CONDOMINIUMS—PROHIBITIONS ON OCCUPATION BY CHILDREN.—One of the manifestations of the increasingly fragmented housing market has been the development of adults-only condominiums. In Ontario, as in other provinces with condominium legislation, units in such buildings are usually subject to restrictions prohibiting their sale to purchasers with young children. These restrictions are generally inserted in the condominium's Declaration, one of the two documents required in Ontario by the Condominium Act (the "Act")[1] to create and constitute a condominium. Such provisions in a Declaration were challenged and upheld in Ontario in the case of *York Condominium Corp. No. 216* v. *Borsodi et al.* (the "*Borsodi*" case),[2] wherein Allen Co. Ct. J. granted a mandatory injunction requiring the defendant unit owners to comply with them.

It is the argument of this comment that, with all due respect to the learned County Court Judge, such provisions are in fact *ultra vires* the condominium corporation and the Act. The Act contains no provisions specifically authorizing such restrictions on the use, occupation or sale of units, and in their absence, the restrictions are void. In addition, such restrictions are contrary to established and accepted grounds of public policy, and so should be struck down by the courts. And, whatever their legal status, they are unenforceable by injunction. Attempts in the Declaration to restrict the sale of units to childless persons may in Ontario also be in violation of the Human Rights Code, 1981 (The "Code");[3] and, to the extent that any provisions of the Act may be said to authorize such restrictions on sale, they will be invalidated by the Code. Finally, it is suggested that such restrictions may be rendered unenforceable with the coming into effect of section 15 of the Canadian Charter of Rights and Freedoms (the "Charter")[4] in April 1985.

---

[1] R.S.O. 1980, c. 84. The other document is the Description: see s. 2(2), (4).

[2] (1983), 148 D.L.R. (3d) 290, 42 O.R. (2d) 99 (Ont. Co. Ct.).

[3] S.O. 1981, c. 53.

[4] Constitution Act, 1982, Part I.

The 'Borsodi' Case

The plaintiff was a condominium corporation of a large complex comprising three towers. Of the three, one, the North tower, was designated an adult building, to be occupied only by persons fourteen years of age and older. The corporation's Declaration contained a clause setting out the nature and scope of the designation, the relevant portions of which are set out below:[5]

> 18(a) To the intent that the owners of the units . . . [in the North tower] shall be permitted to make use of such units . . . and the common elements, without unreasonable interference in their use and enjoyment thereof because of noise and disturbance caused by children, and to the intent that the said building and the said units shall be for the use of adults only, no owner or occupant of such units shall use them or permit them to be used or shall sell or permit them to be sold except for residential purposes for adults and persons 14 years of age and older, and no children under the age of 14 years shall be permitted by the owners and occupants of the said units to occupy or reside in the said units; provided however, that this paragraph shall not be construed so as to prevent reasonable visits (including overnight visits) by relatives, friends, and their children under the age of 14 years. . . .
>
> (b) In the event that any unit owner or occupant is in breach of the provisions of this paragraph, the Board of Directors shall forthwith commence legal proceedings against such person and shall apply for an order directing compliance with this section and an injunction preventing such person from continuing the offence. . . .

The North tower had been advertised as an adult building in both the promotional literature and local newspapers. The defendants, a married couple, purchased and moved into a two-bedroom unit in the North tower in July 1976. In May, 1978 a child was born to them. By the fall of 1980 the property managers of the condominium corporation had become aware not only of the defendant's child, but of children under the age of fourteen residing in thirteen of the North tower's 231 units. The property managers provided the offending unit owners until June, and then September, 1981 to make "alternate arrangements". By the time of the trial in April 1983, the defendants were the only owners who had failed to make such arrangements. (Whether the other owners had complied by moving out or, through the effluxion of time, having their children turn fourteen, was not mentioned.)

