QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 201**

Date: **2017 07 05**
Docket: QBG 97 of 2017
Judicial Centre: Prince Albert

BETWEEN:

DERYK SMOOKE

Applicant

- and -

ROSEMONT ESTATE CONDO CORP 101222494

Respondent

Appearances:

Deryk Smooke	on his own behalf
Brett A. Stevenson	for the respondent

FIAT — DANYLIUK J.
July 6, 2017

Introduction

[1] Mr. Smooke occupies a unit in this residential condominium complex situated in Prince Albert. Recently, his monthly condominium fees (along with those of all other unit owners) were increased by the respondent [Condo Corp]. Mr. Smooke is displeased. He feels the Condo Corp imposed this increase improperly and illegally.

[2] He has therefore applied to this court for relief. The precise relief claimed is, in some regards, unclear. At least in part, this is because in his notice of application, under "Remedy claimed or sought", Mr. Smooke says:

> 1. Appropriate remedy that is usual for the violations under the Condominium Property Act and the Condominium Regulations.
>
> 2. Coverage of legal costs due to their archaic approach to not wanting to do dispute resolution at my request.

[3] However, elsewhere in his application, Mr. Smooke states he wishes to have an administrator appointed to oversee the preparation of properly audited or reviewed financial statements. He says he has been oppressed by the Condo Corp. He says the executive of the Condo Corp has prepared improper financial information and he wants this remedied.

[4] For its part, the Condo Corp's position is that it has done nothing wrong. Somewhat curiously, it treats this application almost like a criminal matter. While the onus on this application is undoubtedly on Mr. Smooke, this is a civil proceeding, and there are expectations as to disclosure.

[5] In the event, I have decided that Mr. Smooke's application must be dismissed in its entirety.

Facts

[6] The evidence is less than ideal. Some items have not been put into evidence that would have been useful. For example, the bylaws of the Condo Corp are not before me. Nevertheless, the evidence filed leads to the following factual findings.

[7] Mr. Smooke occupies Unit 103 in this condominium. Although unclear, it appears he has done so since early 2016. In March 2017, he received notice of an

increase in monthly condominium fees from the Condo Corp. On March 26, 2017, the president of the board of the Condo Corp, Mr. Aaron Exner, emailed a reminder about the increase to several owners. The next day, Mr. Smooke emailed Mr. Exner to ask why the condo fees had gone from $210.00 to $260.00 per month. While in his affidavit Mr. Smooke states he simply inquired about the increase, in fact his email to Mr. Exner reads as follows:

> Aaron,
>
> $50 a month increase seems to be a little excessive. I'm speaking on behalf of the majority of tenants here who are most likely are on CPP, old age pension or people with families who are working with a limited income. How can they afford it when they are on a limited income?
>
> I looked in the meeting notes and you mentioned about the increased cost giving a cusion [*sic*] for unforeseen circumstances due to the law suit. I highly disagree with that statement, it sounds discriminatory in nature as the condo board is impacting the lives of people who have families and the lives of the elderly, plus it seems punitive in nature as our community is suffering reprisal from the board in faith of what happened to cause the lawsuit in the first place.
>
> The gist of what I'm saying is the increase is unreasonable, reprisal is evident, and I want a better explanation before I start handing out $600 (25 percent increase) more a year.

[8] Nowhere in any of the material filed is the background explained. I do not know anything about any lawsuit. I do not know what is meant by the increase being "discriminatory" or that it is a "reprisal".

[9] On April 1, 2017, Mr. Exner replied to Mr. Smooke by sending a lengthy email with an explanation of the rationale behind the increase. He indicates the board of the Condo Corp voted unanimously in favour of the increase. The email indicates that upon reviewing year-end finances internally, a 2017 deficit was predicted. It was felt the deficit warranted an increase to the monthly fees. The fiscal

year-end is August 31. The deficit was predicted to be $5,140, or $17.85 per unit. Thus, an increase was required just to keep up with regular maintenance costs, with no allowance for unforeseen costs. Failing this, the Condo Corp would start eating into reserve funds. The proposed increase to $260.00 per month would result in an overall 2017 surplus of $860.00. The email notes that it is the board, not the entire association, that votes on any increase to monthly fees.

[10] This information had originally been sent just to board members, but Mr. Exner forwarded same to Mr. Smooke. As well, Mr. Exner had reviewed these numbers with "Darcie". The material is unclear as to who "Darcie" is, but I can infer that he is referring to Darcie Doell, a board member of the Condo Corp.

