COURT OF APPEAL FOR ONTARIO

CITATION: Cheung v. York Region Condominium Corporation No. 759, 2017 ONCA 633
DATE: 20170803
DOCKET: C62478

Weiler, Pardu and Benotto JJ.A.

BETWEEN

Yuk-Ying Cheung

Applicant (Appellant)

and

York Region Condominium Corporation No. 759

Respondent (Respondent)

Jonathan Fine, William Pepall and Julia Lurye for the appellant

Antoni Casalinuovo and Megan Molloy for the respondent

Heard: April 11, 2017

On appeal from the order of Justice Robert F. Goldstein of the Superior Court of Justice, dated July 5, 2016, with reasons reported at 2016 ONSC 4236, 74 R.P.R. (5th) 94.

Pardu J.A.:

[1] The respondent condominium corporation passed a by-law to try to deal with a parking lot dispute in the common element parking areas of its commercial condominium complex. The appellant, Yuk-Ying Cheung, appeals from the

dismissal of her application for an order that the by-law was invalid and that the condominium corporation's conduct in passing the by-law was oppressive.

[2] The appellant advances four arguments:

(1) The by-law was beyond the powers of the board conferred by the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), and the condominium declaration.

(2) The by-law was void for uncertainty because the leases had not yet been executed.

(3) The by-law was unreasonable and the board's conduct was oppressive, that is to say, unfairly prejudicial to her interests.

(4) This court should grant leave to appeal from the application judge's award of costs in favour of the respondent, set aside those costs, strike out references to incivility in the applications judge's reasons, and reassess costs or refer the amount of those costs back to the Superior Court.

[3] There are 34 units in this complex, of which the appellant owns three. She has leased her units to a very popular restaurant. The 162 parking spaces are common elements, and she says that she needs all of them: "I want to be able to use all the 162 shared parking spaces on [the respondent's] property because a 230 seat restaurant requires the use of a sufficient number of parking spaces to

accommodate its patrons." The other unit owners also want to use some of the parking spaces. The application judge, in his reasons at para. 9, described one of the unit owner's evidence about the very toxic parking situation and conflict between the restaurant patrons and other users of the parking. There were "altercations among restaurant customers, between restaurant customers and other customers, and between restaurant customers and business owners within the complex." The restaurant was very busy during its peak hours, 9:00 a.m. to 3:00 p.m. and after 5:00 p.m.

[4] This has been a long-standing problem. The respondent tried to solve the problem in 2009 by passing a by-law to allocate two parking lots to each unit owner, but that by-law was invalid as it had never been registered on title.

[5] In 2015, the respondent adopted the by-law that gave rise to this litigation. It provided that the respondent could "from time to time" grant a lease to each owner of four parking spaces in the common element parking spaces on such terms and conditions as "may be deemed appropriate by the Board of Directors from time to time."

A. IS THE BY-LAW BEYOND THE POWERS OF THE BOARD?

[6] The appellant argues that the by-law is invalid because it in effect creates "exclusive use common elements." Section 7(2)(f) of the Act requires that a declaration shall contain "a specification of all parts of the common elements that

are to be used by the owners of one or more designated units and not by all owners." Here, the declaration contains no such provision describing any parking spaces as exclusive use common elements.

[7] On the other hand, s. 21(1)(a) of the Act provides that a condominium corporation may by by-law "lease a part of the common elements, except a part that the declaration specifies is to be used only by the owners of one or more designated units and not by all the owners." Section 56(1) of the Act provides that a board of directors may "make by-laws to govern the use and management of the assets of the Corporation."

[8] The appellant argues that, based on the declaration, she expected that she could use all of the common element parking spaces on the property, and this expectation was integral to her decision to acquire her units. It is reasonable to suppose that the other unit holders had the same expectation.

[9] The by-law passed by the respondent does not have the degree of permanence so as to amount to, in effect, the creation of exclusive use common elements which would pass with ownership of a unit. The board could repeal or vary the by-law at any time. All unit owners reasonably share the parking spaces. The parking spots are not like an apartment balcony, which might be designated an exclusive use common area for a particular unit, such that there is no expectation that any other unit owner would ever use that space and an owner

would reasonably expect that the right to use the space would pass with ownership of the unit. There is no such expectation here in relation to the parking spaces.

[10] I therefore reject the appellant's submission that the by-law creates exclusive use comment elements in a manner contrary to the Act.

B. IS THE BY-LAW VOID FOR UNCERTAINTY?

[11] The by-law evinces an intention to allocate, by lease, four parking spaces to each unit, and contains a plan for that allocation. The respondent, awaiting a determination of these proceedings, has not yet executed the leases contemplated by the by-law. More work will have to be done to execute the proposal in principle embodied in the by-law, as the terms of the leases will have to be approved by the board, but that does not make the by-law void for uncertainty.

C. WAS THE BY-LAW UNREASONABLE OR OPPRESSIVE?

[12] The application judge concluded that the by-law was reasonable, stating at para. 41 of his reasons:

> Thus, I do not see how the Board's actions can be called unreasonable. There was a parking problem and it had to be remedied. The Board came up with a solution that it believed would remedy the problems and treat all owners on an equal basis. It is not my job to second-guess the Board and substitute my judgment for theirs unless the by-law is clearly unreasonable or contrary to the *Condominium Act* or the declaration:

> *York Condominium Corp. No. 382 v. Dvorchik*, [1997] O.J. No. 378 (C.A.) at paras. 5-6; *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan,* 2001 CarswellOnt 2495, [2001] O.J. No. 2785 (Sup.Ct.) at para. 45.

[13] Section 135(2) of the Act provides that if the conduct of an owner or a condominium corporation "threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant," the court may make an order to rectify the matter.

[14] The application judge noted that the purpose of the section is to protect reasonable expectations. He adopted the views expressed in *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2011 ONSC 4876, 111 R.P.R. (5th) 189, writing at para. 49 of his reasons:

> In my respectful view, my colleague D.A. Wilson J. set out the proper approach in *Orr v. Metropolitan Toronto Corp No. 1056,* 2011 ONSC 4876 at para. 158:
>
> > It must be recognized that the Board is charged with the responsibility of balancing the private and communal interests of the unit owners and their behaviour must be measured against that duty. The court does not look at the interaction between the Board and the Plaintiff in isolation. Justice Juriansz (as he then was) articulated some limits to the oppression remedy's power and the balance of interest that must be borne in mind in *McKinstry v. York Condominium Corp. No. 472*, 2003 CanLII 22436 (ON SC), [2003] O.J. No. 5006, 2003 CarswellOnt 4948 (S.C.J.):

> It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets …

[15] The application judge concluded that the appellant's expectation that her tenant should be able to use all of the common area parking spaces was unreasonable and amounted to an allegation that the board acted unfairly by not giving her special parking privileges not enjoyed by the other owners.

[16] The decision by the application judge that the by-law was reasonable and was not oppressive in relation to the appellant is a question of mixed fact and law and is owed deference: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2. S.C.R. 235, at para. 36. I agree with his conclusions and see no basis to interfere.

D. SHOULD THIS COURT GRANT LEAVE TO APPEAL FROM THE COSTS ORDER?

[17] There is no reason why costs should not follow the result in this matter. Before the application judge, the appellant argued that each party should bear its own costs. According to the application judge, both sides "point metaphorical fingers at the other for being unreasonable and dishonest." The appellant's partial indemnity bill of costs totaled $65,313.01; the respondent's amounted to $63,085.44. The appellant sought substantial indemnity costs because of an offer

to settle it had made, which the application judge said was reasonable and would have left the appellant in a significantly better position. Its substantial indemnity costs amounted to $72,862.77.

[18] The appellant's concern is about the application judge's comments about incivility. The trial judge noted:

> After reading the competing emails and letters, one is left with the impression of hard fought litigation that sometimes descended to petty behavior by both parties. That said, in the race to the bottom I find that the Applicant has gotten there first – by a significant winning margin.

[19] The application judge saw no reason to depart from the usual rule that "the loser pays," but concluded there should be some discount to the costs awarded to the respondent on the ground that its behavior "may not have descended to the level of the Applicant's but it was not pure."

