

SUPREME COURT OF YUKON

Citation: *Whitehorse Condominium Corp. No. 95 v.
37724 Yukon Inc.*, 2014 YKSC 2

Date: 20140113
S.C. No. 13-A0042
Registry: Whitehorse

Between:

WHITEHORSE CONDOMINIUM CORPORATION NO. 95

Petitioner

And

37724 YUKON INC.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

James Tucker and Kelly McGill
Daniel Bennett and Meagan Lang

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Whitehorse Condominium Corporation No. 95 (the “Condo Corp.”) under s. 23 of the *Condominium Act*, R.S.Y. 2002, c. 36 (the “Act”) for an amendment to the declaration and plan registered in 2005 (the “2005 declaration and plan”) to add Units 55 to 88 and Bare Land Unit A. It also seeks to add Unit 61 (the “Clubhouse”) without any voting right or obligation to pay common expenses. Units 55 – 88 are already constructed.

[2] This application is required as a consequence of a judgment cited as *Whitehorse Condominium Corp. No. 95 v. 37724 Yukon Inc.*, 2013 YKSC 4, (the “injunction

decision”) in which the purported amendments to the 2005 declaration and plan were declared invalid as they did not have the consent of the existing owners and encumbrancers as required.

[3] The application by the Condo Corp. is not opposed by 37724 Yukon Inc. (the “Condo Developer”) insofar as it adds Units 55 – 88 and the Clubhouse to the declaration and plan.

[4] The dispute focusses on Bare Land Unit A, which is a large piece of land on which the Condo Developer wishes to construct 18 stacked apartment-style condominiums (the “18 stacked units”) and five single family homes. In the injunction case heard in December 2012, the Court granted a permanent injunction against the Condo Developer, ceasing its construction of a partially constructed 24-unit apartment building. The Court also prohibited the Condo Developer from using Bare Land Unit A for any building or construction without the consent of all the unit owners and persons having registered encumbrances as required by ss. 5 and 6 of the *Act*.

BACKGROUND

[5] It is necessary to review the injunction decision to place the present application in context.

[6] The Condo Developer was incorporated in 2004 to pursue a condominium housing project known as Falcon Ridge. The 2005 declaration and plan created 54 bare land units and made no reference to Bare Land Unit A. The 2005 declaration and plan was drafted and executed by the Condo Developer. Brian Little was the President and a Director of the Condo Corp. Duncan Lillico was a director.

[7] The Court ruled that the amendments to the 2005 declaration and plan filed by the Condo Developer in 2007, 2010 and 2012 were invalid as the necessary consents

of the owners and encumbrancers had not been obtained. In effect, Units 55 – 88 and Bare Land Unit A were not validly created as part of the 2005 declaration and plan for Falcon Ridge.

[8] In the invalid 2012 amendment, Units 1 – 60 and units 63 – 68 were given a 0.74% interest in the common elements and expenses. Bare Land Unit A was allocated a 35.76% interest. The Clubhouse was given a 0.60% interest.

[9] At the time of the injunction application, the Condo Developer was in the process of constructing a 24-unit apartment building on Bare Land Unit A and planned to construct two additional buildings of 16 apartment units each, none of which were contained in the 2005 declaration and plan. There was a newspaper report indicating the apartments would be rental units: See para. 25 of the injunction decision.

[10] In the injunction decision, the Court dismissed the Condo Developer's applications to terminate the government of the Condo Corp. and amend the 2005 declaration and plan. The injunction decision stated the following:

[84] I conclude in assessing all of the above factors that it is the Condo Developer who has created the confusion and uncertainty in proceeding to construct an apartment building that is clearly not permissible pursuant to the Condo Corp.'s Declaration and Plan. Rather than bringing an application to amend in early 2012, the Condo Developer engaged in subterfuge and bullying tactics to achieve the desired amendment in a manner that contravenes the consent provision of the *Act*. In trying to fulfill its duty to enforce compliance with the original Declaration and Plan, the Condo Corp. has legitimately and reasonably sought the direction of the court to resolve the matter.

[85] It is not just and equitable that the Condo Developer proceed to construct an apartment building in a manner that contravenes the *Act*. The Condo Developer registered a Declaration and Plan in 2005. The Declaration contemplates each unit being occupied as a single-family residence. The Plan contains no indication of apartment buildings. The

Condo Developer now asks the court, at this late date, to amend the 2005 Declaration to permit its commercial interests to prevail over the unit owners who purchased their units in the legitimate expectation that the Falcon Ridge project would consist of separate single-family residences.