[11] Mr. Smooke seized on some isolated phrases from the original email from Mr. Exner to board members: "After reviewing the year end finances with Darcie"; "I have crunched the numbers in a variety of ways to reflect a Sept 1 – Aug 31 fiscal year". Mr. Smooke's position in his material was that this meant financial statements were prepared internally by two board members with no audit or review from a qualified outside accountant. On April 2, 2017, Mr. Smooke replied by stating the financial statements he perceived as being prepared by two board members were improper and that this also amounted to a reserve fund study, which was not to be done internally either. Again, it is useful to review exactly what Mr. Smooke sets out in his email of April 2, 2017:

> Aaron,
>
> I would like a copy of the initial reserve fund study from a qualified person. Great attempt at doing your own study, but that's against the law as an independent qualified person needs to do that.
>
> I do not want to complain to the governing body, but I now have proof that a law was broken, also incriminating statements from the AGM report outlining one of the reasons for the increase due to unforeseen costs of the lawsuit. A lawsuit is not a common expense

> and we shouldn't be paying out of pocket for that's what insurance is for.
>
> You are not qualified, nor anybody else within the condo board, in order to conduct this study as per section 51 of the condo property regulations. It's simply conflict of interest.
>
> I want to trust your figures, but I demand a copy of the initial reserve fund study from a qualified independent person i.e engineer, architect, professional designation as per to the regulations.
>
> The regulations state that an official reserve fund study needs to be conducted within three years of the date of the corporations [*sic*] first annual meeting.
>
> If you had your first meeting in 2015, that means you have until 2018 to complete it, etc. But, in light of significant condo fees increasing, I'm demanding an official expert to provide this professional report as proof to me, not an amateur who's not qualified and drafted the report based upon numbers that make no sense to me.

[12] Mr. Exner replied by email the next day, indicating that what he had forwarded was not a reserve fund study prepared for the Condo Corp. Such a study was not yet due (and was not due for another 18 months). He advised that until such an expensive study was completed, the board would determine the amounts required for the reserve fund and the amounts payable by the owners, as per s. 58 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*Act*], and s. 51 of *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2 [*Regulations*].

[13] Mr. Smooke replied the next day, alleging Mr. Exner and the board were "in clear violation" of s. 39(1) of the *Act* and s. 53.1 of the *Regulations* "which are prescribed together to follow the rule of law". He alleged that Mr. Exner and Darcie prepared financial statements contrary to s. 39(3) of the *Act*, and that they audited same contrary to s. 53.1(d) of the *Regulations*.

[14] A plain reading of these email exchanges discloses how the dispute was escalating quickly.

[15] As well, Mr. Smooke's affidavit contains more than facts; it contains his conclusions, arguments and positions. These items have no place in a properly drawn affidavit. For example, at paragraph 5 of his first affidavit, Mr. Smooke states that Mr. Exner's April 3 email "implicitly confirmed" that the figures he and Darcie prepared were financial statements. This sort of argument is improper in an affidavit, and I have disregarded same.

[16] Mr. Smooke continued to pay the original monthly condominium fees of $210.00 but refused to pay the increased fees of $260.00. The difference has been accumulating as arrears, from the Condo Corp's perspective.

[17] By registered letter dated April 20, 2017, the Condo Corp wrote to Mr. Smooke and to Ms. Gillian Smooke, who is not a party to this application. The letter sought payment of the increased condominium fees and outlined collection options the Condo Corp had in the event payment was not received. One of Mr. Smooke's complaints is that the Condo Corp did not engage in mediation or alternate dispute resolution. He uses this ostensible refusal to partially ground his allegation of being oppressed by the Condo Corp.

[18] A second affidavit was filed by Mr. Smooke. It is unclear why this occurred, but I have considered it as part of his original application. In the main, it repeats his earlier averments but adds an event that occurred after his original affidavit was sworn. Mr. Smooke emailed Mr. Exner to arrange for service of his court documents. He notes Mr. Exner requested that same be served by registered mail and that in his reply Mr. Exner stated, "There is NO NEED for you to personally pester and upset your neighbors more than you already have."

