



Citation: Millcreek Management Inc. v. Registrar of the Condominium Management Regulatory Authority of Ontario under the *Condominium Management Services Act, 2015*, S.O. 2015, c. 28 Sched. 2, 2022 ONLAT CMSA 13289

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Appeal from a Proposal to Apply Conditions to the Licence of Millcreek Management Inc. pursuant to sections 40 and 41 of the *Condominium Management Services Act, 2015*.

Between:

Millcreek Management Inc.

Appellant

-and-

Condominium Regulatory Authority of Ontario

Respondent

DECISION AND ORDER

ADJUDICATOR: Stephen Scharbach, Member

APPEARANCES:

For the Appellant: Frederick Schumann, Counsel

For the Respondent: Erica Richler, Counsel

Held by Videoconference: December 13, 2021

Overview

- [1] This is an appeal by Millcreek Management Inc. (“Millcreek”) from a proposal issued by the Registrar under the *Condominium Management Services Act, 2015*, (“Act”) to apply conditions to Millcreek’s licence as a condominium management provider.
- [2] Gavin Kendrick (“Kendrick”) and Kevin Moule (“Moule”) are co-owners of Millcreek – they each own 50% of Millcreek’s shares. Both were licenced under the Act as condominium managers.
- [3] The regulatory body that administers the Act¹ received several complaints from condominium corporations about Millcreek. An inspection revealed that Kendrick improperly directed funds from condominium corporations under his management to his own companies resulting in significant losses to the condominium corporations.
- [4] Kendrick has been charged criminally with fraud and theft in respect of those corporations and others - those charges are still pending. He resigned as an officer and director of Millcreek, voluntarily surrendered his condominium manager licence, and is no longer involved in Millcreek’s operations.
- [5] However, Kendrick remains a 50% shareholder of Millcreek.
- [6] Considering Kendrick’s past conduct, the Registrar proposes to attach a condition to Millcreek’s licence that would prohibit Millcreek from allowing Kendrick to be an “interested person” in respect of Millcreek². The practical effect of the condition would be that Millcreek could only provide condominium management services if Kendrick is no longer a shareholder.
- [7] Millcreek objects to the condition on the basis that it is unduly onerous and unnecessary to protect the public.
- [8] For the reasons set out below, I conclude that the condition is appropriate, and I direct the Registrar to carry out his proposal.

¹ The Condominium Management Regulatory Authority of Ontario (“CMRAO”)

² As defined in s. 37(2) of the Act

The Legal Context

- [9] The Act is a consumer protection statute which, along with its regulations, attempts to regulate the business of providing condominium management services to condominium corporations.
- [10] Its main objective is to ensure that condominium corporations (and by extension members of the public who own condominiums) receive honest, ethical, and competent services from management service providers in accordance with the standards established by the Act and its regulations.
- [11] Section 34 of the Act prohibits anyone from providing condominium management services unless they are licenced as either a condominium management provider or a condominium manager. Section 37 provides that licences are granted only to applicants who meet the prescribed qualifications and pass background checks.
- [12] Once a licence is granted, the Registrar may revoke, suspend or attach conditions to the licence in the circumstances specified in the Act.
- [13] The legislative authority to apply conditions to a licence is set out in s. 40 of the Act. Since there is an issue between the parties as to the scope of that authority, it is useful to set out the whole section here:

40 (1) Subject to s. 41³ the registrar **may refuse to licence an applicant or may suspend or revoke a licence or refuse to renew a licence if, in his or her opinion, the applicant or licensee is not entitled to a licence under s. 37.**

(2) Subject to s. 41, the registrar may,

- (a) approve the licence or renewal of a licence in the conditions that the registrar considers appropriate.
- (b) **at any time, apply to a licence the conditions that the registrar considers appropriate** (emphasis added).

³ Section 41 requires the Registrar to first issue a written notice of proposal informing the recipient of the reasons for the proposed action and the right to a hearing before this Tribunal.

- [14] According to the Act, before the Registrar may suspend, revoke, or attach conditions to a licence, the Registrar must first give written notice to the licensee who may then request a hearing before this Tribunal.
- [15] If requested, the Act requires the Tribunal to hold a hearing after which the Tribunal may:
- “...by order, direct the registrar to carry out the registrar’s proposal or substitute its opinion for that of the Registrar and the Tribunal may attach conditions to its order or to a licence.”⁴

Background to Proposed Condition

- [16] Kendrick and Moule were originally both officers and directors of Millcreek. They were both licenced as condominium managers and they were the only condominium managers employed by Millcreek.
- [17] However, in 2019 and 2020, the CMRAO received complaints from 18 different condominium corporations concerning Millcreek, Kendrick and/or Moule.
- [18] The Registrar initiated an inspection which substantiated serious concerns about Kendrick’s conduct as a condominium manager in relation to three condominium corporations:

Condominium Corporation #1 – Kendrick, Moule, and a member of the corporation’s board of directors had signing authority for the corporation’s bank accounts. Kendrick issued cheques on behalf of the corporation to two of his own companies totalling approximately \$143,813 for services that were not provided. To do so, he transferred funds from the corporation’s reserve account to its operating account leaving the reserve account inappropriately depleted.

