

**CITATION:** Unit Owners of YCC No. 42 v. YCC No. 42, 2021 ONSC 8509  
**COURT FILE NO.:** CV-21-00663639  
**DATE:** 20211224

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** ALBERT CHAUDRY, SIAMAK RAUFI, SAMAN ALI RAUFI, ISABELL CHAVES, AMIT SARKAR, RONALD BORRISON, J. GUPTA, JANET RODRIGUEZ, PATRICIA ST. LOUIS, AMANUEL ZAKARIAS, RUDY HAZELL, ABDUL MAJEED, LILY TRIEU, EDUARD ASTVATSATRYAN, SHIVTEJ SANDHU, KOSTADIN MIRTCEV, JAMILA CHAUDRY, TAJWINDER SINGH, VANDA FITA BONELLO, MORGAN DALANA, MANZAR HASSAN, MARIA DE FATIMA FITA, RAKELLA HANIF, BOHDAN LUKASEWYCZ, ASIF SHAIKH, EVERAL EVANS, MEERA RAMSARAN, JUDY DULCHAND, EVGENIA ROGOVOY, KAMALAWATTIE STANLEY, GREGORY TROJAN, JHONA CAHYONG DELA CRUZ, GERTRUDE ARMBRUST, QUY CAM PHAN, MILLICENT SMITH, DAN HASANALIE, HELGA SAADIA, MARIA SOARES, NOOR MAHAMED SHAI, PAUL S.M. CHANG, LIQAN XU, LAKSHMI PURI, ZAID GULMA, ILHAM BANA and ZAID GULMA  
Applicants

**AND:**

**YORK CONDOMINIUM CORPORATION NO. 42** Respondent

**BEFORE:** Mr. Justice Chalmers

**COUNSEL:** *C. Dirks* for the Applicants

*J. Fine* for the Respondent

**HEARD:** November 2, 2021, by videoconference

**ENDORSEMENT**

**OVERVIEW**

[1] The Applicants are a group of 44 owners of York Condominium Corporation No. 42 (YCC 42). YCC 42 is responsible for the management and administration of three high-rise buildings located at 320, 330 and 340 Dixon Road, Toronto. There are 897 residential units in the buildings.

[2] The Applicants seek an order pursuant to s. 134 of the *Condominium Act, 1988* (the *Act*) to enforce compliance with the *Act*. The most immediate concern of the Applicants is with respect to the replacement of the exterior windows at the building (the Window Project).

[3] There is no dispute between the parties that the exterior windows must be replaced. YCC 42 previously brought an Application for an order pursuant to s. 109 of the *Act* to amend the Corporation's Declaration to correct an error or inconsistency with respect to the obligation to maintain, repair and replace the exterior windows. The Applicants brought a cross-application to address their concerns with respect to non-compliance with the *Act*. By endorsement dated June 24, 2021, I granted the Order to amend the Declaration. The cross-application was adjourned to November 2, 2021.

[4] The Applicants state that there are serious non-compliance issues, including the failure to hold two Annual General Meetings (AGMs) and the failure to adhere to the reserve fund plan. There have not been regular elections of the Directors. The Applicants argue that YCC 42 is required to comply with the *Act*, before it enters into the contract for the repair and replacement of the exterior windows. The Respondent states that the Applicants' objections are unfounded and are an attempt to micro-manage the condominium.

[5] For the reasons set out below, I am satisfied that the Board failed to comply with the requirement to hold regular general meetings and elections of the Directors. I order that an AGM is to be scheduled for the earliest possible date. At the AGM, there will be an election of the Directors. The new Board will be required to consider whether a new Reserve Fund Study (RFS) or a new bid process for the exterior windows is required. The current Board will not enter into an agreement for the repair and replacement of the exterior windows until after the AGM and the election of the Directors.

### **THE ISSUES**

[6] The Applicants identify three issues in which they seek compliance:

- (i) The Reserve Fund Study,
- (ii) Regular Annual General Meetings and Election of Directors, and
- (iii) The competitiveness of the bidding process.

### **ANALYSIS**

[7] The exterior windows require replacement. The estimated cost of the replacement is \$7-7.8M. The Applicants state that they have a genuine concern about how the condominium has been operating. The matter is now urgent because the Board intends to proceed immediately with the Window Project. The Respondent argues that the Directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, at paras. 47-53.

