CITATION: York Condominium Corp. 42 v. Hashmi, 2011 ONSC 2478
COURT FILE NO.: 06-CL-6587
DATE: 20110503

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: York Condominium Corporation No. 42, Applicant

AND:

Abid Hashmi and All Unit Owners of York Condominium Corporation No. 42, Respondents

BEFORE: D. M. Brown J.

COUNSEL: G. Vella, for the Administrator

D. Fulton, for A.J. Karim, M. Bhuiyan, Shah Jahan Khan and Anver Karim, unit owners

K. Bailey, for Nicolo Fortunato, unit owner

Unit owners in person: Hector Fernandes, Dan Hasanalie, Salim Khan, Oscar Dawes, Ted Pasek, Mr. Kabir, Shah Jahan Khan, Mr. Malik, Jawaid Mahmood, Imran Mahmood, Asad Afaqui, Sia Mak Raufi, Mohammed Nizamuddin, Nasrin Islam, Abu Turab, Clara Fernandes, Franca Papagna, G. Harlund.

HEARD: April 20, 2011

REASONS FOR DECISION

I. The future governance of YCC 42: Administrator or elected board of directions?

[1] York Condominium Corporation No. 42 is a three-building condominium complex containing over 800 units located on Dixon Road, near Islington Avenue, in Toronto, Ontario. The buildings are close to 40 years old.

[2] In my Reasons dated March 11, 2011, I issued directions for a hearing into the March 3, 2011 Report of Mr. Andrew Atrens, the court-appointed administrator of YCC 42. In advance of the hearing I received written submissions from, or on behalf of, 261 unit owners. At the hearing I heard brief oral submissions from 18 unit owners, as well as from two counsel for other unit

owners. These Reasons provide further directions to the Administrator regarding the on-going governance of YCC 42.

[3] I intend to order the Administrator to provide copies of these Reasons to all unit owners. So that going forward everyone is working from the same set of information, let me spend a few moments summarizing how YCC 42 finds itself where it does today.

II. History of the administration of YCC 42

A. Why administrators of condominiums are appointed

[4] In Ontario the *Condominium Act, 1998* establishes the legal framework for the creation and operation of condominiums. That Act, and its predecessor acts, were passed to permit individuals to be owners of the freehold estate in residential units in a building, as opposed to tenants in an apartment building. The Act establishes self-governance of the corporation of the unit owners as the norm. As I stated in my 2006 decision in *Bahadoor v. York Condominium Corporation No. 82*:

> In addition to the investment in their units, owners are tenants in common of the common elements: *Act*, s. 11(2). The objects of a condominium corporation are to manage the property and assets, if any, of the corporation on behalf of the owners, and to control, manage and administer the common elements and assets of the corporation: *Act*, s. 17(1)(2). Since the quiet enjoyment of a unit by its owner, and the value of the unit, depend heavily on the proper management of the common elements, it is no surprise that the Act vests the power to manage the affairs in the corporation in the unit owners through the board of directors that they elect: Act, ss. 27 and 28.[1]

[5] Sometimes problems arise in the affairs of a condominium which prove too difficult for the owner-led board of directors to handle, leading to the appointment of an administrator pursuant to section 131 of the Act:

> 131. (1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43.
>
> (2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners.
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> (3) The order shall,

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[1] [2006] O.J. No. 4794; 2006 CanLII 40487.

(a) specify the powers of the administrator;

(b) state which powers and duties, if any, of the board shall be transferred to the administrator; and

(c) contain the directions and impose the terms that the court considers just.

(4) The administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the management or administration of the corporation.

[6] The presence of certain circumstances in the affairs of a condominium corporation may render it just or convenient to appoint an administrator: (i) a demonstrated inability by the board of directors to manage the corporation; (ii) the existence of substantial misconduct or mismanagement, or both, in relation to affairs of the corporation; (iii) the necessity of bringing order to the affairs of the corporation; (iv) the existence of a struggle within the corporation amongst competing groups such as to impede or prevent proper governance of the condominium corporation; or (v) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the corporation. Of course, against these factors must be balanced the costs of involving an administrator in the affairs of a condominium corporation.[2]

[7] A court should utilize the administrator provisions of section 131 only as a last resort because the Act contemplates that unit owners should govern their own corporate affairs:

> When a court is considering either the appointment or termination of an administrator, good reason must be shown why unit owners should not manage their corporation's affairs through an elected board of directors. Self-governance is the norm; administrators are the exception. Or, as put by Huddart J. in *Cook v. Strata Plan No. 50*, [1995] B.C.J. No. 2882 (B.C.S.C.): "... the democratic government of the strata community should not be overridden by the Court except where absolutely necessary."[3]

[8] Dissonance in corporate governance must have existed several years ago at YCC 42. Although I have not gone back to read the original court materials filed in August, 2006, obviously the affairs of YCC 42 were in poor shape at that time because on August 28, 2006, Lederman J. appointed Andrew Atrens as the Administrator for YCC 42.