Condominium Corporation #2 – Kendrick, Moule, and a member of the corporation’s board of directors had signing authority for the corporation’s bank accounts. Using his signing authority as condominium manager, Kendrick issued cheques on behalf of the corporation totalling over \$47,000 to his own companies for services that were not provided. Millcreek was able to produce invoices only in respect of approximately \$5,000 of the payments authorised by Kendrick.

⁴ The Act, s. 41(8).

Condominium Corporation #3 – Kendrick and Moule had sole signing authority for the corporation's bank accounts. Millcreek or Kendrick authorised expenditures of over \$259,000 from the corporation's reserve account in respect of a "river rock project" that was carried out by one or more of Kendrick's businesses. The corporation's Board had approved a quote of \$40,000 for the project to be paid out if its operating budget and did not approve or was made aware of the rising costs for the project. Millcreek was unable to produce invoices for some of the payments it authorised.

- [19] In June 2021, several criminal charges - including fraud and theft - were laid against Kendrick in connection with the three condominium corporations above, and two others. Those charges are still pending before the Court.
- [20] Kendrick withdrew from Millcreek's operation in March 2020 and has not been involved since then. He resigned as an officer and director in March 2021.
- [21] With respect to Kendrick's condominium manager licence, the Registrar issued a proposal to revoke on the basis that Kendrick's past conduct afforded reasonable ground to believe that he will not carry on business in accordance with law and with integrity and honesty. Kendrick voluntarily cancelled his licence in June 2020 while the CMRAO's inspection was on-going.
- [22] However, Kendrick remains a 50% shareholder of Millcreek and that raises concerns for the Registrar that the proposed condition is intended to address.

The Proposed Condition

- [23] The Registrar proposes to attach a condition to Millcreek's licence which in effect requires that Kendrick no longer be a shareholder of Millcreek. The condition states:

Millcreek shall not allow Gavin Kendrick to be an interested person or an associated person (as defined in sections 1(2) and 37(2) of the CMSA in respect of Millcreek's business as a condominium management provider. In particular, Millcreek shall not allow Gavin Kendrick to:

- i. be an officer or director of Millcreek
- ii. have a beneficial interest in Millcreek's activities,

- iii. exercise control either directly or indirectly over Millcreek, or
- iv. provide financing either directly or indirectly to Millcreek's activities.

[24] Under s. 37(2) of the Act, a person is deemed an "interested person" in respect of another person (or corporation) if, in the opinion of the registrar,

- (a) the person has or may have a beneficial interest in the other person's activities,
- (b) the person exercises or may exercise control either directly or indirectly over the other person; or
- (c) the person has provided or may have provided financing either directly or indirectly to the other person's activities.

[25] Kendrick's 50% ownership of Millcreek's shares means that he has a beneficial interest in Millcreek's activities and is an "interested person" with respect to Millcreek. In addition, as one of two equal owners, Kendrick likely exercises direct or indirect control over Millcreek. In any event, in order for Millcreek to comply with the condition, Kendrick would have to no longer be a 50% shareholder of Millcreek.

Registrar's Authority to Attach Conditions

[26] The Registrar points out that the power under s. 40(1) to revoke, suspend or refuse a licence is limited to circumstances where the licensee is not entitled to a licence under s. 37⁵.

[27] In contrast, the Registrar's power to impose conditions under s. 40(2) is not so limited. The Registrar submits that it has a wide discretion to attach conditions to a licence, i.e. the Registrar may "...at any time, apply to a licence the conditions **that the registrar considers appropriate**".

⁵ Section. 37 sets out the circumstances which disentitle an applicant or licensee to a licence. They include the circumstance most relevant in his case - where the past or present conduct of a corporation's officers, directors or of an "interested person" in respect of the corporation affords reasonable grounds for belief that it will not perform the activities of a licensee in accordance with the law and with integrity and honesty.