[20] He concluded:

> In my view, given the complexity of the issues, the behaviour of both parties (but especially the Applicant), and the Offer to Settle, a global amount of $60,000 in favour of the Respondent is fair and reasonable in the circumstances. This amount reflects a discount as well as the offer to settle. It also reflects the fact that the Applicant, as the loser in this complex and contentious litigation, must reasonably expect to pay significant costs.

[21] Given the near parity of the partial indemnity costs claimed by each party, and taking into account the offer to settle made by the respondent, the $60,000

awarded by the trial judge was well within the range a losing party would expect to pay in costs, regardless of the conduct of either counsel.

[22] An appellate court must not interfere with a discretionary costs award unless it is plainly wrong or the trial judge made an error in principle in arriving at the costs award: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. The application judge was in the best position to assess the extent to which exchange of aspersions, of which there were undoubtedly a few, contributed to the increased temperature of this litigation.

[23] Accordingly, for these reasons, leave to appeal costs is dismissed and the appeal is otherwise dismissed.

[24] Costs of the appeal should follow the result, on a partial indemnity basis, in favour of the respondent, in the sum of $27,749.12, inclusive of all applicable taxes and disbursements.

"G. Pardu J.A."
"I agree M.L. Benotto J.A."

Weiler J.A. (Dissenting):

A. INTRODUCTION

[25] The respondent, York Region Condominium Corporation No. 759 ("YRCC"), enacted a by-law purporting to lease four common element parking spaces to each condominium unit owner (the "2015 By-law"). The appellant, Yuk-Ying Cheung, owns three units in YRCC and leases them to a busy restaurant. Cheung challenges the validity of the 2015 By-law and seeks a remedy under the oppression provision of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act").

[26] Is the 2015 By-law valid? Is it reasonable? Are Cheung's expectations reasonable and, if so, does the 2015 By-law unfairly disregard her interests? These are the questions raised in this appeal.

[27] I would hold that although the application judge correctly held a condominium's declaration does not have to specifically authorize leasing of common elements, he erred in not examining the actual wording of the 2015 By-law to ascertain if it is valid. Proper consideration of the wording and history of the 2015 By-law reveals it purports to lease the parking spaces on a permanent or potentially permanent basis, effectively creating "exclusive use" common element parking spaces. Exclusive use common elements can only be designated through the declaration. Accordingly, I would hold that the 2015 By-law is invalid.

[28] The 2015 By-law is also unreasonable because there is no line of analysis that could reasonably lead the Board to lease four parking spots to each unit owner. The effect of the 2015 By-law is reduce the number of unreserved parking spaces by 80 percent. It is a further reduction of about 50 percent from the By-law's predecessor, passed in 2009, which allocated two parking spaces to each unit (the "2009 By-law"). There is no evidence – expert or otherwise – that an increase from two reserved parking spots per unit in the 2009 By-law to four in the 2015 By-law is necessary to resolve YRCC's parking problems. There is also no evidence that rigorous enforcement of two reserved parking spots per unit would be insufficient.

[29] Further, in holding the 2015 By-law is reasonable, the application judge relied on his finding that overflow parking was available on adjacent lands. In doing so, he committed a processing error that informed his conclusion because, practically speaking, there is no available alternative parking.

[30] Overall, in weighing conflicting interests, the 2015 By-law is not within a range of reasonable choices that the Board could have made to address its parking issues. Accordingly, the 2015 By-law is also invalid because it is unreasonable.

[31] Finally, in relation to the last question, I would uphold the application judge's finding that Cheung's expectations are unreasonable. In this regard, I agree with my colleagues.

[32] In the result, I respectfully disagree with my colleagues that the 2015 By-law is valid and that the appeal should be dismissed. Instead, I would allow the appeal and grant Cheung's application for a declaration that the 2015 By-law is invalid.

[33] In relation to costs, I would grant Cheung's request for leave to appeal costs and set aside the application judge's costs award. Having regard to the partial success each party achieved, I would order that each party bear their own costs throughout.

[34] Before discussing the issues and my conclusions, it is necessary for me to set out the facts, legislative background, and the application judge's reasons. For ease of reference, the 2009 and 2015 By-laws are attached in Appendix A.

B. FACTS

[35] YRCC is a condominium corporation comprised of 33 commercial-industrial units municipally known as 160 East Beaver Creek, Richmond Hill, Ontario. It is located within a larger development called the York Corporate Centre.

[36] Cheung owns three units in YRCC, which she purchased from the developer in 1989 and has leased for the operation of a restaurant since 1990. Dragon Boat Fusion Cuisine has leased Cheung's restaurant space since 2007 (the "restaurant"). The restaurant can facilitate about 30 tables, which can each accommodate four to eight people and they are constantly full. The restaurant also has over 20 employees.

[37] YRCC's common elements include 162 parking spaces, five of which are accessible parking spaces for persons with disabilities.

(1) The parking problem

[38] For almost 20 years – from the creation of YRCC on October 19, 1990, until May 25, 2009 – owners and patrons of the various units used the 162 shared or open parking spaces on a first-come, first-use basis.

[39] As a result of the restaurant's popularity, the parking situation has been described as "toxic". The restaurant is very busy during its peak hours – 9:00 a.m. to 3:00 p.m. and after 5:00 p.m. – which resulted in the shared parking spaces being "monopolized" by restaurant employees and patrons to the detriment of the owners and customers of the other units within YRCC.

[40] For example, in affidavits sworn in response to Cheung's application, one unit owner who operates a window business said he has lost customers because they leave when they cannot find parking outside his showroom. Another owner,

who runs a centre providing services to children with disabilities, said her students had difficulty navigating through the parking lot to get to her centre because they could not find suitable parking nearby.

[41] There was also evidence before the application judge that because of the parking shortage, visitors to YRCC at times parked illegally by blocking fire routes, accessible parking spaces, or double-parking other vehicles.

[42] The parking problem resulted in altercations involving restaurant patrons, unit owners, tenants, and customers of other businesses in YRCC.

(2) YRCC's declaration

[43] YRCC's declaration states:

> **Use of Common Elements:** Subject to the provisions of the Act, this Declaration and the By-Laws, and any Rules passed pursuant thereto, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided.

[44] The declaration does not "otherwise provide" any restrictions affecting common elements.

(3) The 2009 By-law

[45] On May 25, 2009, YRCC's Board of Directors passed the 2009 By-law to address the parking situation. The preamble to the 2009 By-law stated, in part: "Problems exist with regards to availability of parking, in that unit owners, their

employees, guests, clients and customers are not able to access parking spaces within a close proximity to their units."

[46] The 2009 By-Law provided as follows:

> [E]ach unit owner shall be the exclusive lessees of two (2) parking spaces.
>
> Each lease shall forever run with the title to the unit it is attached to, notwithstanding change(s) of ownership of the unit.
>
> The leases shall terminate with the termination of the Corporation. [Emphasis added.]

[47] Thus, the 2009 By-law purported to "forever" lease two parking spaces to each unit owner and consequently reduce the number of open parking spaces from 162 to 96. A majority of the unit owners approved the 2009 By-Law at a special meeting held on June 11, 2009, but it was never registered on title to YRCC.

[48] During the six years following the passage of the 2009 By-Law, no leases were ever entered into with unit owners. Unit owners did, however, act as though leases had been entered into and some placed "private property" signs on their two assigned parking spaces threatening to ticket or tow unauthorized vehicles. This signage was loosely enforced.

[49] In 2014, the Board discovered the 2009 By-law was not valid because it had never been registered on title.

(4) The 2015 By-law

[50] On January 20, 2015, about 60 percent of the unit owners approved the 2015 By-Law, which authorizes the lease of four common element parking spaces to each unit owner, thereby further reducing the number of open parking spaces to 30. The 2015 By-Law was registered on title to YRCC on February 20, 2015.

[51] Paragraph 3 of the 2015 By-law provides as follows:

> The Board of Directors of the Corporation may ... from time to time, grant a lease or license … over, upon, under or through the "Common Element Parking Spaces" assigned to the owner's unit as set out in Schedule "B" attached hereto, upon the terms and conditions herein contained and any other such terms and conditions as may be deemed appropriate by the Board of Directors from time to time.

