard: September 17, 1998.
Judgment: April 7, 1999.
(49 pp.)



Real property — Condominiums — Declaration and Rules, no pet prohibition.

Application by Niagara North Condominium Corporation for an order directing the respondents, Raymond and Muriel Chassis, to remove their 16- year-old cat from their unit in the condominium. Niagara claimed that the presence of the cat was contrary to the Declaration and Rules and Regulations of the Condominium. Muriel suffered mental and physical problems. Doctors opined that the removal of her cat would be deleterious to her health. The cat stayed in the unit. The Chassies argued lack of reasonableness, acquiescence by the Board with respect to the presence of pets and delay in the enforcement of the Declaration and Rules, and Human Rights Code considerations. They contended that the Condominium Board knowingly set a precedent by not enforcing the no pet by-law for eight years and that they were not notified of the no pet rule before presenting an offer to purchase and saw cats in several windows and units at various times during their visits to the premises. The allegations as to the presence of cats on the premises were supported by other people. The Chassies said that they would not have bought the unit in the complex if they had known that there would be a problem about the cat.

HELD: Application dismissed. A condominium corporation could make rules respecting the use of common elements and units. The rules were required to be reasonable. A total prohibition of dogs and cats was not reasonable. The Rule was very arbitrary as the presence of the cat could not reasonably be said to interfere with the use or enjoyment of the common elements or the units. There was substantial evidence that there had been cats in the building over the years. The Board acquiesced in the presence of cats in the building over the years and did not provide any explanation to justify the delay in enforcement. Muriel suffered from a handicap within the meaning of the Human Rights Code and to enforce the Declaration would have constituted discrimination against her because of her handicap. The Chassies were put in a position of disadvantage in buying the unit. They would not have bought the unit had they known of the cat prohibition. It would not have been fair to enforce the prohibition in the circumstances. The equities favoured the Chassies.

Statutes, Regulations and Rules Cited:

Condominium Act, ss. 3(3), 28, 28(1), 28(4), 29(1), 49(1), 49(2).

Human Rights Code, ss. 2(1), 2(a), 10(1).

Landlord and Tenant Act, ss. 107(6), 108(1)(a), 108(1)(b), 109(1).

Tenant Protection Act, ss. 15, 64(1), 65(1), 74(2).

Counsel:

Paul Bauerle, for the applicant.

Muriel Chassie, for the respondents.

¶ 1 **MacDONALD J.**— The Applicant, Niagara North Condominium Corporation No. 46, (the N.N.C.C.), has applied to this Court for an order directing the Respondents, Raymond and Muriel Chassie, to remove their cat from their Unit, being Unit 203 of the condominium building, within 30 days of the Order. In other words, the N.N.C.C. seeks to evict Mineau, a 16-year-old Siamese cat, from her home with the Chassies in the condominium complex, which is located at 3 Towering Heights Boulevard in St. Catharines.

THE ISSUE AND POSITIONS OF THE PARTIES

¶ 2 The issue, as set out in the Applicant's Factum, is:

"Should the Respondents be required to have the cat removed from their unit and, if they fail to do so, may the cat be removed as directed by the Board of Directors, and at the expense of the Respondents?"

¶ 3 The position of the Applicant is that the Respondents should be required to remove the cat from the premises because the residence of the cat in the Respondents' unit is contrary to the Declaration and Rules and Regulations of the N.N.C.C. Counsel for the Applicant submitted that the prohibition is contained in the condominium Declaration as well as in the Rules, both of which are binding on the unit owners, and that there is a strong presumption as to the validity of the Declaration. Further, the Board of Directors of a condominium corporation has a statutory obligation to enforce the Declaration and Rules. Also, contrary to her assertions, Mrs. Chassie was not misled about the pet prohibition in view of the fact that she signed a form acknowledging receipt of the Rules. While he acknowledged that the Human Rights Code relied on by the Chassies is a quasi-constitutional law, he submitted that the Code should not be applied herein. He argued that, for the Code to apply, there must be a physical reliance on an animal, as in the case of a blind or deaf person. The mere emotional attachment to a companion animal is not sufficient to evoke the Code, he said.

¶ 4 I would summarize the defence of the Respondents, who appeared in person, as being lack of reasonableness, acquiescence by the Board in respect of the presence of pets and delay in the enforcement of the Declaration and Rules and Human Rights Code considerations.

¶ 5 In support of their position that keeping a cat in their unit is reasonable, the Respondents, in their response to the Application, submitted that:

"2(f) In recent years, the benefits of pet ownership have become common

knowledge to the extent that the Attorney General saw fit to revise the Landlord and Tenant Act to void the prohibition of pet ownership."

Also, Mrs. Chassie stated, in her affidavit of September 10, 1998:

"14. My husband and I visited eight condominium buildings in this region that were similar to our building and asked them about their pet by-law. All condominiums that we visited deemed it "reasonable" for residents to keep a cat as a pet."

She appended to her affidavit the relevant provisions of the Declaration or Rules of the eight Niagara North or South condominium corporations that she visited. In all instances, a cat or dog or, in one case, a cat and dog and, in another case, a dog and one or two cats were permitted. These provisions were all subject to restrictions providing for eviction in the event of the pet creating a nuisance and, in some instances, to other restrictions such as on the use by pets of certain common areas and the weight of the pet. There was also, in one instance, a prohibition respecting a dangerous animal or pet.

¶ 6 Secondly, the Respondents take the position that the condominium Board "has knowingly set a precedent by not enforcing the no pet by-law for 8 years" and has now singled them out for enforcement with "no attempt to apply the no pet by-law fairly". They submitted that they were not notified of the no pet rules before presenting an Offer to Purchase and, indeed, saw cats in several windows and units at various times during their visits to the premises. The details of these allegations are set out below under the heading THE FACTS.

¶ 7 Finally, in support of their position, the Respondents rely on the Ontario Human Rights Code. They submitted that:

"2(a) To cause the Respondents to give up their cat is cruel and inhumane. The cat is 16 years old and they have owned it all its life. Respondent Muriel Joan Chassie suffers mental and physical health problems and removal of her cat would be deleterious to her health."

Further, in her affidavit of September 10, 1998, Mrs. Chassie stated:

"15. In conclusion, our cat has been a beloved, loyal pet for 16 years and is very much part of our family. When I was sick for a very long period of time, she was my constant companion. Her love and devotion helped me through a long depression, a condition I have had, unfortunately, for many years. As well, I suffer from high blood pressure. I find my cat to be a calming presence and influence. To no avail, I have brought this to the attention of the Board in letters from my doctors."

THE FACTS

¶ 8 The facts, which are for the most part not in dispute, are that, about June 1, 1989, a Declaration was registered by a developer under the Condominium Act creating the N.N.C.C. The condominium complex consists of 92 units on twelve floors. Section 23 of the Declaration states:

"No animal, reptile, livestock or fowl, other than small caged birds and/or small fish, shall reside or be kept within any unit, nor be allowed to enter the condominium

building. The foregoing restriction on pets shall not be deemed to apply to any specially trained "seeing-eye" dog owned by a visually impaired owner, tenant, resident, or invitee of any dwelling unit."

Section 20 of the Rules and Regulations of the N.N.C.C., as contained in Schedule A to By-law No. 1 thereof, provides similarly:

"No animal, livestock or fowl, other than small caged birds and/or small fish, shall be kept within any unit, nor allowed to enter the condominium building. The foregoing restriction on pets shall not be deemed to apply to any specially trained "seeing-eye" dog of an owner who is visually impaired."

¶ 9 Mr. and Mrs. Chassie purchased and moved into Unit 203 in the condominium complex on or about June 13, 1997, bringing with them their cat, Mineau. In the fall of 1997, it was brought to the attention of Peter Greco, the Vice-President of Cannon Greco Management Limited, which has been the Manager of the N.N.C.C. since its appointment on April 28, 1994, that the Chassies were keeping a cat in their unit contrary to the Declaration and Rules and Regulations. Mr. Greco wrote to the Chassies on December 1, 1997, to ask that the cat be permanently removed from the building by December 15, 1997. On December 15, 1997, Mr. and Mrs. Chassie replied, in part, as follows:

"Further to my telephone conversation of December 3, 1997, at which time I asked for copies of the letters of complaint regarding our cat, you indicated to me that there were no letters of complaint.

We were not made aware of Section 23 until after we purchased our unit. Frank Coy [the real estate agent] or Mr. & Mrs. McGee [the vendors] did not inform us of this Declaration before we purchased. As a matter of fact, when we were looking at a number of units at 3 Towering Heights, we observed two cats in windows and one in a unit we were shown. We, therefore, thought cats were allowed in the building. Had we known cats were not allowed, we would not have purchased.

Our cat is a quiet cat that never leaves our unit. It does not in any way interfere with the comfort and enjoyment of our neighbours.

I am aware of three condo owners with cats in this building that did not receive a letter from you and I am sure there are others that I am not aware of. There have been cats in this building since the very beginning (9-10 years) and there will always be cats in this building. This is an impossible situation to police.

Your letter of December 1, 1997 has upset me greatly and caused me many sleepless nights. Our cat is almost 16 years old and a part of our family."

¶ 10 Mr. Greco replied to the Chassies' letter on December 16, 1997 stating that, while there were no written complaints on file regarding their cat, it is the responsibility of the Board of Directors to enforce the Declaration and the Rules. He added that he would "address" their letter with the Board at the Board meeting in January, 1998.

¶ 11 The Chassies did not comply with the demand to remove the cat. However, on January 11, 1998, Mrs. Chassie again wrote to Mr. Greco. She stated:

"Further to my letter of December 15, 1997, I attach a letter from my Doctor, Dr. J. Henry, for your consideration.

Shortly after moving into our unit, Audry Martin [a Board member] stopped by to welcome us to Southgate. She saw our cat and I remarked that we were not aware of

the no pet rule until after we purchased. She stated that Mrs. McGee had already informed her of this and that she was on the Board and they were aware of other cats in the building. She told me not to worry, if there were no complaints, there would be no problem.