B. How the appointment of an administrator affects the powers of a Board of Directors

[9] In his order of August 28, 2006, Lederman J. specified the Administrator's powers. The first power of the Administrator was to "manage the affairs of YCC 42 as if the administrator were the Board of Directors of YCC 42 and in place of the Board of Directors of

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[2] *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385* (2002), 17 R.P.R. (4th) 152 (Ont. S.C.J.), paras. 26 and 27; affirmed 2003 CarswellOnt 5050 (C.A.).
[3] *Bahadoor, supra*., para. 26.

YCC 42, whose powers be and are hereby suspended, until further order of this Court." Section 27(1) of the Act states that "a board of directors shall manage the affairs of the corporation". By suspending the power of YCC 42's Board of Directors, Lederman J. removed the power to manage the affairs of the condominium from the hands of the owner-elected Board of Directors and placed those powers in the hands of the Administrator. That state of affairs was to continue until changed by a further order of the Court.

[10] No order of this Court has altered that state of affairs. That is to say, no judge of this Court has revoked the suspension of the powers of the Board of Directors ordered by Lederman J. back in August, 2006. I emphasize this point because I learned at the last court hearing that in past years the Administrator had facilitated elections for a new Board of Directors, leading to representations before me by a group called the "Elected Board of Directors". As I stated in my Reasons of March 11, 2011:

> [2] [L]et me comment on how the four moving unit owners described themselves. In their materials they styled themselves as the "Elected Board of Directors". With respect, they are not. Since the appointment of the Administrator on August 28, 2006, the powers of the Board of Directors have been suspended. The court has not given permission to hold formal elections for a new Board of Directors. Accordingly, at the present time no Board of Directors exists for YCC 42, elected or otherwise.

C. Orders of this Court since 2006

[11] The Administrator filed several Reports with this Court describing the activities he had undertaken and sought approval for his fees and expenses. By order made March 17, 2008, Hoy J. approved the Administrator's report covering the period September 1, 2006 until August 31, 2007. One year later, on March 4, 2009, Hoy J. approved the Administrator's next report for the period September 1, 2007 until August 31, 2008.

[12] In April, 2010, the Administrator initiated the process to obtain court approval for his activities from September 1, 2008 until August 31, 2009. The Administrator's motion prompted a number of unit owners to file responding submissions. As well, some unit owners brought their own motion to remove Mr. Atrens as Administrator. The Court ordered that separate hearings be held for the Administrator's motion for approval of his Report and the motion by unit owners to remove him.

[13] Wilton-Siegel J. heard the Administrator's motion over two days in late October, 2010. In his Reasons released December 30, 2010 (2010 ONSC 6113), Wilton-Siegel J. approved the Administrator's Report. In light of the pointed criticism of the Administrator contained in some of the owners' submissions filed with me, let me repeat, for the benefit of all owners, what Wilton-Siegel J. decided:

> [37] With respect to approval of the Administrator's accounts, the Court requested narrative disclosure of the activities of the Administrator of the nature provided by legal counsel in addition to his report. Such narrative was subsequently provided to the Court.

> [38] Based on such narrative and the other materials before the Court, there is no basis for concluding that the Administrator did not perform the work set out in his accounts, or that the time spent was either unrelated to the Corporation or that the time spent was otherwise unreasonable.
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> …
>
> [40] I have considered the Administrator's accounts against the standard set out by Brown J. in *Bahadoor v. York Condominium Corporation No. 82 et al*, [2007] O.J. No. 489 (S. Ct.) at paras. 18 and 19.
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> [41] Based on the foregoing as well as the nature of the work and responsibilities involved and the cost of comparable services, I find the Administrator's fees to be fair and reasonable. Accordingly, the Administrator's accounts are hereby approved.
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> [42] Similarly, there is no basis in the record before the Court for denying approval in respect of the fees of the Administrator's legal counsel, which I also find to be fair and reasonable given the nature of the work involved, the level of seniority of counsel and the reasonable expectations of the Corporation.