The plaintiff corporation sought a mandatory injunction requiring the defendants to comply with paragraph 18 of the Declaration. At trial, three other unit owners testified on behalf of the plaintiff to the effect that they had purchased their units as retirement residences, and had relied upon the "adults-only" designation to provide a quiet, serene atmosphere. One testified that she had noticed children playing in the halls and creating noise, though she was unable to say whether the children lived in the North tower, or in one of the other two towers (which did permit children).

---

[5] *Supra*, footnote 2, at pp. 292 (D.L.R.), 101 (O.R.).

His Honour Judge Allen granted the plaintiff a mandatory injunction requiring the defendants to comply with the Act, particularly section 31 thereof (which provides that each owner "is bound by and shall comply with . . . the declaration"[6]), and with paragraph 18 of the Declaration. In coming to his decision he rejected the submission of the defendants, who represented themselves, that the Declaration violated section 15 of the Charter. He quite rightly observed that the section was not yet in force. He went on to note that the Code, in establishing "age" as a prohibited ground of discrimination, defined it to be "an age that is eighteen years or more".[7] Accordingly, even if a violation of section 15 of the Charter were involved, it was one that could be demonstrably justified in a free and democratic society under section 1.[8]

The defendants also submitted that clause 18 of the Declaration was *ultra vires* the Act. While the Act permitted a Declaration to contain "provisions respecting the occupation and use of the units",[9] this authority did not, they argued, extend to prohibiting the occupancy of persons under the age of fourteen. His Honour Judge Allen rejected that argument as well:[10]

> With all due respect, a power to create 'provisions respecting the occupation and use of the units' surely includes a power to prohibit certain occupations or uses, including occupation and use by children under the age of 14 years.

In coming to his decision Allen Co. Ct. J. also relied on American caselaw respecting condominiums, finding it "helpful and persuasive".[11] In particular, he cited *Hidden Harbour Estates* v. *Basso et al.*,[12] apparently for the proposition that restrictions in a Declaration "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". His Honour Judge Allen described this *rationale* as "of assistance and applicable" to the case before him.[13] He also relied on *Riley et al.* v. *Stoves et al.*,[14] wherein the restrictions were to be upheld if they were "a reasonable means to accomplish the private objective".

---

[6] Condominium Act, *supra*, footnote 1, s. 31(1).

[7] Human Rights Code, *supra*, footnote 3, s. 9(a).

[8] *Supra*, footnote 2, at pp. 296 (D.L.R.), 105 (O.R.).

[9] Condominium Act, *supra*, footnote 1, s. 3(3)(b).

[10] *Supra*, footnote 2, at pp. 297 (D.L.R.), 106 (O.R.).

[11] *Ibid.*, at pp. 298 (D.L.R.), 107 (O.R.).

[12] 393 So. 2d 637, at pp. 636-640 (Fla. Dist. Ct., 1981); cited in *Borsodi*, *supra*, footnote 2, at pp. 298 (D.L.R.), 107 (O.R.).

[13] *Borsodi*, *ibid.*

[14] 526 P. 2d 747 (Ariz. C.A., 1974), cited in *Borsodi*, *ibid.*, at pp. 299 (D.L.R.), 108 (O.R.).

In granting the mandatory injunction, Allen Co. Ct. J. did not specifically elaborate on what would be required of the defendants. In summary, paragraph 18 of the Declaration provides that no unit owner shall:

(1) use it, except for residential purposes for adults and persons fourteen years of age and older;

(2) sell it, except for residential purposes for adults and persons fourteen years of age and older; or

(3) permit children under the age of fourteen years to occupy or reside in the unit.

In the circumstances of the *Borsodi* case, compliance with the Declaration would *prima facie* appear to require the defendants to give up the custody of their child to someone not residing in the unit. Since this seems rather unlikely, *effective* compliance would require the defendants to move out of the unit. But it should be noted here that this latter option is not one that could be directly ordered by a court under section 31 of the Act, since nothing in the Act authorizes the creation of a power in a condominium corporation to evict a unit owner, or of a duty in the owner to move out should compliance with a Declaration prove impossible. We will return to this point.