Because the no pet provision was not enforced from the beginning, the Board sent a clear message that this "No Pet" rule was not being enforced.

I believe that a reasonable solution to this problem would be to "grandfather" the Rule. When our pet dies, we will not replace it. This is a more peaceful and humane approach."

¶ 12 The January 9, 1998 letter from Dr. Henry states in part:

"Mrs. Chassie's cat has been her companion for 16 years. In my opinion, to force her to abandon it, would cause her extreme emotional distress. I would appeal to the "powers that be" to show compassion and try to find a compromise to this situation."

¶ 13 On January 16, 1998, Mr. Greco wrote one more time to the Chassies reiterating that it is the responsibility of the Board to enforce the Declaration and Rules and informing them that 78% of the owners were in favour of a no pet building and threatening legal action if the cat were not to be removed from the building by January 30, 1998.

¶ 14 On March 27, 1998, at a meeting of the Board of Directors of the N.N.C.C., it was decided to commence a legal action against the Chassies. Mr. Greco, in his affidavit dated April 29, 1998 in support of this Application, stated:

"As far as I am aware, the Respondents are the only unit holders in the condominium building who are contravening the no pets clause contained in the Declaration and in the Rules and Regulations."

¶ 15 While Mr. Greco's statement may, possibly, reflect the state of affairs at the condominium building as of the date the affidavit was sworn, I do not believe it accurately reflects the level of pet ownership in the condominium building over the years or even at the date of his first letter of December 1, 1997, to the Chassies. I am of this opinion partly because of the December 15th letter of the Chassies above and, also, by reason of other evidence submitted by them. This evidence includes excerpts from the Minutes of two meetings of the Board of Directors. In respect of a meeting on September 20, 1995, almost two years before the Chassies purchased their unit, the Minutes state:

"18(f) Mr. Smith commented that there were several cats in the building and asked if it should be allowed to continue. Peter Greco stated that either this issue should be ignored or a complete crackdown on animals in the building be made."

In respect of a meeting on November 25, 1996, the Minutes state:

"Mr. Greco spoke to Glenn Parker who suggested sending letters to all pet owners mentioning this is against the Rules and Regulations. When existing pets cease to reside in the building no new pets will be allowed in the building.

Dr. Wood presented a note submitted to the Board from Mrs. Hazelton (#505) stating she was being harassed over this issue.

Mr. Greco stated that Mrs. Hazelton is moving out of the building at the end of

January. Mr. Greco explained that because the Rule has not been enforced up to this point, a precedent has been set and thus it may not stand up in a court of law. Dr. Wood read a statement submitted by Ray Moen stating that something should be done about this Rule as the Board was elected to uphold the Rules and Regulations. Brian Neil suggested that a reminder be sent to the owners restating the policy regarding the Rule of pets and trust that the owners will be in compliance of this section of the Declaration.

The Board was in agreement with this suggestion."

¶ 16 There is no evidence that any action was taken pursuant to this suggestion at that time. Indeed, the evidence is that pets continued to remain in the building until and after the Chassies purchased their unit in 1997. Mrs. Chassie stated, in her affidavit of September 10, 1998, as follows:

1. Prior to purchasing Unit 203 of #3 Towering Heights Boulevard on June 13, 1997, we went several times to this condominium building over a two year period with two different Real Estate agents, one being Nancy Philbrick of Sally McGarr Realty and Sam Cino of Re/Max. On each occasion, from the parking lot, we saw cats in the windows. One of the units through which we were shown had a cat. We assumed that cats were allowed. We would not have purchased in this building if we had known cats were prohibited ...
2. On June 9, 1997, prior to our moving into our unit, the Superintendent, Gwen Biggins gave me an abbreviated list of the Rules and Regulations. When I saw the "No Pets Rule", I told her we had a cat. She replied "So do eight others in the building". This statement reassured me that this By-law was not being enforced.
3. We purchased our unit from Mr. and Mrs. Donald McGee. Mr. McGee had been a Board member and President of NNCC#46 for 3 years. Although he mentioned a number of By-laws, at no time prior to our signing our offer to purchase, did he say that cats were prohibited. Later, when we learned of the By-Law, we told him we had seen cats in the windows and assumed they were allowed. Mr. McGee told us not to worry, that he had been on the Board for several years, and knew there [were] cats in the building from the very beginning (1989). He basically said that the Board was not enforcing the By-Law ...
4. On June 27, 1997 Audrey Martin, a current member of the Board, elected August 13, 1990, came to our unit to welcome us to the condominium. I pointed to our cat and explained we had assumed that cats were allowed because we had seen them in various windows. She said that the McGees had already informed her that we had a cat, but as long as there were no complaints she could see no problem."

¶ 17 From the other available evidence, the above dates appear to correctly reflect the sequence of events except that Mrs. Chassie may have received the abbreviated Rules on June 6 and signed them on June 9. The Offer to Purchase was not included in the evidence but the Land Titles Transfer of Land form was signed by the vendors, Mr. and Mrs. McGee, on May 27, 1997, and probably reflects the approximate date of the Agreement for purchase and sale.

¶ 18 Mrs. Chassie continued her affidavit of September 10, 1998, by stating that she knew that the December 1, 1997 letter to them and a letter of even date to one other resident, Sally Barton of Unit 701, were the first letters the Board had sent to any cat owners respecting the animal by-law because, on June 15, 1998, she had searched through all the Board minutes since 1989 and because, on August 20, 1998,

she had confirmed with Mr. Greco that there had been no prior letters.

¶ 19 The allegations of Mrs. Chassie as to the presence of cats on the premises were supported by a number of people. Sam Cino, the real estate sales representative for the Chassies, stated, in an affidavit dated June 25, 1998, that he saw several cats in apartment windows and observed a cat in one of the units he had shown them. John MacPherson, the owner of Unit 502 since August, 1997, stated, in an affidavit dated June 25, 1998, that he had "witnessed" cats in the windows of more than one unit at various times. Mr. Chassie, in an affidavit dated September 10, 1998, stated that the owner of Unit 503, Jim Atcheson, told him that he had kept his cat in his unit (picture of cat in window attached) since purchasing his unit in 1989. Sally Barton, the owner of Unit 701 since 1996, and the only other owner to receive letters from the Board dated December 1, 1997, and January 16, 1998, ordering her to remove her cat stated, in an affidavit dated June 23, 1998, that she is "permanently wheel chair bound" and felt unable, for health reasons, to fight the issue on her own. Consequently, she had her cat taken to a friend's house. When her husband, who works on the boats, comes home, he brings her the cat for the two or three weeks he is there. She stated further:

"My cat is a loved companion and helped me through a severe depression after my 1994 car accident. I miss my cat and am depressed by the Board's insistence that I get rid of my pet. I think the present Board is being very unreasonable in enforcing a rule which they had not enforced since the condominium was registered in 1989."

¶ 20 While, clearly, there have been more cats living in the building over the years than Mr. Greco was willing to acknowledge, it is also evident that the majority of unit owners are opposed to pets. Dr. Norman Wood, a unit owner since 1988 and a member of the Board of Directors of the N.N.C.C. who chaired the annual meeting of unit owners in September of 1997, in his affidavit of July 15, 1998, stated that the Board of Directors [on October 21, 1997] sought the views of all unit owners respecting the no pet rules and received 66 responses which represents 71% of owners. Of these owners, 49 opposed changing the pet rules and 17 said they would agree with a conditional change. Some owners indicated that they bought units there on the basis of the no pet rules and three owners indicated that they are allergic to cats. Dr. Wood also stated that a no pets sign has been posted on the front door of the condominium complex since about January, 1997.

¶ 21 In her response to the affidavit of Dr. Wood, Mrs. Chassie restated some of her allegations about cats being in the complex over the years to the knowledge of the Board. She also submitted that, since each unit is "concrete enclosed with its own heating and air-conditioning system", a cat "should pose no health problem to someone allergic to cats". In support of this argument she appended a letter from Dr. Donald A. Hitch, M.D.F.R.C.S.[C] of Dundas, Ontario, dated June 22, 1998 which reads as follows:

"Many people are allergic to cat antigen, some suffering violent reactions, in their respiratory tract.

In order to have a reaction, the sensitive person has to contact the cat or rooms where the cat has resided.

If a cat were confined to a room or rooms, and that cat never allowed to venture beyond those rooms, there is no possibility that cat antigen could go beyond this restricted area except through a common air circulation system."

¶ 22 Before leaving the facts, I wish to refer in more detail to the subject of Mrs. Chassie's health. In paragraph 2(a) of her responding material and paragraph 15 of her affidavit of September 10, 1998, (both set out above). Mrs. Chassie referred to her mental and physical health problems (depression and high blood pressure) and submitted that removal of her cat, which she finds to be a calming influence, would be deleterious to her health. Further, she submitted several letters from medical practitioners to

support her allegations. The letter of Dr. J. Henry, her family physician, dated January 9, 1995, (set out above) refers to the "extreme emotional distress" loss of her cat would cause her. Dr. Henry wrote two further letters dated May 15 and August 8, 1998. They read as follows:

"Mrs. Chassie suffers from high blood pressure. The emotional well-being she gets from her cat are an important component of her treatment. To separate her from her cat would cause severe emotional and physical detriment to this lady."

"Mrs. Chassie has been under my care since 1995. She has a history of depression dating back to approximately 1977.

More recently she has experienced severe episodes of depression in the spring of 1996, and again in January of 1997.

Mrs. Chassie was receiving treatment, including psychotherapy (sic) and antidepressants (Paxal 20 mg, po OD) from January through April of 1997.

The emotional trauma caused by the legal proceedings surrounding her cat have precipitated a worsening of her depression and antidepressants were initiated in December 1997. (Paxal 30 mg, po OD)."

Further, her former, now retired, family physician, Dr. F. Gillian Richards, wrote a letter dated May 29, 1998 which reads, in part, as follows:

"I was Mrs. Chassie's family physician for many years until the end of 1995 when I retired. I treated her throughout her long debilitating episode of myalgic encephalitis complicated by depression. During the years of her illness, her cat was a constant companion and great source of comfort.