[14] Wilton-Siegel J. also addressed the issue of the future governance of YCC 42. At paragraphs 30 through 32 of his reasons Wilton-Siegel J. provided a "road map" for the future governance of the condominium corporation. He wrote:

> [30] In my view, it would be inappropriate to order the transfer of the governance of the Corporation to the board of directors at this time. This must await completion of the current renovation work. It also requires an orderly transition which, in turn, requires an acceptable business plan for the Corporation given its present challenges. On the other hand, it will be necessary to address the transfer of governance to another party within a relatively short timeframe, given the Administrator's indication to the court of his intention to seek a discharge after completion of the current restoration work at 340 Dixon Road.
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> [31] In this regard, several factors must be taken into consideration. First, it is unclear whether a majority of the owners would be prepared to have governance returned to the board of directors or would prefer the appointment of another administrator. Second, if the preference of the majority of the owners is to return governance to the board of directors of the Corporation, it would appear to be necessary to conduct an election to establish that the directors seeking such an order have the confidence of the owners. Third, if the preference of the majority of the owners is to return governance to the board of directors, it will be necessary for the board of directors to propose a business plan for the Corporation based on a current comprehensive Reserve Fund Study at the time of consideration of any motion to return governance to the board of directors.
>
> [32] These are not matters that can await the Administrator's application for discharge. As the Administrator is the person responsible for the governance of the Corporation, the

> Administrator should prepare a report to the Court setting out his views on these issues and proposing a course of action. Such a report should be the subject of a future hearing, prior to any hearing to approve the discharge of the Administrator, in which the owners shall be entitled to respond by delivery of any responding materials they may choose. To the extent practicable, the Administrator should consult with interested owners, including the board of directors, in the preparation of such report. (emphasis added)

[15] On March 10, 2011, I heard the motion by several unit owners to remove the Administrator. I dismissed that motion holding that it completely ignored the judicial "road map" clearly set out by Justice Wilton-Siegel. In paragraph 5 of my March, 2011 Reasons I summarized this "road map" and the steps which should be taken to implement it:

> [5] Put simply, Wilton-Siegel J. thought that a "road map" for the immediate future of the operations of YCC 42 would involve the following steps:
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> (i) The Administrator would prepare a report to the Court setting out his views on governance and operational issues and proposing a course of action. The Administrator has done that, filing a report dated March 3, 2011. It became evident, however, during the course of the hearing that the Administrator had not sent his report to all unit owners. I will give him directions to do so. Unit owners cannot comment on a report if it is not sent to them;
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> (ii) Unit owners should have the opportunity to file in Court written comments on the Administrator's report, specifically on the Administrator's proposed course of action;
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> (iii) A fair process should be put in place to find out whether a majority of the unit owners would prefer to have the court appoint another administrator or would prefer to see the governance of YCC 42 transferred into the hands of an elected board of directors;
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> (iv) If a majority of the owners would like to see elections for a new board of directors, then a fair process should be put in place to hold such elections;
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> (v) Once a new board of directors is elected, it must prepare a financial and operating plan which demonstrates to the Court that governance of YCC 42 can be returned to the board of directors. Only when the Court is satisfied that governance should be transferred to the board of directors will the mandate of the Administrator come to an end.

III. The Administrator's March 3, 2011 Report

[16] In his Report dated March 3, 2011, Mr. Atrens provided the following information and made several recommendations:

(i) During his tenure he arranged for two reserve studies to be conducted, the most recent completed in December, 2010, with a supplemental cash flow study performed in February of this year. He stated:

> That study indicates that over the next nine (9) years YCC 42 must carry out extensive repair and replacement work on the balance of the underground garage (which the City of Toronto has indicated must be repaired), the roofs, the windows and several other major components of the common elements.

(ii) A very large percentage of unit owners live off-site and rent out their units. Mr. Atrens commented:

> I am concerned that without continuous guidance and given the number of rented units and the ability of the unit owners to raise cash, that the common elements will be neglected and not repaired and replaced as needed.

(iii) He recommended that another Administrator be appointed with authority to oversee the board of directors "for a reasonable period of time and apply to the Court at the expense of YCC 42 if that person has come to the conclusion that the Board of Directors has or is about to take a position or course of action which that person feels is not in the best interests of YCC 42 or the unit owners. There would have to be an accompanying Court Order that restricts the Board of Directors from making any decision/resolutions except at properly called meetings of the Board at which the Administrator is present."

(iv) Weather permitting, brick and balcony repair work should be completed by the end of June, 2011;

(v) The "board of directors" should not attend site meetings with the contractor or instruct the engineers or contractors;

(vi) Two of the unit owners who styled themselves as members of the "Elected Board of Directors", A. J. Karm and Anvir Karim, are related and the former is a condominium property manager. The Administrator expressed the view that A. J. Karim would have a large and on-going conflict of interest if he, or his corporation, had a contract to manage YCC 42;

(vii) The manager of YCC 42 should not be a member of the Board of Directors or related to a Board member;

(viii) The Court should consider a mechanism which ensures that any termination of the current management contract and the hiring of a new management company is carried out in the best interests of the unit owners in general;

(ix) The Administrator expressed concerns about the ability of the "Board" to manage the condominium in an objective fashion with a view to the best interests of all unit owners;