Validity of the Declaration

In determining the validity of the Declaration one must look to the Act and the Act alone. The Declaration is not a contract. Its existence and character are mandated and regulated by the Act.[15] Any provisions inconsistent with the Act are deemed amended accordingly.[16] It is the Act, and the Act alone, that makes the Declaration binding on the unit owners.[17] And neither the owner nor the condominium corporation can contract out of the Act.[18] As Galligan J. observed in *Re Peel Condominium Corp. No. 11 and Caroe*,[19]

> A declaration under the *Condominium Act* is a creature of that statute and is therefore prescribed by it. In my view, a declaration may only restrict rights and impose duties if the statute authorizes it to do so.

The fact that the unit owner might have had notice, either actual or constructive, of the restrictions contained in the Declaration is irrelevant.

---

[15] Condominium Act, *supra*, footnote 1, ss. 2, 3.

[16] *Ibid.*, s. 3(5).

[17] *Ibid.*, ss. 31, 49.

[18] *Ibid.*, s. 61.

[19] (1974), 48 D.L.R. (3d) 503, at p. 505, 4 O.R. (2d) 543, at p. 545 (Ont. H.C.); for similar comments, see *Re York Condominium Corp. No. 42 and Melanson* (1975), 59 D.L.R. (3d) 524, at p. 526, 9 O.R. (2d) 116, at p. 118 (Ont. C.A.), and *Re Basmadjian and York Condominium Corp. No. 52* (1981), 122 D.L.R. (3d) 117, at p. 119, 32 O.R. (2d) 523, at p. 525 (Ont. H.C.).

Notice cannot make binding in law that which is illegal or of no effect. A court will neither specifically enforce, nor grant damages for the breach of, an illegal contract, notwithstanding the fact that the parties agreed to the terms for valuable consideration.[20] *A fortiori* then, the court will not enforce a provision that is *ultra vires* the legislation which authorizes its existence (particularly where it affects property rights) simply because a party took property with notice of the provision.[21] Similarly, the issue of reasonableness is irrelevant to any determination of the validity of the Declaration. An owner is bound by the Act and the Declaration, and by the By-Laws and Rules of the condominium corporation.[22] But while both the By-Laws and the Rules are expressly made subject to a reasonableness test,[23] the only requirement imposed on the Declaration is that it be consistent with the Act.[24] Thus the wording of the Act itself strongly suggests that the Legislature intended to exclude reasonableness as a test for the validity of a Declaration.

In looking to the Act for the Declaration's authority, the Act must be strictly construed.[25] A unit is, after all, "real property for all purposes".[26] It is one of the canons of statutory construction that private rights are not to be taken away by implication. Any authority to affect adversely private rights must be direct and specific, "and if there is any ambiguity the construction which is in favour of the individual should be adopted".[27]

There are only two sections of the Act upon which the *Borsodi* restrictions could conceivably be grounded. Sub-sections (3)(b) and (3)(c) of section 3 provides as follows:

> In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,
>
> (b) provisions respecting the occupation and use of the units and common elements;
>
> (c) provisions restricting gifts, leases and sales of the units and common interests. . .

Subsection (3)(b) appears relevant to conditions (1) and (3) of the *Borsodi* Declaration,[28] while subsection (3)(c) appears relevant to condition (2).

---

[20] *Rees* v. *Marquis of Bute*, [1916] 2 Ch. 64 (Ch.D.).

[21] Thus the court in *Caroe*, *supra*, footnote 19, and the Court of Appeal in *Melanson*, *ibid.*, struck down *ultra vires* provisions in, respectively, a Declaration and a By-Law of condominium corporations without even raising the issue of notice.

[22] Condominium Act, *supra*, footnote 1, s. 31(1).

[23] *Ibid.*, s. 28(4) and s. 29(2), respectively.

[24] *Ibid.*, s. 3(5).