I understand that she has been told to get rid of this cat. However, the animal is sixteen years old (elderly, I understand, for a cat) and unlikely at this age to adapt to a new home. Forcing Mrs. Chassie to put her loyal pet to sleep, or otherwise remove it, will make her feel guilty and could precipitate a relapse of her depression. This seems to be taking an unnecessary risk when the animal is likely to die soon of old age and when it bothers no-one.

...

I wish to emphasize that I am no long (sic) Mrs. Chassie's doctor, but I write as her former family physician. I recall vividly the years of despair she went through."

Finally, a letter from the Director of Human Resources of Mrs. Chassie's employer, Niagara College, confirms that she was on sick leave from February 13, 1991 to August 9, 1991, inclusive, after having been diagnosed as having myalgic encephalitis and depression.

THE LAW

¶ 23 The Condominium Act provides as follows:

3(3) ... a declaration may contain,

(a) ...

(b) provisions respecting the occupation and use of the units and common elements;

12(3) The corporation has a duty to effect compliance by the owners with this Act,

the declaration, the by-laws and the rules.

(5) Each owner ... has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

29(1) The board may make rules respecting the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

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

¶ 24 Section 28 of the Condominium Act provides authority for a condominium board to pass by-laws. I have not quoted that section because it would appear, from a reading of subsection 28(1), that restrictions respecting pets are more properly provided for by rules under section 29. In any case, pursuant to subsection 28(4), the by-laws, like the rules, are required to be reasonable and consistent with the Act and the declaration. Subsection 49(1) provides for the corporation and any owner, inter alia, to bring an Application for a court Order to require the performance of any duty and subsection 49(2) provides as follows:

"49(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances."

¶ 25 Ontario has recently enacted new legislation entitled the Condominium Act, 1998 which received Royal Assent on December 18, 1998. However, it has not yet been proclaimed. The new Act has amended and clarified the above provisions to some extent. For example, clause 3(3)(b), which provides that a declaration may contain "provisions respecting the occupation and use of the units and common elements", has been replaced by the more specific authority for a declaration to contain "conditions and restrictions with respect to the occupation and use of the units or common elements" (emphasis added). However, the new Act, like the present Act, does not contain any specific provisions relating to pets. Presumably, the law remains unchanged in this regard and declarations and rules will continue to be subject to the interpretations imposed by case law deriving from the present Act. It would appear that it is to remain the responsibility of the court to determine whether a pet prohibition or restriction in a declaration or rule is consistent with the Act and, to the extent required by the Act or case law, reasonable.

1. The Reasonableness of Pet Prohibitions and Restrictions

¶ 26 John Mascarin, Assistant Town Solicitor, Markham, Ontario, in a case comment on York Condominium Corp. No. 382 v. Dvorchik, (1992), 24 R.P.R. (2d) 19, entitled The Enforceability of No Pet Clauses in Condominium Documents, [1992] 24 R.P.R. (2d) 24, reviewed and commented on the law respecting no pet clauses as expressed in that and other cases. It should be noted that this case comment was published before the 1997 Court of Appeal decision reversing the trial decision in Dvorchik. He stated at p. 24:

"No pets" clauses in condominium documents can be found either in the rules, by-laws or declarations of residential condominiums. In considering the validity of such provisions, the courts have typically drawn a distinction in determining the enforceability of such restrictions or prohibitions depending on the mechanism which is used to create the restriction or prohibition. Thus, the decisions have tended to create a

varying or sliding scale test depending on the nature of the condominium document creating the regulation. This whole area has been very substantially influenced by recent developments in the law of landlord and tenant."

¶ 27 I agree with Mr. Mascarin's summary of the condominium law respecting the enforceability of no pets provisions and I shall elaborate on these matters further below. At this point, I would simply say that it would appear that a distinction in the enforceability of such provisions arises because both condominium by-laws and rules are required to be reasonable. On the other hand, the Condominium Act does not specifically require a condominium declaration to be reasonable although the case law has, to a certain degree, imputed a requirement for reasonableness into the law respecting declarations. However, any imputed requirement for reasonableness is tempered by a strong presumption as to the validity of declarations.

¶ 28 Mr. Mascarin's statement that the whole area has been substantially influenced by recent developments in the law of landlord and tenant is also interesting. Although he has probably modified his view in the light of the reversal by the Court of Appeal of the trial decision in Dvorchik, his statement raises the question of the extent to which modifications in the law and changes in societal attitudes in one field can influence the law in another related field. Since the subject under consideration is reasonableness and that is a criterium that, in all fields, has evolved over the years, as society has developed, I think it worthwhile, in the context of the present case, to look into the external influences, both legal and societal, that may have some impact on the interpretation of the Condominium Act at this time, as we head into a new millennium.

¶ 29 If outside legal and societal influences have an impact on the interpretation of the Condominium Act in respect of pet prohibitions and restrictions, they do so because they reflect changing values and opinions as to what constitutes reasonable rules for community living. Nowhere are the changes in the attitudes of society respecting the reasonableness of pet prohibitions and restrictions more apparent than in the cases under the former Part IV of the Landlord and Tenant Act and the new Tenant Protection Act, 1997 and in the amendments to the law itself. Therefore, I shall review the developments in the landlord and tenant law before proceeding to consider reasonableness in the broad social sense and in the context of the condominium law.

(1) The Landlord and Tenant Act and Tenants Protection Act, 1997

¶ 30 The cases under the Landlord & Tenant Act, prior to its amendment in 1990, for the most part, subjected the rights of pet owning tenants to the concerns and preferences of landlords and other tenants. These concerns are thoroughly summarized by Gotlib, D.C.J., in her February 2, 1989, judgment in Cassandra Towers v. Ryll, [1989] O.J. No. 1233, an appeal from which was dismissed without reasons on July 7, 1989. In that case, which is popularly known as the "Fluffy" case, the Respondents, after signing a lease with a no pets clause, kept their cat, Fluffy, in their apartment. While there were no complaints that the cat was bothering other tenants, the landlord applied the no pets clause without exception and brought an Application under clause 109(1)(c) of the Landlord and Tenant Act which provides for eviction where "(c) the conduct of the tenant ... substantially interferes with the reasonable enjoyment of the premises for all purposes by the landlord or other tenants." The position of the Applicant was that allowing pets would increase maintenance costs in the common and private areas. Also, the Applicant expressed concern for the safety of the tenants and the possible damage that might be caused by an animal.

¶ 31 The position of the Respondents was that they should be allowed to keep their cat because there was a lack of affordable housing and they had a great emotional attachment to the cat, which had been their pet for 16 years. Their evidence was that the cat never left their apartment except to go to the

veterinarian and had never created any odour or caused a problem of any kind. There were no complaints about it. Evidence was also given that Mrs. Ryll was in poor health to the point of requiring a wheel chair at times and that it was likely that, if the cat were to be evicted, "the inevitable result would be that she would have to be put down or euthanised".

¶ 32 Despite her "sympathy" for Mrs. Ryll, and although "mindful of the public issues involved", Gotlib, J., observed that the duty of the Court is "to apply the law as it exists both by way of statute and decided cases". Accordingly, on the basis of the case law and because the landlord had consistently enforced the no pets provision and all the tenants had signed the same no pets agreement and expected that there would be no animals on the premises, she found that the Rylls' conduct in keeping the cat substantially interfered with the reasonable enjoyment of the premises by the landlord and the other tenants. On those grounds, the Application by the landlord was allowed and an Order made that, if the cat were not to be relocated before a specific date, a writ of possession was to issue.

¶ 33 In support of her decision, Gotlib, J., cited various cases. In one of those cases, *Kay v. Parkway Forest Development* (1982), 35 O.R. (2d) 392, Linden, J., for the Divisional Court, stated that the court, in deciding whether to enforce a no pets clause, should consider "the nature of the conduct complained of, its duration, its extent and its seriousness". In that case, a no pets clause, alone, was held to be insufficient to cause the eviction of a dog loved by all the tenants. In the *Kay* case, and some other cases cited by Gotlib, J., the decision was based on whether, regardless of a no pets clause, the conduct complained of was contrary to the Landlord and Tenant Act in that it actually substantially interfered with the reasonable enjoyment of the premises by the landlord and other tenants. However, in many other cases, it was held that simple evidence of complaints made by tenants, or the strict and consistent enforcement of a no pets rule by a landlord, was sufficient grounds to establish substantial interference on the basis that the landlord and other tenants had a right to have the covenants enforced. Further, in at least one case, judicial notice was taken that some people are allergic to or have an aversion to cats.

¶ 34 After the Ryll decision, there was considerable public and press sympathy for the plight of the Rylls and concern about the arbitrary limitations on the right of tenants to possess pets, even long term members of the family. One further decision the next year, 1990, added to the momentum for change. In *Montcrest Towers v. Withers*, [1990] O.J. No. 911, a decision by Rapson, D.C.J., on May 31, 1990, an Application for the termination of the tenancies of three different tenants was granted. As stated in the head note to the case:

"The court accepted the evidence that animals allowed on the premises caused allergic problems, dirt, noise, odour and increased the landlord's maintenance costs. There was a reasonable expectation of all tenants that they would be living in a pet free environment. Taking all factors into consideration, the court concluded that the presence of pets amounted to a substantial interference with the reasonable enjoyment of the premises by other tenants and the landlord. Under the circumstances the court refused to exercise its discretion under section 121 of the Landlord and Tenant Act and granted the landlord the writs of possession."

¶ 35 The Withers case was very quickly followed by amendments to the Landlord and Tenant Act designed to provide criteria to be used by the courts when considering Applications for the termination of tenancy agreements where the mere keeping of pets by a tenant was the landlord's main complaint. On introducing the amendments in Legislature, the then Attorney General of Ontario, the Honourable Ian Scott, referred to the decisions in the Withers and Ryll cases and explained the purpose of the Bill (as quoted by Cusson, J., in *Couch v. Deopersaud*, [1991] O.J. No. 2566, on February 14, 1991) as follows:

""The purpose of the Bill is to protect tenants from eviction if they have well-behaved pets that have not caused harm and are not dangerous.