[52] The 2015 By-law does not state that it repeals or amends the 2009 By-law. (Perhaps because the Board realized the 2009 By-law had never been registered, it was thought unnecessary to do so.)

[53] Two communications, one from YRCC's Board and one from its lawyers, advised that the 2015 By-Law "grants each unit *exclusive* use of four parking spaces" (emphasis added). Neither communication made reference to any leases.

[54] By virtue of being the owner of three units, Cheung was assigned 12 parking spaces. Cheung's 12 spaces, together with the 30 open parking spaces

(including the five reserved for accessible parking), result in 42 spaces being potentially available for restaurant customers.

[55] On or about September 8, 2015, other unit owners began installing additional reserved parking signs throughout the common element parking lot.

[56] No leases were ever entered into with owners.

[57] Cheung's application was heard on April 19, 2016 and dismissed on July 5, 2016.

C. THE GOVERNING LEGISLATIVE BACKGROUND

[58] A condominium corporation is governed by the Act, its declaration, by-laws, and rules.

(1) The Act and the declaration

[59] The Act sets out what must be contained in a corporation's declaration (s. 7(2)) and what may be contained in the declaration (s. 7(4)). Section 7(2)(f) requires the declaration to include "a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners." Any "exclusive use" space specified under this section must be described in a schedule attached to the declaration for the purpose of allowing someone to determine whether the parking, storage, balcony or patio areas are exclusive use space and, if so, to which unit they are exclusively

assigned: Audrey Loeb, *Condominium Law and Administration*, loose-leaf (2016-Rel. 9), (Toronto: Thomson Reuters Canada Ltd., 1995), at p. 3-16.

[60] Section 56(1) of the Act contains a list of the matters over which a condominium corporation has the power to pass by-laws. These matters include by-laws "to govern the management of the property" (s. 56(1)(l)); or "to govern the conduct generally of the affairs of the corporation" (s. 56(1)(p)). Section 56(6) further states, "The by-laws shall be reasonable and consistent with this Act and the declaration." A by-law is not effective until a copy of it is registered in accordance with the Act: s. 56(10).[1]

[61] Section 21 of the Act gives a corporation power to pass a by-law to lease a part of the common elements, unless the declaration has specified that part of the common elements is to be used only by the owners of certain designated units (exclusive use common elements). I address s. 21 in more detail below.

[62] Although we are not concerned with rules in this case, for the sake of completeness, I note that a corporation may also pass rules respecting the use of common elements and units to "promote the safety, security or welfare of the owners and of the property and assets of the corporation" (s. 58(1)(a)); or to "prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation" (s. 58(1)(b)).

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[1] Section 78 of the *Land Titles Act*, 1990, c. L.5, provides that once a by-law is registered on title, it is deemed to have been validly passed.

[63] Overall, the Act creates a hierarchy. After the provisions of the Act, the declaration is to have priority. The declaration is subject to the Act, and s. 7(5) provides the Act prevails over any provision in a declaration that is inconsistent with the Act and the declaration is deemed to be amended accordingly. The declaration is considered to be akin to the corporation's constitution and, therefore, it is difficult to amend.

(2) By-laws

[64] By-laws are subject to the declaration and the Act. The validity of any by-law, and therefore of the 2015 By-law, must be examined in the light of the priority given to the provisions of the Act and the declaration. Such an interpretation of the interplay between these provisions provides coherence to the statutory scheme. Ruth Sullivan states, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014), at p. 337:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

[65] This approach is supported by the decision in *Rosen v. Grey Condominium Corporation No. 31* (12 July 2012), Toronto, 11-164 (Ont. S.C.). Tulloch J. (as he then was) was asked to reconcile the by-law making power under s. 56 of the Act

with the requirements of s. 7 in interpreting a by-law which purported to place restrictions on unit owners' ability to rent out their units on a short-term basis.

[66] Pursuant to s. 7(4)(c) of the Act, the declaration may contain conditions or restrictions on the occupation and use of units and leases of units. In *Rosen*, the condominium corporation's declaration provided each unit was to be occupied and used for no purpose other than living accommodation. The corporation sought to justify the by-law under ss. 56(1)(l) and (m), which grant a board the power to govern the management of the property and the use and management of the assets of the corporation.

[67] In considering whether the corporation could impose short-term rental restrictions through a by-law, Tulloch J. stated, at para. 48:

> From these subsections, it is clear that according to the *Condominium Act*, if a condominium corporation wants to put a restriction on the occupation or leasing of a unit, then the provision must be placed within the declaration. There is no doubt that condominium corporations do have the right to restrict leasing of the units within the condominiums; what is clear is that if these restrictions are going to be imposed, they must be contained within the declaration and must be registered so that prospective owners are aware of those restrictions.

[68] Essentially, Tulloch J. treated a restriction on the occupation and leasing of units as falling exclusively within s. 7 of the Act and accordingly he held the by-law was invalid.

[69] Like restrictions that relate to the occupation and use of a unit, the designation of exclusive use common element space is also a matter specifically enumerated in s. 7.

(3) Common elements and exclusive use common elements

[70] The Act treats “common elements” and “exclusive use common elements” differently. “Common elements” are defined in s. 1(1) of the Act as “all property except the units”. Section 11(2) provides the owners are tenants in common of the common elements. Thus, it is the owners and not the corporation who own the common elements. Section 11(4) provides the ownership of a unit cannot be separated from the ownership of the common interest. Section 11(5) prevents partitioning or dividing common elements, except as provided by the Act.

[71] “Exclusive use common elements” are not specifically defined in the Act. Section 7(2)(f) refers to space that is exclusively reserved for the use of “the owners of one or more designated units and not by all the owners.” Exclusive use common elements are created where the declaration reserves common element space to designated unit owners. Even though the word “permanent” is not used, it is the allocation of common element space on a permanent basis which creates exclusive use: Loeb, at p. 6-9.

[72] In her book, *Condominium Law and Administration*, Audrey Loeb refers to the difference between common elements and exclusive use common elements as follows:

> It is important to distinguish the allocation of common element parking and/or locker spaces from exclusive use common element spaces, which are allocated to a particular unit for all time. They can only be changed by an amendment to the declaration and description: at p. 6-9.

[73] The net effect is this. If parking spaces are exclusive use common elements, they must be designated as such in the declaration. The units and the exclusive use parking spaces which are allocated to each unit must be listed in a schedule to the declaration. When a unit is transferred, the exclusive use parking space is tied to it. The only way to sever the exclusive use common element parking space from the unit would be by an amendment to the declaration, which requires 90 percent of the owners' written consent, or an application to the court to amend the declaration where there is an error or inconsistency: *Condominium Act*, ss. 107-109.

[74] Loeb's commentary suggests, however, that a condominium board can allocate common element parking spaces by by-law: Audrey Loeb, *The Condominium Act: A User's Manual*, 4th ed. (Toronto: Carswell, 2013), at pp. 179-180. Such allocations are not permanent. The by-law can be changed by an

amendment, which requires 50 percent plus one of the units to vote in favour of the amendment: *Condominium Act*, s. 56(10).

[75] Section 21 of the Act, which deals with leasing common elements, is central to this appeal. For this reason, I will quote it in full:

> 21(1) The corporation may by by-law
>
> (a)lease a part of the common elements, except a part that the declaration specifies is to be used only by the owners of one or more designated units and not by all the owners;
>
> …
>
> (2) A lease, grant, transfer or release mentioned in subsection (1), signed by the authorized officers of the corporation, affects the interest of every owner in the common element as if the lease, grant, transfer or release had been executed by that owner.

[76] Section 21(1) prohibits common elements that are designated in the declaration for exclusive use from being leased by a condominium corporation. Subject to that exception, a condominium corporation can lease any part of the common elements, or grant a licence over the common elements; it must do so by by-law. However, pursuant to s. 21(2), only when the lease or grant of licence is signed by the authorized officers of the corporation is there a deemed lease or licence by an owner of the owner's interest (as tenant in common) in the common elements.