### ***Reserve Fund Study***

[8] An RFS dated December 7, 2018 was prepared by Stephenson Engineering. This was a class 2 study which included a site visit. The Board issued a Form 15, on December 19, 2018. The 2018 RFS and the Form 15 did not include any provision for the funding of the exterior windows.

[9] On January 2, 2020, the Board obtained a further RFS prepared by Stephenson. This was a class 3 study, which did not include a site visit. The RFS included increases in the reserve fund for the Window Project. The Board was required to approve the 2020 RFS within 120 days of receipt. The RFS was received on January 2, 2020 and therefore it was to be approved by April 30, 2020. The Form 15 was to have been sent to unit owners within 15 days of the RFS being approved. The Applicants state that the Form 15 was not sent to the owners until July 9, 2021.

[10] It is the Respondent's position that it complied with the requirement to send out the Form 15 (albeit late) and that there are no issues with respect to the content of the Form 15. The Respondent states that the Applicants' complaint is one of timing and not substance.

[11] The Applicants take issue with the substance of the 2020 RFS and state that it is flawed and not in compliance with the *Act*, in that:

- (a) The funding plan does not begin with the current fiscal year of 2002 but instead commences in 2018/2019;
- (b) the opening balance for January 1, 2020 in the reserve fund is \$1,542,108, which is higher than the actual balance in the reserve fund account, which has an amount of \$963,000;
- (c) the estimated cost of the Windows Project in the 2020 RFS is approximately one-half of the estimated total cost in the Windows Condition Assessment Report prepared by Stephenson dated March 27, 2019; and
- (d) There is no provision for the replacement cost of the exterior balcony doors which form part of the Windows Project.

[12] The Applicants argue that a new RFS is required by December 2021. The Applicants seek the appointment of a new independent engineering firm, Synergy Partners to carry out the RFS. The Respondent states that a new RFS is not required at this time.

[13] Section 94 of the *Act* sets out the procedure to be followed with respect to the reserve fund. The *Act* provides that an RFS is to be completed every three years. Within 120 days of the receipt of the RFS, the Board is to review the RFS and approve a plan that ensures there are sufficient funds for the maintenance of the building. Within 15 days of approving the plan, the Board is to provide to the unit owners a Notice of Future Funding of Reserve Fund (Form 15).

[14] Here, the Respondent failed to deliver the Form 15 within the time limit set out in the *Act*. The Form 15 was eventually sent to the unit owners on July 9, 2021. On the evidence before me, I am unable to conclude that the Form 15 was deficient in any meaningful way. The Board's failure to deliver the Form 15 on time, was rectified. There is no requirement to have an RFS at this time. The last study was in January 2020. This was a class 3 study (no site visit). The RFS is to be conducted every three years. The studies alternate between class 2 and class 3 studies. The next RFS is due in January 2023. That study must be a class 2 (site visit).

#### ***Failure to Hold an AGM/Election of Directors***

[15] The Applicants state that there has been no AGM since October 2019. Even that meeting was late because it was more than six months after the fiscal year end of December 31. The Election of Directors is to take place during the AGM. The Applicants state that there are currently three positions on the Board (out of a total of 5) which are overdue for an election.

[16] The Respondent states that the AGM for 2020 was cancelled because of the restrictions on social gatherings due to the Covid-19 pandemic. The Respondent called an AGM for October 16, 2021. The notice for the meeting was sent out on October 1, 2021. On October 7, 2021 the Board was advised by their lawyer that the AGM would have to be rescheduled because it was not possible to have an in-person meeting. The lawyer recommended that the meeting be held virtually and hosted by a third party. The Respondent states that steps are underway to organize the virtual AGM.

[17] The Respondent concedes that as a result of the suspension of the AGM, there has been no Election of the Directors since October 2018. The term for each director is three years. A director may continue to act until a successor is elected. Until the directors are replaced, the director continues to have the right and obligation to manage the affairs of the corporation.