Until last year it was clearly understood that breach of a no-pet provision in a lease was not a sufficient ground for eviction. Eviction is only permitted if the landlord proves that one of the grounds sets out in the Landlord and Tenant Act has been met. Eviction is possible if, for example, a pet has substantially interfered with other tenants.

On May 31 of this year, however, a judge evicted three tenants although there were no complaints about behaviour of their pets. The judge decided in a wide-ranging decision, that the mere presence of a pet, even a harmless pet, could amount to a substantial interference with others. The judge relied heavily on the fact that all tenants had signed leases prohibiting pets. A similar result in a narrower framework occurred in a case last year.

The amendments in this Bill will ensure a careful balancing of the rights of landlords and tenants.

The amendments recognize that in a building where animals have caused problems, it may be difficult for the landlord to identify specifically which pet or pets are responsible. If a landlord is seeking to evict a tenant because of a pet, therefore, the amendments will require the landlord to prove [that] animals of the same species as the tenant's have caused problems."

¶ 36 He concluded his remarks as follows:

"I believe these amendments strike a fair balance that will permit action to be taken against irresponsible pet owners but will protect tenants whose pets are well behaved, do not cause harm and are not dangerous.""

¶ 37 The amendments continued the prior law in that they permitted a landlord to apply for the termination of a tenancy where:

"107(c) the conduct of the tenant or a person permitted in the residential premises by the tenant is such that it substantially interferes with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;

(d) the safety or other lawful right, privilege or interest of any other tenant in the residential premises is or has been seriously impaired by an act or omission of the tenant ..."

However, while those provisions were similar to the provisions of the previous law, the amendments went further to provide specifically for the manner in which the law was to be applied where an Application for termination of a tenancy agreement was based on the presence, control or behaviour of an animal on the premises. The amendments prescribed a double test that must be met before an eviction order could be made, whether or not there was a no pets agreement in place. Firstly, pursuant to subsections 107(6) and 108(1), the judge must be satisfied that:

"(a) the past behaviour of an animal of that species has substantially interfered with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;

(b) the presence of an animal of that species has caused the landlord or another tenant to suffer a serious allergic reaction; or

(c) the presence of an animal of that species or breed is inherently dangerous to the safety of the landlord or the other tenants."

Even where one of the general tests set out in subsection 107(6) or clause 108(1) (a) or (b) was met, an Order still could not be issued if the judge was satisfied that the particular animal kept by the tenant did not cause or contribute to the substantial interference or to the allergic reaction. The general test relating to danger was not made subject to the second test relating to the particular animal. Further, pursuant to subsection 109(1), the provisions of a tenancy agreement respecting pets could not be considered in making a determination pursuant to section 107 or 108.

¶ 38 The 1990 amendments to the Landlord and Tenant Act were somewhat lengthy and cumbersome. This is possibly why the law was clarified and refined in the Tenant Protection Act, 1997, which replaced Part IV of the Landlord and Tenant Act, effective June 17, 1998. It provides, in part, as follows:

"No pet" provisions void

15. A provision in a tenancy agreement prohibiting the presence of animals in or about the residential complex is void.

Termination for cause, reasonable enjoyment

- 64(1) A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or another tenant or substantially interferes with another lawful right, privilege or interest of the landlord or another tenant.

Termination for cause, act impairs safety

- 65(1) A landlord may give a tenant notice of termination if,
 - (a) an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant seriously impairs or has seriously impaired the safety of any person; and
 - (b) the act or omission occurs in the residential complex.

Application based on animals

- 74(2) If an application based on a notice of termination under section 64 or 65 is grounded on the presence, control or behaviour of an animal in or about the residential complex, the Tribunal shall not make an order terminating the tenancy and evicting the tenant without being satisfied that the tenant is keeping an animal and that,
 - (a) subject to subsection (3), the past behaviour of an animal of that species has substantially interfered with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or other tenants;
 - (b) subject to subsection (4), the presence of an animal of that species has caused the landlord or another tenant to suffer a serious allergic reaction; or
 - (c) the presence of an animal of that species or breed is inherently dangerous to the safety of the landlord or the other tenants.

Same

- (3) The Tribunal shall not make an order terminating the tenancy and evicting the tenant relying on clause (2) (a) if it is satisfied that the animal kept by the tenant did not cause or contribute to the substantial interference.

Same

- (4) The Tribunal shall not make an order terminating the tenancy and evicting the tenant relying on clause (2)(b) if it is satisfied that the animal kept by the tenant did not cause or contribute to the allergic reaction."

This is the current law applicable to landlords and tenants. It sets standards for eviction that have a reasonable basis and are not merely founded on the preferences of landlords and some anti-pet tenants. The standards are basically nuisance (reasonable enjoyment), health (allergic reaction) and danger.

¶ 39 The landlord and tenant cases since 1990 reflect the need to show substantial interference with the enjoyment of the premises that goes further than a mere no pets agreement and constitutes actual substantial interference. For instance, an Application to terminate a tenancy agreement was allowed in *Denewood Apartments v. Dodds* [1993] O.J. No. 1146 wherein the issue was the noise caused by the three dogs kept by a tenant. On the other hand, an Application was, in effect, not allowed in *Thunder Bay District Housing Authority v. Stephens* (1990), 12 R.P.R. (2d) 247 decided by Kurisko, D.C.J., while the amendments to the Act were pending. In that case, two cats were kept by a tenant contrary to a no pets clause in a lease. Similarly, in *Dassios v. Budai* [1996] O.J. No. 1723, (1996), 2 R.P.R. (3d) 206, Pitt, J., found that the mere presence of a dog in a rental unit was not sufficient grounds to terminate a tenancy notwithstanding a no pets clause in the rental application signed by the tenants. He found that the dog was quiet and well behaved and did not interfere with the reasonable enjoyment of the premises.

¶ 40 As is apparent from the above statutory amendments and case law, the attitudes of the law and society respecting the reasonableness of pet prohibitions and restrictions in the landlord and tenant field have evolved significantly over the years so that, no longer, can mere anti pet preferences result in a finding that the presence of a pet in a residential complex constitutes substantial interference with the reasonable enjoyment of the complex by other people. Now, the balance of rights based on the test of reasonableness, at least in this field, has shifted to favour tolerance of pets in a residential complex unless there is a genuine substantial reason for their exclusion, such as nuisance, the potential for allergic reactions or danger.

(2) The Therapeutic Value of Pets

¶ 41 As stated above, the attitudes of society respecting the reasonableness of pet prohibitions and restrictions have evolved significantly over the years as is particularly evident from developments in the landlord and tenant laws. Before leaving the topic of the evolution of social attitudes, I should like to briefly direct attention to current expressions of views outside the legal system as to the value of domestic animals.

¶ 42 In considering what are the present attitudes of society towards pets and their value for physical and mental therapeutic purposes, I have paid close heed to recent newspaper reports respecting domestic animals. It has long been recognized that seeing eye or guide dogs are vital helpmates to their owners and should be allowed to accompany them everywhere. But what about other animals? Let me refer to some of the recent articles I have noted, all of which, except the last one, were published in the *St. Catharines Standard*.

¶ 43 In his syndicated column, "Dr. Game", W. Gifford Jones, in an article published September 14, 1998, entitled "Dog's bark warns of epileptic attack", commented on reports of various disability support animals including a schnauzer which invariably warns its owner about 40 minutes before an epileptic attack and a brown Labrador dog which has been trained to assist and restrict some activities of an autistic child much as a guide dog does for a blind person. He explained that the Labrador dog was trained by a Burlington, Ontario, not-for-profit organization founded in 1996 to provide service dogs for Canadians suffering from epilepsy, hearing loss, physical disabilities and autism. Surely, animals trained to assist persons with physical disabilities are as necessary to the owners who rely on them as seeing eye or guide dogs and should be widely accepted.

¶ 44 Let me now turn to what is currently being said about animals which might be termed companion or comfort animals and their value to the mental well being of people. The growing awareness of the extent to which animals improve the mental and physical well being of people has been recognized by the St. John Ambulance Society by its institution of its Therapy Dog Program. An article entitled "Dr. Champ", published January 9, 1999, describes the program and the regular visits of a German shepherd named Champ and his owner, Henry Clement, to two homes for seniors in St. Catharines. The article states in part:

"During regular visits to hospitals and nursing homes, program members and their dogs provide companionship to the sick and the lonely ...

A small dose of Champ goes a long way toward improving a resident's physical and mental well-being. Therapy dogs have been shown to lower blood pressure and help people relax, Clement said.

Since its inception in Ontario, thousands of pets have become therapy dogs.

"It's a very, very worthwhile program," said Manzuk. [Kevin Manzuk, coordinator for the program in St. Catharines] "It's amazing to see what these dogs do. They lift people's spirits; they bring people out of their shells.""

¶ 45 Other organizations, as well as the St. John Ambulance Society, have recognized the importance of animals for mental therapy. I take judicial notice of the fact that many seniors homes in St. Catharines and elsewhere retain at least one resident dog or cat and I have been informed of a senior's home in St. Catharines that keeps a cat as a pet on every floor. Further, I have personally observed how the faces and eyes of sick or wheelchair bound seniors in hospitals and homes light up when they are approached by a friendly animal. They can hardly wait to pat or cuddle it. Objections are rare.

¶ 46 Turning from animals as guests or residents in institutions to companion animals in the home, I would refer to an article by the syndicated columnist, Dr. Robert Wallace, published in late 1998 and entitled "Some Therapists can purr or bark". In the article, Dr. Wallace refers to "what some professionals have to offer on this subject" [pets]:

"Pets make you laugh and take your mind off your troubles. They are marvellous therapeutic agents," says Dr. James Lynch, professor of psychology at the University of Maryland and an expert on loneliness ...

The day may soon come when pets are prescribed instead of pills, says Dr. Leo Bustad, dean of Veterinary Medicine at Washington State University. Scientists, psychologists and physicians all around the world are finding that the companionship of pets can improve your health and even help you live longer."