(4) Oppression remedy

[77] Section 135 of the Act sets out the oppression remedy. A unit owner may make an application to the court on the basis that the conduct of an owner, corporation, declarant or mortgagee of a unit "is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards" the applicant's interests. Where the court is satisfied that a remedy under s. 135 is justified, it may make "any order the judge deems proper", including an order prohibiting the impugned conduct or awarding the applicant compensation.

D. THE APPLICATION JUDGE'S REASONS

[78] The application judge described the 2009 By-law and observed although the parties acted as if the 2009 By-law was valid, it was agreed it was not because it was not registered on title. As a result, the Board passed the 2015 By-law. The application judge found, "The 2015 By-law essentially did the same things as the 2009 By-law, except that it authorized the lease of four common element parking spaces to each condominium unit."

[79] The application judge then turned to the two issues before him: (1) whether the 2015 By-law is valid, and (2) whether Cheung was entitled to relief under the oppression remedy.

(1) The validity of the 2015 By-law

[80] The application judge held the 2015 By-law is valid. He rejected Cheung's submission that YRCC can only lease common element parking spaces if the declaration provides for it. He concluded a plain reading of s. 21(1) of the Act permits YRCC to lease part of the common elements. Section 56(1), which sets out a board's by-law making authority more specifically, does not curtail the power given in s. 21(1) to lease part of the common elements. Further, he held the 2015 By-law is consistent with YRCC's declaration.

[81] The application judge also held the 2015 By-law is not discriminatory. The 2015 By-law is aimed at the parking situation and imposes a solution that treats all unit owners equally. The application judge noted a by-law is "not discriminatory simply because it aims at a problem caused by one unit holder."

[82] In addition, the application judge considered whether the 2015 By-law is reasonable. He found the restaurant is very popular, especially during its peak hours, from 9:00 a.m. to 3:00 p.m. and after 5:00 p.m. He found the restaurant monopolized the parking, which was to the detriment of other unit owners. He noted YRCC's evidence that altercations over parking spaces would occur and other obnoxious behaviour was displayed by some of the restaurant patrons. He accepted Cheung's evidence that the 2015 By-law (and to a lesser extent the 2009 By-law) has had a detrimental effect on the restaurant, and some of the

other businesses often have empty parking spaces when the restaurant is at peak capacity.

[83] As an aspect of reasonableness, the application judge considered whether the restaurant's customers were able to park elsewhere in the York Corporate Centre. He relied on the evidence of both parties' experts, who commented on the effect of the Town of Richmond Hill Zoning By-Law No. 150-80, as amended, on parking at the York Corporate Centre (the "Zoning By-law"). Based on this expert evidence, the application judge concluded the restaurant's customers "have the ability to park in other parts of the York Corporate Centre." At para. 42 of his reasons, he stated:

> As Mr. Mannett, [Cheung's] expert concedes, the zoning by-law on its face contemplates that parking will be available throughout the York Corporate Centre. Furthermore, as Mr. Rodger [YRCC's expert] mentioned in his analysis, whether over-flow parking is required depends on the time of day. [Cheung] concedes that on its face the 2015 By-law does not contravene the zoning by-law. I also note that if Mr. Mannett is correct that, historically, parking has not been available in other parts of the York Corporate Centre, then it strikes me as entirely reasonable that the Board would be required to manage the available parking for the benefit of all unit holders.

[84] Ultimately, the application judge held the 2015 By-law is reasonable. The Board was faced with a parking problem and it crafted a solution that treats the unit owners equally. The application judge then proceeded to consider whether Cheung was entitled to relief under the oppression remedy.

(2) The oppression remedy

[85] The application judge disagreed that the Board's conduct was oppressive. If anything, he noted, it was Cheung's conduct in monopolizing the parking that was oppressive.

[86] The application judge noted the authority under s. 135(2) of the Act to remedy conduct that is oppressive or unfairly prejudicial to a unit owner. He set out the two-step approach to the oppression remedy articulated in *BCE Inc. v. 1976 Debenture Holders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 56:

> One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

[87] Under the first branch of the test, the application judge considered Cheung's expectations. He noted the oppression remedy is limited by the Board's obligation to balance the private and communal interests of the unit owners – s. 135 protects reasonable expectations and not "individual wish lists": *Orr v. Metropolitan Toronto Corp. No. 1056*, 2011 ONSC 4876, 11 R.P.R. (5th) 189, at para. 158, varied on other grounds, 2014 ONCA 855, 62 R.P.R. (5th) 1.

[88] The application judge reviewed Cheung's evidence and referred to her expectation that her tenant would be able to use all 162 of the parking spaces, as had been the situation prior to 2009. He concluded, at para. 52:

> First come, first served appears to mean, in practice (and in Ms. Cheung's expectation) that the patrons of the restaurant could use every single un-allocated parking spot. That, of course, is not a legitimate or reasonable expectation.

[89] Having concluded Cheung's expectation was unreasonable, the application judge held there was no need to consider the second branch of the oppression test. He dismissed Cheung's application.

(3) Costs

[90] The application judge received costs submissions in writing from each party. YRCC sought costs on a substantial indemnity basis. Cheung submitted each party should bear their own costs.

[91] The application judge held there was no basis to depart from the usual rule that costs are awarded to the winner. He found, however, both parties should bear some responsibility for driving up costs and prolonging the proceedings. Although YRCC's conduct did not descend to the same level as Cheung's, it was not "pure", and therefore some discount should apply.

[92] He also noted YRCC served an offer to settle, which Cheung did not accept. The offer provided two of each unit's four allocated parking spaces would only be reserved between 8:00 a.m. and 5:00 p.m. each day. That would have significantly increased the amount of parking available after 5:00 p.m. The

application judge held the offer was reasonable. It would have resolved many of Cheung's parking issues. Accordingly, YRCC was entitled to enhanced costs.

[93] In the result, the application judge noted but for YRCC's contribution to the bad temper between the parties, he would have ordered substantial indemnity costs against Cheung from the date of YRCC's offer. Instead, he ordered a global award of $60,000 in favour of YRCC, which reflected a discount as well as the offer to settle.

E. STANDARD OF REVIEW

[94] The decision of the application judge is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. A trial judge's primary findings of fact and inferences of fact are subject to review on a standard of palpable and overriding error. A palpable error is one that is obvious, plain to see or clear. Examples of palpable factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference. An overriding error is an error that is sufficiently significant to vitiate the challenged finding of fact. An appellate court must also defer to a trial judge's findings on questions of mixed fact and law. Questions of law are reviewable on a standard of correctness.

[95] An appellate court may also intervene where there has been a processing error. In *Waxman v. Waxman* (2004), 186 O.A.C. 201, at para. 334, this Court defined the term “processing error” as follows:

> The phrase "processing errors" is borrowed from *Keljanovic Estate v. Sanseverino*, where O'Connor J.A., for the majority, said:
>
> > The second kind of error that may warrant appellate interference is what might be called a "processing error", that is an error in processing the evidence that leads to a finding of fact. This type of error arises when a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending that evidence. When the appellate court finds such an error it must first determine the effect of that error on the trial judge's reasoning. It may interfere with the trial judge's finding if it concludes that the part of the trial judge's reasoning process that was tainted by the error was essential to the challenged finding of fact. [Citations omitted.]

F. ISSUES ON APPEAL

1. Did the application judge err in holding the 2015 By-Law is valid?
2. Did the application judge err in concluding the 2015 By-law is reasonable?
3. Did the application judge err in concluding the 2015 By-law does not violate s. 135 of the Act?
4. Did the application judge err in awarding $60,000 in costs to YRCC?

G. DISCUSSION

(1) Did the application judge err in holding the 2015 By-Law is valid?

[96] In principle, I agree with my colleagues that YRCC can pass a by-law to lease common element parking spaces to individual owners. The application judge did not err in concluding YRCC's ability to lease common elements did not have to be provided for in the declaration. As he pointed out, s. 21 of the Act specifically authorizes a condominium corporation to enact a by-law to lease common elements or to grant a licence over them.

[97] Section 21(2) of the Act states, "A lease … signed by the authorized officers of the corporation, affects the interest of every owner in the common elements as if the lease … had been granted by the owner." Reading s. 21 as a whole, therefore, the passing of a by-law to lease does not affect the interest of an owner in the common elements. When there is an actual lease signed by the authorized officers of the corporation, then the interest of an owner in the common elements is affected because then every owner is deemed to grant a lease of his or her interest in the common elements.