...

[88] The application to amend the Declaration and Plan is similarly flawed. The Condo Developer does not purport to amend the Declaration and Plan to clarify an issue of interpretation. Rather, it seeks to change the entire concept of the Falcon Ridge Project to accommodate his own commercial interests.

[89] In circumstances where the Condo Developer has attempted to circumvent the intent and scheme of the Act, it would be unjust and inequitable to grant such a sweeping amendment without the consent of the owners of the remaining units and I dismiss this application to amend.

[11] To be fair, the Condo Developer had some equities in its favour. As was also detailed in the injunction decision, the Condo Developer had an intention to develop apartments on the Falcon Ridge property, it discussed the location of the apartment buildings with the Condo Corp. Board and it obtained the necessary municipal permits. The failure of the Condo Developer was in not obtaining the required consents of other unit owners.

[12] In the case at bar, the Condo Developer submitted that, but for incorrect legal advice it received when planning its phased development, the 2005 declaration and plan would have properly accommodated the planned development.

[13] The Condo Developer also stated that its prime tool in marketing the development was a document called the 2005 Site Plan, which was shown to all prospective purchasers and identified multi-family units in the northwest corner as traditional apartment-style condominiums. I note that not all owners would agree that

they were shown the 2005 Site Plan. However, as I read the 2005 Site Plan, it makes no reference to stacked units in apartment-style buildings but rather displays 12 four-plex multi-family units. These are referred to as "apartment-style condominiums" in material filed by the real estate agent but I am able to observe only 12 four-plex units and no 24- or 18-unit apartment-style stacked-unit buildings.

THE AMENDMENT APPLICATIONS

[14] The Condo Corp. proposes that the proportion of each owner's common interest and contribution to the common expenses be allocated as follows:

(a) Units 1 – 54	0.760%
(b) Units 55, 57 & 59	1.020%
(c) Units 56, 58 & 60	1.030%
(d) Units 63 – 88	0.810%
(e) Bare Land Unit A	31.750%
Total Percentage Allocated	100.000%

[15] As stated above, the Condo Corp.'s proposed amendment does not include any development on Bare Land Unit A.

[16] The Condo Corp. also seeks an order that the amendments be without prejudice to any claim or cause of action that an owner or encumbrancer may have against any party as a result of the earlier invalid amendments. The Condo Corp. includes this latter order as the 2005 declaration and plan referred to the undeveloped portion of the plan as "common property", and it has since been constructed on and will be formally divided into units to reflect this development.

[17] In contrast, while the Condo Developer does not take any particular issue with the amendments insofar as they recognize the existing development, its modified

proposal would permit the development of Bare Land Unit A into 18 stacked units and five single family homes. The Condo Developer proposes its amendments take place in two stages. The first would permit the construction of the 18 stacked units and additional single family dwellings. The second amendment would be made after construction to assign each of the new units a proportionate share of the common property and to reflect the new construction in a plan.

[18] While the parties to these applications have provided the evidence in the form of affidavits, some of the individual unit owners also made submissions in court.

[19] Neither the Condo Corp., nor the Condo Developer has obtained the approval of all the owners and encumbrancers. The Condo Corp. Board and a majority of owners oppose the Condo Developer's proposed 18 stacked units. While the numbers do not easily reconcile, it appears that the Condo Corp. has obtained the approval of 54 of the 87 unit owners. The Condo Developer has obtained the consent of 44 unit owners, although I note that 10 of those units are owned by the Condo Developer and another four units are owned by a principal of the Condo Developer. However, if the seven units that consented to the Condo Developer's plans for development at the time of purchase are added, the Condo Developer has 51 approvals for the 18 stacked units and five single family homes.

[20] The Condo Corp. Board conducted an extensive consultation process with the unit owners. It instructed legal counsel to prepare documents outlining the proposed amendments and mailed information packages to all unit holders at their mailing addresses. A similar information package was mailed to encumbrance holders.

[21] The Condo Corp. Board held a special general meeting of unit owners and encumbrance holders on May 15, 2013, to discuss and answer questions about the proposed amendments to the 2005 declaration and plan.

