



[4] YRCC 818 asserts the scrutineers made a mistake in counting the votes in relation to a proxy vote made on behalf of a corporation, Skyrise Developments Limited (“Skyrise”) (“the Commercial Proxy”). Jay Libfield, Skyrise’s president, signed the Commercial Proxy appointing Anthony Farrah, president and director of the condominium board, to vote on his behalf for Skyrise which owns 33 commercial units in the condominium. YRCC 818 submits the error was that the Commercial Proxy was before the scrutineers during the count at the AGM but they only counted it for one vote instead of 33 votes representing the 33 units Skyrise owns.

[5] After the vote, Mr. Farrah contacted the six scrutineers who counted the votes on June 14, 2017. He advised them there had been an error in the count and that a recount was required to be done (“the Recount”). The Recount took place on June 20, 2017 which rendered the same result, that Mr. Przysuski and Mr. Steinmetz were victorious. YRCC 818 asserts the scrutineers made the same error on the Recount of counting the Commercial Proxy as one vote.

### **ORDERS SOUGHT**

[6] YRCC 818 seeks on this application:

- a) an Order invalidating the election of Mr. Przysuski to the board of directors at the AGM of YRCC 818 owners on June 14, 2017;
- b) an Order deeming that Ed Dale is to have been elected to the board of directors of YRCC 818 for a three-year term of office;
- c) an Order permitting YRCC 818 to destroy the ballots and proxies from the 2017 AGM 30 days after the determination of this application; and
- d) costs of the application on a full indemnity basis;

### **ISSUES**

[7] There are factual and legal issues in dispute.

[8] There is a factual credibility dispute as to whether the Commercial Proxy was present at the election and the Recount to be counted by the scrutineers. In support of Mr. Przysuski, five of the six scrutineers swore affidavits that either the Commercial Proxy was not present on either occasion or that if it was there they did not see it. For YRCC 818, property managers for the condominium, Guido Serafini and Barbak Ardalán, and Mr. Farrah, all of whom were present at the AGM and/or the Recount, state that the Commercial Proxy was present on both occasions.

[9] I will determine the factual issue first. Depending on the outcome of that issue, the determination could dispose of the application.

[10] There are a number of legal issues that arise: whether Skyrise was legally entitled to vote; whether the Commercial Proxy, lacking initials, was valid; and whether the Commercial Proxy was properly executed by Jay Libfield. A decision as to whether the Commercial Proxy was valid will dispose of the application without deciding the other legal issues. In the event I am wrong on the factual issue I will determine the proxy validity issue. I find I will not need to determine the other legal issues.

## **THE PARTIES' POSITIONS**

### **COMMERCIAL PROXY - THE AGM AND THE RECOUNT**

#### *The Respondent's Position*

[11] Fundamental to success on this application is whether the Commercial Proxy was present at the AGM and the Recount.

[12] The five scrutineers who provided affidavits gave their accounts about what occurred in relation to the ballot and proxy counts at the AGM and Recount. Their evidence is substantially the same on the critical points.

[13] The scrutineers state that Mario Deo, the chairperson of the AGM, instructed them that only those candidates' names that were also initialed on the proxy forms were to be counted in the vote. The scrutineers understood that if there were no initials in section 4 of the proxy form beside the candidate's name, the proxy was invalid and not to be counted.

[14] The scrutineers received notice on June 16, 2017 that there may have been a mistake in counting proxies and ballots at the AGM. They were asked to attend a meeting on June 20, 2017 to do a Recount of the votes. The scrutineers attended. Also present at the Recount were Mr. Serafini and Mr. Ardalan, the property managers.

[15] The scrutineers state that like the approach at the AGM, at the Recount only the proxies on which the candidate's name was initialed were counted. The result was the same. Mr. Steinmetz and Mr. Przysuski won the two seats.