[25] *Re Peel Condominium Corp. No. 11 and Caroe*, *supra*, footnote 19, at pp. 505 (D.L.R.), 545 (O.R.); *Winnipeg Condominium Corp. No. 1* v. *Stechley*, [1978] 6 W.W.R. 491, at p. 495 (Man. Q.B.).

[26] Condominium Act, *supra*, footnote 1, s. 6(1).

[27] Maxwell on the Interpretation of Statutes (12th ed., 1969), pp. 251-252; and see Craies on Statute Law (7th ed., 1971), pp. 118-121.

[28] As set out, *supra*, at

We will leave the latter to one side for the moment, since our focus here will be on the question of whether the Act authorizes the restriction of the occupation and use of the unit to those above a certain age.

Turning then to section 3(3)(b) of the Act, we are left with the problem of its intended scope. Are "provisions respecting occupation and use" intended to comprehend simply restrictions providing for single-family occupancy or non-commercial use only?[29] Or is a broader scope intended, one designed to limit who and what kind of occupants are to be permitted to occupy the units? *Prima facie*, given the generality of the word "respecting" and given that the Act uses the more specific word "restricting" in section 3(3)(c), one would have thought that the latter construction was not intended.

It is submitted that it is more likely that the legislature intended by section 3(3)(b) to provide for the *regulation* of the occupation and use of units, rather than *the prohibition* of certain kinds of persons from occupying them. Since an owner's ownership and use is subject to the Declaration,[30] the Act by implication must intend to regulate the owner's occupation and use. But it is one thing to regulate an occupation or use; another to prohibit them altogether. The courts have long held that a statutory power to regulate and govern does not comprehend a power to prohibit.[31] In *Merritt* v. *City of Toronto*,[32] for example, the city of Toronto had attempted to use its power to govern and regulate auctioneers to refuse licenses to all persons with "bad characters". The Ontario Court of Appeal quashed this attempt to exclude from the regulated class such persons as being *ultra vires* the enabling legislation. Maclennan J.A. noted that:[33]

> The words "govern and regulate" are no doubt very large words, but in themselves they cannot . . . when applied to a class of persons, extend to giving power to exclude from the class to be regulated and governed. What the municipality is authorized to do is to regulate and govern a certain class of persons. To exclude a person from that class is one thing; to regulate and govern is another, and different thing".

By analogy to the *Merritt* case, one can say that the power to regulate a class of people (unit owners) in their occupation and use of units does not extend to a power to exclude from that class particular persons (parents with young children).

It might be objected that an owner's use and occupation is not being prohibited absolutely; that only one of many uses is being prohibited. The

---

[29] As was suggested in *Re Peel Condominium Corp. No. 11 and Caroe*, *supra*, footnote 19, at pp. 506 (D.L.R.), 546 (O.R.); *Re York Condominium Corp. No. 42 and Melanson*, *ibid.*, at pp. 530 (D.L.R.), 122 (O.R.).

[30] Condominium Act, *supra*, footnote 1, s. 6(2).

[31] *City of Toronto* v. *Virgo*, [1896] A.C. 88 (P.C.); *The Corporation of the City of Prince George* v. *Payne*, [1978] 1 S.C.R. 458, (1977), 75 D.L.R. (3d) 1, [1977] 4 W.W.R. 275.

[32] (1895), 22 O.A.R. 205 (Ont. C.A.).

[33] *Ibid.*, at p. 213, Hagarty C.J.O. and Burton J.A. concurring.

objection is, however, disingenuous. For the use in question is one that is coterminous with the owner's civil status: it is not something that can be "stopped". For example, a provision that prohibits the use of a unit as a bakery does not preclude an owner who happens to be a baker from using and occupying it for other purposes. But as a rule, the activity of parenting is carried on in the parents' residence. Thus to prohibit children is to require the parents to move out, giving up the occupation and use of their unit for *all* purposes.