[22] The President of the Condo Corp. asked unit owners to provide feedback about the amendments proposed by the Condo Developer. She summarized the feedback as follows:

5. Some of the concerns of individual owners which have been expressed to the Board of Directors of CC95 are as follows:

- a. Disruption and disturbance caused by people who would rent the units in the building to be constructed ...
- b. That 37724 has not completed the grading and landscaping on the units it has already constructed ...
- c. Certain owners simply stated that they opposed the construction of an apartment building in CC95. ...
- d. Concerns were voiced with respect to the notion of living in a high density environment ...
- e. Concerns were raised regarding the unsafe conditions of the common property in the newer part of CC95 ...
- f. Concerns have also been raised regarding the quality of work performed by 37724 to date, suggesting a concern with work they might perform in the future. ...

...

[23] The President expressed the concerns of the Condo Corp. Board as follows:

6. The Board of Directors for CC95 has the following concerns with the amendments to the Plan and Declaration of CC95 which have been proposed by 37724, which the

Board of Directors view as being the concerns of the owners of CC95 as a group:

- a. The Board does not want the units in the apartment building to be rental units, as there is a concern that the small, contained neighbourhood would be negatively impacted.
- b. The Board feels that it is improper for completion of the common property in CC95 to be "held as a hostage" by 37724 as it attempts to negotiate an amendment of the Declaration and Plan to permit construction of the apartment building.
- c. The Board is concerned with how the condominium fees will be managed and the imposition of the costs of maintaining a building on owners who will gather no benefit from the building.
- d. The Board is concerned that the amendment to the Plan proposed by 37724 is not in accordance with the requirements of the Condominium Act in that it does not show the units which will be built. 37724 is seeking Court approval of an amendment which does not clearly specify what is being changed.
- e. The Board is also concerned with the fact that the amendments to the Declaration which are being proposed, being the amendments attached to 37724's Notice of Application, do not clearly indicate all of the changes proposed by 37724. While they appear to be proposing changes to the Declaration after it is amended by the Amendment as proposed by CC95, the 37724 proposed amendment document does not clearly indicate by strike out or redline all of the changes that 37724 would make. The Board is concerned that this document may have confused or misled owners when they considered whether they would consent or not.

[24] The President further stated:

I attended at the Annual General Meeting for CC95 on June 26, 2013 at which Brian Little said that he understood that

people's concerns were overwhelmingly with the unfinished work on the common property of CC95, including paving the roads, sidewalks and landscaping. He went further to say that, because of the litigation, none of that is possible. He also indicated that the units in the apartment building will be sold. ...

[25] One unit owner, Fabian Barajas, asserts that the Condo Developer has intentionally made the process confusing and has consistently deceived and manipulated his wife and him and other owners in the condominium community. Since he put down his deposit in April 2012, he states that the Condo Developer has presented a single plan of the property which has never indicated apartment buildings or stacked housing. Mr. Barajas states that the realtor representing the Condo Developer confirmed that the future phase would be single family homes or four-plexes.

[26] Mr. Barajas concludes:

g. I believe that an apartment building in Falcon Ridge will significantly decrease the value of our home because of the increased traffic, lack of adequate parking, loss of aesthetic qualities in the complex, loss of community feel of the complex, and most especially the fact that the apartment building is located directly beside our home.

[27] He chose Unit 88 because it was far from the entrance, had excellent views, a relatively exclusive backyard and faced south. The partially constructed apartment building places his unit in shadow during the evening. He states that he would not have purchased his unit had he known that an apartment building was going to be constructed.

[28] Rick Karp purchased a unit in November 2005. He was shown a plan that indicated the Condo Developer planned to build two multi-family stacked units. He also believes that the modified proposal of one apartment building and five single-family units will pave the way for completion of the landscaping, the paving of the road, the

construction of the retaining wall and other projects, all of which are in the best interests of the owners.

[29] For the purpose of this application, it is not necessary to make findings of fact about the aesthetic complaints or perceptions of the unit owners except to say that they are reasonable held opinions, whether consenting to or opposing the Condo Developer's proposal for Bare Land Unit A.

[30] However, I do find the following facts:

1. The 2005 declaration and plan did not contain any reference to Bare Land Unit A, the parcel of land now proposed for an apartment building of 18 stacked units and five single family homes;
2. The 2005 declaration and plan did not indicate any planned multi-family apartment buildings of any size or number of units;
3. The Condo Developer did have plans to construct multi-family apartment buildings and it discussed this with the Condo Corp. Board but not the individual unit owners;
4. The Condo Developer did not seek the consent of the unit owners and encumbrancers with respect to the 18 stacked units and five single family units until responding to this amendment application of the Condo Corp.;
5. The 2005 Site Plan, which is not a formal document under the *Act*, was used by the Condo Developer as a marketing tool. It did not contain any reference to multi-family apartment buildings but did show 12 four-plex units;
6. There has been no impediment to the Condo Developer completing its landscaping and paving obligations for existing unit owners;

7. Bare Land Unit A is partially constructed and the Condo Developer states that it has expended over \$1,000,000 on the structure and it would cost a substantial amount to demolish it.