[98] Entering into leases is not a mere technicality. What YRCC did in this case is pass a by-law allowing it to enter into leases, skip entering into any leases, but nonetheless adversely affect Cheung's interest in the common elements by permitting other owners to erect or maintain private parking signs in their

allocated spaces. No leases have ever been entered into under either the 2009 or 2015 By-laws. Simply put, YRCC's actions have not conformed to the requirements of the Act respecting leasing.

[99] Inherently, the leases must also be valid to affect Cheung's interest in the common element parking. The requirements for a valid lease are set out in this court's decision in *Canada Square Corp. et al. v. VS Services Ltd. et al.* (1982), 34 O.R. (2d) 250 (C.A.), at p. 258, in which this court quoted the following passage from Eston Kenneth Williams & F. W. Rhodes, *Williams' Canadian Law of Landlord and Tenant*, 4th ed. (Toronto: Carswell, 1973), at p. 75:

> To be valid, an agreement for a lease must show (1) the parties, (2) a description of the premises to be demised, (3) the commencement and (4) duration of the term, (5) the rent, if any, and (6) all the material terms of the contract not being matters incident to the relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.

The court further commented, at p. 259, "It may be said now that conditions (1) to (5) are invariable requirements."

[100] Further, one cannot grant a valid lease in perpetuity: see Christopher A.W. Bentley et al., *Williams & Rhodes Canadian Law of Landlord and Tenant*, loose-leaf (2016-Rel. 8), 6th ed. (Toronto: Thomson Reuters Canada Ltd., 1988), at para. 3:3:7; Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf (2016-Rel. 17), 3d ed. (Toronto: Thomson Reuters Canada Ltd.,

2006), at p. 7-10; and Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2010), at p. 290.

[101] Having regard to these requirements, it seems obvious that the 2009 By-law, which purported to authorize entering into leases that "forever run with the title to the unit it is attached to, notwithstanding change(s) of ownership of the unit", is illegal. Inasmuch as a lease in perpetuity is illegal, a by-law purporting to authorize a lease in perpetuity would also be illegal and invalid. It is a By-law that purports to create permanent exclusive use of the common element parking spaces and it contravenes s. 7 of the Act because that can only be done through an amendment to the declaration.

[102] This brings me to the 2015 By-law. For ease of reference, I restate the relevant portion of para. 3:

> The Board of Directors of the Corporation may, on behalf of the Corporation from time to time, grant a lease or license to each owner of a unit listed in Schedule "B" attached hereto … upon the terms and conditions herein contained and any other such terms and conditions as may be deemed appropriate by the Board of Directors from time to time.

[103] YRCC submits because the Board may "from time to time" grant a lease or licence to each owner, no lease or licence would be permanent. I disagree. The words "from time to time" modify the action of the Board. The words "From time to time" mean what the Board is doing is done "sometimes, not regularly". The Board could grant a lease to each owner permanently allocating four parking

spaces and then, at another time, grant a lease permanently allocating an additional parking space. The words from time to time do not modify or restrict the nature of the lease. Meaning must still be given to the By-law's words "upon the terms and conditions herein contained."

[104] YRCC also argues the effect of the 2015 By-law is not to eliminate parking spaces, but to assign them. In this case, however, that assignment is tied to a by-law providing for leases. If the by-law providing for leases is invalid, then so is the assignment.

[105] One of Cheung's submissions is the 2015 By-law is invalid for uncertainty because it does not contain any lease terms. The 2015 By-law provides for the granting of a lease "upon the terms and conditions herein contained", but no terms and conditions are set out in the 2015 By-law. In addition, leases may be granted upon "any other such terms and conditions as may be deemed appropriate by the Board of Directors from time to time." These are vague, imprecise terms. This does not mean, however, that the 2015 By-law is invalid for uncertainty.

[106] By-laws are akin to legislation and thus statutory principles of interpretation apply; by-laws are created in the execution of a power conferred by the Act: *Condominium Corp. No. 021235 v. Scott,* 2015 ABQB 171, 27 Alta. L.R. (6th) 36,

at para. 41.[2] Thus, the grammatical and ordinary sense of the words employed in the by-law is not determinative. Instead, the words must be read in their entire context. This inquiry involves examining the history of the paragraph at issue, its place in the overall scheme of the condominium's by-laws, the object of the by-law, and the board's intent – both in enacting the by-law as a whole and in enacting the particular wording at issue: see *Chieu v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 3, [2002] 1 S.C.R. 84, at paras. 27-28.

[107] In *Sullivan on the Construction of Statutes*, the author states under the heading, "When ordinary meaning is not binding":

> Ordinary meaning is apt to be unhelpful when the language in which the legislation is drafted is vague, abstract or requires the interpreter to apply a standard rather than a rule: at p. 51.

The author notes, in order to determine the intended meaning, "In such cases the courts have no choice but to look elsewhere for assistance": Sullivan, at p. 51. Thus, to give meaning to the words, "upon the terms and conditions contained herein" in the 2015 By-law, I must "look elsewhere" by considering the evidence.

[108] The evidence consists of the following:

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[2] Although the court's determination in *Scott* was based on the Alberta *Interpretation Act*, R.S.A. 2000, c. I-8, Ontario's *Legislation Act, 2006*, S.O. 2006, c. 21, contains parallel wording in s. 17.

- The 2009 By-law created two permanent, exclusive use parking spots per unit and purported to authorize leases that "forever run with the title to the unit" for so long as the Corporation was in existence.
- The application judge found the 2015 By-Law, "essentially did the same things as the 2009 By-law", except it allocates four parking spaces to each unit instead of two.
- Two communications, one from YRCC's Board and one from its lawyers, advised that the 2015 By-Law "grants each unit exclusive use of four parking spaces." Neither communication referenced leases or any requirement to enter into a lease as a precondition to the assignment of the parking spaces.
- Oshin Chobanian, a director and the president of YRCC's Board, was examined under oath and agreed the Board's intention was to create four permanent exclusive use parking spaces per unit. He also admitted he was aware the only way to create exclusive use common element parking was to amend the declaration.
- The fact that no leases were ever entered into supports the inference that the Board was attempting to permanently create exclusive use common element parking. Although YRCC contends it did not enter into leases in 2015 because the matter was proceeding to litigation, there is no evidence to this effect and the submission is undermined by the fact the

communication to unit holders makes no mention of the requirement to enter into a lease.

- When the 2015 By-law was passed, roughly 70 percent of the reserved parking signs erected in 2009 were still in place. Other owners subsequently installed reserved parking signs.
- The 2015 By-law does not purport to repeal, revoke, amend or supersede the 2009 By-law. Although the 2009 By-law is not in effect, it still exists. The 2015 By-law can be said to impliedly replace the 2009 By-law to the extent of the allocation of the number of parking spaces, but, otherwise, no apparent conflict exists. Accordingly, if registered, the remaining provisions of the 2009 By-law would be "deemed" valid until declared otherwise.

[109] Courts have noted the importance of the terms of leases purportedly authorized under a by-law. In *Koletar v. Peel Condominium Corp. No. 516,* [1998] O.J. No. 1620 (Gen. Div.), Ground J. adjourned the consideration of a by-law until "written detailed information about the proposed leases and licenses [was] made available to the unit owners". Thus, Ground J. was of the opinion that the terms of the leases were an important consideration before any by-law authorizing the entering into of leases was passed.

[110] The uncertainty created by a by-law providing for a lease for an indeterminate period makes it impossible to determine the integrity of title in the

common elements until a lease is actually entered into. This uncertainty is impermissible.

[111] A condominium corporation's declaration and by-laws are vital to the integrity of the title a unit owner acquires. Thus, the extent of a unit owner's title in the common elements must be readily ascertainable. An indeterminate period could be permanent. Due to the uncertainty created by the passage of the 2015 By-law, there is evidence in the record that Cheung is unable to sell her units until the litigation over the parking spaces is resolved. The fact that the 2015 By-law can be repealed or amended, or that leases may, in the future, be entered into, cannot affect the court's assessment of the 2015 By-law's present validity, which is what we are asked to do.