- [28] According to the Registrar, when read as a whole, s. 40 makes it clear that the Registrar has a wider discretion in attaching conditions than when revoking, suspending, or refusing a licence.
- [29] In this case, according to the Registrar, the proposed condition is “appropriate” and in the public interest. The overall objective of the Act is to protect the public by ensuring that those who provide condominium management services do so honestly and in accordance with the law. Kendrick’s past conduct as a condominium manager make him unsuitable to be involved in Millcreek as a co-owner and 50% shareholder.
- [30] According to Millcreek, although the Registrar may, under s. 40(2), attach conditions the Register considers “appropriate”, consideration of what is appropriate should be guided by the eligibility requirements set out in s. 37. In other words, what is appropriate should be informed by a consideration of whether Kendrick’s position as a 50% shareholder of Millcreek provides reasonable grounds for belief that Millcreek will not carry on business in accordance with law and with integrity and honesty.
- [31] Millcreek argues that from this perspective the condition is not appropriate. Firstly, it is onerous (and perhaps impossible) for Millcreek to comply. Millcreek cannot force Kendrick to divest himself of the shares. According to Millcreek, that will require either negotiation or a court application. Both options are uncertain and would require Kendrick’s involvement or possibly agreement.
- [32] Secondly, Kendrick’s role as 50% shareholder does not provide reasonable grounds for belief that Millcreek will not carry on business in accordance with law and with integrity or honesty.
- [33] Millcreek points out that Kendrick is no longer licenced as a condominium manager, has not been involved in Millcreek’s business for almost two years, is not an officer or director, and has no role in Millcreek’s day to day operation.
- [34] His share ownership gives him the ability to vote for directors but since he does not have a majority of shares he cannot do so unilaterally. Kendrick has a beneficial interest in Millcreek by virtue of his 50% share ownership and would be entitled to dividends if they are paid. However, his ability to control Millcreek directly or indirectly through ownership of the shares is too theoretical and insignificant to justify such an onerous condition.

Decision and Analysis

[35] In my view, the Registrar clearly has discretion to impose conditions that are “appropriate,” and that discretion is not restricted to the circumstances described in s. 37. However, any consideration of what is appropriate should take into account the overall purpose of the Act which is to protect the public – especially that sector of the public that utilizes the services of condominium management providers.

[36] I conclude that the proposed condition is necessary and appropriate to protect the public, despite the fact that Kendrick has not been involved in Millcreek’s business since March 2020 and is no longer an officer or director. There are two factors that I consider to be particularly relevant in reaching that conclusion:

- The gravity and nature of Kendrick’ conduct,
- Kendrick’s position as a 50% shareholder and one of Millcreek’s two owners gives him a beneficial interest in Millcreek and an opportunity to control Millcreek’s activity directly or indirectly.

[37] Firstly, based on the agreed facts, Kendrick’s past conduct while providing condominium management services was egregious. Using his authority as a condominium manager, he moved funds from condominium corporations to his own companies for services that were not provided. In two of the cases, funds were taken from reserve accounts to pay Kendrick’s companies. His conduct demonstrated a willingness to manipulate condominium corporation funds to his own advantage and to the detriment of the corporations. That is squarely the type of public harm that the Act is intended to address, and it calls out for a strong regulatory response.

[38] Secondly, Kendrick is not just a shareholder. He is one of Millcreek’s two owners and holds 50% of Millcreek’s issued shares. The value of Kendrick’s stake in the company and his right to receive dividends if distributed will both be impacted by Millcreek’s financial performance. Kendrick thus has a beneficial interest - a financial interest - in Millcreek’s activities and realistically that provides a motivation to influence the affairs and activities of Millcreek.

[39] The company’s two shareholders are entitled to elect the directors and presently Moule is the only director. However, since Moule and Kendrick each own 50% of the shares, any change or addition to the Board of Directors will require

Kendrick's agreement. In fact, **any** issue that must be decided by shareholders will require Kendrick's agreement.

- [40] Also, in practical terms, since Kendrick is one of only two owners, Kendrick's interest in the company and his views will have to be taken into account by Moule in any significant decision involving the company. That potentially gives Kendrick the leverage and ability to indirectly control, or at least influence, Millcreek's operation.
- [41] Millcreek argues that the proposed condition is onerous and possibly impossible for Millcreek to meet. I acknowledge that the condition poses a practical difficulty for Millcreek and ultimately there is no guarantee that Millcreek can comply with it.
- [42] However, I agree with the Registrar that given Kendrick's conduct, he should not be involved in Millcreek. The Registrar has not issued a proposal to revoke Millcreek's licence based on Kendrick's past conduct and has instead proposed the condition. It appears to be the least restrictive regulatory option.
- [43] Although the condition is potentially onerous, in my opinion it is appropriate and necessary both to protect the public interest and to maintain public confidence in the condominium management service sector.

ORDER

- [44] Pursuant to s.41(8) of the *Condominium Management Services Act, 2015*, I direct the Registrar to carry out his proposal dated April 22, 2021 to apply conditions to the licence of Millcreek Management Inc.

LICENCE APPEAL TRIBUNAL

Stephen Scharbach, Member

Released: February 14, 2022