[19] The Condo Corp responded to the application by filing the affidavit of Aaron Exner, sworn June 16, 2017. He is the board president. He denied each of the

allegations of Mr. Smooke. Specifically, he denies that the email exchange in early April 2017 constituted the provision of "financial statements"; rather, they were emails "forecasting" the 2017 budget and contemplating how the Condo Corp should address same. Mr. Exner's affidavit illustrates that the Condo Corp was acting proactively to prevent a shortfall in the next fiscal year by using financial predictions for the immediate future, as opposed to producing financial statements which are retrospective in nature, waiting for a deficit to occur, then reacting to same.

[20] Mr. Exner also explicitly denies that these emails constituted any type of reserve study.

[21] Mr. Exner avers that the condominium fee increase was required to stave off an operating deficit. The increase, he says, was duly passed by the board (unanimously) and did not need other approval. Mr. Exner indicates that this increase was applied universally and that Mr. Smooke was not singled out in some oppressive fashion. Simply put, the Condo Corp needed more income to meet ongoing expenses.

[22] Both sides filed a brief of law on June 26, 2017, which of course is late filing for the 27th. I reviewed both briefs in their entirety before chambers and subsequently while this matter was held on reserve, notwithstanding the late filing. However, Mr. Smooke also attempted to file another exhibit (Exhibit G) to his previously filed affidavits. This consisted of a petition protesting the increased monthly fees, which purports to be signed by three people (including Mr. Smooke). It was explained to Mr. Smooke in chambers that even if it was relevant, this was not the way to get such evidence before the court. I have disregarded "Exhibit G" in these deliberations.

[23] As well, Mr. Smooke's unsigned brief also purports to provide additional evidence and alters the argument from the original. Again, I have

considered all of both parties' arguments in their entirety notwithstanding the form or manner in which they have been put forth. Mr. Smooke, self-represented, has received considerable leeway and accommodation.

[24] Finally, it was pointed out to Mr. Smooke that using a notice of application instead of an originating application was likely incorrect, given *The Queen's Bench Rules* and, in particular, Rule 3-2. However, I have exercised and used my discretion under Rule 3-2(7) and Rule 1-6 to cure this irregularity to allow the application to proceed. The respondent was not prejudiced by this procedure as it clearly knew the case it had to meet, and the parties were saved time and expense. It made sense to proceed in this fashion.

Issues

[25] The issues in this application are:

1. What are the requirements of the legislation and regulations?

2. Has the respondent breached any of those requirements?

3. If so, what remedy pertains?

4. What is the proper cost award?

Analysis

1. What are the requirements of the legislation and regulations?

[26] The law pertaining to condominiums has evolved differently than the law relating to other forms of real property. It has been driven largely by statute. Much more so than in other areas of the law, there is a close tie between the

legislation and the regulations. Reference must be made to both sources in examining the issues raised in this application.

[27] As a result, I have considered various provisions (as set out below) of both *The Condominium Property Act, 1993*, and *The Condominium Property Regulations, 2001*.

[28] A condominium corporation is responsible for the enforcement of its bylaws and for the control, management and administration of the units and the common property and facilities. It must keep all of this property in a state of good repair and ensure the requirements of the law and of regulatory agencies are met: s. 35 of the *Act*.

[29] To carry out the s. 35 duty, a condominium corporation obviously needs money. Owners pay condominium fees. Section 56 of the *Act* provides that the condominium corporation "shall" levy these fees to contribute to two funds: a common expenses fund (s. 57) and a reserve fund (s. 58).

[30] The common expenses fund exists for the purposes set out in s. 55(2). This includes expenses incurred in the "control, management and administration" of the condominium. Essentially, it is an operations fund. Under s. 57(1)(b), the condominium corporation, from time to time, determines the amounts of owners' contributions to that common expenses fund by apportioning the total needed amongst the owners. Fees for the common expenses fund are due and payable once the board of the condominium corporation passes a resolution for that purpose (s. 57(2)(a)).

[31] The reserve fund is different. Under s. 55(3), a reserve fund is set up to ensure that unforeseen expenses can be paid, such as major repairs of the common facilities (roof, exterior, roads, sidewalks, utility items). The money in a reserve fund can only be used for those purposes and must be distinct from the common expenses

fund. Again, from time to time the condominium corporation determines the amounts needed for the reserve fund (s. 58). Reserve fund studies are required from time to time. Under s. 58.1 of the *Act*, a condominium corporation has to obtain such a study within three years of its first annual general meeting. Interestingly, under s. 58.1(7), the cost of a reserve fund study is a common expense, but it may be charged back to the reserve fund.