[112] Moreover, the 2015 By-law has affected Cheung's interest in the common elements, but s. 21(2) has not been complied with since 2009. Not only is a unit owner bound by the declaration and by-laws, she is entitled to insist that other unit owners are similarly bound: see *Carleton Condominium Corporation No. 279 v. Rochon et al.* (1987), 21 O.A.C. 249, at para. 27.

[113] Thus, although the application judge correctly held that a condominium's declaration does not have to specifically authorize leasing of common elements, his analysis was incomplete. He erred in not examining the actual wording of the 2015 By-law and, specifically, the meaning to be given to the words "upon the

terms and conditions herein contained", in the light of the history and circumstances surrounding the 2015 By-law's enactment. When properly considered, the meaning of "upon the terms and conditions herein contained," is the 2015 By-law allocated four common element parking spaces to each owner for each owner's exclusive use on a permanent basis or for an indeterminate period (as did the 2009 By-law, which was not repealed). I would therefore hold the 2015 By-law contravenes the Act and is invalid.

(2) Did the application judge err in concluding the 2015 By-law is reasonable?

(1) General Principles

[114] As indicated earlier, s. 56(6) of the Act provides that by-laws must be reasonable and consistent with the Act and the declaration. The requirement that by-laws be reasonable is indicative that the legislator wishes the court to adopt a deferential standard when reviewing a by-law passed under the Act. Thus, it is for a condominium corporation to interpret its own declaration and by-laws and, as long as that interpretation is reasonable, courts should not interfere: *London Condominium Corp. No. 13 v. Awaraji,* 2007 ONCA 154, 221 O.A.C. 240, leave to appeal refused, [2007] S.C.C.A. No. 203, at paras. 6-7.

[115] There will often be no single right solution to the issues a by-law purports to address. When a decision is taken in the context of condominium unit owners whose objectives are in tension with one other, there may be no particular

decision that is apparently superior to others. Accordingly, in *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375,* 2016 ONCA 650, 77 R.P.R. (5th), at paras. 48-53, this court held that provided a board's decision is within a range of reasonable choices that it could have made in weighing conflicting interests, a court should not go on to determine whether the decision was the "perfect" one.

[116] An illustration of a case in which this court held a board's decision was within a range of reasonable choices is *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.). Although *Dvorchik* dealt with the validity of a rule, s. 58 of the act similarly requires rules to be reasonable. This court noted, at para. 5:

> [A] court should not substitute its own opinion about the propriety of a rule enacted by a condominium board **unless the rule is clearly unreasonable or contrary to the legislative scheme**. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners. [Emphasis added.]

[117] In *Dvorchik*, the impugned rule prohibited pets that weighed more than 25 pounds. This court held that a limit on the size of pets was reasonable given the size of the condominium, which had over 1,000 residents. The panel noted, "There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the '25

pound rule' is not the best rule or the least arbitrary. But this does not make it an unreasonable one": *Dvorchik*, at para. 6.

[118] On a more abstract basis, a general principle of administrative law is that a decision will be unreasonable if there is no line of analysis that could reasonably lead the administrative body to arrive at the conclusion it did: *Law Society of New Brunswick v. Ryan,* 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 55. In line with that reasoning, in *York Condominium Corp. No. 545 v. 602809 Ont. Ltd.* (1989), 4 R.P.R. (2d) 192 (Ont. Dist. Ct.), at para. 31, the court held reasonableness requires a "proper, lawful motive intended to remedy a meaningful problem which cannot reasonably be dealt with in other ways."

[119] The ultimate question is whether the by-law read as a whole is reasonable: *York Condominium Corp. No. 545.* The person challenging the by-law bears the onus of showing it is unreasonable: *Awaraji*, at para. 10.

[120] With these general principles in mind, I turn to the application judge's assessment of the reasonableness of the 2015 By-law.

(2) Applying the principles

[121] An important caveat to the standard of deference afforded to a condominium board in enacting rules or by-laws is contained in the emphasized portion of the passage quoted in *Dvorchik*, above. Namely, a by-law cannot be contrary to the legislative scheme. I have already held the 2015 By-law does not

comply with the Act and is invalid. Thus, no deference is owed to the Board's decision to pass the 2015 By-law. Quite apart from my conclusion in this regard, however, I would hold the 2015 By-law is unreasonable.

Increasing the number of allocated parking spaces from two to four

[122] Cheung submitted the 2015 By-law is unreasonable because it discriminates against her. The application judge responded to this argument by pointing out that Cheung was treated on an equal basis with the other unit holders. At para. 40 of his reasons, he commented:

> I accept [Edward] Cheung's evidence that some of the other businesses often have empty spots when the restaurant is at peak capacity. That, however, does not mean that the 2015 By-law is oppressive or discriminatory. It means that not everyone is using the assigned parking spots assigned to them at all times. It is a unit holder's right to not park in their designated space as much as it is their right to park in their designated space.

[123] Equality does not mean merely equal treatment. Substantive equality, or in other words, the effect of the by-law, must also be considered. For example, in *York Condominium Corp. No. 545*, the condominium board in a corporate development attempted to enforce a by-law prohibiting owners from parking vehicles weighing over 17,500 pounds on the common element parking area overnight. One of the stated purposes of the by-law was to reduce future asphalt repairs because owners were of the view that heavy trucks resulted in damage to the parking area. The applicant was a commercial unit owner operating a gravel

trucking business. Although he was treated equally with the other owners, the application judge held, at para. 28, the by-law was not reasonable, in part because there was no evidence to establish the actual cause of any asphalt damage. A second reason why the application judge held the by-law was invalid was because the board had not identified a proper lawful motive to address a meaningful problem. The latter is not the situation in this case.

[124] In this case, YRCC had a proper lawful motive in passing the 2009 By-law. A by-law was necessary to address the parking problem created by the popularity of the restaurant and Cheung's indifference to the effect her restaurant's monopolization of the parking had on other unit owners. In 2015, a by-law to govern parking continued to be necessary. However, YRCC's submission that the 2015 By-law is reasonable in providing for the leasing of four parking spaces to each unit owner is weakened by the fact the 2009 By-law provided for the leasing of only two parking spaces per owner. There is a dearth of evidence respecting the rationale for the increase from two spaces to four. On the other hand, Cheung's evidence, which the application judge accepted, was that other businesses often have empty spots when the restaurant is at peak capacity.

[125] Ordinarily, the number of parking spaces leased to each unit owner under by-law would be but a single aspect of the by-law that would not affect its validity as a whole. In this case, however, increasing the number of leased parking

spaces from two to four is a major aspect of whether the 2015 By-law is reasonable. The effect of the 2015 By-law is to reduce the amount of open parking by approximately 80 percent overall, and about 50 percent from the 2009 By-law.

[126] Unlike the 2009 By-law, the 2015 By-law contains nothing in the preamble or elsewhere referencing a parking problem. There is no issue the 2009 By-law was "loosely enforced". The sole rationale for enacting the 2015 By-law appears to be in paras. 35-37 of Chobanian's affidavit, sworn March 11, 2016, which states:

> In spite of the 2009 By-law and the reserved parking signs erected at the Property, the Restaurant continued to monopolize the parking spaces at the Property since the Restaurant's employees and patrons/clients frequently disregarded the 2009 By-law and the reserved parking signs erected on the Property.
>
> Accordingly, on December 23, 2014, the Board, which included Mr. Lau, passed By-Law no. 6, which granted to each unit owner the use of four (4) common element parking spaces at the Property by way of a lease or licence.

[127] There is no evidence that rigorous enforcement of two parking spaces allocated per unit would be insufficient to resolve the parking problem.

[128] Neither of the two expert reports filed on the application address the need to further reduce the number of open parking spaces from those available under

the 2009 By-law. Although expert evidence is not necessary in every case, such evidence is, nevertheless, important.

[129] For example, in *371624 Canada Inc.*, a case involving converting an area of a parking lot into hourly rented public parking spaces, this court relied on expert evidence from two security firms in analyzing the security implications of such a proposal. Based in part on the security issues raised in those reports, this court upheld the board's decision to prevent the public parking from taking place. In *York Condominium Corp. No. 545,* as already noted, the absence of any expert evidence concerning the effect of heavy trucks on the parking area was a significant factor in the application judge's conclusion that the by-law was unreasonable.