[16] According to some of the scrutineers, after the Recount was completed, Mr. Serafini entered the room with a piece of paper in his hand, the Commercial Proxy, and announced that the Recount had not taken into account 30 votes YRCC 818 says should have been attributed to Skyrise. The scrutineers objected to the suggestion that the Commercial Proxy should have been counted because they had not previously seen it at the AGM.

[17] The scrutineers say that the first time they saw the Commercial Proxy was when it appeared with Mr. Serafini at the Recount. On the scrutineers' evidence the Commercial Proxy was not part of the Recount either. The scrutineers' belief was that Mr. Steinmetz and Mr. Przysuski were legitimately successful at the AGM election and on the Recount.

[18] After the Recount Mr. Serafini got Mario Deo on speaker phone to address the attendees at the Recount meeting. What the scrutineers recall from that call is that Mr. Serafini insisted to Mario Deo that the Commercial Proxy should be included as 30 votes for Mr. Steinmetz and Ed Dale. According to YRCC 818, the vote on the Commercial Proxy was only counted as one vote. So with the extra 29 votes that ought to have been counted Mr. Steinmetz and Ed Dale would have won the seats.

***YRCC 818's Position***

[19] In opposition to the five scrutineers' contentions that the Commercial Proxy was not present, YRCC 818's position is that there is only one reference to the Commercial Proxy in Mr. Farrah's affidavit, sworn on August 29, 2017. Mr. Farrah makes a simple reference to Tab L of his affidavit indicating that all the proxies related to the unit owners that Mr. Serafini recorded as attending the AGM are contained there. There are 244 pages at Tab L, the first page, page 212, is the Commercial Proxy YRCC 818 claims was present at the AGM.

[20] Aside from that statement by Mr. Farrah, there are references by Mr. Ardalan and Serafini in their affidavits sworn on November 28, 2017 in relation to the Recount. Their statements presume the Commercial Proxy was present at the AGM with the scrutineers without providing the basis for their knowledge and belief. There is no direct evidence that they had personal knowledge of the Commercial Proxy being in the hands of the scrutineers at the Recount.

[21] I find this problematic in view of the scrutineers, who actually handled the proxies during the election, swearing adamantly under oath that the Commercial Proxy was not among the ballots and proxies at the AGM.

[22] The AGM chairperson, Mario Deo, appointed Andrew Fine, a lawyer, and Melvin Muroff, as scrutineers. Andrew Fine was paired with scrutineer, Marvin Rosenshein, and Mr. Muroff was paired with scrutineer, Helen Rosenthal, to count the ballots and proxies at the AGM election.

[23] There is an affidavit from Andrew Fine sworn on November 20, 2017 where he states he did not recall seeing the Commercial Proxy at the AGM. Mr. Muroff also had hands-on connection with the proxies and ballots, and I presume he would have come in contact with the Commercial Proxy at the AGM if it were there. One would think Mr. Muroff might have had something to contribute to this application on this crucial question but he did not swear an affidavit.

[24] Mr. Ardalan and Mr. Serafini were both at the Recount. They both deny the scrutineers' evidence that after the Recount Mr. Serafini left the room where the count was being conducted and re-entered with the Commercial Proxy in his hand. Mr. Serafini asserts that while he left the room several times he did not return with the Commercial Proxy. He claims the Commercial Proxy was at all times in the room with the scrutineers.

[25] Mr. Ardalan also asserted that the Commercial Proxy was present at the Recount and in the hands of the scrutineers during the Recount. However, he makes what I find to be a rather obtuse account of his thoughts and actions at the Recount. He stated that he directed Mr. Serafini not to draw the scrutineers' attention to the Commercial Proxy during the recount because he ...

... wanted to see if the scrutineers would 'make the same mistake' as they had at the 2017 AGM, or if they would notice during their Recount that the Commercial Proxy should be counted as 30 votes (as it indicates on its face that it pertains to all 30 commercial units). [Mr. Ardalan's parenthesis]

[26] Mr. Ardalan confirms scrutineer Sheldon Aderback's statement in his affidavit where Mr. Aderback states that Mr. Ardalan whispered to him something like "let's see if they make the same mistake". Mr. Aderback goes on to say in his affidavit that Mr. Ardalan did not particularize the mistake he was referring to.