¶ 47 Finally, I would refer to an article on the St. Petersburg Times of Florida dated November 27, 1998, entitled "Troubled juveniles to train dogs for elderly companions." The article describes how, pursuant to an idea conceived by an appeals court judge, teens (now boys and soon girls) incarcerated in

Florida correction centres are being trained, in a program called FETCH, to teach dogs intended to be donated as companions for elderly people. The program provides further for special benefits such as free dog food and veterinary care to be provided to recipients of dogs who enlist them in a community service program.

¶ 48 While the above newspaper reports and other observations could hardly be called empirical scientific evidence, I think they do give some indication of developing professional and social attitudes as to the value of pets for therapeutic purposes both in the sense of the reliance on the animals for assistance with physical disabilities and in the sense of the mental and physical comfort provided by a loving pet.

¶ 49 In deciding to incorporate into this judgment, both under this heading and in my conclusions respecting the reasonableness of pet prohibitions, facts not proved in the evidence, I have been influenced by the thinking of the Honourable Mr. Justice Thomas A. Cromwell of the Nova Scotia Court of Appeal, as set out in a Paper prepared for presentation at the Ontario Court (General Division) Education Seminar "Judging in a Diverse Society" held October 28-30, 1998. He stated:

"The great American evidence scholar, James Bradley Thayer wrote in 1898 that in judicial reasoning, as in any other kind of reasoning "... not a step can be taken without assuming something which has not been proved." Judges and juries must bring to their task a wide array of facts and a multitude of understandings about the nature of things -- in short, common knowledge and common sense. Resort to facts not proved in evidence is, in this sense, necessary because the task of judging is impossible without it. Reliance on extra-record facts is, therefore, not something which is suspect, but something which is essential.

The use of extra-record facts is necessary in another sense. Judges and juries are permitted -- indeed required -- to know what is known to intelligent persons generally in the community. This is required not only for the proper carrying out of judicial duties, but for maintaining public confidence in the process. The results reached by judges and juries are not likely to be respected if they appear to be ignorant of things that everybody else knows.

Not only is use of extra-record facts necessary in both of these ways, it is also desirable. As Edmund M. Morgan put it in his leading article, "Judicial Notice" (1944), 57 Harv. L. Rep. 269, "... if the common law is to grow through adaptation to changing conditions by means of judicial decisions, the device by which knowledge of the changed conditions becomes part of the court's working equipment is judicial notice." The flexibility and adaptability of the common law depend, at least in part, on the use of evolving conceptions of common knowledge and common sense."

(3) The Condominium Act

¶ 50 Subsection 3(3) of the Condominium Act, set out above immediately after the heading THE LAW, provides that a declaration may contain provisions respecting the occupation and use of the units and common elements. Further, subsection 29(1) provides that the board of a condominium corporation may make rules respecting the use of common elements and units to promote the safety, security or welfare of the owners and property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units. The rules are specifically required to be reasonable and the case law indicates the declaration should be reasonable. As I stated above, there may be some distinctions in enforcement depending on whether a pet prohibition is contained in the declaration or in the rules of a condominium. Because, in the present case, the prohibition is in the Declaration as well as in the Rules and, because the presumption of validity is stronger in respect of

provisions in declarations, I shall direct my attention more to the cases relating to prohibitions in declarations than to those in condominium rules.

¶ 51 Counsel for the Applicant cited a number of cases in support of his position as follows:

¶ 52 In Peel Condominium Corporation No. 78 v. Harthen et al (1978), 20 O.R. (2d) 225, the Declaration creating the condominium corporation contained a prohibition against pets. Because some unit owners were either misled by representatives of the developer or actually assured by them that pets would be permitted, some 22 out of 204 unit owners acquired or continued to possess pets after moving in the complex and resisted attempts to have them comply with the prohibition. Misener, Co. Ct. J., held that, although the change in the proposed declaration by the developer to include a no pets provision might be unfair or unjust, it was a deliberate change and the condominium corporation had a duty to effect compliance. Also, since the great majority of the owners had adhered to the prohibition, he decided that he was duty bound to exercise his judicial discretion in favour of allowing the Application.

¶ 53 In Re Carleton Condominium Corp. No. 279 and Rochon et al (1987), 59 O.R. (2d) 545, (C.A.) the respondents, in purchasing a penthouse unit from the condominium developer, included in the agreement the right to install a satellite dish on the roof. This arrangement was not included in the Declaration and, as the existence of the dish was opposed by the condominium corporation after the unit owners had taken control of it, an Application was brought for its removal. The Court of Appeal allowed an appeal from an Order dismissing an Application to remove the dish. Finlayson, J.A., stated at p. 552:

"The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f))."

He stated further at p. 553:

"I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith."

He went on to conclude at p. 555 that, while an order of this nature is discretionary, he was not persuaded that this was a proper case for the court to exercise its discretion in favour of the Respondents.

¶ 54 In Metropolitan Toronto Condominium Corp. No. 776 v. Gifford (1989), 6 R.P.R. (2d) 217, a unit purchaser who was confined to a wheel chair and who relied on his small poodle for comfort and support acted, in bringing the dog into his unit, on the statement of a developer's agent that small dogs were permitted in the condominium whereas, in fact, pets were prohibited by the Declaration. An Application to remove the dog was allowed although no complaint about its behaviour had been made. Herold, D.C.J. first considered the Ontario Human Rights Code and found that subsection 46(2) (now 47(2)) of the Code does not apply to cause the Code to prevail over the Declaration because subsection 46(2) of the Code provides only that the Code prevails over an Act or a Regulation and a declaration is not such an enactment. Further, although Mr. Gifford suffered from a handicap, as it is defined in the Code, he was not being discriminated against pursuant to section 10 of the Code in that no person (handicapped or otherwise) was allowed to have a pet on the property. He added at p. 222:

"Even if this were not so I would have found that the exception contained in section 10 (1)(a) of the Code which excepts those requirements, qualifications or factors which are reasonable and bona fide in circumstances would apply ..."

He then turned to the Declaration and found that the no pets clause was reasonable in that it was agreed to by the majority of the occupants. Also, the covenant did not seem unfair to him in that it was not simple a blanket arbitrary no pets clause but rather permitted a guide dog, one cat, fish and certain caged birds and animals. He concluded that his discretion should be exercised in favour of enforcing the Declaration. Referring to the misleading information provided by the agent of the developer, he followed the Court of Appeal decision in Rochon, above, in stating that there is no place for a private arrangement between a developer and an individual owner that is not disclosed in the Declaration.

¶ 55 In York Region Condominium Corp. No. 585 v. Gilbert [1990] O.J. No. 130, dated January 23, 1990, Gilbert, D.C.J., followed the reasoning in Gifford in enforcing a no pets provision in a condominium declaration and ordering the eviction of a Collie dog about which there had been several complaints. The unit owners had been made aware of the provision before purchasing the unit and taking possession of it. Gilbert, D.C.J., quoted the judgment of Allen, J., in York Condominium Corporation No. 216 v. Borsodi et al. at p. 107, wherein Allen, J., quoted Judge Moore of the District Court of Appeal of Florida in Hidden Harbour Estates, Inc. v. Basso (1981), 393 (2d) 637 at pp. 639 and 640 as follows:

""There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

- (1) In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.""

Gilbert, D.C.J., commented that "the rationale of that judgment is of assistance and applicable to the present case". He concluded by stating:

"It seems to me that a prohibitive pet restriction could be contained in the Declaration or the bylaws or the rules of a condominium corporation provided that the prohibitive pet restrictions is brought to the attention of a purchaser of a condominium unit prior to the closing of the sale and purchase of the unit. ...

As long as a restriction in a Declaration bylaw or rule of a condominium corporation is intra vires and is reasonable and consistent with the condominium Act, it should be enforceable."

¶ 56 Similarly, in Peel Condominium Corp. No. 338 v. Young [1996] O.J. No. 1201, Webber, J., followed the reasoning in Gifford and Gilbert and allowed an Application to evict a dog which exceeded the 25 pound restriction on pets contained in the Declaration. In so doing, he said that he agreed with counsel that it is an implied term of a Declaration that a pet restriction should be reasonable. However,

the weight restriction was "more reasonable than a blanket denial of pets". While the dog was much needed, it was not as necessary to the respondents as the dog referred to in Gifford or in the 1993 decision of Hogg, J., in Ferris, reviewed below, in which an Order was made to permit a hearing assist dog to remain in a condominium.

¶ 57 The last case cited by the Applicants was Peel Condominium Corp. No. 449 v. Hogg (1997), 8 R.P.R. (3d) 145, another case in which the original declarant of a condominium corporation did not enforce the pet prohibition provisions in the Declaration while it controlled the corporation from 1993 to 1995. As a result, numerous unit owners acquired pets. When the first unit owner Board of Directors was elected in 1995, it turned its attention to the perceived pet problem and all owners, except the Respondent, agreed to remove their pets. Carnwath, J., held, following Rochon and Gifford, that the equitable doctrines of laches and acquiescence do not apply to validate a private agreement made between the declarant and some unit owners in the light of the immediate action taken by the first unit owners' Board of Directors. Consequently, he exercised his discretion in favour of enforcing the Declaration.

¶ 58 In support of their position, the Respondents referred to two cases wherein Applications to evict pets were dismissed.

¶ 59 In York Condominium Corporation No. 375 v. Dodd, dated April 13, 1987, Trotter, D.C.J., refused to enforce a no pets provision in a Declaration where the Respondents had owned the dog for eight years, it was not a nuisance and it was required for the health of Mrs. Dodd. The evidence of her poor health and the need for her dog was supported by a letter from her doctor. Trotter, D.C.J., stated:

"I put this case on a parallel and on the same basis that I would with someone that required a seeing eye dog."

He added that "... only because the reasons are extraordinary" was he dismissing the Application. He indicated that he did not intend the decision to be an excuse for other people to disobey the Declaration. In his judgment, he referred only to the facts and did not review the law.