(x) YCC 42 is a huge property with many supplier contracts and a large cash-flow. Day-to-day operation of the condominium is complex and requires attention which is over and above that usually required to operate a condominium. Accordingly, there should be a transition period of at least two months for any move from the Administrator to a Board to ensure the Board becomes familiar with the practical aspects of running YCC 42;

(xi) The Administrator expressed concerns relating "to a possible divided Board and the commitment of the Board to deal with the ongoing problems and incur the necessary expenses". He recommended that when he is removed as Administrator the Court should appoint another administrator with limited, defined powers for a period of time and that administrator should report to the Court on whether a board of directors can and will deal adequately with the challenges of running YCC 42.

IV. Comments by unit owners on the Administrator's March 3 Report

[17] As noted, in response to my March Reasons I received written submissions from, or on behalf of, 261 unit owners. Many submissions were in the form of individually written letters; some consisted of a standard form letter signed by different unit owners; and one was a petition signed by 185 unit owners. The petition obviously was circulated by the Bhuiyan/Khan/Karim/Karim group, who previously had styled themselves as the "Elected Board of Directors", and now call themselves the "Core Group".

[18] I appreciate the time taken by those who wrote or signed submissions sent to me.

[19] The submissions revealed a significant difference of views amongst unit owners about what next steps should be taken regarding the governance of YCC 42. About 67 unit owners favoured the continuation of an administrator, although not necessarily the present Administrator. 188 (including the petitioners) called for the termination of the Administrator and the restoration of "orderly self governance through transparent independent elections within two months". Six submissions took a middle ground.

[20] Some submissions thought the Administrator had done a good job; many did not. Some thought the repairs undertaken by the Administrator were too expensive; others did not. Many unit owners expressed strong concerns about the reduction in their property values over the past decade. All unit owners voiced fears and concerns about the lack of adequate security at YCC 42. Many referred to a murder which took place two months ago in one of the buildings.

[21] A number of the submissions criticized the Administrator for not monitoring and enforcing the occupancy requirements contained in YCC 42's Declaration and By-laws. Article XII(a) of the Declaration states: "No unit shall be occupied by more than a single family and shall be used only as a residence for such single family and for no other purpose." Several unit

owners complained that some who rented out their units were renting them to lessees who brought several families to live together in one unit, in violation of the Declaration.

[22] Several unit owners questioned the leasing practices of other unit owners. Article XX(b) of the Declaration provides that if an owner wishes to lease his unit, "he shall furnish to the Corporation an undertaking signed by the Lessee that the Lessee and other residents of the unit will comply with the provisions of the Act, the Declaration, the By-laws and the rules and regulations relating to the use of the unit and common elements." It is unclear whether the Administrator has enforced this provision of the Declaration.

[23] Several unit owners complained about the poor maintenance of the common elements, including widespread graffiti in the corridors and the lack of lighting in portions of the underground garage. Some owners stated that the Administrator was not accessible, communicated poorly and did not respond to owners' complaints.

[24] Some owners expressed concern that in past elections proxies had been misused and, as a result, fair elections had not been held. One unit owner recommended abolishing the use of a "manual proxy system". A number of owners voiced disappointment about strong divisions which had appeared in the YCC 42 community along ethnic and religious lines.

[25] Some of the unit owners are members of the Association of Condominium Owners, or A.C.O. Evidently it is an informal owners group. Some submissions supported A.C.O., others criticized it. Mr. Fortunato, the President of A.C.O., filed an affidavit in which he made the following points:

(i) The Administrator should retire;

(ii) Political instability still permeates YCC 42 and the condominium is not yet ready for self-governance;

(iii) The use of proxies in elections has been misused and abused. Mr. Fortunato described this as "one of YCC 42's biggest dilemmas". This year competing meetings of unit owners were held, one hosted by A.C.O., the other by the unit owners represented by Mr. Fulton. According to Mr. Fortunato, more than 100 unit owners attended the A.C.O. meeting, while only 26 were present at the other meeting, although a proxy count brought the total representation up to 322 unit owners;

(iv) The court should appoint Mr. Robert Buckler as the new Administrator of YCC 42 for a period of one year. Mr. Buckler filed an affidavit deposing that at present he acts as administrator of YCC 385, a 211-unit condominium in Toronto and he would be willing to act as the administrator of YCC 42 for a one year term. Thirty-five (35) unit owners signed a submission supporting the appointment of Mr. Buckler as administrator.