[27] What Mr. Ardalan states in his affidavit about what he did in relation to the Commercial Proxy throws real doubt on the Commercial Proxy and its presence at the AGM and Recount. What he describes he and Mr. Serafini engaged in amounts in my estimation to nothing more than a stunt – not drawing the scrutineers' attention to the Commercial Proxy and then Mr. Ardalan whispering in a scrutineer's ear about waiting to see if a mistake is made. I think Mr. Aderback became an unwitting participant in the scheme when he received the whisper in his ear and repeated it in his affidavit. This is game-playing at its finest on a matter of critical importance to all owners – the democratic choice of whom they wanted to represent them on the board to conduct the business of the corporation.

[28] I do not quite know what to make of this. I can only conclude this does not make sense except as a ploy to supplant a duly elected candidate with a candidate preferred by a certain faction of the board. The maneuvers of Mr. Ardalan and Mr. Serafini were a nefarious but equally absurd effort to discredit the scrutineers and cast a pall of incompetence over them. I simply do not accept that the Commercial Proxy was present at either the AGM or the Recount. This means the count at the AGM that resulted in Mr. Steinmetz and Mr. Pyrzysuski's victory was accurate and valid.

[29] This finding is sufficient for me to determine this application in favour of Mr. Pyrzysuski. However, as I indicated earlier I will determine the legal question of the validity of the Commercial Proxy in relation to the initials issue.

### **The Absence of Initials on the Commercial Proxy**

#### **The Evidence**

[30] There is no dispute that the Commercial Proxy lacked initials beside the candidate's name. The question is whether the absence of initials invalidates a proxy.

[31] The scrutineers take the position that even if the Commercial Proxy were present at the AGM and at the Recount, they would not have counted it as it lacked initials next to the candidate's name pursuant to Mario Deo's instructions and those contained in the Proxy Form Instructions.

[32] The scrutineers point to the instructions they received in relation to proxies. The instructions they received from Mario Deo as the AGM chairperson were that initials were required or the proxy would be invalid. The Proxy Form Instructions at section 3 states:

Print the name of the candidate(s) you wish to vote for, in rank order, and insert your initials in the space provided on the proxy form. Please note, in order to be included in the tally, your initials must be present beside his/her candidate selection(s).

[33] The scrutineers followed the same instructions at the Recount. They attested to the fact that no one objected to the instruction about the requirement for initials. Not only do the scrutineers assert that the Commercial Proxy was not present at the AGM or the Recount they also say they did not encounter any proxies without initials on either occasion. Andrew Fine, with other scrutineers, states that had he seen a proxy without initials he would not have counted it in the vote in any event.

[34] In fact, after the results were in Mario Deo declared to the meeting, as was his duty, that Michael Przysuski and Jack Steinmetz won the election.

### **Application of the Law**

[35] The *Act* does not contain provisions that address the conduct of owners' meetings or the duties of the participants such as the chairperson. Common law and general principles on the conduct of meetings govern the duties of the chairperson. The general understanding is that it is the duty of the chairperson of the condominium owners' meetings to enforce the rules of order including instructing scrutineers. The chairperson decides questions of validity when they arise, including decisions as to the validity of ballots and proxies.

[36] The chairperson has the responsibility to examine all ballots, decide on their validity, count the votes, cast and declare the result. In the case of uncertainty, the matter of proxy validity should be referred to the chairperson for him or her to decide. Once the chairperson makes a declaration as to the result of the vote, it is final and binding unless otherwise reversed by the court: [*York Condominium Corporation No. 42 v. Gosal, et al.* 2014 ONSC 2035, at para. 22, (Ont. S.C.J.) referring to *Nathan's Company Meetings for Share Capital and Non-Share Capital Corporations*, 10<sup>th</sup> ed. (Lexis Nexis), pp. 159 and 195]. The 11<sup>th</sup> edition of *Nathan's Company Meetings for Share Capital and Non-Share Capital Corporations* ("Nathan's") provides the rule that all parties must understand and agree to be guided by the applicable rules of order: [*Nathan's*, at p. 2].

