

## **Fine & Deo**

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### **What's the Difference Between a Gazebo and a Hot Tub?**

**The Case:** *Metropolitan Toronto Condominium Corporation No. 985 v. VanDuzer*, 2010 ONSC 900.

**The Decision:** A gazebo on an exclusive use common element terrace is an “addition” to the common elements, pursuant to s. 98 of the *Condominium Act, 1998*. The court ordered the unit owner to remove the gazebo, and to pay costs in favour of the condominium corporation on a full indemnity basis. The case for the condominium corporation was argued by Jon Fine of the law firm of Fine & Deo.

**The Reason:** The unit owner had defended the application on the basis that the gazebo was a freestanding structure, and was not attached to the common elements. The *McMahon* “hot tub” case, which says that an “addition” is defined as something that is joined or connected to the common elements, appeared to support this position. However, the gazebo’s manufacturer’s instructions called for it to be attached to the surface of the terrace. The mere fact that the unit owner failed to follow these instructions did not change the nature of the structure. In this case, the gazebo should have been affixed, thus it was an “addition” under the *Act*. S. 98 of the *Act* restricts unit owners from making such changes to the condominium corporation’s common elements. Thus, the court ordered the unit owner to remove the offending gazebo.

**Note:** This case also touched on the issue of mandatory mediation and arbitration between unit owners and condominium corporations. Since the gazebo was prohibited by the condominium corporation's declaration, the unit owner argued that the proper venue was mediation and arbitration pursuant to s. 132(4) of the *Act*. Nevertheless, the fact that the condominium corporation framed its application under the *Act* in addition to its rights under the declaration was sufficient to grant the court jurisdiction over the matter.

**Advice to Boards of Directors:** Unauthorized changes to the common elements are a clear breach of the *Act*, and can cause real problems in terms of liability to the condominium corporation. As a practical matter, unauthorized changes to the common elements deprive the board of its ability to maintain aesthetic control of the condominium community. It is the responsibility of the board to enforce compliance with the *Act* in 100% of the cases where an unauthorized change has occurred. Where a section 98 agreement is required, our position is that the unit owner should be responsible for the cost of compliance and the condominium corporation should be reimbursed for all of its costs, including legal costs.