[26] A. J. Karim, M. Bhuiyan and Anver Karim filed written submissions. They describe themselves now as the "Core Group". Before reviewing their submissions, let me say that I am

thoroughly unimpressed by the efforts of this group of unit owners to cloak themselves in some mantle of authority with respect to the affairs of YCC 42, when they have none. First they described themselves as the "Elected Directors" of YCC 42, when they were not. Now they are the Core Group. If they are the "core", who, might I ask, falls within the "non-core" group? Any owner who disagrees with them? I strongly caution these owners that the more they try to promote themselves as standing in a different position than the other unit owners, the more closely the court will review their proposals to ensure they are not motivated by self-interest. Mr. Karim, Mr. Bhuiyan and Mr. Karim made the following proposal:

(i) A special meeting of unit owners should be held by the end of May, 2011 for the purpose of electing directors. The meeting should be conducted by an independent person who should be responsible for preparing and distributing meeting materials, including proxies;

(ii) The Administrator should hold five meetings with the new Board during the month of June;

(iii) By the end of June the new Board should file with the Court a Financial and Operational Plan;

(iv) The Administrator should file a final report with the Court by July 8; and,

(v) The Court should hold a hearing by the end of July to determine whether the governance of YCC 42 can be returned to the Board of Directors.

[27] Finally, one unit owner recommended that all units should be surveyed by qualified inspectors to ensure that they comply with the occupancy requirements in the Declaration – i.e. that only one family occupies a unit.

V. Analysis: governance issues

A. The framework set by Wilton-Siegel J.

[28] The comments submitted and made by the unit owners and counsel raise some important questions about the role of an administrator appointed under section 131 of the Act, the role of the board of directors of a condominium corporation for which an administrator has been appointed, and the process regarding the transfer of the governance of a corporation from an administrator back into the hands of the members. I propose spending some time discussing these issues because the Act gives little direct guidance on many of them.

[29] Before I do so, let me place my analysis within the framework of the process articulated by Wilton-Siegel J. in his December Reasons. I start here because most of unit owners from whom I heard advocated the immediate termination of the Administrator and many urged that I schedule quick elections for a new board of directors. Let me recall for all unit owners what Justice Wilton-Siegel wrote in paragraph 30 of his December 30, 2010 Reasons:

> [I]t would be inappropriate to order the transfer of the governance of the Corporation to the board of directors at this time. This must await completion of the current renovation work.

The current renovation work has not yet been completed. As the Administrator stated in his March 3 Report, he anticipates completion of the work by the end of June, weather permitting. Accordingly, the time has not yet arrived to consider the discharge of the Administrator or the transfer of governance to an elected board.

[30] Further, Wilton-Siegel J. went on to write that "it is unclear whether a majority of the owners would be prepared to have governance returned to the board of directors or would prefer the appointment of another administrator". From the submissions that I have read and heard, I perceive that a significant division exists amongst unit owners on this question. I think some form of independently-supervised referendum is required to find out the answer to this question before setting the wheels in motion for elections to the board of directors. I will return to the referendum issue later in these Reasons.

B. Administrators of condominium corporations

[31] In paragraph 5 above I reproduced section 131 of the Act which authorizes a court to appoint an administrator for a condominium corporation "if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners." Section 131(3) goes on to provide that the court's order must (a) specify the powers of the administrator, (b) state which powers and duties, if any, of the board shall be transferred to the administrator, and (c) contain the directions and impose the terms that the court considers just. Several principles flow from these provisions of the Act:

(i) Since an administrator is put in place as the result of a court order, not the private act of the corporation's members, an administrator is an officer of the court. The duties and obligations owed by an administrator are shaped by that cardinal fact;

(ii) Not all administrators are created alike. As section 131(3) clearly states, a court may accord different powers to different administrators, depending upon the circumstances of the case. A court may also limit the term of an administrator or appoint an administrator on a more open-ended basis;[4] and,

(iii) The effect of the appointment of an administrator on the powers of the board of directors may well vary from case to case depending on the scope of powers granted to an administrator by the court order, as well as the identification of those powers and duties of the board which the court orders transferred to the administrator.

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[4] In *York Condominium Corp. No. 25 v. Persaud*, 2009 CarswellOnt 8142 (S.C.J.), the administrator had been appointed for a fixed term.

Consequently, the powers of an administrator may range from the narrow and single-purpose – e.g. managing the repair of certain of the common elements – through to the comprehensive, such as where a court transfers all the powers of the board to an administrator. An administrator's role and powers will depend upon the court's assessment of what would be "just or convenient" in the circumstances.

