CITATION: Ballingall v. Carleton Condominium Corporation No. 111, 2015 ONSC 2484
COURT FILE NO.: 14-60620
DATE: 2015/04/21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MIREILLE BALLINGALL, MARK HAIART, STEPHEN PILON, and DENISE THOMPSON	)	Rodrigue Escayola and Jocelyn Duquette, for the Applicant
Applicants	)	
– and –	)	
CARLETON CONDOMINIUM CORPORATION NO. 111 and JOHN MACMILLAN	)	Christy J. Allen, for the Respondent, Carleton Condominium Corporation No. 111
Respondents	)	Howard Yegendorf, for the Respondent, John MacMillan
	)	**HEARD:** February 5, 9, 2015 (at Ottawa)

REASONS FOR JUDGMENT

AITKEN J.

Nature of Application

[1] The Applicants, who are all owners of units at Carleton Condominium Corporation No. 111 ("CCC 111" or "the Corporation"), seek a declaration that article X(1)(a) of the Declaration of the Corporation prohibits the use or occupancy of units by unrelated occupants not forming a social unit consisting of a single family, and they seek corollary relief in this regard. As well, the Applicants seek certain oppression remedies against the Corporation and its President, John MacMillan ("MacMillan"). Finally, the Applicants seek a declaration that MacMillan, as a director and officer of the Corporation, has not acted honestly and in good faith, and has not exercised the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. The Applicants seek their costs against MacMillan or, in the alternative, against the Corporation.

Factual Background

[2] CCC 111 is a 27-storey condominium complex, comprised of 242 units, located at 1380 Prince of Wales Drive in Ottawa. Its Declaration and Description were registered on May 30, 1977.

[3] The Applicants are owners of units at CCC 111, and they all reside in their units. Mireille Ballingall ("Ballingall") was on the Board of Directors ("the Board") of the Corporation from 1994 to 1997 and 2006 to 2014, and was President of the Board until her resignation in January 2014.

[4] MacMillan owns and occupies one unit at CCC 111, and owns and manages four other units, which he has been renting to students for several years. He has been on the Board of the Corporation since June 2012, and has been the Board's President since approximately March 2014.

[5] Article X(1)(a) of the Corporation's Declaration has always provided that: "[e]ach unit, except Unit 1, Level 1, shall be occupied and used only as a private single family residence and for no other purpose ... ."

[6] The following related Rule 44(C) appears in the Corporation's Rules:

> (C) Article X(1) of the Declaration
> Article X(1) of the Corporation's Declaration deals with the occupation and use of units and states that each dwelling unit "shall be occupied and used only as a single family residence and for no other purpose". Landlords are reminded that there can only be ONE lease that encompasses all tenants per rental unit. Rooming/boarding houses are prohibited.

[7] Nowhere in the Corporation's governing documents is "single family residence" defined.

[8] CCC 111 is located within walking distance of Carleton University. Historically, there has been a tension between unit owners who live in the building and want to promote it as a community of resident owners, and those owners who are investors seeking to maximize the income-earning potential of their units. Many investor or landlord owners want to rent to students. Many resident owners do not want any units occupied by multiple, unrelated, transient tenants.

[9] At different times, steps were taken by the Corporation to ensure that the units at CCC 111 were predominantly owned by resident owners. The Corporation commenced litigation against Thomas C. Assaly Corporation ("the Developer") in 1985 because the Developer was leasing unsold units on a long-term basis without entering into a *bona fide* agreement to sell the unit, as required under the *Condominium Act* in force at the time. Of particular concern were rentals to students. In 1987, the Board decided to place a "no rental" sign in the lobby. By the late eighties, there was an influx of resident owners. However, in subsequent years, the number of investors buying units to rent increased significantly. Now, out of the 242 units at CCC 111, approximately 126 are occupied by resident owners and approximately 116 are owned by

investors who rent them out. Of the 116 rental units, approximately 54 are documented to have multiple, unrelated, tenants.

[10] In regard to the units rented to multiple, unrelated, residents, some are leased by the room. Others are leased to one tenant who sublets to other people or finds roommates to lessen the burden of monthly expenditures. In other cases, owners use a single lease to rent to numerous unrelated tenants. Many units that have multiple tenants have locks on each bedroom door. A large percentage of renters are students at Carleton University.

[11] In 2009, the Board adopted new rules in an effort to deal with the increasing problem of units being purchased for rental purposes. Two rules created a $100 move-in/move-out fee to cover some of the Corporation's costs related to frequent moves. The third rule prohibited notices on the Corporation's bulletin boards relating to the sale and rental of units. MacMillan took the lead in requisitioning a meeting of unit owners to have the rules repealed. At the meeting on March 8, 2010, MacMillan was the primary spokesperson against the rules. The meeting was heated. In the end, the rules were repealed.

[12] Prior to December 2011, there was no jurisprudence specifically dealing with the question of how the term "single family" should be interpreted in the context of condominium law. Instead, the fall-back position was how that term had been defined for municipal planning purposes. In *R. v. Bell*, [1979] 2 S.C.R. 212 [*Bell*], the Supreme Court ruled as unreasonable and *ultra vires* a municipal by-law that restricted the use of certain dwelling units to an individual or one family because it defined "family" too narrowly to mean "a group of two or more persons living together and inter-related by bonds of consanguinity, marriage or legal adoption". After *Bell*, it was assumed that a condominium unit, rented to multiple, unrelated, tenants, could still be considered a "private single family residence" if the individuals lived together as a single unit, in the same way a family would.

[13] Over the years, the Board realized that the single family provision in CCC 111's Declaration was not being respected by some of the Corporation's unit owners, but the Board struggled to determine the best way to tackle the problem.

[14] In December 2011, the Corporation's counsel, James Davidson ("Davidson") published a newsletter discussing two recent condominium cases in which the definition of "single family" was considered by the Ontario Court of Appeal: *Nipissing Condominium Corporation No. 4 v. Kilfoyl*, 2009 CanLII 46654 (ONSC), aff'd 2010 ONCA 217, 260 O.A.C. 94 [*Nipissing*] and *Chan v. Toronto Standard Condominium Corporation No. 1834*, 2011 ONSC 108, [2011] O.J. No. 90, aff'd 2012 ONCA 312, 2012 CarswellOnt 5909 [*Chan*]. He offered his opinion that these cases represented a significant shift in the law relating to the definition of "single family residence" in the condominium context.

[15] In *Nipissing*, the condominium's declaration contained the following provisions:

> Each unit shall be occupied only as a one family residence. For the purpose of these restrictions "one family residence" means a unit occupied or intended to be occupied as a residence by one family alone, including guests and containing one

> kitchen, provided that no roomers or boarders are allowed. A "boarder" for the purpose of these restrictions is a person whom room and board are regularly supplied for consideration and a "roomer" is a person to whom room is regularly supplied for consideration.
>
> [A family is] a social unit consisting of parent(s) and their children, whether natural or adopted and includes other relatives if living with the primary group.

[16] On an application by the Corporation to enforce these provisions against a landlord owner renting to unrelated students, Stong J. decided that these provisions did not contravene the *Human Rights Code*, R.S.O. 1990, c. H. 19 and that renting to multiple, unrelated, tenants was contrary to the provisions in the declaration. He stated: "[a] 'one family residence' is a basic social unit which involves more than merely sharing short term temporary sleeping quarters and shared facilities on a rental basis ... ." The Ontario Court of Appeal upheld this decision and noted that *Bell*, being a land use planning case, had no application to the interpretation of a condominium's declaration. The principles that apply in the two different contexts were distinct.

[17] In *Chan*, although the facts are scant, it would appear that the condominium's rules included a requirement that each unit was to be occupied and used only as a "private single family residence" – the same wording as in article X(1)(a) of CCC 111's Declaration. The term was not further defined in the condominium documents. Allen J. adopted the definition of family that had been included in the condominium documents in *Nipissing* and found that a number of unrelated tenants using separate bedrooms and sharing common areas was not included within the meaning of "single family". The Ontario Court of Appeal agreed.[1]

[18] As a result of Davidson's newsletter regarding these two cases, and subsequent discussions with Davidson, the Board understood that, under Ontario law, in circumstances where a condominium corporation's governing documents state that units are to be occupied by a single family, but no definition of that term is provided, "family" means "a social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group." Davidson recommended that condominium corporations wishing to apply the new definition of "family" when enforcing their declaration, by-laws, and rules, may wish to pass a rule adopting the new definition, thereby giving notice to unit owners prior to enforcing this definition in circumstances where it had not been strictly enforced previously. If this were done, Davidson recommended that the rule include appropriate grandfathering provisions.

