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Other areas of practice include estate administration and disputes, property law disputes and employment law issues.

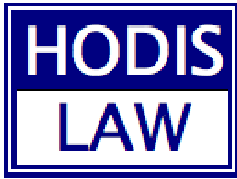
Single Family Occupancy Provisions NCC #4 v. Kilfoyl – Where are we now?

It has now been several years since the Ontario Court of Appeal in *Nipissing Condominium Corporation No. 4 v. Kilfoyl* (*Kilfoyl* case) upheld the Superior Court judgment which declared that an occupancy provision in the condominium's declaration that restricts the use of the units to a one family residence does not violate s. 2(1) of the Human Rights Code. The court also upheld the definition of "family" as found in the condominium's declaration and the condominium's interpretation of that definition. Family was defined as "a social unit consisting of parent(s) and their children whether natural or adopted and includes other relatives if living with the primary group." The condominium interpreted the definition to include anyone that is related. In this case, the owner was renting his units to multiple students who were not living together because of some familial connection.

The condominium commenced a s. 134 compliance application against the owners and the occupants. The Superior Court of Justice granted the s. 134 order and declared that the owner was in breach of his obligations under s. 119 of the Condominium Act and that the occupants were in breach of the occupancy provision in the declaration. Following the Superior Court decision, the *Kilfoyl* case was named one of the top 10 cases of 2009 by Ontario Condo Law Blog.

The proceedings in the *Kilfoyl* case did not end at the Court of Appeal. The owner also commenced a Human Rights Tribunal application asking the Tribunal to strike the provision of the declaration that stipulated that units could only be occupied as a one family residence on the basis that it contravened the *Human Rights Code*. The Tribunal dismissed the owner's application on the basis that the Superior Court and Court of Appeal had already dealt with the issue of whether this provision of the condominium's declaration violated the *Human Rights Code* and found that it did not. As such, the owner lost his case that he should be able to rent to multiple tenants (namely students) in both the court proceedings and at the Human Rights Tribunal.

As litigation counsel for the condominium in the *Kilfoyl* case at both the Superior Court and Court of Appeal as well as the Human Rights Tribunal and given the ground breaking declarations made by the Superior Court and confirmed by the Court of Appeal, I was curious to see how important cases such as *NCC #4 v. Kilfoyl* evolve over time and how the courts have treated them subsequent to their release.

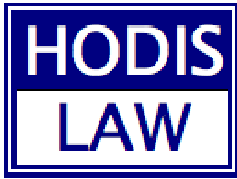


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The Superior Court in *MCC # 747 v. Korolech* dealt with a situation where a condominium was seeking an order to force the unit owner to sell her unit due to her conduct which was threatening and caused mischief to property. The Court dealt with a preliminary issue raised by the owner that the mandatory mediation provisions under s. 132 of the Condominium Act should be followed. This issue is often raised in s. 134 compliance applications as parties may disagree as to whether or not the matter can proceed directly to court or must proceed by way of mediation and arbitration. In most cases, the condominium corporation will want the matter to proceed under s. 134 by way of court application in order to take advantage of the benefits of the cost recovery provisions in s. 134(5). This issue was also a preliminary issue raised in the *Kilfoyl* case as well as in the companion case of *NCC #4 v. Simard*. In *NCC #4 v. Simard*, this issue was argued at the Court of Appeal and Court of Appeal confirmed that matter could proceed by way of court application under s. 134 as not all issues raised in the application could proceed by way of arbitration but all issues could be dealt with in the application. In the *Kilfoyl* case, the owner did not object to the condominium commencing the application instead of proceeding with mediation until after cross examinations had been conducted. The Court also faulted the owners for not bringing a motion to stay the application. In both the *Kilfoyl* case and the *Simard* case, the Superior Court and the Court of Appeal rejected the owners attempts to stay the court proceedings. Referencing the *Kilfoyl* case, the Court in *Korolech* held that the circumstances of that case were similar to the *Kilfoyl* case. The Court in *Korolech* followed the decision in *Kilfoyl* and rejected the owner's attempt to stay the application at such a late stage in the proceedings.

The Superior Court in *Chan v. TCC #1834*, dealt with an application by an owner to remove a lien placed on her unit and a counter application by the condominium corporation seeking an order that the unit owner and tenants comply with the provisions in the rules which required the unit to be occupied as a private single family residence and for no other purpose. In this case, the unit was being occupied as a rooming/boarding house and the door to each room had its own lock. The Court cited the *Kilfoyl* case as authority for the definition of "family" within the condominium context. It also accepted the finding in *Kilfoyl* that family means occupants who are related. The Superior Court decision was upheld by the Court of Appeal. For condominiums that want to restrict the use of their units to single family residents, *Chan v. TCC #1834* is a welcoming extension of the *Kilfoyl* decision. In *Kilfoyl*, the occupancy provision relating to a single family residence was contained in the condominium's declaration. In the hierarchy of a condominium's governing documents, the declaration falls underneath the Act. A declaration ranks high in the hierarchy and is difficult to change or challenge. A declaration must comply with the Act and need not be reasonable. On the other hand, the single family occupancy provision in the *Chan* case was not found in the condominium's declaration but rather in their



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rules. In the hierarchy of a condominium's governing documents, rules are at the bottom. It is much easier to challenge a rule as rules must comply with the condominium's bylaws, declaration and the *Condominium Act*. In addition, rules must be reasonable under s. 58 of the *Condominium Act*. Prior to the decision in *Chan*, it was believed by some that the enforcement of an occupancy provision in a rule may not be successful and the findings in the *Kilfoyl* case were limited to occupancy provisions in declarations. However, *Chan*, following the *Kilfoyl* case has further confirmed that occupancy provisions limiting the use of a unit to private single family residences are reasonable and are permitted not only in declarations but also in rules. For those of you that do not have a provision in your declaration similar to the one found in *NCC #4 v. Kilfoyl*, but wished they did, it now appears possible to create the single private family use restriction by way of a rule.

Allowing condominiums to create a rule instead of having to follow the onerous procedures under the *Condominium Act* to amend the declaration may make it easier for those condominiums that wish to impose private single family residence restrictions. Condominiums now have the support from the courts as is evidenced in *Kilfoyl* and *Chan* to uphold those provisions. However, condominiums must still be mindful of the provisions in the *Human Rights Code* when they create their occupancy restrictions and particularly the definition of family. Keeping the definition of family in line with the *Kilfoyl* case should provide some assurance, but no guarantees, that the Human Rights Tribunal will continue to follow the Court of Appeal decision in *Kilfoyl* should an owner wish to challenge the occupancy provision at the Human Rights Tribunal. Condominiums should contact legal counsel for advice if they are planning to implement an occupancy restriction in their governing documents.

Sonja Hodis is a lawyer in Barrie that practices condominium law in Ontario. She advises condominium boards and owners on their rights and responsibilities under the *Condominium Act*, 1998 and represents them at all levels of court, mediation/arbitration or the Human Rights Tribunal. Sonja was litigation counsel to the condominium corporation in the *Kilfoyl* and *Simard* cases. Sonja can be reached at (705) 737-4403, sonja@hodislaw.com or you can visit her website at www.hodislaw.com.

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