[32] In terms of raising money for either fund, the *Regulations* come into play. Section 47 of the *Regulations* states:

> **47** For the purposes of sections 57 and 58 of the Act, the corporation shall raise the amounts required for the common expenses fund or the reserve fund by levying contributions on the owners of the units:
>
> (a) in proportion to the unit factors of their respective units; or
>
> (b) if a scheme of apportionment for contributions to the fund has been established pursuant to sections 48 and 49, in accordance with that scheme.

[33] The operation and interplay of these two funds is likely obvious from the construction of the *Act* and the *Regulations*, but it was aptly summed up by Smith J. in *Condominium Plan No. 91R052147 v Page Credit Union*, 2004 SKQB 73 at para 2, 245 Sask R 252:

> [2] Critical to the operation of any condominium corporation is the assessment and collection of common fees for upkeep of the property and the creation and collection of a reserve fund for the inevitable capital expenditures required.

[34] Owners have a very strict obligation to comply with assessments for either fund, and to pay regular condominium fees and any special assessments levied from time to time as and when same fall due. Section 54(3) of the *Act* provides that owners are not exempt from making these contributions, even when they are involved

in a dispute with the condominium corporation. This recognizes that there is an interdependency amongst owners. Each must contribute his or her proportionate share to the funds to ensure the proper and orderly operation of the project as a whole. If one owner defaults, all the other owners are prejudiced: *Hallmark Place Condominium Corporation v McKenzie*, 2015 SKQB 260 at para 34, 482 Sask R 309.

[35] The legislative scheme also provides for the condominium corporation to pass bylaws that govern its affairs. I do not know if this Condo Corp's bylaws address the issues that are applicable herein in a more precise fashion, as is often the case. Presumably not, as neither party saw fit to place those bylaws into evidence in this application. I therefore rely entirely on the provisions of the *Act* and the *Regulations*.

[36] At the heart of Mr. Smooke's application is his position that the Condo Corp could not increase any condominium fees without producing financial statements which, once prepared, are audited or reviewed by an arm's-length professional. Central to this issue is s. 39 of the *Act*:

> **39**(1) Subject to any restriction imposed or direction given at a general meeting, a board shall exercise the powers and perform the duties of the corporation.
>
> (2) A board shall:
>
> (a) keep proper books of account with respect to all moneys received and all moneys expended by the board and the matters with respect to which the receipts and expenditures relate;
>
> (b) for each annual general meeting, prepare financial statements with respect to all moneys of the corporation, including the moneys received and moneys expended by the corporation;
>
> (c) maintain financial records of all the assets and liabilities of the corporation;
>
> (d) submit to the annual general meeting an annual report that

> consists of the financial statements mentioned in clause (b) and any other information determined by the board or required by a resolution passed at a general meeting;
>
> (e) keep minutes of its proceedings;
>
> (f) keep minutes of proceedings at general meetings;
>
> (g) make the books of account mentioned in clause (a) available for inspection at all reasonable times on the application of an owner or a person authorized in writing by an owner.
>
> (3) Subject to the regulations, the financial statements prepared for the annual general meeting pursuant to clause (2)(b) must be audited by a prescribed person.

[37] The interpretation of this legislation governs the outcome of this application.

2. Has the respondent breached any of those requirements?

[38] Mr. Smooke maintains the Condo Corp has misapprehended the operation of the *Act* and in particular s. 39. His position, very clearly made in chambers, is that before making any change to the monthly condominium fees payable by owners, the board of the Condo Corp must take that matter to an annual general meeting and, by virtue of s. 39, must present audited financial statements.

[39] The initial problem with Mr. Smooke's argument is his assumption that the board can only change condominium fees at an annual general meeting and once equipped with audited financial statements. That assumption underlies his entire argument. But the assumption is faulty. Sections 57 and 58 of the *Act* provide that the Condo Corp is to levy such funds "from time to time". The *Act* does not say that this must be done in conjunction with an annual general meeting, or with audited financial statements. This makes sense for several reasons:

(a) A financial statement, in the main, tells you what has happened rather than what is going to happen.

(b) The plain words of ss. 57 and 58 show that the determination of condominium fees is a task for the board, not the association as a whole.

(c) The use of the words "from time to time" suggests that there is no set time for adjusting such fees, such as at an annual general meeting. The board should do this when it proves necessary.