[19] In January 2012, 131 units at CCC 111 were owner occupied, 25 units were owner family occupied, and 86 units were tenant occupied.

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[1] See also *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* (1994), 44 R.P.R. (2d) 55 (Ont. Gen. Div.) where Lissaman J. concluded that "private single family dwelling, means owner-occupied or long-term residential tenancy and that use of condominium units for short term occupancy is inconsistent with 'private single family use'." E. Macdonald J. in *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, 2001 CarswellOnt 3203, [2001] O.J. No. 3512 at para. 14 (S.C.) agreed.

[20] Following Davidson's advice, the Board, at a March 5, 2012 meeting, moved to amend Rule 44 to broaden the definition of "single family" accepted by the Ontario Court of Appeal while, at the same time, making it clear that multiple, unrelated, transient, tenants did not fall within the expanded definition. The proposed Rule 44A defined "single family" as:

> (a) A social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group;
> (b) An adult person living alone, whether single, a widower or a widow;
> (c) Two persons who are married to one another or living together in a conjugal or common-law relationship;
> (d) Two or more unrelated persons who are living together in order to pool their resources and reduce their cost of living, provided that it is clear that their collective intention is to live together permanently;
> (e) Two unrelated persons who are each owners of the unit;
> (f) Two or more persons who are siblings of one another;
> (g) A family can include one or more persons who are living in the unit in order to provide health care or assistance to a member of the family.

[21] The proposal was to grandfather all existing occupancies. However, if new tenants were being sought for a unit, they would have to fall within the definition of "single family" under the proposed Rule 44A. The proposed Rule was circulated in May 2012 with the notice of the June 18, 2012 annual general meeting ("AGM") in order to give owners a chance to consider the Rule and provide feedback to the Board. By June 2012, there were 130 owner occupied units and 112 rental units, of which half were occupied by students. There was a lively discussion at the AGM about how to proceed with Rule 44A.

[22] At the September 17, 2012 Board meeting, the majority of the Board voted to forward a revised proposed Rule 44A to Davidson for comment. The revised Rule was as follows:

> (a) A social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group;
> (b) An adult person living alone, whether single, divorced, a widower or a widow;
> (c) Two or more siblings, a single father or mother with son(s) and/or daughter(s);
> (d) Two persons who are married to one another or living together in a conjugal or common-law relationship;
> (e) Two or more unrelated persons who are living together in order to pool their resources and reduce their cost of living, provided that it is clear that their collective intention is to live together permanently;
> (f) Two unrelated persons who are joint owners of the unit;
> (g) A family can include one or more persons who are living in the unit in order to provide health care or assistance to a member of the family.

[23] In a strongly worded memorandum to the Board dated September 17, 2012, MacMillan, who had been elected to the Board in June 2012, vigorously opposed the amendments to Rule 44. At MacMillan's request, another Board member, Guy Comeau ("Comeau"), forwarded

MacMillan's memorandum to Davidson along with the proposed Rule 44A. In doing so, Comeau made strong statements against MacMillan's stridency in opposing any definition of "single family residence" and any restriction on the ability of landlord owners to rent their units to multiple tenants like students. MacMillan challenged Comeau's comments and, when Comeau was unrepentant, sent a four-page letter to the Board, placing his position on the record. This was the beginning of overt hostilities on the Board.

[24] In light of the very restrictive definition of "single family" accepted by the Court of Appeal in *Nipissing* and *Chan*, Davidson considered a new rule necessary to broaden the meaning of "single family", and he considered the proposed wording of Rule 44A reasonable. On November 27, 2012, the Board decided to circulate the proposed Rule 44A with its next newsletter of December 3, 2012 and to put the Rule to a vote at the AGM on June 17, 2013. MacMillan objected. He also wanted the Board to circulate a memorandum he had prepared regarding grandfathering owners and the duty the directors owed to the Corporation as a whole. The Board refused to circulate this memorandum.

[25] From December 3, 2012 forward, MacMillan engaged in an active campaign to ensure that proposed Rule 44A was voted down at the June 2013 AGM. On January 3, 2013, without any prior discussion with other Board members, MacMillan circulated a letter to all unit owners, *except the other Board members*, to outline his objections to proposed Rule 44A and to solicit their support and proxy to vote down the Rule. In his letter, he purported to explain legal principles to other owners and set out several reasons why the Board's decision, in his view, was wrong. He stated: "[i]t appears that the Board's sole agenda for introducing a single family definition is to restrict existing owners from renting their units to students and without any facts showing the necessity to implement such a rule." In his affidavit in response to this Application, MacMillan asserts that he circulated this letter in his capacity as an owner; however, he indicated in the heading of the letter that it was from "John MacMillan, Director, CCC-111 Board", and he identified himself as the sole dissenting voice on the Board to implementing an expanded "single family" definition as Rule 44A.

[26] On January 11, 2013, after learning of this letter, the other Board members had a teleconference meeting with Davidson to discuss what MacMillan's duties and responsibilities were as a Board member and what should be done regarding his letter of January 3, 2013 to other unit owners. Following a January 15, 2013 meeting of these Board members, and on Davidson's recommendation, the Board sent a letter to MacMillan and a second letter to unit owners. The letter to MacMillan advised that, in Davidson's opinion, MacMillan's letter constituted a breach of his obligations as a Director. Davidson was quoted as follows:

> In my view, Mr. MacMillan is in breach of his obligations as a Director in two respects:
>
> 1. In his letter, Mr. MacMillan has advised owners <u>not to support the Board</u>. In my view, Mr. MacMillan can express his views (including his concerns), but in my view he cannot be soliciting owners to vote against the Board's recommendations.
> 2. In my view, the obligation of the Directors is to make all reasonable efforts to uphold the corporation's governing documents – by looking for ways to

> enforce them rather than seeking to avoid them. And in seeking to enforce the governing documents, Directors generally should be guided by the corporation's professional advice in that regard. I have given the condominium corporation my opinion that the corporation can properly and legally pass Rule 44A. Mr. MacMillan's choice, as Director, to provide contrary advice to the owners is, in my view, entirely misleading to the owners and not in keeping with his obligations as Director.

[27] On January 17, 2013, the Board members, aside from MacMillan, and on the recommendation of Davidson, sent a letter to all unit owners advising them that MacMillan's letter of January 3, 2013 was not in keeping with the legal advice that the Board had received and was misleading to the owners. The letter reinforced the advice of Davidson that, if Rule 44A were passed, it would be legal and enforceable. There would be no breach of privacy or violation of human rights, as alleged in MacMillan's letter. As well, the Rule would not be void for "past failure to enforce" as alleged by MacMillan, because the law respecting the definition of "single family" had changed. The letter, drafted by Davidson, went on to explain that change. It concluded by stating:

> The bottom line is as follows:
>
> **I. Our Declaration says that the dwelling units can only be used as "private single family residences".**
>
> **II. As a Board, our obligation is to enforce this provision in some reasonable way. We are not permitted to simply avoid it.**
>
> **III. The courts have now said that this means that we are only supposed to be allowing residents who meet the following definition: <u>A social unit consisting of parent(s) and their children, whether natural or adopted and other relatives if living with the primary group.</u>**
>
> **IV. We would prefer to have a much broader definition, and that's why we're recommending Rule 44A.**
>
> **V. Our legal counsel advises that Rule 44A, if passed, will be perfectly legal – and note as well that existing occupancies will be grandfathered.**

[28] On March 4, 2013, MacMillan again circulated a letter to all unit owners, identifying himself as "John MacMillan, Director, CCC-111 Board". In it, he accused the Board of having consulted the Corporation's counsel "to give their letter an aura of credibility when in fact all it did was to needlessly fuel our Corporation's expenditures on legal fees." In regard to a further amendment to Rule 44A which the other Board members had recommended in answer to an earlier concern raised by MacMillan, he accused the Board of unfairly advantaging resident owners by allowing them, but not investors, to rent to a roomer or boarder, contrary to the Declaration. He accused the Board of not acting in good faith by refusing to grandfather owners and only grandfathering existing occupants of the units. He urged other unit owners to not support the Board's decision to introduce the proposed Rule 44A.

[29] MacMillan's next line of attack was to demand that he be given access to the submitted proxies regarding Rule 44A. On the basis of legal advice from Davidson, the President of the

Board refused this request. MacMillan objected, necessitating Davidson writing to him to explain why, under the law, he was not entitled to that documentation. In his letter of March 11, 2013, Davidson advised MacMillan that, in his opinion, MacMillan was in a conflict of interest in regard to Rule 44A and that MacMillan might not be meeting his obligations as a director in relation to this matter due to the lack of respect he had shown Board decisions and the Corporation's Declaration.