¶ 60 In Waterloo North Condominium Corp. No. 198 v. Donner, (1997), 36 O.R. (3d) 243, 15 R.P.R. (3d) 134, Salhany, J., dismissed an Application to evict a "hearing ear" dog from a condominium unit in spite of a no pets provision in the condominium Declaration. In that case, the Respondent purchased a unit in 1988 and agreed to abide by the Declaration and Rules. After renting the unit to tenants for several years, in 1977, she moved into the unit with her mother who was totally deaf and relied on her dog to assist her in hearing heat and smoke alarms, the telephone and the entrance intercom. Salhany, J., dismissed the Application on the grounds that the Declaration contravened the Human Rights Code. He stated:

"In this case, s. 29(1) of the Condominium Act has no application to these proceedings. Section 29(1) deals with rules governing the use of common elements and the units. Section 29(2) requires that such rules "be reasonable and consistent with" the Act, the declaration and the by-laws. We are dealing here with a declaration. The question of the "reasonableness" of the declaration is not an issue that may be attacked. Even assuming that it is an issue, I am not convinced that a "no pet" restriction is unreasonable. Surely those purchasers of a unit who understood that they were buying into a "no pet" building are entitled to have that understanding protected. If the respondent is to succeed in this application, then it must, in my view, be on the basis that the declaration violates the Ontario Human Rights Code.

With respect, I cannot agree with Herold J. that the Code does not apply to a declaration made under the Condominium Act. As McIntyre J. noted in *Ontario Human Rights Commission v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at p. 214, 3 C.H.R.R. 781 at p. 785, "[t]he Ontario Human Rights Code has been enacted by the legislature of the Province of Ontario for the benefit of the community at large and of its individual members". The parties are not entitled to contract out of its provisions. To allow the parties to do so would be contrary to public policy. Surely, a declaration prohibiting accommodation based on race, such as a "no blacks or a "no whites" clause, would offend and not be tolerated by right-thinking members of the Canadian community. It would conflict with the Code, notwithstanding that the unit buyers contracted to live in an "all white" or an "all black" building. I cannot see why handicapped people are entitled to any less protection under the Code. In my view, the Human Rights Code precludes enforcement of the declaration if it would result in the discrimination of Ms. Donner's mother because of her specific handicap.

Ms. Rose argued that the declaration does not prohibit Ms. Donner's mother from living in the condominium, only her dog. The difficulty which I find with that argument is that enforcement of the declaration would effectively prohibit her from living in the building. The evidence is that she is 85 years of age and has been deaf for many years. She is fully dependent on her dog to enable her to function on her own. For example, the dog assists her in hearing the heat alarms, smoke alarms, the telephone, and the intercom if someone is at the door. In other words, it is the dog who hears for her and alerts [her] so that she can function without the assistance of another human being.

In my view, it is not incumbent on Ms. Donner to establish that there are no other ways for her mother to function independently of her without a dog, such as with the hiring of a housekeeper. There is no obligation upon her to exhaust every other means of assistance before she is entitled to the protection of the Ontario Human Rights Code."

In so deciding, Salhany, J., was relying on subsection 2(1) of the Code which provides:

"2.(1) Every person has a right to equal treatment with respect to occupancy of accommodations, without discrimination because of ... handicap ...".

Because section 10 of the Code defines handicap to include "deafness or hearing impediment", to enforce the Declaration would, in fact, result in discrimination against Mrs. Donner's mother.

¶ 61 In addition to the cases cited by the parties, there are two other cases to which I wish to make reference.

¶ 62 In *Nippissing Condominium Corp. No. 24 v. Ferris* [1993] O.J. No. 1504, Hogg, J., after a careful analysis of *Gifford*, dismissed an Application to evict a well behaved Maltese dog belonging to an eighty year old woman who was in bad health and suffered from hearing problems. Although the dog was not trained under the Hearing Ear Dog program, it, in fact, served as a hearing assist dog and, hence, was a therapy utility animal and not merely a companion animal providing emotional support as was the situation in the *Gifford* case.

¶ 63 In *York Condominium Corp. No. 382 v. Dvorchik et al* (1992), 24 R.P.R. (2d) 19, a condominium Rule provided that pets must not exceed 25 pounds at maturity. The two unit purchasers who owned dogs which exceeded this weight were both aware of the rule when they brought the dogs into the building and were not, in any way, misled or misinformed about the Rule. Keenan, J., dismissed the two Applications to evict the dogs stating that the evidence proffered in support of the rule

failed to meet the test in subsection 29(1) of the Condominium Act that the "safety security or welfare of the owners" was more threatened by large dogs than by small dogs. He considered it to be "unreasonable to condemn a dog who is not guilty of misconduct, simply because of its size." Also, in his view, there was no evidence that large dogs unreasonably interfere with the use and enjoyment of the common elements and of other units any more than small dogs. He concluded that the rule was unreasonable and not valid. This was the decision that led Mr. Mascarin, in the case comment referred to above, to conclude that the condominium law had been substantially influenced by the recent developments in the law of landlord and tenant.

¶ 64 On the appeal in Dvorchik, [1997] O.J. No. 378, the Court of Appeal reversed the decision of Keenan, J., stating in its endorsement as follows:

"In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

With respect, we do not agree that the rule restricting the size of pets is either unreasonable or inconsistent with the Condominium Act. This is a condominium with several hundred units and over a thousand residents. On its face, it is both reasonable and consistent with the legislation that there be a limit on the size - or for that matter the number - of pets to prevent the possibility of "unreasonable interference with the use and enjoyment of the common elements and of the other units." There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the "25 pound rule" is not the best rule or the least arbitrary. But this does not make it an unreasonable one."

(4) Conclusions Respecting the Reasonableness of Pet Provisions

¶ 65 My consideration of the question of reasonableness in the context of the developing statute and case law in the landlord and tenant and condominium fields, and in the context of societal views, generally, as to the value of domestic animals, has led me to the conclusion that, as modern society has developed and evolved into the electronic age, the law and societal attitudes have also evolved to give rise to new concepts as to what are reasonable rules for community living and to a greater appreciation as to how pets can appropriately fit into a closely knit community.

¶ 66 When condominiums first became popular about thirty years ago, developers and unit owners were less experienced in crafting declarations, by-laws and rules than they are today. As building standards were less stringent and many buildings may have had less sound proofing and less control of air circulation, than they do today, it made sense to write fairly stringent declarations, by-laws and rules to promote the safety, security and welfare of the owners and of the property and for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements. Given the, then, legally approved practice in rental accommodation agreements of trying to avoid problems of nuisance and allergies by prohibiting pets, it is not surprising that condominium corporations followed established precedents and banned pets. Similarly, they banned businesses in most residential condominiums. Here, again, the object probably was to protect the peace and enjoyment of the residential community by excluding an activity that could create a nuisance. Businesses might create noise or odours and bring strangers, namely, employees and customers, onto the property together with motor vehicles that could plug parking lots.

¶ 67 What made sense thirty years ago is not necessarily reasonable today. In the electronic age, a business is often conducted by computer with none of the nuisance and traffic problems of the past. Yet, condominium corporations have been slow to recognize this evolution and permit residents to engage in private non-intrusive businesses. Similarly, in the field of tenancy accommodation, the law has been revised to recognize better building construction and ventilation and provide a more sophisticated and reasonable approach to animal control, that of regulation to prevent genuine problems rather than total prohibition. In the 1990s, two governments of Ontario have amended the landlord and tenant legislation to shift the balance of rights respecting pet ownership from emphasis on the preferences and concerns of landlords to greater tolerance of animals based on standards that allow the ouster of pets only where there is genuine substantial interference with the reasonable enjoyment of the premises by other people. No such amendments have been made to the Condominium Act and here, once more, many condominium corporations have been slow to change with the changing times and the needs of a modern society.

¶ 68 While condominium residency is based on ownership rather than tenancy, in either case the building or related group of buildings may consist of a few units or be a large residential complex. In both kinds of land holding, people frequently live together in fairly close quarters. Given the similarities in living arrangements between rental and condominium units, a question arises as to why prohibitive rules that are unreasonable in respect of tenancy accommodation should be reasonable in respect of condominium accommodation.

¶ 69 On the one hand it can be argued, as John Mascarin did at p. 28 of the case comment cited above:

"The community of interest shared by all members of a condominium corporation should be enough to permit one member to enforce (through the condominium corporation) a rule against another member without the requirement that extraneous, statutorily mandated safeguards be fulfilled."

On the other hand, it can be said that this point of view is simply an extension of the continuing, and possibly outdated, belief that majority preference should prevail even where there is no genuine substantial interference by one unit owner in the reasonable enjoyment of premises by another unit owner. Is that attitude reasonable today?

¶ 70 Proponents of the position that group preference is a reasonable basis for pet prohibition rules would probably submit that people should be entitled to buy into what they expect to be a pet free environment and that, if purchasers know the rules when they choose to buy a condominium unit, it is reasonable to expect them to obey those rules. There is some merit in that argument. However, life, particularly in present day society, is not always that simple. In the Donner case, cited above, Mrs. Donner purchased a unit knowing the rules. After renting the unit to tenants for several years, she moved into her unit bringing with her her elderly mother and a dog which acted as a hearing assist dog for her mother. Should she have been denied occupancy of her unit because of a change in circumstances? Salhany, J., in effect, answered that question in the negative on the basis of the Human Rights Code. However, there may be many other changes in the circumstances of unit owners in which it might be reasonable for them to keep a pet but in which it is questionable whether the Human Rights Code would apply. For example, as a person becomes older, he or she may lose a spouse and, for the first time in his or her life, begin to live alone. Should that person be forced to give up his or her condominium home if he or she tries to avoid depression and loneliness by acquiring a small four legged companion? Similarly, a unit owner may have an accident or illness and become housebound or wheelchair bound and, at that time, begin to feel a need for the comfort that can be provided by a small and faithful companion. (I think of Mr. Gifford and his small poodle in the Gifford case and of Sally

Barton, the wheelchair bound unit owner in the present case, who has also been ordered to give up her cat.) It is not the young and the strong, who can easily adapt to the vicissitudes of life, or even healthy middle aged people, who may have or develop a need to enjoy the benefits of pet ownership. It is the sick, the incapacitated and the elderly who may have a pressing need for such support but be torn between retaining their condominium home and seeking the comfort and companionship of a pet. These are the same groups of people who are the most likely to wish to relinquish single family homes in favour of some group accommodation that will provide greater security and less home management. In the past, such people often moved in with their children or other family members or were sent straight to nursing homes. Now, many people wish to opt for the intermediate step of a condominium. Should such persons be forced either to remain in their single family homes or to choose rental accommodation because they are loathe to abandon a long time four footed member of their family as Dr. Wood, in his affidavit dated July 15, 1998, said he did with his five year old schnauzer on moving into the N.N.C.C. complex in 1988?