There is another argument in favour of a construction of section 3(3)(b) of the Act that stops short of comprehending a power to prohibit a unit's occupation and use by parents with young children: such restrictions are contrary to public policy. It is well established at common law that a condition attached to the use and enjoyment of property which "operates to restrain or forbid a man from doing his duty" is bad and will be held invalid by the courts.[34] Thus conditions attached to gifts of real property to married women that made them revocable should they continue to live with their husbands are void, inasmuch as they require "a married woman to disregard her matrimonial obligations".[35] Conditions on gifts of property to children, or in contracts with parents, that interfered with the parents' duty respecting the religious instruction of their children are also void.[36] Similarly, conditions tending to produce the separation of a parent and his or her child are void.[37] Surely, then, the Declaration in the *Borsodi* case, which in express terms seeks to forbid a parent from doing his or her duty and to require, by implication, the separation of the parent and child, would be void on these grounds.

There is a third reason for construing section 3(3)(b) of the Act narrowly: it is to avoid the anomaly wherein unit owners in condominiums could be "evicted" on becoming parents, while tenants in the same circumstances could not. It is true that in Ontario a landlord may refuse to rent an apartment to a parent with a child, where the building is for adults only.[38] However, it is unlikely that a landlord could evict a childless tenant who subsequently became a parent. The Landlord and Tenant Act[39] creates a fixed number of specific grounds for eviction; having children is not one

---

[34] *Re Sandbrook*, [1912] 2 Ch. 471, at p. 477 (Ch.D.); *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181, at p. 189, 24 E.R. 347, at p. 350 (K.B.).

[35] *Re Nurse* (1921), 20 O.W.N. 428, at p. 429 (Ont. H.C.), per Middleton J.; and see *Wilkinson* v. *Wilkinson* (1871), 24 L.T. (N.S.) 314 (V.C.).

[36] *Re Borwick*, [1933] 1 Ch. 657 (Ch.D.); *Re Agar-Ellis* (1878), 10 Ch.D. 49 (C.A.).

[37] *Re Boulter*, [1922] 1 Ch. 75 (Ch.D.); *Re Piper*, [1946] 2 All E.R. 503 (Ch.D.); *Clarke* v. *Darraugh* (1884), 5 O.R. 140 (Ont. Ch.); *Re Sandbrook*, *supra*, footnote 34.

[38] This is the effect of s. 20(4) of the Human Rights Code, *supra*, footnote 3, which exempts such buildings from the right established under s. 2 to freedom from discrimination because of "family status" in the occupancy of accommodation.

[39] R.S.O. 1980, c. 232.

of them.[40] That being the case, to read section 3(3)(b) of the Act as authorizing an adult-only designation and thus the eviction of an owner who becomes a parent, creates an anomaly wherein the owner of real property may be required to move out, while a tenant may not be. Yet the relative position and rights of a unit owner *vis a vis* other unit owners is no different from that of a tenant *vis a vis* other tenants. There being no reason for treating unit owners differently from tenants in this regard, section 3(3)(b) of the Act should be construed so as not to create such an anomaly. Indeed, since there is no direct authorization in the Act whereby a duty to vacate may be imposed on a unit owner (as opposed to a duty not to use the unit in a prohibited manner), one would have expected a court not to be quick to create such a duty by indirection.

So far we have focussed our attention on section 3(3)(b) of the Act and on the restrictions in the Declaration on the occupation and use of the unit. It will be recalled, however, that the Declaration in the *Borsodi* case also contained a prohibition on the sale of the unit, except for residential purposes for adults and persons fourteen years of age and older. Section 3(3)(c) of the Act would *prima facie* appear to be authority for such a prohibition, inasmuch as it permits the inclusion of "provisions restricting gifts, leases and sales of the units". But here again, the same principles of statutory construction discussed with respect to section 3(3)(b) make it probable that by "restricting" the Legislature did not mean "prohibiting". Indeed, the courts have held that the Act does not authorize an absolute prohibition of the power to lease a unit.[41] Moreover, there is reason to believe that a broad interpretation of section 3(3)(c), such as to authorize the *Borsodi* Declaration, would bring it into conflict with the Code; and that, as a result, a narrower construction is to be preferred.