[30] During the spring of 2013, the relationship between MacMillan and other Board members, particularly the President, deteriorated further, with allegations of improper conduct being levied back and forth. The environment was clearly very toxic. On April 5, 2013, MacMillan asked the property manager to give him access to the records of the Corporation, including documents addressed to others. At the same time, MacMillan accessed the property manager's computer, without the approval of the property manager or, when asked, the President. MacMillan ignored the President's direction for him to stop using the property manager's computer. Subsequently, the President asked MacMillan to hand in his key to the Management Office. MacMillan refused. At the Board meeting of April 22, 2013, the Board voted that all Board members, aside from the President, would turn in their keys to the Management Office. MacMillan refused to return his key.

[31] In May 2013, the Board members, other than MacMillan, with Davidson's assistance, arrived at a proposal for scrutineers to be present at the AGM to count ballots and proxies related particularly to Rule 44A. Davidson advised MacMillan of the proposal. MacMillan responded negatively, and accused Davidson of favouring certain Board members and not acting in the best interests of the owners of the Corporation. Davidson responded that he did not act for Board members; he acted for the Corporation and generally took instructions from the Board. He again told MacMillan that he was in conflict with the Board and the Corporation in relation to the proposed Rule 44A and, as a result, could not participate in any of the Board's decisions regarding Rule 44A.

[32] On May 24, 2013, the notice of the AGM to be held on June 17, 2013 was circulated to all unit owners. It included the full text of the proposed Rule 44A:

> **Rule 44a SINGLE FAMILY USE OF UNITS:** Article X(1) of the Declaration
>
> (1) Article X (1) (a) of the Corporation's Declaration includes the following:
>
> *"Each unit, except Unit 1, Level 1, shall be occupied and used only as a private single family residence and for no other purpose"*
>
> (2) For the purpose of Article X of the Declaration, a "private single family residence" means a unit occupied or intended to be occupied as a residence by one family alone, including guests and containing one kitchen, provided that no roomers or boarders are allowed. A "boarder" for the purposes of these restrictions is a person to whom room and board are regularly supplied for consideration and a "roomer" is a person to whom room is regularly supplied for consideration.

(3) Effective July 17, 2013, in the Declaration and these Rules, a "family" means either:

(a) A social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group;
(b) An adult person living alone, whether single, divorced, a widower or a widow;
(c) Two or more siblings;
(d) A single father or mother with son(s) and/or daughter(s);
(e) Two persons who are married to one another or living together in a conjugal or common-law relationship;
(f) An Owner's family occupied unit can include a friend to share costs;
(g) Two or more unrelated persons who are living together in order to pool their resources and reduce their cost of living, provided that it is clear that their collective intention is to live together permanently;
(h) Two unrelated persons who are joint owners of the unit;
(i) A family can include one or more persons who are living in the unit in order to provide health care or assistance to a member of the family;

(4) Grandfathering of existing occupants

Notwithstanding the foregoing, this Rule shall not apply to prevent an occupant who does not meet the above definition of family (who was occupying one of the units on June 30, 2013) from continuing to occupy the unit **provided that** by July 31st, 2013:

(a) The condominium corporation receives written notice (signed by the occupant) stating that the occupant was residing in the unit on June 30th, 2013 AND
(b) In the case of tenants, the landlord has complied with Section 83 of the Act in relation to the particular tenancy and the tenant has also signed the agreement required by Article X (2) of the Declaration.

Landlords are reminded that there can only be one lease that encompasses all tenants per rental unit. *Furthermore, within the condominium context, the occupancy of units by roomers or boarders is prohibited.*

[33] On May 27, 2013, MacMillan sent a third letter to unit owners, identifying himself as a Resident Owner and Director. He urged others to vote against proposed Rule 44A, and listed ten reasons why the rule needed to be voted down. On June 10, 2013, the President of the Board sent a letter to all unit holders urging them to attend the AGM, explaining the reason why Rule 44A was required, and explaining that, if Rule 44A was not adopted, the original version of Rule 44 would incorporate the extremely narrow definition of "single family" accepted by the Ontario Court of Appeal in recent jurisprudence. The Board would have to enforce that rule. The

President went on to urge owners to vote for Comeau and Stephen Pilon ("Pilon") as directors. Both men were then on the Board and were resident owners. The President made no mention of two other candidates for director, Errol Collins ("Collins") and Elena Ramirez ("Ramirez"), who, although resident owners, supported MacMillan's position regarding Rule 44A. It was not appropriate for the President to have used her official position to encourage unit owners to support particular candidates for the Board.

[34] On June 10, 2013, MacMillan sent a fourth letter to unit owners, and again identified himself as a Resident Owner and Director. Again, he urged others to vote down Rule 44A. He also advised that he was endorsing Collins and Ramirez in the election of directors.

[35] At the AGM on June 17, 2013, Rule 44A was voted down – 78 for to 127 against. On July 2, 2013, the new Board, comprised of Ballingall, MacMillan, Comeau, Doug Molnar ("Molnar"), and Ramirez, met and reviewed a newsletter to be sent to all owners. No disagreement to the newsletter was voiced, though in his affidavit, MacMillan stated that this was because he did not have adequate time to fully consider the newsletter before voting on it. On July 3, 2013, the Board circulated the newsletter, advising owners that the Corporation now had to enforce the single family residence requirement in the Declaration, and that meant that units could only be occupied by a social unit consisting of parent(s) and their children, whether natural or adopted, and any other relatives living with the primary group. This was subject to the grandfather clause in the defeated Rule 44A to the effect that current occupants could stay, even if not compliant.

[36] At subsequent Board meetings, MacMillan strongly objected to the July 3rd newsletter having been circulated to owners. He criticized its contents, as well as the fact that it had been signed by the Treasurer, Comeau, instead of the President, Ballingall.

[37] In August 2013, the Board posted on the Corporation's bulletin board a notice to owners reminding them that, effective July 17, 2013, the single family residence policy was being implemented. MacMillan objected to this. Neither he nor Ramirez agreed with the description of the single family residence restriction given in the notice, despite it being the interpretation provided by Davidson.

[38] At the September 10, 2013 Board meeting, the Board agreed to get legal advice as to whether the status certificates issued by the Corporation should refer to the single family residence requirement in the Declaration. MacMillan abstained because he had not received prior notice that the issue of status certificates would be raised. MacMillan then published on his private website Davidson's response to the Board's inquiry, dated September 18, 2013. In that response, Davidson, after considering several ways to deal with the current uncertainty regarding the single family residence rule, concluded that it might be appropriate to include the following statement in status certificates issued by the Corporation:

> The Corporation's Declaration states that the residential units can be occupied and used only as private single family residences. The Courts have said that, in the condominium context, a family means "a social unit consisting of parents and their children, whether natural or adopted, and includes their relatives if living

> with the primary group." The condominium corporation attempted to adopt a broader definition of "family" (by rule), but the owners did not pass the rule. As a result, the meaning of the term "private single family residence", in our Declaration, is not clear. There is therefore a possibility that the aforesaid definition of "family", from the Courts, may apply at CCC 111. We believe that a final determination of this issue will require an Application to Court.

[39] On September 19, 2013, MacMillan posted on his website a letter he had sent to other Board members in which he categorically stated that, under s. 76(1)(f) of the *Condominium Act 1998*, S.O. 1998, c. 19 ("the *Act*"), there was no legal requirement for any reference to be made in status certificates regarding the issue of single family residence. At the same time, he accused certain other Board members of "[continuing] to act in bad faith by going against the wishes of the majority of owners in [the] Corporation" in regard to Rule 44A. He also stated: "[i]n my view, Mr. J. Davidson by his response ... is clearly ignoring the legal requirements for the Status Certificate as outlined in the *Condominium Act* [s.] 76(1)(f) and the Status Certificate Form 13."

[40] A motion to add to status certificates the wording about the single family residence rule, as recommended by Davidson, was passed at the Board meeting of October 21, 2013, with MacMillan and Ramirez voting against the motion. On November 1, 2013, MacMillan posted to his website his position against the inclusion of any warning regarding the single family residence rule in status certificates issued by the Corporation, and he undertook to have the warning deleted from such certificates when the composition of the Board changed the following year. On November 5, 2013, in a letter signed by the President, owners were advised that the single family residence restriction would be referenced in future status certificates. Although it is unclear why, the President indicated how Board members had voted in regard to the inclusion of this item. In a strongly worded email to the President dated November 21, 2013, MacMillan objected to the wording in the letter to owners, accused the President of bad faith, and warned her that her days on the Board were numbered. On the next day, he reprinted this email on his website. Throughout November and December, at Board meetings, in emails to the Board, and on his website, MacMillan continued to voice his objection to the inclusion in status certificates of the warning regarding the single family residence restriction.