[32] Court-appointed administrators are officers and instruments of the court. Their powers are set out in, and limited by, the terms of the appointment order. Just like a court-appointed receiver, an administrator appointed under section 131 of the Act must act honestly and in good faith, and it must deal with or manage the property of the condominium corporation over which it has power with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[5] It also owes duties analogous to those of a court-appointed receiver as described by Kevin McElcheran in *Commercial Insolvency in Canada, Second Edition*:

> As a court officer, the court-appointed receiver has a duty to take a broad perspective in the exercise of its duties. It cannot favour the interests of one party over another. It has a duty of even-handedness…[I]n the balancing of interests of various stakeholders, it has a duty to give the rights of parties affected by its activities, and its decisions, the appropriate weight.[6]

C. An administrator and the board of directors

[33] Under section 27(1) of the Act, a board of directors shall manage the affairs of a condominium corporation. The Appointment Order of Lederman J. suspended those powers of the Board of YCC 42 and transferred them to the Administrator. Counsel for the Administrator and counsel for Messrs. A. J. Karim, Anver Karim, M. Bhuiyan and Shah Jahan Khan submitted that notwithstanding the appointment of the Administrator, it remained open to the unit owners to elect a board of directors and for that board to meet and pass resolutions. They pointed out that by order dated May 21, 2008 Hoy J. had issued directions regarding the use of proxies at meetings of the YCC 42 and that, with the approval of the Administrator, several "elections" of directors had taken place during his administration. Accordingly, they argued, a duly elected board of directors existed for YCC 42 and any plan for the transition of governance from the Administrator to a board of directors should take that corporate history into account.

[34] I do not accept those submissions.

[35] How the appointment of an administrator affects the powers of a condominium corporation's board of directors will depend upon the language of the appointment order. In the present case paragraph 2(a) of the Appointment Order made by Lederman J. on August 28, 2006 provided that the Administrator shall:

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[5] See: *Condominium Act, 1998*, s. 37(1); *Bankruptcy and Insolvency Act*, s. 247.
[6] Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), p. 165.

> Manage the affairs of YCC 42 as if the administrator were the Board of Directors of YCC 42 and in place of the Board of Directors of YCC 42, whose powers be and are hereby suspended, until further order of this Court.

The Appointment Order went on to empower the Administrator to determine and collect the common expenses; levy special assessments; review, deal with, and enter into contracts for the administration of the property and assets of YCC 42; exercise exclusive control over the on-site management office; act as sole signing officer of YCC 42; and retain and employ counsel and other advisors. Although the unit owners of YCC 42 have purported to elect boards of directors since the Administrator's appointment, the true legal situation is like that described by Harvison-Young J. in *York Condominium Corp. No. 25 v. Persaud*:

> On June 30, 2009, the unit owners of YCC 25 elected a new Board of Directors (the "Board"). *As the Administrator had, in effect, stepped into the shoes of the previous Board of Directors, this new Board is a board without any powers as long as the Administrator continues in his role pursuant to court order*.[7]

[36] The Administrator and the Karim Group owners argued that the Appointment Order did not suspend the power of the unit owners to hold annual meetings, so the order did not terminate their power to elect a board of directors for YCC 42.[8] I agree that the Administration Order did not suspend the power of the unit owners to hold annual meetings. Although under the Act meetings of unit owners are held to approve any matter requiring approval of a vote of the owners and at an annual general meeting an owner may raise for discussion any matter relevant to the affairs and business of the corporation,[9] the appointment of an administrator vested with the powers of the board of directors places a very practical limitation on the ability of unit owners to vote on certain matters. If, during an administration, the power of the board is suspended – i.e. the board cannot do anything – what is the purpose of going through the motions of holding a vote by the unit owners to elect a board? They would be voting for a board which lacked any power; it would be a vote without a purpose.

[37] Further, real mischief can arise from the election of a board without powers, as can be seen from the experience of YCC 42. The affidavit sworn by Mr. Karim last December revealed that the "elected board" had "retained Mr. Andy Wallace, a respected Consultant in the Condominium Industry to act as a Facilitator and advisor to the Elected Board and to among other things, offer guidance and assist as long as and in any manner required to ensure the transition from the Administrator to the Elected Board and the carrying out of the Board's mandate." I ask: how can a board without any powers purport to retain an advisor? The simple answer is: it cannot. From my review of the materials, over the past year the "elected board" has held itself out as a parallel decision-making group for the affairs of YCC 42 when, at law, it had

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[7] [2009] O.J. No. 5571, 2009 CarswellOnt 8142, para. 2.
[8] *Condominium Act*, ss. 28(1) and 45(1).
[9] *Ibid*., s. 45(3).

absolutely no authority to do so. The materials disclosed that the efforts by this self-styled "elected board" to assume a governance role has served only to increase the divide which exists between two groups of unit owners and further poison an already noxious environment within the YCC 42 community.