[40] There are also factual assumptions made by Mr. Smooke that are simply not borne out by the evidence. What he sees as "smoking guns" are not. For example, he takes short comments out of the overall context of Mr. Exner's lengthy email explaining how the increased condominium fees were arrived at, and draws the conclusion that Mr. Exner and Ms. Doell are putting forth their examination of next year's budget as the financial statements required under s. 39. Quite clearly, on a factual basis, they are not. They are forecasts or projections.

[41] Just because Mr. Smooke insists the board is saying these were s. 39 financial statements does not make it so. "Reviewing year end finances with Darcie" does not somehow translate into Mr. Exner propounding the reviewed figures as financial statements. The field of accounting has many attributes and nuances, but it does not to my knowledge contain any doctrine of fiscal transubstantiation.

[42] Thus factually and legally, the respondent has not breached s. 39 of the *Act*. Mr. Smooke's argument fails.

[43] Were any proper financial statements, audited and reviewed by a professional, actually prepared for the annual general meeting? I do not know. Like

the bylaws, this information was not placed before me. It would have been helpful to know this, but it is not essential to determine the narrow issue of whether the respondent has breached s. 39 in adjusting the owners' monthly condominium fee payments. It has not.

[44] Even if I divorce the s. 39 financial statement issue from the issue of the increase in condominium fees, there is no evidence before me that the respondent has failed to properly prepare financial statements as required by law. It was for Mr. Smooke to demonstrate this has not occurred. He has not met his onus on this application. He has failed to file any evidence as to what material was presented at the annual general meeting. He has not even demonstrated that Mr. Exner's email was ever presented to the annual general meeting. Casting this issue both narrowly and in the most advantageous manner for Mr. Exner, he still has not met his onus of proof.

[45] I therefore find that no breach of s. 39 of the *Act* has been demonstrated.

[46] Next, Mr. Smooke claims to have been oppressed within the meaning of the *Act*. It is unclear whether Mr. Smooke wishes to proceed with this aspect of his application. In chambers, he repeatedly indicated he would not proceed on this basis, but that advice was always conditional upon the respondent providing financial statements in the form requested by Mr. Smooke. Accordingly, I am not treating this ground as abandoned and will deal with it on its merits.

[47] Section 99.2 of the *Act* states:

> **99.2**(1) An owner, a corporation, a developer, a tenant, a mortgagee of a unit or other interested person may apply to the court for an order if the applicant alleges that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.
>
> (2) On an application pursuant to subsection (1), if the judge

> determines that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, the judge may make any order the judge considers appropriate, including:
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> (a) an order prohibiting the conduct alleged in the application; and
>
> (b) an order requiring the payment of compensation.

[48] The legal test for oppression has not been met in this case. That legal test was reviewed in *Harvard Developments Inc. v Park Manor Condominium Corporation*, 2017 SKQB 83. In that decision, Justice Kalmakoff reviewed the jurisprudence in this area at paragraphs 17 through 20 of his decision:

> [17] I am not aware of any reported decisions interpreting s. 99.2 of the *Act*. However, judicial interpretation of s. 135 of Ontario's *Condominium Act, 1998*, SO 1998, c 19 (which is worded in a very similar fashion to s. 99.2 of Saskatchewan's *Act),* has established a two-part test to be applied in determining whether impugned conduct amounts to oppression. In order to establish that there has been oppressive conduct warranting a remedy, the claimant must demonstrate (1) that there has been a breach of its reasonable expectations; and (2) that, considered in the commercial context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corporation No. 1272 v Beach Development (Phase II) Corporation*, 2011 ONCA 667, 285 OAC 372; *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*, 2016 ONCA 650.
>
> [18] In *Ryan v York Condominium Corporation No. 340*, 2016 ONSC 2470, Justice Perell had this to say about the application of s. 135 of Ontario's *Condominium Act*, at paras 75 – 79:
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> > 75 The oppression remedy in the Condominium Act, 1998 grants the court the jurisdiction to protect condominium owners, corporations, declarants, and mortgagees from unfair treatment. In *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (Ont. S.C.J.) at para. 33, Justice Juriansz described the nature of the court's jurisdiction as follows:
> >
> > > 33. .... This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct

> that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". 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.