[41] From the summer of 2013 through to January 2014, the Board struggled in determining how it should go about enforcing the single family residence rule in the Declaration, with MacMillan and Ramirez objecting to any type of enforcement.

[42] Meanwhile, in November and December 2013, other owners were upset that the Board had decided to include a warning about the single family residence rule in the Corporation's status certificates. A movement was afoot for a special meeting of owners to be called to vote Ballingall and Molnar off the Board. On January 22, 2014, Molnar resigned from the Board as a result of unrelenting pressure and, in his view, threats from MacMillan and others who agreed with MacMillan's position. On January 23, 2014, Ballingall resigned as a result of the apparent inability or unwillingness of the Board to enforce the single family residence rule contained in the Corporation's Declaration. By the end of January 2014, the notice on the Corporation's bulletin board regarding enforcement of the single family residence rule had been removed. No steps were taken by the new Board to enforce the rule.

[43] On March 13, 2014, Pilon wrote to MacMillan asking what the Board's position was concerning the single family residence rule and what steps the Board was taking to enforce it. On April 2, 2014, MacMillan, then President of the Board, responded that the *status quo*, as it existed prior to June 17, 2013, remained in effect in regard to the single family residence rule. The essence of his response was that the Board's position was that "single family" included any number of unrelated persons, as long as they were living "as a family", but did not include roomers or boarders. In stating this, MacMillan quoted, out of context, a passage in Davidson's letter to the Board dated September 18, 2013.

Litigation History

[44] The original Notice of Application was dated April 15, 2014, and was served on MacMillan and the Corporation later in April.

[45] On August 5, 2014, the Board passed a new rule purportedly aimed at defining the term "single family" for occupancy purposes. The Applicants opposed the adoption of this new rule pending the hearing of the Application and advised the Respondents that they would seek an injunction preventing the adoption of the Rule prior to the hearing of the Application. The Board agreed to not put the new Rule into effect by circulating it to owners until this Court had ruled on the Application, provided that the validity of the Rule was submitted at the hearing for adjudication.

[46] On September 10, 2014, the Applicants served an Amended Notice of Application seeking, in addition to the original relief being sought, a declaration that the Corporation's newly proposed Rule 44A, and more particularly its grandfathering clause, is inconsistent with the Corporation's Declaration and, therefore, cannot be adopted as drafted.

[47] The newly proposed Rule 44A reads virtually the same as the one rejected at the AGM of June 2013, with two exceptions: (1) paragraph 3(f), allowing an owner's family to include a friend to share costs, was deleted, and (2) a new grandfathering clause replaced the one in the previously proposed Rule 44A. The new clause grandfathered owners for a period of ten years, instead of grandfathering current occupants of units until their departure. The newly proposed Rule 44A read:

> **Rule 44A SINGLE FAMILY USE OF UNITS:** Article X(1) of the Declaration
>
> (1) Article X (1) (a) of the Corporation's Declaration includes the following:
>
> *"Each unit, except Unit 1, Level 1, shall be occupied and used only as a private single family residence and for no other purpose"*
>
> (2) For the purpose of Article X of the Declaration, a "private single family residence" means a unit occupied or intended to be occupied as a residence by one family alone, including guests, and containing one kitchen. Therefore, no roomers or boarders are allowed. A "boarder" for the purposes of these restrictions is a person to whom room and board are regularly supplied for

consideration and a "roomer" is a person to whom room is regularly supplied for consideration.

(3) Effective (herein called the "effective date of this Rule"), in the Declaration and these Rules, a "family" means either:

(a) A social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group;
(b) A person living alone, whether single, divorced, a widower or a widow;
(c) Two or more siblings;
(d) A single father or mother with son(s) and/or daughter(s);
(e) Two persons who are married to one another or living together in a conjugal or common-law relationship;
(f) Two or more unrelated persons who are living together in order to pool their resources and reduce their cost of living, provided that it is clear that their collective intention is to live together permanently; OR
(g) Two unrelated persons who are joint owners of the unit.

A family can include one or more persons who are living in the unit in order to provide health care or assistance to a member of the family;

(4) Grandfathering of existing owners

Notwithstanding the foregoing, the following additional provisions apply to any unit that has not been transferred since the effective date of this Rule (and is therefore still owned by the same owner(s) who owned the unit on the effective date of this Rule). Such units are herein called "grandfathered units".

(a) For each grandfathered unit that is a two-bedroom unit, in addition to the definition of family set forth in paragraph (3) above, a family can also include up to two unrelated persons (even if they are not owners of the unit).

(b) For each grandfathered unit that is a three-bedroom unit, in addition to the definition of family set forth in paragraph (3) above, a family can also include up to three unrelated persons (even if they are not owners of the unit).

(c) The within grandfathering shall not apply to a unit unless the owner of the unit has sworn a statutory declaration stating as follows: "When I purchased the unit, I intended to lease the unit at some time in the future. I also understood and assumed (at the time of my purchase) that I would be able to lease the unit to unrelated persons (provided those persons lived together as a "family" – not as roomers or boarders).

(d) The within grandfathering shall cease to be of force and effect on the tenth anniversary of the effective date of this Rule.

Applicants' Concerns

[48] The Applicants raise the following concerns regarding the practice of renting units to multiple, unrelated, transient parties:

- Transient tenants undermine the sense of community within the condominium complex.
- Transient tenants are less likely to take pride in their surroundings.
- Transient tenants, particularly student tenants, are more likely to reflect a younger demographic who tend to be noisier and more casual about disturbing neighbours when compared with older resident owners.
- With multiple, unrelated, tenants in one unit, there is higher traffic and greater security concerns than there would be if the unit were occupied by a single family.
- Transient tenants increase the cost to the Corporation.
    - There are increased moves in and out, particularly in August/September and April/May, when students arrive and leave.
        - Increased moves, particularly involving amateur movers, increase the damage to the common elements.
        - After the students' moving period, there are loads of discarded furniture and other items abandoned by tenants, and extra garbage pickups are required.
        - Increased moves reduce elevator access.
    - All new tenants have to be documented, call-entry systems must be changed, and electronic key access to the building must be provided.

[49] Specific examples of the problems leading to these concerns were documented in various affidavits.

[50] In regard to the newly proposed Rule 44A, the Applicants take the position that, due to the ten-year period during which grandfathering provisions will apply, the proposed Rule is unreasonable and contrary to the Declaration. Many resident owners may have died or moved away before they will ever experience any benefit from the enforcement of the single family residence rule.

MacMillan's Concerns

[51] From January 2012 forward, *until the commencement of this litigation*, MacMillan has been steadfastly opposed to the inclusion of any definition of "single family residence" in the Corporation's governing documents, and he has insisted that this term be interpreted as allowing rentals to multiple, unrelated, transient tenants provided there is only one lease per unit and the units are not being used as rooming houses or boarding houses. The reasons he advanced for this position were outlined in his letter to owners dated May 27, 2013, and can be summarized as follows:

- The single family resident restriction has never been enforced throughout the Corporation's history. It would be unfair to enforce it now, and there is no reason to do so.

- Occupants have always been an approximately equal mix of resident owners and landlord owners.
- Most tenants are from Carleton University or are young professionals. It is difficult to find families who can afford the going rent for two or three bedroom units.
- There are sufficient Rules already in existence to cover any problems created by tenants.
- When existing landlord owners purchased their units, they did not realize that there was a restriction in place preventing them from renting their units to anyone other than a social unit comprised of parents, their children, and relatives living with them.
- The condominium investor market is an important component of condominium sales. If investors are dissuaded from purchasing at CCC 111, units will be harder to sell and prices will plummet.
- Rental restrictions enforced against landlords will force them to lease their units to higher risk tenants.
- The current quality and mix of the residents of CCC 111 makes for a good community with appropriate diversity.

[52] In response to the Application, MacMillan identified his three chief concerns with the earlier proposed Rule 44A as being the non-grandfathering of owners (just the grandfathering of occupants), the negative impact Rule 44A would have on property values, and the restrictive definition of "single family" under which neither students, nor two professionals, would be acceptable tenants.

Misconstruing the Issue

[53] In the affidavits of MacMillan, Ramirez, Ashifa Jiwa ("Jiwa"), and Barbara Morelli, an effort is made to paint resident owners (including old Board members, Ballingall, Comeau, Pilon, and Molnar) as being opposed to a broad definition of "single family" in keeping with modern reality, and as being wedded to the restrictive definition of "single family" accepted by the Ontario Court of Appeal in *Nipissing* and *Chan*. At the same time, these affiants suggest that it was the new Board, under the leadership of MacMillan, that saw the need to clarify what was meant by "single family" in the Declaration and, in doing so, to ensure that the definition was broad and inclusive. Nothing can be further from the truth.