ANALYSIS

[31] Section 23(1) of the *Act* permits any interested party to apply for an amendment to the declaration and plan, so long as the corporation, any owner, or encumbrancer "considers it advisable". In determining whether to grant an amendment, s. 23(2) of the *Act* says that the court shall consider: (a) the scheme and intent of the *Act*; (b) the rights and interests of the owners, individually and as a whole; (c) which course of action would be most just and equitable; and (d) the probability of confusion and uncertainty if an order is not made.

The Scheme and Intent of the *Act*

[32] I have discussed the scheme and intent of the *Act* in the injunction decision at paras. 22 – 36.

[33] The application of the *Act* is triggered by the registration of a declaration and plan under the *Land Titles Act*, R.S.Y. 2002, c. 130. This authorizes the registrar to issue a certificate of title in the name of the condominium corporation and separate certificates of title in the names of the owners of each unit described in the plan.

[34] Section 5 of the *Act* sets out the specific requirements that must be included in the declaration. For example, the declaration must set out the percentage of the common expenses to be paid by each unit. It must contain provisions respecting the occupation and use of the units and common elements. Section 5(3) states that all matters contained in a declaration may only be amended with the written consent of all owners.

[35] Section 6 sets out what the plan “shall contain”, which includes the structural plans of the building, the boundaries of each unit by reference to the buildings and diagrams showing the shape and dimensions of each unit and its approximate location in relation to the other units and buildings. Like the declaration, the plan may only be amended with the written consent of all owners and encumbrancers.

[36] Sections 5 and 6 together clearly give unit owners and encumbrancers some comfort that the details set out in their condominium’s declaration and plan will not be changed without the consent of all owners. An owner can therefore review the declaration and plan to determine the size and type of structures in the condominium project before purchasing a unit and be confident that these specifications will not be easily changed. The requirement for unanimous consent is, however, subject to an overriding discretion of the court to determine what is just and equitable pursuant to an application made under s. 23 of the *Act* if the owners and encumbrancers do not agree with each other.

[37] Section 13 sets out the rights and duties of owners, encumbrancers and the corporation *vis-a-vis* one another as follows:

13(1) Each owner is bound by, shall comply with and has a right to the compliance by the owners with this Act, the declaration and the bylaws, and the corporation has a duty to effect that compliance.

2) The corporation and each person having an encumbrance against a unit and common interest has a right to the compliance by the owners with this Act, the declaration and the bylaws.

(3) Each member of the corporation and each person having an encumbrance against a unit and a common interest has the right to performance of any duty of the corporation specified by this Act, the declaration or the bylaws.

[38] Section 24 sets out the ability of owners, encumbrancers and the Condo Corp. to seek a court order when there is a failure to perform such a duty:

24(1) If a duty imposed by this Act, the declaration or the bylaws is not performed, the corporation, any owner or any person having an encumbrance against a unit and common interest may apply to the court for an order directing the performance of the duty.

...

[39] The scheme of the *Act* gives unit owners clear rights and obligations that can be enforced. Both an individual owner and the Condo Corp. have the right to enforce the obligations of other owners or encumbrancers. However, it is mandatory for the Condo Corp. to enforce compliance of unit owners but discretionary for an owner or encumbrancer to apply for compliance.

[40] In the context of this case, the Condo Corp. must ensure compliance with the *Act*, declaration and bylaws. On the other hand, the Condo Developer has no specific statutory obligations or empowerment *qua* developer.

[41] The scheme and intent of the *Act* is such that amendments to the declaration and plan require the consent of all owners so that a single owner, who purchased a unit, gets the benefit of what he or she bargained for. That said, s. 23 of the *Act* allows for court-ordered amendments where there is no unanimity of the unit owners and encumbrancers.

[42] Under the *Act*, the unit owner has significant power to protect the condominium concept he or she bought into, however it is subject to the overriding discretion of the court to permit change where there is no unanimity about what that change should be.

The Rights and Interests of the Owners

[43] Cromwell J.A., as he then was, expressed the essence of the condominium concept and the rights of owners this way in *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, at para. 3:

The term "condominium" refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), Estates 195, Vol. 31, p. 260. (my emphasis)

[44] It is fair to say that the views of all owners should be considered whether they oppose or consent to the Condo Developer's proposal for the development of Bare Land Unit A. However, the Condo Corp. has a duty under s. 13(1) of the Act to effect compliance by owners and to that extent, its views may be granted some deference that may not be granted to individual owners.

