CONDOMINIUM CORPORATIONS MUST BE FAIR TO ALL OWNERS

By Rod Escayola, head of Gowlings' Condominium Law Group

We often think that democracy is the ultimate decision-making process in a condominium corporation. After all, owners elect directors to manage the corporation for them. Democracy would therefore require that owners accept decisions of the majority. Well it isn't so simple.

The first challenge to the general tenet of democracy is that various decisions require different levels of support from owners. Quorum for an AGM is fixed at 25% (unless a bylaw provides differently). A majority of the owners present at an AGM (12% of all owners) can therefore decide on many issues. Fifteen percent of owners are sufficient to call a special owners meeting. Fifty percent are required to adopt a bylaw. Sixty-six and 2/3 percent are required to approve a substantial change to common elements. Finally, an amendment to the declaration requires the support of 80% (or 90% in certain cases).

In a recent Ottawa case, however, a condominium corporation was forced by the courts to change its declaration despite the fact that 80% of the owners were in favor of the existing declaration. The problem in that case is that the declaration was unfair and oppressive to an owner who sought the protection of the courts.

The factual Background

This is the case of condominium owners who purchased a unit, a storage locker and a parking space from the developer. At the time of purchase, however, there were no available indoor parking space and no adequate storage locker in the building where their unit was located. The developer sold them instead a parking space and locker in the sister condominium corporation (OCSCC 706), which was being built beside the first one. As is often the case, these two condominium corporations were concurrently developed, built and registered as two separate corporations. At the time of purchase, there were no restrictions preventing non-residents from owning and using a parking and locker at OCSCC 706.

Some five years later, following some security breaches and acts of vandalism near the garage, the OCSCC 706 and its owners decided to amend their declaration to specifically prevent the use and ownership of parking and lockers by non-residents. In essence, these amendments prevented these neighbouring owners from using or owning their own parking and locker since they did not reside in OCSCC 706. This amendment also had the effect of preventing them from being able to eventually sell their unit *with* parking and storage. Their only option was going to be to try to sell their parking and storage to OCSCC 706's residents or to the corporation and to sell their unit without parking and storage.

These owners (the "Applicants") were the only non-residents owners and therefore the only ones affected by this amendment to the declaration. Despite their plea (including a personal address at an owners meeting of OCSCC 706), the amendment to the declaration was approved by at least 80% of the owners, as required by the *Condominium Act*, and the declaration was therefore amended.

The Applicants entered into discussions with the corporation to have the declaration amended a second time to allow for a specific exemption regarding their parking and locker. Eventually the Applicants and the corporation agreed on the wording of the amendment but the corporation was unable to obtain the support of 80% of the owners – despite a second plea from the Applicants at a further owners meeting. As such, the corporation was unable to further amend the declaration and the Applicants were left in the same predicament.

Despite the prohibition against non-residents owning and using parking and lockers, the corporation did not enforce it against the Applicants and even offered to grandfather their continued use of the parking and locker but only for as long as they owned their residential unit in the neighbouring complex. They would still be prevented from selling them together with their unit to non-residents.

The Applicants brought a court application

When the Applicants decided to sell their unit, they found themselves unable to sell it with parking and locker due to the amended declaration. They brought an application[1] under section 135 of the *Condominium Act*, claiming that the amendment to the declaration was oppressive and that it was unfairly prejudicial to them. They sought an order directing the corporation to amend its declaration to exempt them and any subsequent owners of their unit from the prohibition against ownership and occupation of their parking and locker by non-residents.

When the matter first came before the court, the presiding Judge directed the Applicants to attempt to sell their unit to ascertain the relative value of the unit. The Applicants put their unit on the market for nearly two years with two separate listings: one *with* their parking, and one *without* parking. There was virtually no interest in the unit marketed without parking. Conversely, there was significant interest in the unit with parking but all offers were conditional on the Applicants obtaining a further amendment to the declaration to allow non-residents to own and use the parking.

When the matter returned to court in 2014, the Applicants argued that their inability to sell their unit without parking and storage demonstrated that the declaration, as it stood, was oppressive or unfairly prejudicial to their interests as owners. They asked the Judge to amend the declaration under section 135 of the Act.

Section 135 of the Act grants judges the authority to make "*any order*" when faced with conduct which "is or threatens to be oppressive or unfairly prejudicial to the applicant or [when it] unfairly disregards the interests of the applicant". Basically, in the presence of oppression, the *Condominium Act* grants a judge very wide remedial powers to rectify the situation. The question in this case was whether this section also granted the courts with the authority to amend the declaration.

The Decision

The Court did not agree with the Corporation and agreed with the owners that the declaration was unfair to them. It concluded that the Applicants' unit was virtually unsellable without parking. The Applicants had purchased their unit in good faith with the expectation that they

[1] The Applicants were represented by Gowlings' lawyer, D. Lynne Watt.

would be able to sell it *with* parking and locker and the evidence confirmed that they would not have purchased their unit otherwise.

The court concluded that this restriction on use and ownership had the effect of undermining the reasonable expectations of the Applicants and of unfairly disregarding their interests. As such, it was oppressive. The court reiterated that a conduct is oppressive if it is "burdensome, harsh and wrong" or if it "visibly departs from the standard of fair dealing" or if it is an "abuse of power". The purpose of this section is to protect the parties' reasonable expectations and to protect them from unfair treatment.

The court ordered the corporation to amend its declaration as requested by the Applicants, based in part on the fact that the amendments requested by the Applicants would not detrimentally affect the interests of any other unit owner in OCSCC 706.

Lessons Learned

This case confirms that courts have, as part of their remedial powers under section 135 of the Act, the authority to amend a condominium's declaration even when it contains no error or inconsistencies. Indeed, under section 109 of the Act, the court's jurisdiction to amend a declaration is reserved to cases where it is necessary or desirable to correct an error or an inconsistency in the declaration.

This case also confirms that, before a corporation is able to amend its declaration, it not only requires the support of 80% of the owners (90% is certain cases) but it must also ensure that individual owners are not oppressed or unfairly affected by the proposed changes. This is not to say that a single owner can oppose an amendment without valid reasons. Oppression still has to meet the test of whether the Corporation's actions <u>unfairly</u> disregard the interests of a minority of unit owner(s).

What really concerned Justice Warkentin in this case was that the Applicants' property interests (for which they had paid a lot of money) were being fundamentally affected despite the fact that there was an easy solution to this problem that did not harm other owners.