[54] The history of events, and more particularly the documentary evidence in this case, makes it very clear that, as soon as the old Board learned of the definition of "single family" adopted in *Nipissing* and *Chan*, it sought legal advice as to what course of action it should follow, and it accepted the legal advice given in this regard by Davidson. (See para. 20 above.) From January 2012 to the June 2013 AGM, the old Board took steps to come up with a definition of "single family" that was much more inclusive than that in *Nipissing* and *Chan*, but that still respected the spirit and intention of the wording in article X of the Declaration. There is no merit whatsoever to the following allegation levied by MacMillan in para. 125 of his affidavit sworn July 30, 2014:

> Moreover, the "single family" definition championed by the Applicants would restrict the occupancy of CCC 111 such that 85% of the current owners would not meet that definition. For example, Molly and I do not reside with any children.

> Accordingly, we would not meet the definition of a single family "as composed of parents and their children". A single resident or widower would also not meet this definition. Neither would two siblings living together.

[55] This argument is a continuation of the fear-mongering that MacMillan employed during his campaign against the earlier proposed Rule 44A. I have trouble seeing how any reasonable interpretation of *Nipissing* or *Chan* would lead to the conclusion that the definition of "single family" accepted in those cases did not encompass couples without children, single residents, or siblings living together.

[56] In any event, Ballingall and Pilon, when Board members, did their best to have the Corporation adopt the Rule 44A that was defeated at the 2013 AGM. At no time did they, or the other two Applicants, "champion" a restrictive meaning of "single family" as accepted in *Nipissing* and *Chan*. In their Application, they seek the enforcement of the single family residence restriction in the Declaration because they cannot ask the Court to force the Corporation to amend the Declaration. However, there has never been any suggestion by any of the Applicants, or by any of the resident owners who filed affidavits in support of the Application, that they were seeking a restrictive definition of "single family". To suggest otherwise is disingenuous. As everyone involved in this litigation realizes, it is only the nature and length of the grandfathering provision in the newly proposed Rule 44A that is objectionable to the Applicants. The rest of the newly proposed Rule 44A mirrors the earlier version put to a vote at the 2013 AGM under the leadership of Ballingall.

[57] I totally reject as being inaccurate and unfair the dichotomy described by Ramirez in para. 6 of her affidavit and in para. 8 of Jiwa's affidavit to the effect that resident owners want a very restrictive definition and landlord owners want a much more inclusive definition of "single family" under article X of the Declaration.

[58] There is no doubt that the majority of the old Board, and many other resident owners, did not want units at CCC 111 being rented to multiple, unrelated, transient tenants, most of whom happened to be students. Quite understandably, in their view, these rentals did not comply with the single family residence restriction in the Declaration. In this regard, I am satisfied that it was not the fact that a tenant was a student that caused the majority of the old Board concern; it was the fact that there were multiple, unrelated, parties in the same unit for short-term tenancies. In the view of these resident owners, there is a higher incidence of problems relating to transiency, high traffic, security, noise, increased costs, and lack of commitment to community the higher the volume of such tenancies in a building. That observation is not patently unreasonable.

Analysis

[59] Under s. 134(1) of the *Act*, owners of units at CCC 111 may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of the *Act* and with any provision in the Corporation's Declaration, By-laws, and Rules. The relief sought by the Applicants in paras. 1-4B of their Amended Notice of Application falls under this section. All parties agree that, in the circumstances of this case, where it is alleged that there has been a

breach of the *Act*, ss. 132(4) and 134(2), do not apply. Thus, there was no requirement for the issues raised under s. 134(1) to have been referred to mediation or arbitration.

[60] Under s. 135 of the *Act*, if the court determines that the conduct of an owner or a corporation is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter. Such oppression remedies include an order prohibiting the conduct referred to in the application and an order requiring the payment of compensation. The relief sought by the Applicants in para. 5 falls under this section. The Applicants were not required to refer the issues they raise under s. 135 to mediation or arbitration (*McKinstry v. York Condominium Corp. No. 472*, 2003 CarswellOnt 4948, [2003] O.J. No. 5006 at paras. 37-42 (S.C.) [*McKinstry*].)

Issue 1: Are the owners and occupiers of units at CCC 111 bound by the Corporation's Declaration?

[61] The obligation of CCC 111, and its unit owners and unit occupiers, to comply with the Corporation's Declaration, By-laws, and Rules is set out in s. 119 of the *Act* which provides:

> **Compliance with Act**
> **119(1)**A corporation, the directors, officers and employees of a corporation, ... , an owner, an occupier of a unit ... shall comply with this Act, the declaration, the by-laws and the rules.
> **Responsibility for occupier**
> **(2)** An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.
> **Right against owner**
> **(4)** A corporation, an owner ... have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

[62] I must comment on a point raised in virtually all of the affidavits filed in response to this Application, and that is the assertion that, when the affiants purchased their units at CCC 111, they were not told by their real estate agents or their real estate lawyers that the Corporation's Declaration contained a single family residence restriction.[2] While that may or may not be the case, this is an issue that the affiant should take up with the real estate agent or lawyer in question (*Waterloo North Condominium Corp. No. 186 v. Weidner* (2003), 65 O.R. (3d) 108 at paras. 46-47 (S.C.)). The single family residence restriction has been in the Corporation's Declaration since CCC 111 came into existence. It was there for all to see, if those concerned took the time to read the Declaration. There is no reason why those who purchased a unit at CCC 111, with the knowledge of, and in reliance upon, the single family residence restriction in the Declaration should be expected to forego the benefit of such a restriction because other

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[2] See, for example, para. 3 of the affidavit of Ashifa Jiwa, paras. 4 and 26 of the affidavit of Alastair Mills-McEwan, and para. 14 of the affidavit of Barbara Morelli, who is herself a real estate agent and owns 5 units at CCC 111.

purchasers did not read the Declaration before purchasing the unit or were not told about the restriction by the real estate agent or lawyer they retained.

[63] As stated by Finlayson J.A. in *Re Carleton Condominium Corp. No. 279 v. Rochon* (1987), 59 O.R. (2d) 545 at 12 (C.A.): " [t]he declaration, description and by-laws, including the rules, are ... vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound."

Issue 2: Does the Board of Directors of CCC 111 have an obligation to enforce the Corporation's Declaration?

[64] There is no dispute that the Corporation's Board of Directors has a positive duty to enforce the Corporation's Declaration, By-laws, and Rules. Section 17(3) of the *Act* states: "[t]he corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules." (See *Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463 at para. 8, 2010 CarswellOnt 2504 [*Muskoka*].)

[65] As Penny J. explained in *York Condominium Corp. No. 137 v. Hayes*, 2012 ONSC 4590 at paras. 22-23, 20 R.P.R. (5th) 154:

> One of the advantages of requiring compliance is that a message is sent, by the board and the court, to unit owners that the declaration, bylaws and rules are in place for a good reason and that they will be enforced. To permit noncompliance opens the door to the noncompliance of other unit owners [authorities omitted].
>
> The general message should be that enforcement will be expected and exceptions will be rare. This is to foster the result that people only move into the condominium if they are prepared to live by the rules of the community which they are joining. If they are not, they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences.

Issue 3: Is CCC 111 estopped from enforcing its Declaration because it failed to effectively do so in the past?

[66] No grounds for an estoppel argument have been made out in this case.

[67] First, article X(1)(a) of the Declaration is clear that each unit shall be occupied and used only as "a private single family residence and for no other purpose". All unit owners had notice of the Declaration prior to purchasing their units. There is no evidence that any of them were led to believe that they would **not** be bound by this provision in the Declaration. Nor is there any evidence that, when any of them purchased their units, they were led to believe by the Corporation that occupation of the unit by multiple, unrelated, tenants of a transient nature, not living together as a family, would be in compliance with this provision in the Declaration.

[68] Second, prior to the *Nipissing* and *Chan* decisions, it was generally understood under Ontario law that a "private, single family, residence" allowed the residence to be occupied by unrelated individuals, provided they lived together as a family. The Corporation had taken some steps to enforce the single family residence provision in the Declaration based on this understanding. The Corporation passed Rule 44(C) to the effect that there could be only one lease per unit, units could not be divided into sub-units, and units could not be used as boarding houses or rooming houses. When the property manager became aware that this Rule was being breached, the unit owner was advised to conform. Although many lapses occurred, it could not be said that the Corporation turned a blind eye to non-compliance.