[38] Where an appointment order transfers the powers of the board of directors to an administrator, the unit owners should not hold an election for a board without permission of the Court, which should assess whether it would be in the best interests of the condominium community as a whole for such an election to occur. If deep divides exist within a community, the election of a nominal board might well do more harm than good. If, on the other hand, the community has united behind a plan to exit from the administration, an election might constitute a positive step in furtherance of that transition. As I have stated, an administrator is a court-appointed officer. If an administrator is faced with a request by unit owners to hold elections for a board of directors during the term of an administration, an administrator should apply to court for directions on that issue; it should not act unilaterally to approve the holding of a meeting for an election, as happened in this case.

D. The role of unit owner votes in terminating an administrator

[39] The timing of the termination of the appointment of an administrator will turn upon a court's assessment of whether it would be just or convenient, having regard to the scheme and intent of the *Condominium Act* and the best interests of the owners, to bring the administration to an end.[10] More specifically, a court should consider whether (i) a reasonable prospect exists for the orderly self-governance of the condominium corporation and (ii) the elected board of directors has formulated an operating and project expenditure plan that presents a reasonable prospect of achieving the orderly management of the affairs of the corporation.[11]

[40] When considering whether to terminate an administrator, a court should ascertain whether good reason has been shown why unit owners should not manage their corporation's affairs through an elected board of directors, because self-governance is the norm. At the same time the scheme of the Act takes into account more than just the interests of unit owners. A principal object of the Act is to achieve fairness among the parties - owners, their tenants, their mortgagees, and the corporation itself - in raising the money to keep the common enterprise solvent.[12] Consequently, on a motion to terminate an administrator the Court must take into account the impact that the discharge might have on other interested persons, including the corporation's creditors and the relevant municipal agencies such as the fire services department and building inspection authorities.[13]

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[10] *Bahadoor v. York Condominium Corp. No. 82*, [2006] O.J. No. 4794; 53 R.P.R. (4th) 281 (S.C.J.), para. 4.
[11] *Ibid.*, para. 29.
[12] *York Condominium Corporation No. 482 v. Christiansen*, [2003] O.J. No. 343 (S.C.J.), para. 5.
[13] *Ibid.*, paras. 26 and 27.

[41] As a result, while the vote of the unit owners for a return to self-governance, or their vote for a new a board of directors, is a necessary step in the termination of an administration, it is not a sufficient one because the interests of the unit owners are not the only interests at stake.[14]

E. Directions

[42] Based on my review of the written submissions filed by unit owners on the Administrator's March 3 Report and my consideration of the further oral submissions made before me by a number of the unit owners, I conclude that a significant division exists amongst the unit owners as to whether an administrator should continue to manage the affairs of YCC 42. As a first step a referendum vote of the unit owners should be held on whether they wish the affairs of YCC 42 to continue under the management of an administrator. This is consistent with the road map laid down by Wilton-Siegel J. That vote should be supervised by an independent party, preferably a retired judge of this Court. The Administrator shall report the results of that vote to me and seek further directions.

[43] However, the submissions made before me indicate that decisions need to be made on several preliminary questions regarding how future votes by unit owners should be conducted. Specifically, the unit owners' submissions raised two important questions:

(i) Who is eligible to vote? Section 49(1) of the Act contains a limitation on the eligibility of a unit owner to vote: "an owner is not entitled to vote at a meeting if any contributions payable in respect of the owner's unit have been arrears for 30 days or more at the time of the meeting." A number of submissions complained about other ways in which owners of YCC 42 were not in good standing. Many unit owners complained about the overcrowding in the buildings caused by breaches of Article XII(a) of the Declaration which limits occupancy of a unit to "a single family". The Administrator's Report suggested that a number of unit owners who lease units have not complied with Article XX(b) which requires a lessor/unit owner to furnish an undertaking signed by a lessee that he/she will comply with the provisions of the Act, the Declaration, the By-laws and the rules of the corporation;

(ii) Should a unit owner be allowed to vote by proxy? Section 52 of the Act and Article VIII(d)(iv) of YCC 42 By-Law No. 1 permit unit owners to vote by proxy. However, many submissions by unit owners, as well as the Report of the Administrator, described problems which have arisen historically at YCC 42 because of the extensive use of proxy voting.

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[14] *Bahadoor v. York Condominium Corp. No. 82*, 2006 CarswellOnt 2770 (Ont. S.C.J.), para. 30.

[44] Before issuing specific directions on the holding of a referendum vote on whether or not unit owners wish to continue with an administrator, I would like to receive written submissions from unit owners and the Administrator on the following questions regarding such a vote:

(i) Does the court possess the power to disqualify from voting any unit owner who is not in compliance with Article XII(a) – single family occupancy – or Article XX(b) – filed undertaking from lessee – of the Declaration?

(ii) If the court does possess such a power, should it impose such restrictions on the eligibility of unit owners to vote in the referendum on whether or not unit owners wish to continue with an administrator?