[130] Although YRCC's factum makes reference to "a deteriorating parking situation" and refers to the Chobanian affidavit in this regard, the application judge made no finding that between 2009 and 2015 the parking situation deteriorated. Instead, at para. 9 of his reasons, he stated:

> According to the Respondent's evidence, the restaurant's patrons and employees monopolized the parking until the passage of the 2015 By-law.

[131] The application judge then referenced the parking difficulties Chobanian described and concluded, "He states in his affidavit that the parking situation led the Board to pass the 2009 By-law, and ultimately the 2015 By-law." The

application judge did not find the parking situation worsened after 2009 such that a greater number of assigned parking spaces per unit was justified.

The availability of overflow parking on adjacent lands

[132] Further, it would appear the Board and the application judge were under the misapprehension that overflow parking was available elsewhere in the York Corporate Centre. In coming to his decision that the 2015 By-law is reasonable, the application judge relied on the expert evidence about the applicability of the Zoning By-law and observed, at para. 42:

> An aspect of reasonableness is whether patrons of the restaurant have the ability to park in other parts of the York Corporate Centre. In my view, they do.

[133] As I indicate below, the record does not support the application judge's finding that parking is available elsewhere in the York Corporate Centre. Although there was expert evidence that the Zoning By-law provides for a shared parking formula across the entirety of the York Corporate Centre, the evidence demonstrates – practically speaking – that the Zoning By-law does not have the effect of creating available parking for restaurant patrons. The application judge accordingly committed a processing error in this regard. This error affected the application judge's assessment of the reasonableness of the 2015 By-law as a whole.

[134] Both experts opined on the interaction between the 2015 By-law and the Zoning By-law. The Zoning By-law provides for a shared parking formula to determine the minimum number of parking spaces required in a development. Both experts addressed whether the minimum parking spaces calculated under the shared parking formula are site-specific (i.e. specific to a particular property within the York Corporate Centre), or whether that calculation takes into account parking located anywhere within the York Corporate Centre.

[135] Both experts' reports concluded the shared parking formula applied to the York Corporate Centre as a whole. The application judge concluded, at para. 16 of his reasons, "that meant parking for individual developments (such as the Respondent) may be accommodated by other developments within York Corporate Centre." Although in theory the application judge's conclusion may hold true, the evidence before him was that, in practice, parking was not available elsewhere in the York Corporate Centre.

[136] In particular, Cheung's expert, Michael Mannett, concluded "the Zoning By-law contemplates shared parking for the Area" but noted "there is no mechanism (easement, parking agreement, etc.) to enforce the shared parking formula as intended in the [Zoning] By-law".

[137] YRCC's expert, Jonathan Rodger, also stated he was not aware of any easements or parking agreements applicable to shared parking throughout the

York Corporate Centre. He acknowledged in cross-examination that in the absence of any easements or parking agreements, the ability of customers to park elsewhere in the York Corporate Centre requires "good faith" on the part of the other property owners.

[138] The application judge did not reference the fact that the availability of overflow parking elsewhere in the York Corporate Centre essentially depends on the adjacent landowners' good faith.

[139] Cheung tendered evidence that, in practice, the restaurant's patrons have not been able to use parking spots elsewhere in the York Corporate Centre. This evidence included affidavit evidence and photographs depicting "private parking" signs erected on parking spaces on adjacent lands; evidence that restaurant patrons had been ticketed for parking elsewhere in the York Corporate Centre; and correspondence between Cheung's counsel and counsel for adjacent landowners, where the adjacent owners took the position that they reserve "the right to deny [Cheung's] patrons access to, egress from, and use of the parking lot".

[140] Although the application judge noted Cheung's evidence that some of the restaurant patrons have received parking tickets, he did not reference any of the other evidence summarized above. The application judge seems to have grounded his finding in the experts' opinions that the Zoning By-law provides for

shared parking across the York Corporate Centre. The evidence, however, demonstrates that even if the Zoning By-law in theory prescribes shared parking, in practice this is not the case.

[141] Further, the application judge noted "the zoning by-law *on its face* contemplates that parking will be available throughout the York Corporate Centre" (emphasis added), but then added, "if Mr. Mannett is correct that, historically, parking has not been available throughout the York Corporate Centre, then it strikes me as entirely reasonable that the Board would be required to manage the available parking for the benefit of all unit holders." The application judge's conclusion that it is "entirely reasonable" for the Board to manage its available parking because historically parking has not been available elsewhere in the York Corporate Centre undermines his finding – made in the same paragraph – that "patrons of the restaurant *have the ability* to park in other parts of the York Corporate Centre" (emphasis added). If parking "has not been available" elsewhere in the York Corporate Centre – for whatever reason – then patrons of the restaurant do not really have the "ability" to park on those adjacent lands.

[142] In any event, I am of the opinion that YRCC cannot offload its responsibility to manage its parking onto other unit owners in the York Corporate Centre. None of those owners are parties to this proceeding. Presumably, the various condominium corporations that govern the York Corporate Centre can also pass

by-laws to address parking issues. The state of the parking in the York Corporate Centre as a whole is therefore subject to change. Similarly, the Town of Richmond Hill is not a party to this proceeding. Regardless of the experts' interpretations of the Zoning By-law, the evidence is the municipality is not enforcing the Zoning By-law and, in reality, it does not have the effect of creating an alternative parking solution for the restaurant's patrons and employees.

[143] I therefore conclude the application judge committed a processing error in that he misapprehended the evidence with respect to alternative parking and ignored evidence that, practically speaking, alternative parking was unavailable. These errors were an essential aspect of his finding that the 2015 By-law is reasonable.

(3) Conclusion on the reasonableness of the 2015 By-law

[144] The 2015 By-law is unreasonable because there is no line of analysis that could reasonably lead the Board to assign four parking spots to each unit holder as opposed to two. Practically speaking there is no available alternative parking elsewhere in the York Corporate Centre. There is no expert evidence that an increase from two to four assigned parking spots per unit was necessary to resolve the parking problems and no evidence that rigorous enforcement of two assigned parking spots per unit would be insufficient. Nothing in the 2015 By-law speaks to the necessity to lease four spaces. Given the application judge's finding that other businesses often have empty spots when the restaurant is at

peak capacity, the 2015 By-law assigning four parking spaces per unit is not within a range of reasonable choices that the Board could have made in weighing conflicting interests. Cheung has discharged the onus on her of showing that the By-law is unreasonable.

(3) Does the 2015 By-law contravene s. 135 of the Act?

[145] As outlined above, s. 135 of the Act enables Cheung, an owner, to make an application to the Superior Court of Justice for an order that YRCC's conduct, "is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant".

[146] In *BCE*, the Supreme Court commented on the approach to the oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The Court defined "oppression", "unfair prejudice" and "unfair disregard" as follows, at para. 67:

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders. [Citations omitted.]

[147] The application judge found, at para. 52 of his reasons, that Cheung had an expectation that her tenant would be able to use "all" of the shared parking

spots. He held that was not a legitimate or reasonable expectation: "Indeed, it is what led to the parking problems in the first place." As Cheung's expectation was unreasonable, the application judge held she was not entitled to a remedy under s. 135 on the basis that the Board had unfairly disregarded that expectation.

[148] Cheung submits the application judge erred in considering only her subjective expectations, as opposed to a unit owner's objective ones. Cheung's counsel submits we should first decide on an objective basis what a unit owner's reasonable expectations would be and, having ascertained them, go on to address whether they were unfairly disregarded.

[149] In support of her position, Cheung relies on *BCE*, at para. 62, as follows:

> The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[150] Relying on the court's comments that it is the objectively reasonable expectations that are to be considered and that the actual expectation of a particular stakeholder is not conclusive, Cheung submits the application judge ought to have gone on to determine a unit owner's objectively reasonable expectations and whether a breach of them had been established.