[69] Third, once the Board of Directors of the Corporation became aware of the *Nipissing* and *Chan* decisions, it immediately took steps, with the assistance of the Corporation's counsel, to draft a new rule to be applicable to all unit owners and occupiers, to broaden the definition of single family beyond that accepted in these two cases while, at the same time, excluding occupation of a unit by multiple, unrelated, tenants of a transient nature. Throughout the long process during which the Board of Directors tried to pass amended Rule 44A, unit owners were repeatedly advised that, if a new rule was not passed, and if the Declaration was not amended, the Corporation would have no choice but to enforce article X(1)(a) of the Declaration, and the old Rule 44(C). All unit owners have been aware of this since May 2012.

[70] Thus, this is not a case where there has been a massive non-enforcement of the Declaration or of Rule 44 throughout the history of CCC 111 and then an attempt to have a sudden crack-down. The clarification of the law provided by the Ontario Court of Appeal in both *Nipissing* and *Chan* meant that the legal landscape had changed, and the legal interpretation of article X(1)(a) of the Declaration had changed. None of this creates an estoppel against the Board of Directors, or unit owners, from seeking enforcement of the Corporation's governing documents. (See *Peel Condominium Corp. No. 108 v. Young*, 2011 ONSC 1786 at para. 27, 4 R.P.R. (5th) 162.)

[71] Finally, and in any event, article XXVII of the Declaration contains a non-waiver clause that reads as follows:

> Non-Waiver
> Any excusing, condoning, or overlooking by the Corporation or by default, breach or non-observance by the Corporation or by any owner or owners at any time of any covenant, proviso, condition or regulation in the Declaration, the Description and the By-Laws, the Act and the Rules and Regulations, any release of regulations or any instrument by or upon the Corporation or owner shall not operate as a waiver of the rights of the Corporation or any owner or owners, as the case may be, in respect of any subsequent default, breach or non-observance of the terms of such instrument or instruments and shall not defeat or affect in any way the rights of the Corporation or any owner or owners as the case may be, in respect of any subsequent default or breach.

Such non-waiver clauses have been recognized as providing a complete answer to any argument advanced by non-compliant owners based on *laches* or estoppel. (See *Toronto Common Element*

Condominium Corp. No. 1508 v. William Stasyna, 2012 ONSC 1504, 18 R.P.R. (5th) 15; *Waterloo North Condominium Corp. v. Silacshi*, 2012 ONSC 5403, 2012 CarswellOnt 11860.)

Issue 4: What is the appropriate standard of review to be applied by the court when considering a rule or proposed rule?

[72] Provisions restricting owners and affecting the use to which units at CCC 111 can be put may be found in four sources. These are, in order of priority: (1) the *Act*, (2) the Declaration, (3) the By-laws, and (4) the Rules of the Corporation. Any provision in one of these documents must be consistent with the provisions in the documents higher up in the hierarchy. Just because a subject could be dealt with in a document higher up the chain does not mean that it has to be, unless the *Act* otherwise provides. (*Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, 2001 CarswellOnt 2495, 43 R.P.R. (3d) 78 at para. 36 (S.C.) [*Zeidan*].)

[73] The board of directors of a condominium corporation derives its authority to make rules under s. 58 of the *Act*, which reads:

> **Rules**
> 58. (1) The board may make, amend or repeal rules respecting the use of common elements and units to,
>
> (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
> (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.
>
> **Rules to be reasonable**
> (2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

[74] There is no question that the Corporation's Board has the authority to make a rule defining the meaning of "private single family residence", as that term is used (but not defined) in its Declaration. The only question is whether proposed Rule 44A is reasonable and consistent with the *Act*, the Declaration, and the By-laws. In this regard, the Applicants take no issue with any aspect of proposed Rule 44A, aside from the grandfathering provisions. The Applicants submit that the grandfathering provisions are both unreasonable and inconsistent with the Declaration.

[75] In *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.) at paras. 5, the Ontario Court of Appeal stated:

> In making its rules, the board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. [134(1) of the *Act*], a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the

> absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.
>
> ... The threshold for overturning a board's rules reasonably made in the interests of owners is a high one, ...

(See also *Zeidan* at paras. 42-45; *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, 2001 CarswellOnt 3203 at para. 16 (S.C.); *York Condominium Corporation No. 26 v. Ramadani*, 2011 ONSC 6726 at para. 46, 13 R.P.R. (5th) 137; *Muskoka* at para. 9; and *Chan* at para. 5.)

Issue 5: Are the grandfathering provisions in proposed Rule 44A unreasonable or inconsistent with the Corporation's Declaration?

[76] The grandfathering provisions in proposed Rule 44A are set out in paragraph 47 above.

[77] All parties recognize that a grandfathering provision is required. [3] From the Respondents' perspective, there is the need to be fair to existing landlord owners who have organized their affairs in an environment where "single family residence", in the pre-*Nipissing* and *Chan* era, had not been restrictively defined or aggressively enforced. Additionally, the Board is obliged "to promote the ... security or welfare of the owners and of the property and assets of the corporation" (s. 58(1)(a) of the *Act*). The bringing into force of Rule 44A by the current Board will result in landlord owners, over time, being required to find tenants who fit within the new definition of "single family", or sell their investment. Unrelated, transient, students to whom many landlord owners now rent their units will be excluded. If other suitable tenants cannot be found to replace the student market, there is a risk that many units will be placed on the market at the same time, leading to a drop in sale prices. There is also the concern that fewer new investors will be interested in CCC 111, if the captive market of Carleton University students is removed from the pool of potential tenants. There is evidence that the resale market in Ottawa for older condominium units is already soft.

[78] The Applicants would not have brought this Application if the grandfathering clause was for existing occupancies only. They strenuously object to the grandfathering clause applying to existing owners for a period of ten years. I accept the Respondents' argument that grandfathering existing occupants only would not adequately protect the value of the condominium units for the benefit of all owners. However, I reject their assertion that it is reasonable to grandfather existing owners for ten years if their unit is not sold in the interim. There are several reasons why the proposed grandfathering provisions are clearly unreasonable and inconsistent with the Declaration.

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[3] When Ballingall and Pilon were on the former Board and introduced the earlier proposed Rule 44A, they included a grandfathering clause for existing occupants of the units.

[79] First, the grandfathering provisions would be in effect for a period of ten years following the coming into effect of the Rule, which would occur, at the earliest, thirty days following the Board giving notice to owners following the release of these Reasons (s. 58(7)(b) of the *Act*). That means that unit owners who purchased their units in reliance on the "private single family restriction" in article X(1)(a) of the Declaration would not have the benefit of that restriction until 2025. It is reasonable to infer, based on the evidence in the Applicants' affidavits, that a number of them may never see the benefit of this provision in the Declaration.

[80] It must be remembered that, since May 2012, all unit holders have been well aware of the issue regarding the meaning of "private single family residence", of the restrictive meaning accepted as reasonable under *Nipissing* and *Chan*, of the desire of most tenants to have a meaning assigned to that term that was broader than what was accepted in that jurisprudence, and of the reality that any new definition – regardless of how inclusive – would likely exclude multiple, unrelated, transient tenants such as unrelated students sharing accommodation for a short period of time. Armed with this information, unit owners, if acting reasonably and in good faith, could have already started on the path of organizing their affairs so as not to be reliant on multiple, unrelated, transient tenants.

[81] Second, the wording in proposed Rule 44A leaves unclear the interrelationship between paragraph 2, which defines the meaning of "private single family residence" and, in the process, explicitly excludes roomers and boarders, and paragraphs 4(a) and (b) which allow unrelated persons to occupy the unit without any restriction as to how they occupy the space. Saying in paragraphs 4(a) and (b) that family encompasses any unrelated persons living in the unit, even if by all appearances they would fall within the definition of "roomers" or "boarders", sets up a conflict with paragraph 2 and invites further litigation.

[82] Third, the grandfathering provisions would apply to all current unit owners, regardless of whether they are currently renting their units, and regardless of the type of tenant they are renting to, provided they swear that, when they purchased the unit, they intended to rent it at a future date and assumed at the time that they would be able to rent it to unrelated tenants living as a family. Since late 2011, the law has been clear that, in the absence of a definition in a condominium's governing documents, use as a "single family residence" does not include rentals to multiple, unrelated, tenants – even if they are living as a family. It is unreasonable to allow owners who purchased from December 2011 forward, with notice of the Corporation's governing documents, to start renting to multiple, unrelated, tenants, at some point in the future because they did not understand the law when they purchased their unit, or they understood it and chose to purchase their unit in any event.

[83] Fourth, the use in paragraph 4(c) of the clause "provided those persons lived together as a 'family' – not as roomers or boarders" begs the question of what "family" means in this context – a question that has plagued this, and other, condominium corporations for decades. Further, as just indicated, it is arguable that the grandfathering provisions in paragraphs 4(a) and (b) would give landlord owners the right to rent to unrelated persons who are not living as one family unit but who are, in essence, living as roomers or boarders. If the provisions are interpreted in this fashion, it is irrelevant that owners may have understood their options to have been more limited when they purchased their units.