76 The test for oppression has two parts: (1) the claimant must demonstrate that there has been a breach of its reasonable expectations; and (2) that, considered in its context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.* 2011 ONCA 667 (Ont. C.A.) at para. 6.

77 The oppression remedy addresses three kinds of unfair conduct: (1) oppressive conduct; (2) unfairly prejudicial conduct; and (3) conduct that unfairly disregards the interests of the claimant.

78 Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance.: *Niedermeier v. York Condominium Corp., No. 50*, [2006] O.J. No. 2612 (Ont. S.C.J.); *Walia Properties Ltd. v. York Condominium Corp. No. 478*, [2007] O.J. No. 3032 (Ont. S.C.J.), varied 2008 ONCA 461 (Ont. C.A.); *1240233 Ontario Inc. v. York Region Condominium Corp. No. 852*, [2009] O.J. No. 1 (Ont. S.C.J.); *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp., supra*; *Hakim v. Toronto Standard Condominium Corp. No. 1737*, 2012 ONSC 404 (Ont. S.C.J.); *Dyke v. Metropolitan Toronto Condominium Corp. No. 972*, 2013 ONSC 463 (Ont. S.C.J.); *Grigoriu v. Ottawa-Carleton Standard Condominium Corp. No. 706*, 2014 ONSC 2885 (Ont. S.C.J.); *Wu v. Peel Condominium Corp. No. 245, supra*; *3716724 Canada Inc. v. Carleton Condominium*

Corp. No. 375, 2015 ONSC 6626 (Ont. S.C.J.) and 3716724.

79 In *Walia Properties Ltd. v. York Condominium Corp. No. 478, supra*, at paras. 23-24, Justice Harvison Young described conduct that falls within the oppression remedy of the *Condominium Act, 1988* as follows:

> 23. In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:
>
> > ... "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.
>
> 24. When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

[19] In my view, given the similarity in legislation, Justice Perell's analysis is applicable to s. 99.2 of the *Act* in Saskatchewan.

[20] Harvard and Western bear the onus of demonstrating that Park Manor's conduct was oppressive, unfairly prejudicial, or that it unfairly disregarded their interests. In my view, the evidence adduced on this application falls short of demonstrating anything of the sort. It is clear, from the decisions that have analyzed the

> analogous sections of Ontario's legislation, that demonstrating oppression, unfairly prejudicial conduct or unfair disregard of interest requires much more than merely demonstrating that one party did something that the other did not like, or did something which produced a result that was unfavourable to the other party's interests.

[49] Mr. Smooke's evidence falls short of establishing oppression. He conflates the existence of a genuine dispute with "resistance, argument and archaic approaches to resolving conflicts". He argues that Mr. Exner was oppressive toward him "in the manner of unfair disregard" (Mr. Smooke's brief, paragraph 29). Mr. Smooke also asks for $500.00 in damages for pain, suffering and mental anguish.

[50] Counsel for the Condo Corp makes the point that the board had no obligation to enter into any sort of alternative dispute resolution mechanism. There was nothing, no legal duty, for the board to breach. There is no legal basis for Mr. Smooke's oppression claim.

[51] There is also a factual dimension to this aspect of the application. While Mr. Smooke asserts he twice invited the Condo Corp to resolve the matter amicably, there is some confusion between engaging in a dispute resolution process (mediation, arbitration) and with capitulation on the board's part. Mr. Smooke asserts that twice in his emails he invited the Condo Corp to deal with this matter in some alternative manner. A review of those emails (Exhibit B to his affidavit) belies this assertion. His email of April 2, 2017, raises the concept of resolving this matter without a complaint to the "governing body". In his email of April 4, 2017, he states, "I would like to resolve this dispute without complaining to the governing body that unfair practices and violations of the condo act and it's [*sic*] regulations are happening by our condo board."

[52] The evidence is that the Condo Corp's board made a reasoned and

objective assessment of the needs of both relevant funds, then set the condominium fees as the statute directs it to do "from time to time". There is no actual evidence of bad faith, ill will or any other conduct that would fit within the broad oppression remedy. There is no evidence that the board did anything more than something Mr. Smooke did not like, or something producing a result unfavourable to the other party's interests. The increase in fees applied to every owner. Mr. Smooke's inchoate allegations of discrimination or reprisal have no basis in reality. He has not met his onus.

[53] There is no basis in fact or law for Mr. Smooke's assertion of oppression. This aspect of his application must also be dismissed.