Section 3 of the Code provides that "every person having legal capacity has a right to contract on equal terms without discrimination because of . . . family status". "Family status" is defined by section 9(d) to mean "the status of being in a parent and child relationship". Section 7 provides every person with "a right . . . to refuse to infringe a right of another person under this Act [the Code], without reprisal or threat of reprisal for so doing". Finally, section 46(2) provides that where "a provision in an Act . . . purports to . . . authorize conduct that is a contravention of Part I [which sets out the rights protected under the Code] . . . [the Code] applies and prevails unless the Act . . . specifically provides that it is to apply notwithstanding . . . [the Code]".[42]

---

[40] See, *ibid.*, ss. 108, 109 and 110(3), for an enumeration of the grounds for eviction.

[41] See *Re Peel Condominium Corp. No. 11 and Caroe*, *supra*, footnote 19; *Winnipeg Condominium Corp. No. 1* v. *Stechley*, *supra*, footnote 25.

[42] It should be noted here that s. 46(2) did not come into effect until June 15, 1984: s. 46(3). But prior to that date there is nothing that says that a court has to construe another statute so as necessarily to come into conflict with the Code, particularly where, as in the case of the Act, the provision to be construed is ambiguous as to its scope.

It would appear then that if section 3(3) of the Act were construed to authorize the prohibition of a contract for the purchase and sale of a condominium unit to a parent, then a person who refused to sell a unit in such circumstances would be in contravention of the Code. It might of course be argued that there would be no intention to discriminate on the basis of family status, since one could sell it to a parent with a child so long as they (or at least the child) did not intend to occupy the unit. But the definition of "family status" in the Code emphasizes the status of being in a relationship; and it is surely an integral part of the parent/child relationship that the two live together. Since, at least in the *Borsodi* case, the Declaration required the unit to be sold only for residential purposes, the only ground for refusing to sell a unit to a person would be because that person was involved in a parent/child relationship—a prohibited ground. As well, the Declaration itself would arguably be unenforceable against an owner who wanted to sell his unit to a parent with a young child, in virtue of the protection afforded him by section 7 of the Code.[43]

It is accordingly submitted that section (3)(c) of the Act should not be construed so widely as to authorize the prohibition of sale to a parent with a young child. But if one cannot properly prohibit the sale of a unit to such a purchaser, how can one prohibit the occupation and use of that unit by him? Thus a narrow construction of section 3(3)(c) reinforces a similarly narrow one of section 3(3)(b).

Enforcement by Injunction

Even if a Declaration which prohibits occupation and use by children is *intra vires* the Act, there is a serious question as to whether or not it could be specifically enforced by injunction. Before granting an injunction, a court is required to inquire into whether damages are an adequate remedy. As Lindley L.J. once observed, "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy".[44]

It is obvious that the plaintiff condominium corporation in the *Borsodi* case would have faced a difficult problem regarding damages. It will be recalled that the plaintiff corporation could not even prove that the defendants' child (or indeed, any child living in the North tower) was causing any noise or physical damage. Even if such interference with the other owners' use and enjoyment of their property could have been proved and laid at the defendants' doorstep, how many of the tower's 231 unit owners were affected by it? Only three testified in the *Borsodi* case, and the evidence was at best sketchy. Indeed, they appeared to be concerned more with the principle of the building being for adults only, than with any

[43] This statement is, of course, premised on the considerations raised in footnote 42.

[44] *London and Blackwell Railway Company* v. *Cross* (1886), 31 Ch.D. 354, at p. 369 (C.A.).

serious interference in their own use and enjoyment caused by children under the age of fourteen. Finally, one would have thought that pecuniary damages would have more than adequately compensated any aggrieved owners for any interference they did sustain, which in all likelihood was both intermittent and minor. (Pecuniary damages would also no doubt have acted as a spur to the offending parents to keep a closer rein on their children, which surely is the real object behind the creation of adult buildings.)

