Section 98 of the *Condominium Act* is Making Waves

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The Ontario Superior Court recently addressed what constitutes an addition, alteration or improvement pursuant to section 98 of the *Condominium Act*, 1998 (the "Act") in the decision of Justice J.R. Henderson in *Wentworth Condominium Corp. No. 198 v. McMahon*. The Judgement, which considered whether the installation of a hot tub on an exclusive use common element was captured by section 98, has been making waves in condominium communities throughout Ontario. A decision is currently pending from the Court of Appeal that will have far-reaching effects.

In this case, the applicant condominium corporation sought an Order compelling the respondent owner to remove a hot tub, privacy fence, water fountain and metal trellis from the backyard exclusive use common element area behind his unit. The privacy fence, water fountain and metal trellis were addressed in the corporation's rules, but the unit owner claimed that the corporation was selectively enforcing those rules. The owner further maintained that the hot tub was not an alteration, addition or improvement and, therefore, did not require an agreement pursuant to section 98 of the Act. While the Court's finding that there was no selective enforcement of the rules was unremarkable, its decision regarding the removal of the hot tub, and its interpretation with respect to the application of section 98, has left some condominium boards and managers feeling like they are in hot water.

Section 98 of the Act sets out that an owner may make an addition, alteration or improvement to the common elements that is not contrary to the Act or the corporation's declaration if, among other things, the board has approved it, and the owner and the corporation have entered into an agreement that addresses cost allocation and sets out the respective duties and responsibilities (including the responsibilities for the cost of repair after damage, maintenance and insurance). Of course, such an agreement isn't required where the change isn't an addition, alteration or improvement.

In its decision, the Court found that, despite the fact that the hot tub in question was 6 feet by 7 feet by 4 feet high, weighed 1000kg when full, and was connected to the unit for purpose of supplying electricity, it was not an addition, alteration or improvement. So what constitutes an addition, alteration or improvement? The Court found as follows:

- an addition was something that was joined or connected to the structure, but that a connection to a power supply did not qualify;
- an alteration was something that changes the structure, and was permanent;
- an improvement was something that increases the value of the property.

Ultimately, the fact that the hot tub was not affixed and could be removed (albeit requiring two men and a half hour to do so) meant that it was not permanent, and did not increase the value of the unit. The court drew an analogy to barbecues that were connected to other units in condo by gas lines and were permitted to remain.

Time will tell if the Court of Appeal will agree with the application Judge's narrow interpretation of Section 98, or give condominium corporations a more workable solution.