(iii) Does the court possess the power to require unit owners to vote in person, and not by proxy, for a vote?

(iv) If the court does possess such a power, should the court require unit owners to vote in person, and not by proxy, on the referendum question of whether or not unit owners wish to continue with an administrator?

[45] I would ask any unit owner, or group of unit owners, who wish to make legal submissions on these questions to do two things **no later than Tuesday, May 24, 2011**:

(a) File brief written submissions with the Commercial List Office, Superior Court of Justice, 330 University Avenue, 7th Floor, Toronto, Ontario M5G 1R7, fax number: 416.327.6228. All submissions must be marked clearly with the name and court file number for this proceeding; **AND**,

(b) Deliver a copy of their submissions to the Administrator at the management office for YCC 42. The Administrator must permit any unit owner to review submissions filed by other unit owners, during regular business hours, at the management office.

[46] If any unit owner, or group of unit owners, wish to respond to the legal submissions filed by any other person, they must do two things **no later than Tuesday, June 7, 2011**:

(a) File brief written responding submissions with the Commercial List Office, Superior Court of Justice, 330 University Avenue, 7th Floor, Toronto, Ontario M5G 1R7, fax number: 416.327.6228. All submissions must be marked clearly with the name and court file number for this proceeding; **AND**,

(b) Deliver a copy of their submissions to the Administrator at the management office for YCC 42. The Administrator must permit any unit owner to review submissions filed by other unit owners, during regular business hours, at the management office.

[47] After receiving those submissions, I will issue further directions regarding the referendum vote on whether or not unit owners wish to continue with an administrator. I do not

intend to hold an oral hearing on these issues but, instead, to deal with the issues by way of written submissions.

[48] Finally, at the hearing on April 20, 2011, some unit owners mentioned that traditionally the annual general meeting of owners is held in the month of June. Although the Appointment Order did not suspend the ability of unit owners to meet, no vote to "elect" a board of directors shall be held at any such meeting. To do so would depart from the road map established by Justice Wilton-Siegel. No vote for directors can take place without the permission of this Court.

VI. Directions: Report by administrator

[49] In his December Reasons Justice Wilton-Siegel approved the report and accounts of the Administrator for the period from September 1, 2008 to August 31, 2009. In my March 11 Reasons I indicated that I would require the Administrator to file an updated report in the first week of July, 2011.

[50] As a court-appointed officer an administrator labours under a duty to report periodically its activities to the court. To approve an administrator's report, a court should be satisfied that the administrator has make good faith efforts to comply with the court-ordered mandate and his decisions have been reasonable and sound.[15]

[51] The Act does not prescribe the format for an administrator's report and, as mentioned, the nature of administrations will vary from case to case. In the present case, I think it appropriate for the Administrator to file reports for two periods: (i) the year running from September 1, 2009 until August 31, 2010; and (ii) the nine-month period from September 1, 2010 until May 31, 2011. Both reports should contain the following information:

(i) A description of the significant activities of the Administrator during the report periods;

(ii) A Statement of the fees and disbursements, including legal fees, for which the Administrator seeks court approval. A brief narrative should accompany the statement of fees and disbursements so that the reader can understand the relationship between the claimed fees and the work performed; and,

(iii) The financial statements of the corporation for the reporting periods.

[52] The report for the period September 1, 2010 until May 31, 2011 shall contain the following additional information:

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[15] *Bahadoor v. York Condominium Corp. No. 82*, [2005] O.J. No. 1413 (S.C.J.), para. 12.

(i) Statements comparing the corporation's balance sheets and profit and loss statements for each year of the administration;

(ii) A statement detailing the stage of completion for any capital expenditure work in respect of which the corporation has entered into contracts;

(iii) A statement detailing the stage of completion for all work in respect of which outstanding work orders exist from the City of Toronto or any other regulatory body or agency;

(iv) Information about the anticipated completion dates of all capital work undertaken or managed by the Administrator; and,

(v) A copy of the corporation's budget for its current financial year, including a *pro forma* year-to-date report of actual performance as against budget.

[53] Given the detail I have required in these reports, I shall give the Administrator until the end of July, 2011, to file its motion seeking approval of these reports. The Administrator shall consult with the Commercial List Office to secure a date for the return of its approval motion before me.

VII. Delivery of these Reasons to unit owners

[54] Finally, consistent with my March Reasons, **I order the Administrator to deliver to all unit owners, no later than Wednesday, May 11, 2011, a copy of these Reasons for Decision.** For those unit owners who live in the YCC 42 complex, delivery of the Reasons should be made directly to their units. For those unit owners who live outside of YCC 42, the Administrator should send the Reasons by regular mail to their addresses on file.

D. M. Brown J.

Date: May 3, 2011