[151] While I can appreciate counsel making this argument, I would not give effect to it. *BCE* sets out a two-step approach to applications under the oppression remedy, which the court summarized at para. 68:

> (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[152] I read this paragraph as requiring a court to first determine whether or not an applicant's expectation is reasonable on an objective basis. If the evidence supports the expectation asserted as being objectively reasonable, then the court goes on to consider whether the applicant's reasonable expectation has been violated. It is in the context of determining whether the applicant's expectation is reasonable that the Supreme Court made its comments about subjective intentions not being conclusive and the necessity to consider them on an objective basis. Thus, an applicant must first establish that her expectations are reasonable before she is entitled to any relief under the oppression remedy. The application judge did not err in his approach to s. 135.

[153] Given the application judge did not err in his approach to s. 135, I agree with my colleagues that his finding that Cheung's expectation is unreasonable is a finding of mixed fact and law and is owed deference. There was ample support in the evidence for his conclusion that her expectation is unreasonable. Some of

that evidence includes that although the restaurant's customers had access to the open parking for almost 19 years, that open access eventually created great problems for the other condominium owners. It was and is unreasonable for Cheung to ignore her fellow unit owners' interests and to insist they return to the practice that existed more than eight years ago (before the passage of the 2009 By-law). As Cheung did not meet the requirements of the first step of the test under s. 135, the application judge correctly held there was no need to consider the second step.

[154] Accordingly, I would hold the application judge did not err in refusing to grant Cheung a remedy under s. 135 of the Act.

(4) Did the application judge err in awarding $60,000 in costs to YRCC?

[155] Cheung created and exacerbated the parking problem because of her intransigence and insistence, which she has maintained on appeal, that she is entitled to access all of the common element parking. YRCC set about fixing the problem but, on the view I take of this appeal, after two attempts YRCC has not passed a valid by-law. Further steps must be taken and, possibly, further litigation will ensue before the parking problem is resolved. Viewed objectively, Cheung's expectations are unreasonable. As a result, I have concluded she is not entitled to a remedy under s. 135 of the Act.

[156] I would hold both parties have achieved partial success. Accordingly, I would grant leave to appeal costs, set aside the application judge's award of costs and order that each party bear their own costs throughout.

[157] In relation to costs that YRCC must pay to its counsel, Cheung submits she should not have to pay her share of the costs of the litigation for which she, as a unit owner, is liable. I would reject this submission. As provided for in the Act, Cheung is required to bear her share of the common expenses, of which this litigation is one such expense. I see no reason to hold otherwise.

H. DISPOSITION

[158] For the reasons given above, I would hold that although the Condominium Board may pass a by-law to lease common element parking, the 2015 By-law passed by this Board is invalid and unreasonable and the application judge erred in holding otherwise. Accordingly, I would allow the appeal and declare the 2015 By-Law invalid and unreasonable. I would also grant leave to appeal costs, set aside the costs ordered on the application and order each party to bear their own costs throughout.

"K.M. Weiler J.A."

Released: August 03, 2017

Ex "P"_ Affidavit of E. Cheung sworn December 13, 2015

Schedule "A"

71

BY-LAW NO. 6
YORK REGION CONDOMINIUM CORPORATION NO. 759
(the "Corporation")

A By-law Respecting the Leasing of Common Element Parking Spaces

WHEREAS:

A. section 21(1) of the *Condominium Act, S.O. 1998, c.19* and any amended or successor legislation (the "Act") provides that a condominium corporation may, lease part of the common elements or grant or transfer an easement of licence through the common elements;

B. Problems exist with regards to availability of parking, in that unit owners, their employees, guests, clients and customers are not able to access parking spaces within a close proximity to their units.

C. The Board of Directors of the Corporation desires each unit to have the benefit of two (2) common element parking spaces that are located within a reasonable distance of the unit.

NOW THEREFORE BE IT ENACTED as a by-law of the Corporation as follows:

1. The Board of Directors of the Corporation has authority to enter into a lease with each unit owner with respect to the parking spaces identified in Appendix "1", attached hereto.

2. In consideration of two dollars ($2.00), the receipt and sufficiency of which is acknowledged, each unit owner shall be the exclusive lessees of two (2) common element parking spaces as described in the chart below and Appendix "1".

3. The leases shall terminate with the termination of the Corporation.

4. Each lease shall forever run with the title to the unit it is attached to, notwithstanding change(s) in ownership of the unit.

5. The following is the breakdown of the units and their attached common element parking spaces, the diagram attached hereto as Appendix "1" approximates the location of each unit and each parking space.

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Unit	Leased Parking Spaces
1	P1 (two spaces)
2	P2 (two spaces)
3	P3 (two spaces)
4	P4 (two spaces)
5	P5 (two spaces)
6	P6 (two spaces)
7	P7 (two spaces)
8	P8 (two spaces)
9	P9 (two spaces)
10	P10 (two spaces)
11	P11 (two spaces)
12	P12 (two spaces)
13	P13 (two spaces)
14	P14 (two spaces)
15	P15 (two spaces)
16	P16 (two spaces)
17	P17 (two spaces)

Unit	Leased Parking Spaces
18	P18 (two spaces)
19	P19 (two spaces)
20	P20 (two spaces)
21	P21 (two spaces)
22	P22 (two spaces)
23	P23 (two spaces)
24	P24 (two spaces)
25	P25 (two spaces)
26	P26 (two spaces)
27	P27 (two spaces)
28	P28 (two spaces)
29	P29(two spaces)
30	P30 (two spaces)
31	P31 (two spaces)
32	P32 (two spaces)
33	P33 (two spaces)

WITNESS the corporate seal of the Corporation this 25th day of May, 2000.

YORK REGION CONDOMINIUM
CORPORATION NO. 759

Per: _____, President

Per: _____, Secretary

I/we have authority to bind the Corporation

Ex "S" - Affidavit of E. Cheung, sworn December 18, 2015

BY-LAW NO. 6
YORK REGION CONDOMINIUM CORPORATION NO. 759
(the "Corporation")

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A By-Law Respecting the Leasing of Common Element Parking Spaces and Director Qualifications

WHEREAS:

1. Subsection 21(1) of the *Condominium Act, 1998*, S.O. 1998, c.19 (the "Act") provides that the Corporation may, by by-law, lease part of the common elements or grant a licence through part of the common elements;

2. Subsection 56(1)(m) of the Act provides that the Board may, by resolution, make by-laws to govern the use and management of the assets of the Corporation; and

3. Subsection 56(1)(a) of the Act provides that the Board may, by resolution, make, amend or repeal by-laws to govern the qualification of the Directors of the Corporation.

NOW THEREFORE BE IT ENACTED as a by-law of the Corporation, by resolution of the Board of Directors, as follows:

1. Section 3 of Article VI of By-Law No.1 is hereby repealed and replaced with the following:

   "3. Qualifications: Each Director shall be eighteen (18) or more years of age and be an owner of a unit at the Corporation."

2. The Board of Directors of the Corporation may, on behalf of the Corporation from time to time, grant a lease or license over, upon, under or through those parts of the common elements identified in Schedules "B" and "C" attached hereto as "Common Element Parking Spaces".

3. The Board of Directors of the Corporation may, on behalf of the Corporation from time to time, grant a lease or license to each owner of a unit listed in Schedule "B" attached hereto over, upon, under or through the "Common Element Parking Spaces" assigned to the owner's unit as set out in Schedule "B" attached hereto, upon the terms and conditions herein contained and any other such terms and conditions as may be deemed appropriate by the Board of Directors from time to time.

4. The Board of Directors of the Corporation may, on behalf of the Corporation from time to time, designate any and/or all of those parking spaces identified in Schedule "C" attached hereto as "Loading Zones" as parking spaces that are to be used by owners, residents and their employees, agents, guests, visitors and/or customers for a maximum duration of time as to be determined by the Board of Directors for the sole purpose of loading and/or unloading goods.

IN WITNESS WHEREOF, the Corporation has affixed its corporate seal attested by the hand of its duly authorized officers this 23rd day of December, 2014.

YORK REGION CONDOMINIUM CORPORATION NO. 759

Per: _____
Name: Simon Lee
Title: President

Per: _____
Name: [illegible]
Title: Secretary

I/we have authority to bind the Corporation