[18] Section 45 of the *Act* provides that the Board shall hold a general meeting of the owners within six months of the end of each fiscal period. The *Act* uses mandatory language. There have been no meetings since October 2019. I am satisfied that there is non-compliance with respect to the requirement to conduct AGMs. As a result of the failure to hold an AGM, there has also been a failure to hold Elections of the Directors.

[19] The Applicants are entitled to an order that the Respondent is to schedule the AGM for the earliest possible date. The Respondent does not oppose this relief. In its material, the Respondent undertakes to call and hold the AGM as soon as is reasonably practical. If there continues to be restrictions with respect to in-person meetings, the meeting will take place virtually. At the AGM, there will be an election for the positions of the directors, whose terms have expired.

#### ***Bidding Process for Exterior Windows***

[20] The Applicants state that the bidding process does not follow a fair and competitive procedure. The Applicants allege that there has been a manipulation of the bids and collusion in the bid process. There were six bids for the engineering work on the exterior windows. Two of the competing engineering firms (RDQ Engineering and Boci Engineering) have bids signed by

the same person. The Applicants argue that they have no confidence that the Board and management will conduct a proper and competitive bidding process.

[21] The Respondent denies there was any wrongdoing on the part of the Board with respect to the bid process. The Respondent notes that the objections to the bids are spurious and speculative and any alleged misconduct is on the part of the contracting parties and not the Board. The allegation that one of the bids was a forgery is based on hearsay evidence.

[22] The Applicants seek an order that the Board follow a competitive bidding process for the engineering services and for the repair and replacement of the exterior windows and doors. The Applicants require the Board to obtain a minimum of three sealed bids. With respect to the bids for the repair and replacement of the windows, the Applicants seek an order that only window companies selected by a licenced third party professional engineering firm or other procurement firm be permitted to bid on the Window Project.

[23] The Respondent proposes that all bids be provided in closed envelopes and the owners can send their representative to participate in the envelope opening process. The Respondent argues that there is no evidence to support a finding that there is a risk that the Respondent will not comply with a fair bidding process.

[24] I am unable to conclude on the admissible evidence before me that the bidding process was improper. The Respondent obtained multiple bids for the window repair work. The Respondent has agreed that the bids will be in sealed envelopes and that representatives of the unit owners may be present when the envelopes are opened.

### *Summary*

[25] There has been no AGM since October 2019. This is contrary to the *Act* which requires an AGM within six months of the year end. I order that an AGM is to take place as soon as possible. If the Covid restrictions limit the number of persons who can attend the meeting, the AGM will take place virtually. The Election of the Directors will take place at the AGM.

[26] Based on the submissions of counsel for the Applicants, it is clear that the Applicants do not have trust or confidence in the Board as it is currently constituted. It is my view that many of the Applicants' concerns will be resolved once there has been an Election of the Directors. The new Board will be responsible for deciding whether a new RFS should be conducted. The new Board will also be responsible for determining whether a new bid process is required for the Window Project.

### **DISPOSITION**

[27] I make the following order:

- (a) The Respondent shall convene an AGM as soon as it is practicable and in no event later than 60 days from the date of this endorsement. If there continues to be restrictions on in-person meetings, the AGM will take place virtually. At the AGM there will be an election for the three directors whose terms have expired;

- (b) Following the election of the new directors, the Board will determine whether a new RFS is required. The Board will also determine whether a new bid process for the repair and replacement of the exterior windows is required, and if so, the Board will determine how the bid process is to be conducted.
- (c) The Respondent will not enter into any contract for the repair and replacement of the exterior windows, until after the Election of the Directors takes place.

[28] The Applicants argue that it should not have been required to bring the motion to compel the Respondent to hold an AGM, which is required pursuant to the *Act*. The Applicants seek its costs of the motion. The Respondent argues that it had agreed to conduct an AGM as soon as it is practicable and that the motion to conduct an AGM was not required. The Respondent argues that the Applicants were not successful with respect to the other relief sought. The Respondent seeks its costs of the motion.

[29] I find there was divided success on the motion. If the parties cannot agree on costs, the Applicants may deliver written cost submissions of no more than 3 pages in length excluding caselaw and bills of costs, within 14 days of the date of this endorsement. The Respondent may deliver its written cost submissions on the same basis within 14 days of receiving the Applicants' submissions.

Date: December 24, 2021