[37] YRCC 818 takes the position that initials need not be on the Commercial Proxy for the proxy to be valid. YRCC 818 submits that the requirement for initials is a mere formality that does not go to the substance of the proxy. YRCC 818's view is that it would be unfair to rely on an informality to invalidate a proxy. They cite the language in s. 134 (3)(c) of the *Act* which provides the court shall grant relief that is "fair and equitable".

[38] YRCC 818 relies on case law that holds that condominium law is remedial in nature and that provisions requiring signatures should not be rigidly or narrowly construed. The court should bring a broad and equitable approach to the resolution of disputes: [*Middlesex Condominium Corp. No. 87 v. Talbot Street London Ltd.* (1998), 1998 CanLII 3245, at paras. 15 and 16, (Ont. C.A.); and *Hogan v. Metropolitan Condominium Corporation No. 595*, 2014 ONSC 3503, at para. 18, (Ont. S.C.J.)].

### **Conclusion on the Requirement for Initials on the Commercial Proxy**

[39] The case before me is distinguishable from the cases relied upon by YRCC 818. In *Middlesex Condominium Corp. No. 87* the court was asked to address a representation the corporation made which led to an issue as to the intention of the corporation. In *Hogan v. Metropolitan Condominium* the court was required to consider s. 46(2) of the *Act* and determine the validity of a request for a meeting where some requisition forms were not signed.

[40] I do not find in the case before me, that there is any question as to intention or as to the rules to be applied to proxies. That is to say, at the AGM meeting the chairperson, Mario Deo, undertook his proper duty to advise scrutineers and to give them express instructions about the treatment of proxies and the requirements that must be met for their validity. The Proxy Instruction Package available to the scrutineers at the AGM was confirmatory of Mario Deo's instructions.

[41] There is no ambiguity about the instructions. No one objected to the rule on proxies. The rules cannot be arbitrarily changed as I find YRCC 818 is attempting to do: [*Nathan's*, at p. 2]. The scrutineers followed the instructions on the count and contend they did not see the Commercial Proxy or in fact any proxy without initials.

[42] There is no reason for the court to exercise its equitable jurisdiction in these circumstances. In fact it would be not at all fair and equitable to disturb the authority of the chairperson in the proper exercise of his duties especially in view of the questionable maneuvering around the Commercial Proxy.

### **CONCLUSION**

[43] I find that even if the Commercial Proxy was present at the AGM and Recount it would have been invalid and would not have been properly counted in the election. I deny the Orders requested and dismiss the application.

### **ORDER**

[44] Order accordingly.

### **COSTS**

[45] I received costs outlines from the parties. The Respondent, Michael Przynski, was successful on this application and is entitled to his costs. He seeks total inclusive partial indemnity costs of \$16,975.59 and total inclusive full indemnity costs of \$26,750.99. I urge the parties to attempt to settle costs on their own. Failing this, written submissions as to costs shall be delivered of no more than 3 pages in length, double-spaced in Times New Roman 12-pt font and shall be delivered within 30 days of this Order.

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**B.A. ALLEN J.**

**Released:** April 12, 2018

**CITATION:** York Regional Condominium Corporation No. 818 v. Przysuski, 2018 ONSC 2382  
**COURT FILE NO.:** CV-17-578778-0000  
**DATE:** 20180412

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**YORK REGIONAL CONDOMINIUM CORPORATION**  
**NO. 818**

Applicant

**– and –**

**MICHAEL PRZYSUSKI**

Respondent

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**REASONS FOR DECISION**

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**B.A. ALLEN J.**

**Released:** April 12, 2018