[45] Consideration must be given to the rights and interests of both individual owners and the owners collectively or as a whole. Mr. Barajas, as an individual owner, would clearly be detrimentally affected by the continued construction of the 18 stacked units whereas Mr. Karp supports the modified proposal of the Condo Developer so long as the landscaping and paving is completed.

[46] The questions of whether and how Bare Land Unit A is developed are the subject of considerable disagreement. The fact that the Condo Corp.'s proposed amendments appear to leave the Bare Land Unit A partially constructed, and under a permanent injunction preventing further construction, despite the obvious aesthetic implications, is an indication of how vehement the opposition is to the Condo Developer's plan. On a collective basis, a slim majority of the owners favours the Condo Corp.'s opposition to the Condo Developer's plans.

The Most Just and Equitable Course of Action

[47] In most court cases, a condominium corporation is pitted against an individual owner and, where the condominium board of directors has been acting reasonably, the rights of the individual owner will give way to the interest of the other owners as expressed by the condominium corporation. See *Gentis v. Strata Plan VR 368*, 2003 BCSC 120, at para. 41.

[48] The case at bar is more complex in that it must resolve what is just and equitable as between all the condo owners, some of whom are on completely opposite sides of the dispute. At the outset, I should indicate that I do not consider the prospect of leaving Bare Land Unit A in a state of partial construction to be just and equitable for either side, as it puts the dispute off without resolution for another day in court. Rather, the question is whether the Condo Developer's proposal of 18 stacked units and five single units is just and equitable or whether some other alternative is more reasonable. I note that both parties agree that the Court is not limited to either accepting or rejecting a specific amendment but can exercise its discretion to consider other alternatives.

[49] The phrase “just and equitable” connotes the balancing of equitable interests with justice and the “reasonable expectations” of the parties is also encompassed in the concept. See *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at paras. 58 – 62.

[50] This phrase appears in statutes in varied contexts, including corporate law and estates law. However, in my view, regardless of the context, the use of the term “just and equitable” signals a legislative intent to confer a broad discretion upon the court to resolve the relevant dispute. It permits consideration of not just the legal rights of affected individuals but also the broader spectrum of equitable rights. The application of the concept is elastic but not unbounded. It is capable of adapting to the facts of a given situation and contemporary standards and views, but it must be exercised judicially and on a principled basis (see e.g. *Vivian v. Firth*, 2012 BCSC 517, at paras. 64 – 67; *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, para. 15).

[51] I am of the view that both the Condo Developer and Condo Corp. anticipated that there would be development of some sort on Bare Land Unit A despite its undeveloped state in the 2005 declaration and plan. There is no evidence that unit owners expected it to be open space or remain undeveloped. The unit owners must have reasonably expected some new units consistent with the concept of Falcon Ridge. However, it was not in the reasonable contemplation of the unit owners that there would be large apartment buildings with stacked condominium apartment units. In my view, any development of Bare Land Unit A, to be just and equitable, must address the views of the unit owners expressed and endorsed by the Condo Corp. The present proposal of the Condo Developer for 18 stacked units in one building would change the character of Falcon Ridge significantly from its present composition of single family units.

[52] It is also legitimate for the unit owners to take issue with the Condo Developer proceeding with its modified development proposal for Bare Land Unit A when it has not provided all the basic common benefits of landscaping and paving and suggesting that those benefits are being stalled by this court action. In my view, the uncertainty about the development of Bare Land Unit A poses no impediment to the Condo Developer completing the common element improvements.

[53] The Condo Corp. amendment preserves the single family unit concept of Falcon Ridge but leaves Bare Land Unit A with a partially constructed multi-storey apartment building. The Condo Developer proposes a reduced size of the apartment building from 24 stacked units to 18, and five single family homes. The Condo Developer has spent \$1,000,000 on the development of Bare Land Unit A and is now under a permanent injunction not to continue construction. The Condo Developer says that it will be expensive to remove the partially-constructed apartment building.

[54] On the other hand, the Condo Developer commenced construction on July 18, 2012, with full knowledge that it did not have an electrical easement for construction. It knew on August 31, 2012, that the Condo Corp. took the position that amendments to the declaration and plan were required. The Condo Developer proceeded in any event until the Court granted a permanent injunction: See the injunction decision at paras. 116 – 118. In the injunction application, the Condo Developer found fault with the Condo Corp. Board. In this application, it is their own lawyer who let them down. Whatever its view of who is at fault for the situation it finds itself in, its problems cannot be visited upon the unit owners.

