

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 2**

Date: **2018 01 08**
Docket: QBG 2692 of 2017
Judicial Centre: Regina

BETWEEN:

REGINALD WILCHUK

APPLICANT

- and -

WESTFIELD TWINS CONDO CORPORATION,
BOARD OF DIRECTORS

RESPONDENT

Counsel:

Reginald Wilchuk
Randall Sandbeck

for the applicant
for the respondent

JUDGMENT
January 8, 2018

LAYH J.

ALLEGATION OF OPPRESSION

[1] Reginald Wilchuk brings an application against Westfield Twins Condominium Corporation [Corporation] and its Board of Directors [Board] alleging, in a broad sense, “major shareholders of the condo corporation may have infiltrated and hijacked the...condo corporation.” Mr. Wilchuk states that these “shareholders” acting through the Board of Directors “are dictating policy in a manner that seems to be for their own interest, and with little regard for the interests of other minor owners and shareholders.”

[2] Mr. Wilchuk seeks an oppression remedy under s. 99.2 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [Act]. Those provisions state:

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:

(a) an order prohibiting the conduct alleged in the application; and

(b) an order requiring the payment of compensation.

99.3 Unless this Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act.

[3] Mr. Wilchuk alleges that the Board has regularly approved special assessments and implemented increases in condominium fees “without lawful authority and the majority consent of the corporation.” In his written materials and oral submissions at the hearing, Mr. Wilchuk anchors his position in an assertion that the implementation of these assessments and fees is a prerogative of the entire body of owners and not a matter of only Board competence.

[4] Mr. Wilchuk looks specifically to the following sections of the *Act* to ground his position that the owners (“shareholders” as he sometimes

refers to them), not the Board, has authority to implement special assessments and condominium fees:

56(1) The corporation shall levy on the owners of the units condominium fees consisting of:

- (a) contributions to the common expenses fund in amounts determined in accordance with section 57; and
- (b) contributions to the reserve fund in amounts determined in accordance with section 58.

...

57(1) The corporation shall, from time to time:

- (a) determine the amounts required for the common expenses fund for the purposes set out in subsection 55(2); and
- (b) determine the amounts of the owners' contributions by apportioning the amounts mentioned in clause (a) among the owners in accordance with the prescribed procedure.

...

58(1) The corporation shall, from time to time:

- (a) determine the amounts required for the reserve fund for the purposes of subsection 55(3) in accordance with the prescribed procedure;

[5] Mr. Wilchuk places emphasis on the word “corporation” in these provisions and then looks to s. 34(3) of the *Act*, which states:

34(3) A corporation consists of all persons who are:

- (a) owners of units in the parcel to which the condominium plan applies;

[6] One can understand the ready logic of Mr. Wilchuk's position. If a corporation consists of “all persons who are owners of units” and if the

“corporation” shall determine the condominium fees and reserve fund, then should not “owners of units” and not the Board determine such fees and levies?

BACKGROUND FACTS

[7] Darren Bird, president of the Corporation and a member of the Board, has provided affidavit evidence. He explains that the Corporation is a registered Saskatchewan condominium corporation. Bylaws created July 27, 2011 by special resolution were registered with the corporate registry on September 27, 2011. Certain by-laws specifying the duties of the Corporation reflect the duties found in s. 35 of the *Act*.

[8] As required by s. 51.2 of the *Act*, the Board has undertaken a reserve fund study every five years. In 2015, the Board requisitioned such a study. The resulting and lengthy reserve fund study dated March 26, 2017 listed three recommended scenarios. On March 28, 2017, the Board unanimously passed a motion to implement one of the scenarios from the study. This scenario required a total special assessment contribution of \$340,000.00 to be paid in 2016, and a six percent increase in annual condominium fees starting in 2016 and continuing to increase by six percent every year up to and including 2020. Thereafter, the scenario required no further special assessments for 30 years and annual condominium fees were scheduled to increase by only 3.4 percent from 2010 to 2014. A second motion – that the special assessment fee would be due by all unit owners on July 31, 2017 – was passed with unanimous approval.

[9] Unit owners were required to pay their proportionate share of the special assessment based on their unit factor as required by the *Act* and *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2. [Regulations]. The range was between \$2,142.00 and \$3,060.00 per unit. The Board notified all unit owners by regular mail sent April 20, 2017. Mr. Wilchuk was required to pay \$2,142.00. Unit owners were also notified of the increase in monthly condominium fees by mail sent on October 18, 2017. Mr. Wilchuk's fees increased from \$362.71 to \$369.07 per month, effective December 1, 2017.

[10] At the annual general meeting on May 11, 2017, the Board presented the 2016 financial statements. The operating budget showed that the Corporation would suffer a net loss of \$3,288.00 for the period December 1, 2016 to November 30, 2017.

ANALYSIS

Mr. Wilchuk's Basic Premise

[11] Mr. Wilchuk seeks a broad range of remedies, including orders quashing the resolution implementing the special assessment and increase in the condominium fees, prohibiting the Corporation from commencing any collection action against owners who refuse to pay the assessment or increase in fees, prohibiting the Board from implementing future assessments, fee increases or major expenditures without the majority support of the owners, and instructing the Board to act lawfully. As Mr. Wilchuk stated at the oral hearing, confirming the gist of his written submissions, these remedies all hinge on one basic premise – the entirety of the unit owners, not the Board of

Directors, is statutorily authorized to enact resolutions respecting condominium fees and assessments for the reserve fund.

[12] When asked whether the interests of unit owners in a condominium corporation are not subject to legitimately enacted resolutions of its board of directors, just like those of members of co-operatives and credit unions or shareholders in business corporations, Mr. Wilchuk stated that wherever such resolutions affected one's private residence "No" board resolutions were effective. Only owners had the right to effect such fundamental rights to one's residence.