Even when damages is not an adequate remedy, a court will not issue an injunction where it would impose "an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful".[45] Surely such obligations, or at least those couched in the form of the *Borsodi* Declaration, are impossible, unlawful and unenforceable. What court would require a parent to cease to permit his or her child to reside with him or her in the unit? Nor can the objection be met by saying that the parent could comply with the Declaration, and still reside with his or her child, by moving out of the unit. For the Declaration imposes no duty or obligation on an owner who becomes a parent to move out of the unit. The court's jurisdiction under the Act is only to direct performance of "a duty imposed by . . . the declaration".[46] If a court cannot order the parent to move out, since the Declaration imposes no duty to do so, its only option is to order the parent to cease permitting the child to reside with him or her: yet this it will not do.

The Charter

Given that the Declaration, although created by private interests, is a creature of a public statute, adult-only restrictions may, even if otherwise valid, run afoul of section 15 of the Charter when it comes into effect in April, 1985.[47] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

---

[45] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese*, [1953] 1 Ch. 149, at p. 181, [1953] 1 All E.R. 179, at p. 198 (C.A.), per Sir R. Evershed M.R.

[46] Condominium Act, *supra*, footnote 1, s. 49(1), (2). It is true that s. 49(2) provides that the Court in making such an order "may include in the order any provisions that the court considers appropriate in the circumstances". It is submitted, however, that such provisions could not amount to a new and distinct duty, but would rather relate to how and when the existing duty should be performed.

[47] A number of courts have accepted the argument that where private rights which are described in the Charter are determined and circumscribed by a public act, then the Charter may be invoked: *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.); *Black et al.* v. *Law Society of Alberta* (1983), 144 D.L.R. (3d) 439, [1983] 3 W.W.R. 7 (Alta. Q.B.).

"Age" is thus a prohibited ground of discrimination under the Charter, equal in status to such traditionally prohibited grounds as "race" or "colour". *Prima facie*, a child of a unit owner whose unit is subject to an adults-only restriction would have grounds for a complaint that his or her rights under the Charter had been violated. However, such rights would be subject to section 1, which provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There are two observations to be made. First, the *prima facie* violation of the child's section 15 rights would place the burden of proving that the restriction was demonstrably justified on the condominium corporation.[48] Second, to meet this burden it might not be sufficient to point to the Code, where "age" is defined to mean eighteen years or more;[49] or to the expectations of the other unit owners in the building, as was done, for example, in the *Borsodi* case.[50] This second observation requires some elaboration.

With respect to the Code's definition of age, it should be noted that the Code itself, as provincial legislation, is subject to the Charter.[51] The fact then that the Code exempts from its ambit age discrimination below a certain age may itself have to be demonstrably justified as a reasonable limit on section 15 rights. Even if it can be justified, the considerations that would justify such an exemption within the complex and broad structure established by the Code would not necessarily apply to the question of whether or not an adults-only designation under an act regulating a particular form of private property is justified under section 1 of the Charter.

With regard to the expectations of the other unit owners, one surely cannot justify a particular form of discrimination on the grounds that certain people believe in it and wish to use it as an organizing principle for their activities. If it is to be justified, it must rather be on some wider grounds established by a balancing of social needs. United States courts, in dealing with challenges to age restrictions in condominiums based on the Fourteenth Amendment,[52] have developed a reasonableness test that looks

---

[48] *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (Ont. Div. Ct.); (1984), 5 D.L.R. (4th) 766 (Ont. C.A.), leave to appeal to Supreme Court of Canada (1984), 5 D.L.R. (4th) 766n.

[49] Human Rights Code, *supra*, footnote 3, s. 9(a).

[50] *Supra*, footnote 2, at pp. 296-297 (D.L.R.), 105-106 (O.R.).

[51] *Supra*, footnote 4, ss. 32(1), 52(1).