[84] Fifth, for Rule 44A to allow a continuing breach of article X(1)(a) of the Declaration for a period of ten years, in the circumstances of this case, creates an inconsistency between the Rule and the Declaration – something which is not permitted under the *Act*. A ten year period cannot reasonably be described as a transition period to inaugurate a new rule in a fair and measured fashion. Ten years is a significant period in the life of a condominium building and a condominium community – not to mention in the life of condominium residents. On the continuum of temporary to permanent, something in existence for a period of ten years is well down the road of being something of an indefinite or permanent nature, rather than being something temporary or transitional.

[85] Furthermore, as mentioned earlier, the open-ended nature of paragraphs 4(a) and (b) of the grandfathering provisions, which do not explicitly exclude roomers or boarders, is inconsistent with the widely held, historical, understanding that "single family" in the Corporation's Declaration does **not** include roomers. It would be inconsistent with the Declaration, and unreasonable, for Rule 44A to allow arrangements akin to a rooming house to continue at CCC 111. For example, Alastair Mills-McEwan ("Mills-McEwan"), in paras. 5-6 of this affidavit, states:

> As my unit has three bedrooms and two bathrooms, once I purchased it for my son's use, I was also able to rent out the unit to two additional students, who would be able to contribute to the total rental income derived from the unit, and also pool their resources for more affordable living. Each additional student tenant that lived in the unit over the years has entered into a formal lease with me, and is made well aware that they are required to obey all rules and regulations pertaining to CCC 111. ...
>
> Although my son has been the main tenant in the unit since 2010, ...

[86] This excerpt leads me to understand that Mills-McEwan lets his son occupy this unit and, in addition, he enters leases with two additional students each year so that each can occupy one of the other bedrooms in the unit. No doubt the students share the kitchen, living room, and bathroom. No one has adequately explained to me how this operationally differs from a lay person's understanding of what a rooming house entails, leaving aside the pejorative connotations that are often associated with use of the term "rooming house", and recognizing that many rooming houses likely have shorter tenancy periods than what Mills-McEwan requires in his leases with student tenants. The tenor of Mills-McEwan's affidavit is to the effect that landlord owners, doing what he has been doing, should be allowed to continue to do so.[4] However, no one has argued that, to be fair to landlord owners, they need a lengthy period of time to get out of the business of renting to roomers because, historically, everyone has understood that renting to roomers is impermissible.

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[4] Now that Mills-McEwan's son had graduated from Carleton University, he is renting to a single mother and her children. This, in itself, is evidence that the units are marketable to those who would fall under the proposed Rule 44A. Daniel Davis's affidavit also supports this conclusion.

[87] Sixth, by having a grandfathering clause in effect for a period of ten years amounts to the Board trying to do by the back door what it cannot do by the front door; namely, amend the Corporation's Declaration regarding the single family restriction. To do so would require the support of 80% of the unit owners (see s. 107 of the *Act*), something the Board would not be able to obtain. Through passage of a rule, ultimately, the Board would only need the support of 50% of unit owners (see s. 58 of the *Act*).

[88] Seventh, as mentioned above, the grandfathering provisions would allow resident owners, who are not currently renting their units, and who may never have rented their units in the past, to start renting their units to multiple, unrelated, and transient tenants for the next ten years. In other words, the grandfathering provisions, in their breadth, have the potential of reducing further the enforcement of Rule 44A, rather than helping the Corporation to move in the direction of enforcing the terms of the Declaration. Providing for this to occur cannot be justified on the grounds that landlord owners who are renting their units to this category of tenant need a reasonable amount of time to reorganize their affairs.

[89] This leaves the question of what reasonable grandfathering provisions in Rule 44A, consistent with the Corporation's By-laws and Declaration, and consistent with the *Act*, would look like? In my view, such provisions would grandfather: (1) existing occupancies, and (2) existing landlord owners for a period of time significantly less than ten years (the range of three to five years strikes me as being reasonable), as long as the owners purchased their units prior to January 2012. As well, the grandfathering provisions would only allow multiple, unrelated, tenants to the extent that they are residing as one family in the sense of sharing the unit in the way a family would, enjoying some relationship or bond beyond being strangers in the same place, without having specific areas officially hived off for someone's exclusive use. Each unit would have only one lease. As well, the grandfathering provisions would clearly not allow the rental of units to roomers or boarders. Ultimately, it is for the Board to craft grandfathering provisions that fairly balance the legitimate interests of all unit owners. I simply suggest some features that might bring such provisions within the realm of being reasonable and not inconsistent with the Declaration.

[90] Rule 44A, in its current form, is not valid because its grandfathering clause renders it clearly unreasonable and inconsistent with the Declaration. The Board shall have 60 days in which to amend the grandfathering clause in Rule 44A to be a truly temporary, transitional, provision to wean landlord owners off rentals to multiple, unrelated, transient tenants not meeting the expanded definition of "single family", while at the same time being reasonable and consistent with the Declaration. Failing the passage of such an amendment, the Corporation must interpret and enforce article X(1)(a) of the Declaration and the old Rule 44 in a fashion consistent with current Ontario law regarding the meaning of "single family residence" in the condominium context.

Issue 6: Were the actions of the Respondent Board of Directors oppressive?

[91] Under s. 135(1) of the *Act*, an owner may apply to the court for an oppression remedy. Under ss. 135(2)-(3) of the *Act*, if the court determines that the conduct of a unit owner or a corporation is, or threatens to be, oppressive or unfairly prejudicial to the applicant or unfairly

disregards his or her interests, the court may make any order the judge deems proper to rectify the matter, including an order prohibiting the conduct referred to in the application and an order requiring the payment of compensation.

[92] The test for determining oppressive conduct in corporate law generally has been applied to the actions of condominium corporations (*Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667 at paras. 5-6, 285 O.A.C. 372). In the corporate law context, the Supreme Court of Canada noted that the oppression remedy is an equitable remedy, seeking to ensure what is "just and equitable" (*BCE Inc. v. 1996 Debentureholders*, 2008 SCC 69 at para. 58, [2008] 3 S.C.R. 69 [*BCE*]). Courts have broad jurisdiction to enforce not just what is legal but what is fair.

[93] Two questions must be asked: (1) does the evidence support the reasonable expectation asserted by the applicant? and (2) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression," "unfair prejudice" or "unfair disregard" of a relevant interest? (*BCE* at para. 68.)

[94] The concept of reasonable expectations is both objective and contextual (*BCE* at para. 62). The actual expectation of the stakeholder is not conclusive. The question is "... whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations". The oppression remedy protects only legitimate expectations and not an individual's wish list (*McKinstry* at para. 33 (Ont. S.C.); *Hakim v. Toronto Standard Condominium Corp. No. 1737*, 2012 ONSC 404 at para. 37, 16 R.P.R. (5th) 315; *Durham Condominium Corporation No. 90 v. Moore and Wallace*, 2010 ONSC 5301 at para. 14, [2010] O.J. No. 4138).

[95] Oppression is described as conduct that is "burdensome, harsh and wrongful," "a visible departure from standards of fair dealing," an "abuse of power," and "a wrong of the most serious sort" (*BCE* at para. 92). Oppression caries the sense of conduct that "is coercive and abusive, and suggests bad faith". Unfair prejudice may "admit a less culpable state of mind, that nevertheless has unfair consequences". The unfair disregard of interests includes "ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations" (*ibid* at para. 67).

[96] A condominium board is charged with the responsibility of balancing the private and communal interests of unit owners (*Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, 2011 ONSC 4876 at para. 158, 11 R.P.R. (5th) 189 rev'd on other grounds 2014 ONCA 855, 2014 CarswellOnt 16774). The board's behaviour must be measured against this duty. Therefore, a court must balance the objectively reasonable expectations of the owner with the condominium board's duty to exercise its judgment to ensure the safety, security and welfare of all the owners and the condominium's property and assets (*McKinstry* at para. 37).

[97] The Applicants have a reasonable expectation that the Corporation's Declaration, By-laws, and Rules will be enforced, and that includes the single family residence restriction in the Declaration. That such an expectation is clearly reasonable is supported by ss. 17(3) of the *Act* which requires the Board of Directors to enforce the Corporation's Declaration, By-laws, and Rules.