Preliminary Matter

[13] The Corporation raises an initial point. Mr. Wilchuk's application probably should have been brought before the court by way of originating application in form 3-49: *Smooke v Rosemont Estate Condo Corp 101222494*, 2017 SKQB 201 [*Smooke*]. However, the Corporation waives any irregularity in the proceedings.

Board's Authority to Act

[14] A condominium corporation must act and exercise powers pursuant to the *Act* and the corporation's bylaws. As required by s. 35, the obligation to control, manage, administer and keep in good repair the condominium's common property is included in the corporation's duties. Section 35 reads:

35(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of the units, and of the common property and common facilities.

(2) Without restricting subsection (1), the duties of a corporation include the following:

- (a) to keep the common property, common facilities and services units in a state of good and serviceable repair and to maintain them properly;
- (b) to comply with notices or orders by the local authority or any other public authority requiring repairs to the buildings or work to be done with respect to the parcel;
- (c) to comply with any reasonable request for the names and addresses of the persons who are members of the board; and
- (d) to file any prescribed returns with the Director

[15] The Corporation's Board is statutorily enabled and obligated to exercise the powers and perform the duties of the Corporation. Mr. Wilchuk's argument that the Corporation consists of all persons owing condominium units does not refute the reality that the Board is the directing mind of the Corporation. Section 39 is operative. It states:

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.

[16] In his written materials, Mr. Wilchuk does not address the authority given to a board of directors under s. 39 and, in particular, the phrase found in s. 39(1) that the board “shall exercise the powers and perform the duties of the corporation.” To the contrary, Mr. Wilchuk asserts: “There is no provision in the Act *C-26.1*, or any other enactment, or in any bylaw, that empowers a board of directors or any board member of a condominium corporation, to create debts out of thin air and impose them on other owners and shareholders.” Mr. Wilchuk’s statement is inaccurate in two regards. First, the Board has not created debts. Second, s. 39 not only permits, but emphatically obligates, the Board to perform “the duties of the corporation.”

[17] Included in those duties are those stated in s. 54 of the *Act*. It obligates a corporation to pay and satisfy expenses incurred respecting common property and common facilities. To pay such expenses, the *Act* enables a corporation to establish a common expense fund and reserve funds. Necessarily, to pay for such expenses, a corporation requires money and s. 56 (as previously quoted) mandates a corporation to levy fees.

[18] Sections 57 and 58 (as previously quoted) impose further obligations upon the corporation, and since the board is directed to perform the duties of the corporation, these obligations fall upon the board. These sections require the corporation to contribute condominium fees to the common expenses fund and reserve fund, and to determine the amounts needed for the reserve fund. The corporation may initiate legal action to recover any unpaid fees owing by owners.

[19] To determine the required contribution to the reserve fund, the corporation must conduct a fund study from time to time. Section 58.1(2) states:

58.1(1) In this section, “study” means a reserve fund study.

(2) Subject to subsections (4) and (4.1), a corporation that exists on the coming into force of this provision shall ensure that a study is conducted and a written report is prepared in accordance with this section:

(a) within three years after the coming into force of this provision; and

(b) within the prescribed period after the date of the previous study.

[20] More precisely, the prescribed period of every five years is mandated in s. 51.2 of the *Regulations*. The *Regulations* provide that the corporation must determine the amount required for the reserve fund by taking into account the most recent reserve fund study and the anticipated repair and replacement requirements of the common property and facilities. Section 47 of the *Regulations* provides the method to raise required amounts for both funds: contributions of each owner must be levied in proportion to the unit factor of each owner’s unit.

[21] These provisions of the *Act* and *Regulations* were the subject of comment by Justice Danyliuk in *Smooke* where an unhappy unit owner brought complaints of oppression against the condominium corporation. Justice Danyliuk's statement is equally determinative of Mr. Wilchuk's allegations of oppressive conduct:

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.

[22] Since the entirety of Mr. Wilchuk's allegations lie with the assertion that the Board lacked statutory authority to set and impose condominium fees and levy a special assessment, and that assertion has failed, his argument that the Board has acted oppressively loses all its vigour. Mr. Wilchuk's suggestion that authority delegated to a board of directors cannot affect the rights of an owner of a private residence fails when one considers the many existing examples of delegated authority that affect homeowners' rights, for example the right of municipal councils to impose taxes or impose

building restrictions. Resolutions by municipal ratepayers are unnecessary to implement such control over private residences.

[23] Because the underpinnings of Mr. Wilchuk’s position have not been accepted, there is little reason to examine whether the Board has acted oppressively. However, oppressive conduct, as that term has been explained in *Harvard Developments Inc. v Park Manor Condominium Corporation.*, 2017 SKQB 83 and *Barber v Wascana Manor Condominium Corporation*, 2017 SKQB 359, has not been established. Mr. Wilchuk’s expectation that the Corporation would not take action to levy a special assessment, increase condominium fees or take any action when either fee is unpaid is an unreasonable expectation. The Board notified Mr. Wilchuk by mail of both the special assessment and the increase in the monthly condominium fees. He was given over three months to pay his special assessment of \$2,142.00 and more than 30 days’ notice of the increase in his condominium fees from \$362.81 to \$369.07 per month.

[24] Nor were the Board’s actions harsh, harmful, in bad faith or an abuse of power. The Corporation acted even-handedly, respected unit owners and acted in their best interests.

CONCLUSION

[25] The Corporation and the Board did not act in an oppressive manner in assessing the fees. The Corporation has a statutory right to place liens and initiate collection action against owners who refuse to pay the special assessment of condominium fees levied upon them.

[26] Mr. Wilchuk's requested relief is denied. He shall pay costs of \$1,000.00

J.
D.H. LAYH