[54] As well, Mr. Smooke sought the appointment of an administrator under s. 101 of the *Act*, to ensure financial statements were properly prepared. Again, he was prepared to abandon this claim for relief but only if the respondent did what he wanted. Again, I will proceed to analyze his claim for this relief as I do not believe I can treat it as abandoned.

[55] This section of the *Act* was considered in *Sharpe v Condominium Plan No. 87R23752 (Owners)*, 1998 CanLII 13969 (Sask QB). Justice Malone refused to grant the request to appoint an administrator, stating (paragraph 4):

> [4] The question remains whether an administrator as contemplated by s. 101 of the Act should be appointed in these circumstances. Neither counsel was able to refer me to any authorities in this regard. I agree however, with the submission of counsel for the respondents that normally an administrator is appointed to investigate and resolve financial irregularities or mismanagement that could have an adverse affect on interested parties. I am not persuaded that the present situation requires such an appointment. Most of the irregularities referred to by the applicants have been resolved and the appointment of Nicor should dictate against any similar difficulties arising in the future. ...

[56] The same result pertained in *Goertz v Owners Condominium Plan No. 98SA12401*, 2017 SKQB 135, where oppression was alleged and one of the remedies claimed was the appointment of an administrator. Having failed to prove that any acts of oppression occurred, the court refused to appoint an administrator.

[57] Mr. Smooke has failed to establish, in the evidence, any irregularities or problems that would justify the intrusion and expense of appointing an administrator pursuant to s. 101. I also dismiss this aspect of his application.

[58] Finally, I turn to the board's collection efforts to determine whether these constitute wrongful conduct against Mr. Smooke and whether they give rise to any remedy in his favour. The evidence is that Mr. Smooke has continued to pay $210.00 since the board's increase in monthly condominium fees. He owes $50.00 per month thereafter. He will not pay it. The board is exerting some pressure on him to pay. I have found this to be a legitimate exercise of the Condo Corp's statutory power. It is not oppression. No remedy pertains.

[59] The statutory powers of collection of a condominium corporation are substantial. Section 59 of the *Act* states that late contributions to either of the two funds established will bear interest. As well, s. 63 gives rise to the condominium corporation's right to register a lien against the delinquent owner's unit covering the amount outstanding as well as any costs of that lien. Further, such a lien may be enforced like a mortgage, with foreclosure being one of the ultimate remedies. These liens have a form of super-priority under s. 63.1

[60] Mr. Smooke alleges "absolute liability" against Mr. Exner and Ms. Doell for their actions. There is no authority or evidence to support such a proposition. The evidence, taken as a whole and even read in the light most favourable to Mr. Smooke, does not establish that the Condo Corp as a whole, its

board, or even Mr. Exner and Ms. Doell were acting contrary to the best interests of the respondent.

[61] In summary, Mr. Smooke has failed to establish any wrongful acts of the respondent giving rise to a remedy in his favour. His application must be dismissed in its entirety. It fails both on a legal and factual basis.

3. If so, what remedy pertains?

[62] As already outlined above, this application fails. No remedy for Mr. Smooke pertains.

4. What is the proper cost award?

[63] Mr. Smooke claimed costs, but given that his entire application has failed he is not entitled to same.

[64] The respondent also claims costs. The respondent claims costs on a solicitor-client basis, to be set in the amount of $3,000.00 and payable forthwith as a judgment against Mr. Smooke. The respondent filed no authorities supporting such a cost claim.

[65] The ability to claim for solicitor-client costs within litigation was explained by Justice Jackson in the oft-cited passage from *Siemens v Bawolin*, 2002 SKCA 84 at para 118, [2002] 11 WWR 246:

> 1. solicitor and client costs are awarded in rare and exceptional cases only;
>
> 2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;
>
> 3. solicitor and client costs are not generally awarded as a

> reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
>
> 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.

[66] These principles were recently revisited in *Hope v Gourlay*, 2015 SKCA 27, 384 DLR (4th) 235. Chief Justice Richards set out the principles governing such cost awards at paragraphs 47 to 51. In particular, at paragraph 49 he said:

> [49] ... But, as Jackson J.A. explained in *Siemens v Bawolin*, solicitor-client costs are not typically awarded on the basis of the *merits* of a claim. In other words, it does not follow that a defendant is entitled to solicitor-client costs simply because a claim is proven to be meritless or because a claim is struck for being scandalous, frivolous or vexatious. Normally, solicitor-client costs are awarded because of behaviour related to the prosecution or defence of a claim. In this case, there has been no suggestion of any sort that the Hopes have acted scandalously, outrageously or reprehensibly in the conduct of this litigation. Accordingly, I see no basis for an award of solicitor-client costs in this case. [Emphasis in original]

[67] In *Hope*, the chambers judge's award of double solicitor-client costs was overturned.