¶ 71 Another argument supporting the proposition that a pet prohibition is reasonable is the allergies argument. Again, this argument has some merit although I think it can be met by reasonable restrictions rather than by an outright prohibition. This is particularly true where the animal can be, and like the cat in the present case is, confined to the owners' quarters and where the ventilation system is a modern one that precludes the spread of antigens from one unit to another.

¶ 72 My consideration of the law and its development and of societal changes over the last few decades has led me to the conclusion that a total prohibition of animals and, in particular, of dogs and cats, is not reasonable today. That is not to say that any particular set of standards, such as those contained in the new landlord and tenant legislation, is particularly reasonable and ought to be acceptable in all circumstances in condominium declarations and rules. Different restrictions might be appropriate for different situations. For example, a limit on the size or weight or pets might be reasonable in some circumstances. What is important in order to make a rule reasonable today, in my opinion, is that the rule have some flexibility to accommodate the needs of different people, especially those of unit owners whose life circumstances change and of unit owners who own, or desire to own, pets that are unlikely to cause genuine substantial interference with the use and enjoyment of other units.

¶ 73 I find some support for my conclusions on reasonableness in the decision of the Court of Appeal in Dvorchik although the Court, in that case, upheld a restrictive condominium rule. As set out above, the Court stated in its endorsement:

"In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners."

¶ 74 The court went on to say that it did not agree that a rule restricting the size of pets is "either unreasonable or inconsistent with the Condominium Act." It concluded that, while "it may be that the "25 pound rule" is not the best rule or the least arbitrary," this does not make it an unreasonable one".

¶ 75 In the present case, the rule is a prohibition not a restriction and is very arbitrary since it denies the Respondents the right to keep a cat which cannot reasonably be said to interfere with the use or enjoyment of the common elements or the other units. With the greatest deference to the Board of Directors, I am of opinion that it is unreasonable in that it does not balance the private and communal interests of the unit owners.

¶ 76 My conclusion that the pet prohibition in this case is unreasonable is possibly not sufficient to decide the case. The Court of Appeal, in *Dvorchik*, was considering a condominium rule not a condominium declaration, which is the governing document in the present case. As has been stated above, the courts have tended to draw a distinction in the enforceability of pet prohibitions and restrictions depending on the mechanism used to create the prohibition or restriction. Rules must be reasonable. The Condominium Act does not specifically require a declaration to be reasonable although case law has imputed some requirement for reasonableness into the law. On the other hand, there is a strong presumption as to the validity of declarations and declarations with some degree of unreasonableness have been upheld by the courts on many occasions, including in some of the above cited cases. Because of the presumption of the validity of declarations and the weight of the case law upholding pet prohibitions in declarations, I hesitate to exercise my judicial discretion to dismiss the Application solely on the basis of the unreasonableness of the provisions. I shall, therefore, consider the other defences raised by the Respondents in order to determine whether there are further reasons to lead me to exercise that discretion in favour of the Respondents in the circumstances of this case.

2. Laches and Acquiescence

¶ 77 I now wish to turn to the second ground for dismissal raised by the Respondents, namely delay or laches and acquiescence. In all of the above cited cases in which there was a delay in attempting to enforce a condominium Declaration to oust a pet living in a condominium building contrary to the Declaration, namely, *Harthen*, *Gifford and Hogg*, or to otherwise enforce a Declaration, as in *Rochon* (the satellite dish case), the facts involved an agreement or implied consent between a developer and unit purchaser that was not, at the time of the agreement or subsequent to it, included in the Declaration of the condominium corporation. In each case, a subsequent Application by the unit owners' Board of Directors was allowed on the grounds that there is no place for a private arrangement between a developer and an individual owner that is not disclosed in the Declaration. In *Hogg*, *Carnwath, J.*, stated that the equitable doctrines of laches and acquiescences did not apply to validate a private agreement made between a developer and some unit owners in the light of the immediate action taken by the first unit owners' Board of Directors in that case. In some instances, the courts found pet prohibition rules to be reasonable. In some other cases, as in *Harthen*, a judge, in that case, *Misener, J.*, expressed the view that, even though the change from the proposed to the actual Declaration might be unfair or unjust, the Board of Directors had a duty to effect compliance. In each case, the court exercised its discretion by enforcing the Declaration.

¶ 78 In some of the cases in which delay or an agreement, implied or otherwise, with a developer was not a factor, as in *Gilbert*, a part of the rationale for granting an Application to oust a pet was the fact that the pet owner had been made aware of the no pets provision before purchasing the unit and taking possession of it but, nevertheless, had moved in with a pet. In those cases, there was no evidence of acquiescence by the condominium Board of Directors.

¶ 79 The question, here, is what is the law where any delay in enforcement of the Declaration or acquiescence in the presence of pets, or both, emanates not from a developer but from the unit owners Board of Directors. The only two condominium cases that I have been able to locate on the subject of delay or laches and acquiescences do not relate to pets. Nevertheless, they may cast some light on the subject.

¶ 80 In *Marafioti v. Metropolitan Toronto Condominium Corp. No. 775 (1994)*, 39 R.P.R. (2d) 47, *Greer, J.*, upheld a condominium Declaration by refusing to grant an injunction to prohibit a condominium corporation from removing, or in anyway dealing with, a deck built by unit owners on their town house in contravention of the condominium Declaration, and by ordering the unit owners to remove the deck. This case did involve a preregistration agreement between the declarant and the unit

owner and, in considering that aspect of the case, Greer, J., followed the reasoning in Rochon and Gifford, cited above. She then went on to ask whether, given the seemingly six year delay in the bringing of the Application by the owners' Board of Directors, the corporation is now estopped from enforcing its rights. She stated:

"The estoppel argument, as set out in the Canadian Encyclopedia Digest, Volume 10, Title 56, Section 51, Pg. 64 reads:

"Whenever an argument against relief that otherwise would be just is founded upon mere delay (that delay not amounting to a bar by the Statute of Limitations), the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

The effect of delay or laches is set out in *Farrell v. Manchester* (1908), 40 S.C.R. 339 (S.C.C.). There is no doubt that at first blush, the six year delay seems like an inordinate length of time to wait to bring the matter to Court. On the other hand, in my review of the facts and as I have set them out in these Reasons, it is clear that the protests began immediately upon the construction beginning."

She then reviewed the evidence respecting the actions taken by the parties during the six year period and concluded that the delay was "perfectly explainable".

¶ 81 Greer, J., next questioned whether the Marafiotis had a defence based on the doctrine of laches. She stated:

"Would it be injustice to allow MTCC 775 the relief it is now requesting? Mere passage of time does not constitute laches. The equitable defence of laches is in the discretion of the Court. See: *Canada Trust Co. v. Lloyd*, [1968] 66 D.L.R. (2d) 722, and *Egnatios v. Leon Estate* [1990] D.L.R. (4th) 137. In *Egnatios*, supra, Sutherland, J. at p. 160 quotes *Waters on the Law of Trusts in Canada*, 2nd ed. (Carswell, 1984) at para. 1024 in speaking of the doctrine of laches:

"It is also closely related to the doctrine of acquiescence. Indeed, it is more likely that what the courts are really concerned with is implied acquiescence rather (than) delay itself. This is particularly true today when limitation statutes expressly apply to so many actions brought in equity."

There is nothing in the evidence presented to me which would lead me to believe that there was acquiescence on the part of the Board."

After reviewing further facts relating to negotiations between the parties over the six year interval, she concluded that, at no time, was the issue of the deck a dead issue and that, therefore, neither acquiescence nor the doctrine of laches applied to the facts of the case.

¶ 82 The Ontario Court of Appeal [1997] O.J. No. 1899 dismissed an appeal by the Marafiotis holding that the Appellants had breached a condominium Rule and that the judge below was justified in exercising her discretion to grant the Respondents the relief requested. The Court of Appeal agreed with her that the Respondent did not acquiesce in the presence of the deck.

¶ 83 In the second case to which I wish to make reference on the subject of laches and acquiescence, York Condominium Corporation No 35 v. Mosseau et al (1995), 48 R.P.R. (2d) 248, three different pairs of Respondents made alterations to windows in their condominium townhouses without the prior consent of the condominium corporation. The condominium Declaration required consent to any alterations not in conformity with the registered drawings. The Respondents, inter alia, argued laches and implied acquiescence in the changes. One respondent, who made the changes at a later date than another respondent, submitted that, if she had known she should not make a change, she would not have put herself in the position she did. Breckinridge, J., referred to the Marafioti case and the decision of Greer, J., that, although six years seemed like a long time to wait, in the case before her there was no acquiescence by the Board of Directors. He found that, in all of the cases before him, there was objective, solid evidence that the condominium corporation had acquiesced in the changes that had been made to the windows over a period of several years. In dismissing the three Applications, he stated at pp. 253-4:

"... it does not in my view lie within the authority of the Condominium Corporation to sleep on its rights so that people acquire or feel they have acquired a proprietary right to the amenities which they are enjoying."