[52] In the United States, age restrictions in condominium declarations are challenged on constitutional grounds on the basis that court enforcement of such restrictions would amount to "state action" within the meaning of the 14th Amendment; and United States courts will neither specifically enforce, nor grant damages for the breach of, a private covenant that, while legal in and of itself, offends the spirit of the Constitution; *Shelley* v. *Kraemer* 334 U.S. 1 (1948); *Barrows et al.* v. *Jackson* 346 U.S. 249 (1953).

not to the other unit owners alone, but also considers social needs as well. In *White Egret Condominium Inc.* v. *Franklin*[53] the Supreme Court of Florida stated:

> In our view, age restrictions are a reasonable means to identify and categorize the varying desires of our population . . . We do recognize, however, that these age restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing. Whenever an age restriction is attacked on due process or equal protection grounds, we find that the test is:
>
> (1) whether the restriction under the particular circumstances of the case is reasonable, and
>
> (2) whether it is discriminatory, arbitrary, or oppressive in its application.

In determining whether or not the restriction met the first condition, the court looked to whether or not the units had been specifically designed to meet the needs of particular categories of occupants. The test was met where the units for young adults were generally one-bedroom, with extensive recreational facilities; for families were generally two- to four-bedroom, with recreational facilities designed for children; and for senior citizens were one- or two-bedroom with no recreational facilities but with extra wide doorways and halls (to accommodate wheelchairs).[54] In *Riley* v. *Stoves*,[55] the court also upheld such restrictions, where there was no evidence of a shortage of housing in the area, or of a desperate need for family housing.

It is submitted that if the physical structure of the units in question is such that families could be accommodated, and if there are child-oriented facilities in the building *or in the immediate neighbourhood*, then some form of the *Riley* v. *Stoves* test would have to be met by the condominium corporation. This requirement would be necessary to prevent condominium developers from bootstrapping themselves into a "reasonable limit" by refusing to build recreational facilities suitable for children in buildings whose units were otherwise suitable for families.

Policy

It may be that the argument advanced in this comment will be accused of missing the substance in the form of the argument. After all, do not retired couples have a right to quiet, serene surroundings? And would not high-rise buildings, were they full of children, be subject to all the hectic noise that the owners had hoped to avoid in the first place by moving into an adults-only building? These may be valid concerns, but they must be balanced against the interests of an owner who has become a parent (and undoubtedly, of society as well) in being able to raise his or her child in his or her place of residence. It is submitted, however, that as the Act now

---

[53] 379 So. 2d 346, at p. 351 (Fla. S.C., 1979).

[54] *Ibid.*

[55] *Supra*, footnote 14, at p. 752.

stands the balancing of these interests can have no proper part to play in its interpretation. It is important to remember that in the *Borsodi* case the policy objection may be coloured by the fact that the case involved high-rise buildings. Yet the Act itself is indifferent to the kind or mix of buildings that are brought within its regime. Units could take the form of townhouses, duplexes, or triplexes, or low- or high-rise buildings, or any mix of these. They could be cramped or spacious; situated in a farmer's field on the outskirts of a city, or in the heart of an already dense and well-developed urban neighbourhood. All of these factors would surely have a part to play in an evaluation of the merits of an "adults-only" designation. One supposes that in some case, such a designation would be reasonable; in others, not. But, as has already been discussed above, there is no reasonableness test imposed by the Act on a Declaration. Thus to read the Act as authorizing an adults-only designation because, on the facts of the particular case, it might seem reasonable, opens the door to its authorizing such designations where it would clearly be unreasonable.

The answer to the policy objection then has to be that if condominium developers are to be permitted to create adult buildings, it must be within the context of the needs of the surrounding community. There should be some negotiation or consultation with officials representing that community, to ensure a proper mix of housing types, and to ensure that no unreasonable burden is placed on the community through the creation of adult buildings. No statutory mechanism to secure such consultation now exists in the Act, but in its absence the courts are not the proper forum for such discussions.

GUS RICHARDSON*