[68] These principles were again reviewed, by Justice Smith in the *Hallmark Place* case. While in no way gainsaying the *Siemens* and *Hope* principles, Justice Smith took the view that the context of a condominium board enforcing clear obligations against a unit owner was sufficiently distinguishable from general litigation that solicitor-client costs were to be presumed on the basis of entitlement to a complete indemnity – that presumption, of course, being rebuttable. At paragraphs 32 to 36:

> [32] In the instant case, the defendants' conduct cannot be said to be outrageous in conduct of the litigation. There is no question that the defendants stuck obstinately to their meritless position but did not otherwise engage in reprehensible conduct.

> [33] Notwithstanding the guidance in *Hope*, I observe that perhaps a condominium corporation is a different circumstance than a normally constituted lawsuit.
>
> [34] There is, by the very nature of a condominium, a duty owed by each co-owner to the other. If one owner defaults on his obligation to the condominium corporation, the other co-owners are prejudiced. The concern for co-owners has been noted in the common law. *Halsbury's Laws of Canada, Condominiums*, 1st ed (Markham, ON: LexisNexis, 2011) at para HCD-112, states:
>
> > … Solicitor-client costs may be awarded to a corporation where an owner contravenes the corporation's rules and fails to follow a compliance request, since it is unfair and inequitable to force other condominium owners to subsidize the corporation's enforcement proceedings against a non-compliant owner. …
>
> [35] I respectfully posit that the concept of complete indemnification in the context of enforcing condominium bylaws occupies a different conceptual space than the discussion of solicitor-client costs in *Hope*.
>
> [36] In my view, in the face of an owner defaulting on a *CPA* statutory duty or a bylaw obligation in a condominium corporation context, the condominium corporation should, *prima facie*, be entitled to a complete indemnity. Of course, that is a rebuttable presumption which will turn on the facts in each case.

[69] Justice Kalmakoff considered this view in *Harvard Developments* but found that case was not amenable to a solicitor-client cost award. See paragraphs 27 and 28.

[70] In the case at bar, Mr. Smooke's application was ill-conceived and without merit. While he has stubbornly clung to his position despite no factual or legal basis for same, it appears to me that he was operating under some fundamental misapprehensions about how the law worked, as opposed to any *animus* against the board. I make this finding despite some inflammatory and poorly chosen language in his communications and in his material. I do not find this to be an appropriate case for the award of solicitor-client costs. Costs in this case should be compensatory.

[71] I also note that the respondent could have made matters easier by filing material that was more complete. I say this notwithstanding my acceptance that the onus on this application was clearly Mr. Smooke's. But it would have been easy to file material clarifying whether financial statements were prepared in an acceptable form, or providing the Condo Corp's bylaws to the court. Playing coy with the evidence does not lead to exercising discretion in favour of that party.

[72] As a result, I decline to order solicitor-client costs. Nevertheless, *The Queen's Bench Rules* provide me with significant discretion as to the award of costs to be made. They generally follow the event. The respondent has been successful in this application and should be awarded costs of same. The questions are how much, and on what terms.

[73] To simply award costs on the tariff will only further inflame the parties and add to their expenses already incurred. Time, effort and money will be expended on an assessment. It is within my discretion to fix the costs, and I have decided to do that.

[74] As well, I appreciate not only that the actual costs of defending this application are significant but that the other unit owners, not in default, will be called to pay a share of same as a result of Mr. Smooke's position. Something more than a tariff award is appropriate, as is an order that such costs be paid forthwith.

[75] I therefore order the applicant to pay costs of his unsuccessful application to the respondent, which costs are hereby fixed in the sum of $1,500.00, payable forthwith.

Conclusion

[76] **Accordingly, I hereby make the following order:**

1. The applicant's application is dismissed in its entirety.

2. The applicant shall pay costs of this application to the respondent, which costs are hereby fixed in the sum of $1,500.00, payable forthwith.

"R.W. Danyliuk" J.
R.W. Danyliuk