¶ 84 In the present case, although Dr. Wood indicated in his affidavit of July 15, 1998, that, on moving into the complex in 1988, he and his wife gave up their five year old Schnauzer dog and that some other unidentified unit owners also gave up their pets when they moved into the complex, there is substantial evidence that there have been cats in the building over the years. This is clear from the affidavits of Mr. and Mrs. Chassie, Sam Cino, John MacPherson and Sally Barton. The presence of cats is also evident from the minutes of the Board of Directors of the N.N.C.C. The minutes for the meeting of September 20, 1995, specify that, after a Mr. Smith commented that there were several cats in the building and asked if it should be allowed to continue, Peter Greco replied that "either this issue [cats] should be ignored or a complete crackdown on animals in the building be done". Also, the minutes for the meeting of November 25, 1996 indicate that it was suggested that letters be sent to all pet owners mentioning the Rule and informing them that, "when existing pets cease to reside in the building, no new pets will be allowed in the building." Further, at that meeting, "Mr. Greco explained that, because the Rule has not been enforced up to this point, a precedent has been set and thus it may not stand up in a court of law." There is no evidence that any action respecting pets was taken after either of those meetings or, indeed, at any time before Mr. and Mrs. Chassie moved into the building. Further, I accept the evidence of the Chassies that they saw cats in the windows of the complex on their various visits to it and, indeed, saw a cat in one of the unit they visited. I also accept their evidence that they were not aware of the no pets provisions before they signed their offer to purchase and that, when they were informed of the no pets provision a few days before they took possession of their unit, they, nevertheless, had reason to believe that the provision was not being enforced and that there would be no problem. Finally, I believe Mrs. Chassie's statement that they would not have purchased a unit in the complex had they thought that there would be a problem about the cat.

¶ 85 Given the facts I have just mentioned, I find that there have been cats in the building to the knowledge of the Board of Directors for a number of years, that they have delayed in enforcing the no pet provisions of the Declaration and Rules and, in so doing, have implicitly acquiesced in the presence of cats in the building. While there was not a long delay in the attempted enforcement of the Declaration in respect of the Chassies after they moved into the complex, the prior long delay and obvious acquiescence as to the presence of cats in the building led the Chassies, as in the case of the unit owner, Mrs. Mosseau, in the Mosseau case, to put themselves in a position they would not otherwise have put themselves in, namely, buy the unit. I agree with the conclusion of Breckinridge, J., in Mosseau that a condominium corporation cannot sleep on its rights and then enforce them against people who have relied on the non-enforcement to put themselves in a position of disadvantage they

would not have put themselves in had the provisions been enforced uniformly and in a timely manner. Unlike, in the Marafioti case, there is no evidence of any actions taken by the N.N.C.C. prior to the autumn of 1997 that would justify and explain the delay in enforcement and lead the court to find that the equities favour the Applicant.

3. Human Rights Considerations

¶ 86 The third and last ground for dismissal raised by the Respondents is the question of the application to this case of the Ontario Human Rights Code. They submitted that to require them to give up their cat would be cruel and inhumane because Mrs. Chassie suffers from mental and physical health problems and the removal of her cat would be deleterious to her health, particularly in respect of her problems with depression and high blood pressure. Her submissions are supported by her medical doctors.

¶ 87 In the above cited cases in which the application of the Human Rights Code was raised, the courts have applied the Code to a somewhat limited extent. In Gifford, in 1989, Herold, D.C.J., found that, although Mr. Gifford suffered from a handicap as it is defined in the Code, in that he was confined to a wheelchair, he was not being discriminated against in that no persons, handicapped or otherwise, were allowed to have a pet on the property. Further, even if this were not so, the exception in clause 10(1)(a) (now 11(1)(a)) of the Code in respect of reasonable requirements would apply to preclude Mr. Gifford from keeping his dog. In Dodd, in 1987, Trotter, D.C.J., without referring to the Code or prior cases, dismissed an Application to evict a dog that was required for the health of Mrs. Dodd who was, according to her doctor, in poor health. He said that he put the case on the same basis as he would with someone who required a seeing eye dog. Similarly, in Ferris, in 1993, Hogg, J., after a careful analysis of Gifford, dismissed an Application to evict a dog belonging to an elderly woman who was in bad health and suffered from hearing problems. He did so on the basis that the dog served as a hearing assist dog and, hence, was a therapy utility animal not merely a companion animal providing emotional support as was the dog in the Gifford case.

¶ 88 In 1997, in Donner, Salhany, J., went one step further to specifically disagree with the decision of Herold, J., in Gifford. In Donner, the dog in question also served as a hearing assist dog for an elderly woman. Salhany, J., dismissed an Application to evict the dog on the ground that the Human Rights Code precludes enforcement of the Declaration if it would result in discrimination in respect of a person because of a specific handicap. In response to the argument that the Declaration did not prohibit Mrs. Donner's mother, only her dog, from living in the building, he said that enforcement would effectively prohibit her from living in the building because she is deaf and fully dependant on the dog to assist her in hearing alarms, the telephone, etc.

¶ 89 Of the cases, to which I have just referred, only in Dodd was a pet permitted on the general ground of the poor health of its owner without the additional factor of the animal providing assistance in respect of a physical disability such as deafness. Further, there has been some suggestion in various cases that a companion animal which provides emotional support is not a therapy utility animal and hence cannot entitle its owner to protection under the Code.

¶ 90 The Human Rights Code provides:

"2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of ... handicap ..."

Subsection 10(1) defines "because of handicap" as meaning:

"for the reason that the person has or has had, or is believed to have or have had,

(d) a mental disorder".

¶ 91 If Mrs. Chassie suffers from any handicap within the meaning of the Code, it is that of a mental disorder. The question is whether her depression can be considered to be a mental disorder within the meaning of the Code. The Code does not define mental disorder and no evidence was introduced as to the meaning of the expression. It is relatively easier to determine whether a person suffers a physical handicap as handicap is defined, in part, as meaning "any degree of physical disability, infirmity, malformation or disfigurement" and includes such disabilities as blindness and deafness. A handicap usually involves some inability to do some important things that most people can normally do. It has also been said to be a substantial ongoing limit on one's activities. A mental disorder, on the other hand, may not be as visible as a physical handicap and does not necessarily limit activities in the same way. The Shorter Oxford English Dictionary defines disorder using such expressions as "disturbance of mind" and "an ailment, disease. (Usually weaker than disease and not implying structural change)". The Tormont Webster's dictionary includes in its definition of disorder "imperfect functioning of the body or mind".

¶ 92 Can it reasonably be said that Mrs. Chassie's depression brings her condition within the meaning of "mental disorder"? Her depression is not a temporary condition. Her history of depression dates back to approximately 1977. She was on sick leave for six months in 1991 suffering from myalgic encephalitis complicated by depression which was described by her former doctor, Dr. Richards, as being a "long debilitating episode". She also suffered severe episodes of depression in the spring of 1996 and from January to April, 1997. Speaking of the current situation, her present doctor, Dr. Henry, stated that to force her to abandon her cat would cause her "severe emotional and physical detriment". He also said that "the emotional well being she gets from her cat are (sic) an important component of her treatment." and that the "emotional trauma caused by the legal proceedings surrounding her cat have precipitated a worsening of her depression." Her former doctor, Dr. Richards, agreed that removing the cat could "precipitate a relapse of her depression." On the basis of at Mrs. Chassie's history of depression, her present condition and the prognoses of her doctors, I find that Mrs. Chassie suffers from an ailment that can be described as a disturbance or imperfect functioning of the mind. It is a serious and long term condition and it is, therefore, a mental disorder within the meaning of the Human Rights Code.

¶ 93 The last question to be answered is whether the Applicant, by bringing this Application, is discriminating against Mrs. Chassie with respect to the occupancy of accommodation within the meaning of the Code. I adopt the reasoning of Salhany, J., in Donner that, while the provision in the condominium Declaration prohibiting pets does not specifically discriminate against her, the enforcement of the Declaration would, in effect, do so. The enforcement would have an "adverse effect" on her within the broad concept of adverse effects discrimination. It would effectively prohibit her from living in the building because her cat is essential to her well being and "an important part of her treatment". Further, the argument that the cat is merely a companion comfort animal providing emotional support, and not a therapy utility animal like a seeing eye dog, does not stand. Her handicap is mental not physical. In the broad sense, as set out above under the heading The Therapeutic Value of Pets, there is a growing awareness of the extent which animals improve the mental and physical well being of people. It has been said that therapy dogs have been shown to lower blood pressure, another medical problem of Mrs. Chassie, and help people relax. In the specific circumstances of this case, a part of Mrs. Chassie's treatment for her mental disorder, depression, is the emotional support provided by her cat. I would, therefore, say that the cat is a therapy utility animal and that its ouster would constitute discrimination against Mrs. Chassie because of her handicap.

CONCLUSIONS

¶ 94 I agree with counsel for the Applicant that the residence of the Chassie's cat in the N.N.C.C. complex is contrary to the condominium Declaration and Rules, that there is a strong presumption as to the validity of the Declaration and that the Board of Directors has a statutory obligation to enforce the Declaration and Rules. However, for the reasons set out above, I am of opinion that the pet prohibition is not a reasonable one. On the other hand, while the provision in the Declaration may not be reasonable, it is not necessarily invalid given the strong presumption in favour of the validity of Declarations. Nevertheless, I think it would not be fair to enforce it given that it is not reasonable and given the circumstances of the present case. The Chassies were put in a position of disadvantage in purchasing the unit that they would not have placed themselves in had they known, before they purchased their unit, of the cat prohibition and that an attempt to enforce it might be made. Their lack of comprehension of the situation is the fault of the Board of Directors. The Board has acquiesced in the presence of cats in the building over a number of years and has not provided any explanation to justify the delay in enforcement and lead the court to find that the equities favour the Applicant. Finally, I have found that Mrs. Chassie suffers from a handicap within the meaning of the Human Rights Code and that to enforce the Declaration would constitute discrimination against her because of her handicap. On the totality of all three grounds of defence, I find that this is a proper case in which to exercise my judicial discretion in favour of the Respondents and to dismiss the Application.

¶ 95 Since the Respondents were self represented, and given the nature of the case and my decision, I do not think that this is a proper case for an award of costs.

¶ 96 Application dismissed.

MacDONALD J.

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