[55] The unit owners were never informed about the 24-unit apartment building on Bare Land Unit A. The apartment building did not exist on the 2005 declaration and

plan, and was not accurately represented on the 2005 Site Plan which, in any event, had no legal status other than as a marketing tool.

[56] However, the 2005 Site Plan does offer an apparent middle ground that would allow the Condo Developer to complete the Falcon Ridge condominium without destroying the character of the development that unit owners found to be so attractive in the first place. In other words, the four-plex units that are described in the 2005 Site Plan offer a basis for compromise.

[57] In my view, it would be just and equitable for the Condo Developer to proceed to construct four-plex units that it included in the 2005 Site Plan or some combination of four-plex and single family units. That plan did not have the stacked apartment units proposed by the Condo Developer but it did contemplate multi-family units in the form of four-plexes. The difficulty with ordering such an amendment is that there is no plan before the Court that sets out structural plans, boundaries and diagrams that show the shape and dimension of the four-plex units in relation to the units on each side as required by s. 6 of the *Act*. In other words, if a development of Bare Land Unit A proceeds, there must be disclosure of the detail of the proposed development.

The Probability of Confusion and Uncertainty

[58] All parties agree that the amendments applied for by the Condo Corp. should be granted except with respect to Bare Land Unit A. There would be confusion and uncertainty in leaving the partially-constructed apartment building, and this would only prolong this litigation. By the same token, it would be unjust and inequitable to the majority of unit owners that oppose the Condo Developer's proposal to allow it to proceed with the construction of 18 stacked units.

[59] Counsel for the Condo Developer objects to the term that these amendments are without prejudice to causes of actions owners may have as a result of the invalid amendments on the ground that this would create uncertainty. However, that uncertainty is a result of the actions of the Condo Developer. Nevertheless, there are no outstanding court actions involving any owners whose rights need to be preserved. In my view, it would be appropriate to deny the Condo Corp.'s application for the without prejudice order.

[60] The only solution that I find to be both just and equitable and to end the confusion and uncertainty is to permit the Condo Developer to proceed with the construction of four-plex units or a combination of four-plex and single family units on Bare Land Unit A. On the record before me, there is insufficient information to order the Condo Developer to proceed with a specific number or configuration of four-plex condo units. If the Condo Developer wishes to proceed with the development of four-plex units on Bare Land Unit A, I order that the Condo Developer submit the plans required by s. 6(1), (2) and (3) of the *Act* for additional condominium units on Bare Land Unit A within 90 days to this Court for approval. The Condo Corp. is at liberty to make submissions on the Condo Developer's proposed plans.

CONCLUSION

[61] In considering all of the factors in his matter, I order the following:

1. The declaration of the Condo Corp. be amended so that the original declaration of the Condo Corp., executed on the 28th day of September, 2005 and registered at the Land Titles Registry in Whitehorse, Yukon Territory on the 17th day of October, 2005 be replaced with a Declaration in the form proposed by the Condo Corp.

2. The plan of the Condo Corp. be amended so that the original Plan of the Condo Corp. registered at the Land Titles Registry in Whitehorse, Yukon Territory on the 17th day of October, 2005 be replaced with a Plan in the form proposed by the Condo Corp.; and
3. If the Condo Developer wishes to proceed with the development of condominium units on Bare Land Unit A, the Condo Developer must submit plans required by the *Act* within 90 days for approval by the Court. If the Condo Developer does not submit a plan within 90 days, the Condo Corp. will be at liberty to apply for removal of the partial construction on Bare Land Unit A.

[62] With respect to court costs, I am satisfied that the Condo Corp. has been obligated to bring this application under s. 13(1) of the *Act* and has had substantial success. It has been time-consuming and very important to the owners of Falcon Ridge and I award costs to the Condo Corp. on Scale C. I have not awarded special costs based on my review of the factors set out in *Ross v. Ross Mining Ltd.*, 2012 YKSC 18, at paras. 17 and 18. However, I reserve the right to consider whether it is appropriate to increase the costs under Scale C by 1.5 times, pursuant to Appendix B, 2(e). The Condo Corp. is at liberty to apply for increased costs.

[63] Counsel are also at liberty to raise implementation issues that may arise out of this judgment in case management.

VEALE J.