[98] As recounted earlier in these Reasons, the previous Board grappled with how to balance the competing interests of resident and landlord owners when passing the earlier version of Rule 44A. The majority of unit owners voting at the June 2013 AGM did not believe that the previous Board had achieved the right balance and was of the view that the earlier version of Rule 44A unfairly favoured resident owners. Although somewhat tardily, the new Board modified the earlier version of Rule 44A by expanding the grandfathering provisions significantly in favour of landlord owners. The Applicants do not believe that the current Board has fairly and reasonably taken into account the interests of resident owners when doing the balancing exercise. One avenue open to the Applicants would have been to garner sufficient support from other unit owners to require the matter be put to a vote at a special meeting of unit owners called for that purpose (see s. 46 of the *Act*). Resident owners are still in the majority at CCC 111. Despite this fact, the Applicants chose to short circuit this process and come directly to court. As the affidavits on this Application demonstrate, this is not a situation where all resident owners, or all landlord owners, vote as a block or define their interests in the same fashion; therefore, the outcome of any vote remains uncertain.

[99] Did the new Board act in an oppressive manner in passing Rule 44A? I am not persuaded that it did.

[100] Once this litigation was commenced, the new Board moved quickly to pass a new Rule 44A that mirrored the previous version of Rule 44A passed by the previous Board (under the leadership of Ballingall), aside from the grandfathering provisions. In that the earlier version of the Rule had been rejected at an AGM due, in great measure, to the restrictive grandfathering provisions, it was reasonable for the new Board to expand those provisions. The Board followed the appropriate procedure to pass the new Rule. The Board considered the advice of legal counsel prior to passing the new Rule. Although I have found that the grandfathering provisions in the new Rule are unreasonable and inconsistent with the Declaration, the evidence is inadequate to persuade me that the Board's passage of the Rule amounted to an abuse of power, a wrong of the most serious sort, or an act of bad faith.

[101] As well, I cannot conclude that the impact of Rule 44A unfairly prejudices the Applicants. The Rule applies equally to all unit owners. All will suffer equally any prejudice arising from increased costs or reduced property values associated with transient tenants. All *resident* owners will suffer the same prejudice arising from transient tenants being allowed in the building – whether or not the resident owner would vote for or against the new Rule, if given the opportunity.

[102] Finally, I cannot conclude on the basis of the evidence before me that the Board showed an *unfair* disregard of the Applicants' interests in the sense of denying the validity of those interests and ignoring them when crafting the Rule. The proposed Rule will ultimately prohibit the type of tenancies which are of greatest concern to the Applicants.

Issue 7: Did MacMillan breach the standard of care owed as a director of the Board?

[103] The Applicants submit that MacMillan breached his standard of care as a director by not acting honestly and in good faith and as a reasonably prudent director would. They allege that MacMillan breached his fiduciary duties to the Corporation by advancing his personal pecuniary interests and by not upholding the Corporation's Declaration. Further, they allege that MacMillan

publicly criticized and discredited the Board and acted contrary to the legal advice received by the Board.

[104] More particularly, the Applicants note that, despite being advised that the Corporation's legal counsel was of the view that MacMillan was in a position of conflict and may be acting in breach of his obligations as a director, MacMillan continued to solicit votes against the Board's recommendation and did everything he could to defeat the Board's attempt to uphold its governing documents. Most importantly, as a member of the old Board, he failed to recuse himself from the debate surrounding the adoption of the proposed Rule 44A. Finally, while on the old Board, MacMillan, via his website, publicly criticized the legal opinions of the Corporation's legal counsel.

[105] MacMillan submits that, at all times, he opposed Rule 44A as an owner and only expressed his opinions against the Rule in his capacity as an owner. He did not send letters on CCC 111's letterhead or commence lawsuits against the Corporation. He only exercised his right to freedom of expression. MacMillan submits that he supported the decisions of the old Board even where he disagreed with those decisions. He argues that those disagreements were noted in the Minutes of the Board meetings. MacMillan states that he did not campaign against the old Board and did not cause owners to distrust the Board. He asserts that, at all times, he acted in good faith and had the interests of all owners in mind.

[106] Section 37(1) of the *Act* "creates a standard of care that applies to directors and officers and describes circumstances in which directors and officers of condominium corporations may be held personally liable for their acts" (*Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (Residences Corp.)*, 2014 ONCA 724 at para. 28, 46 R.P. R. (5th) 1). In order to avoid personal liability, directors and officers of condominium corporations must: (1) act honestly and in good faith in managing the corporation, and (2) exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances (s. 37 of the *Act*).

[107] In a court proceeding, a person is not required to prove that he acted in good faith. As a general principle, persons are assumed to have acted in good faith unless the contrary is proven (*Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 35; *Middlesex Condominium Corp. No. 232 v. Middlesex Condominium Corp. No. 232 (Owners and Mortgagees of)*, 2014 ONSC 106 at paras. 52, 63, 2014 CarswellOnt 198 (Div. Ct.) [*MCC 232*]). This same principle applies to a condominium board of directors (*Channa v. Cobisa*, 2013 ONSC 7399 at para. 33, 2013 CarswellOnt 16592). Directors need not prove that they acted in good faith, but a trial judge can consider evidence of conduct to see if it supports a finding of bad faith (*MCC 232* at para. 53).

[108] In the context of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, the Supreme Court wrote that there is a statutory duty that "requires directors and officers to act honestly and in good faith vis-à-vis the corporation" (*Re People's Department Stores Ltd. (1992),* 2004 SCC 68, [2004] 3 S.C.R. 461, at para. 35). Directors must avoid conflicts of interest with the corporation and avoid abusing their position to gain personal benefit (*ibid*). Directors must serve the corporation "selflessly, honestly, and loyally" (*ibid*). Courts must examine all the circumstances in determining whether a director has acted honestly and in good faith with a view to the best interests of the corporation (*ibid*, at para. 39). For instance, it is not required that directors in all cases avoid personal gain as a direct or indirect result of their honest

and good faith management. Where a director is also a shareholder, there is nothing necessarily wrong with the director's financial position as a shareholder improving as the corporation's financial position improves (*ibid*).

[109] In *Durham Condominium Corporation No. 45 v. Swan*, 2012 ONSC 3441, 2012 CarswellOnt 7475, it was held that Swan's actions as a director breached the standard of care owed by a director of a condominium corporation by rendering the Board divisive and dysfunctional. Some of Swan's actions included: (1) sending an undated letter as President on the corporation's letterhead to the unit owners stating that the current board disregarded the rules and regulations applicable to the proper management of the condominium and that the board was dysfunctional; (2) commencing a Small Claims Court action against the condominium corporation and misleading other members of the board by purporting to have accepted service of the claim on behalf of the corporation, despite being the plaintiff; (3) unilaterally, and without the authorization and knowledge of the board, purportedly terminating the property management contract and demanding delivery to him of the records of the corporation; (4) sending harassing and insulting emails to other Board members, and acting in an aggressive and verbally intimidating manner when they disagreed with his interpretation of the condominium by-laws and the management of the condominium; and (5) installing and maintaining, while a director of the board, a satellite dish on the common elements of the corporation appurtenant to his unit, without the approval of the board, and contrary to the written notice that the satellite dish be taken down. In this case, some of MacMillan's behaviour as a director is similar to some of that displayed by Swan.

[110] MacMillan acknowledged that, when initially on the old Board and arguing against the proposed Rule 44A, he felt obliged to represent the views of the landlord owners since he was the only landlord on the Board at the time. In his view, the other Board members, who were resident owners, were just looking out for the interests of resident owners and turned a blind eye to the concerns of landlord owners. This was an unfair and inaccurate assessment of the efforts taken by the old Board members (aside from himself) to balance the interests of all unit owners while, at the same time, upholding the Corporation's Declaration. It was MacMillan who made no effort to care for the legitimate interests of all unit owners as he single-mindedly pursued his goal to have existing landlord owners grandfathered under any new Rule 44A. In doing so, he did not exercise the care, diligence, and skill that a reasonably prudent director on a condominium board would display.

[111] Nowhere in the documentation relevant to the period prior to the commencement of this litigation can I find any indication that MacMillan was willing to work cooperatively with other Board members to find a solution to the problem presented by the single family residence restriction in the Declaration coupled with the absence of any definition of "single family" in the Corporation's governing documents. Until this Application was commenced, MacMillan's stance was clear: no amendment to the Rules was required to deal with the new reality post-*Nipissing* and *Chan*. The Corporation could continue to turn a blind eye to the rental of units to multiple, unrelated, parties, provided those parties were not roomers or boarders, and there was only one lease per unit. This is clear in his website posting of July 1, 2013 and in his letter to Pilon dated April 2, 2014.

[112] That MacMillan considered himself the champion of the cause against any Rule 44A is clear from the paper trail he created, including his handling of requests from unit owners for contact information for other owners. While a director, he was quite willing to provide personal information about other owners to owners who supported his stand on Rule 44A, but was unwilling to do so in regard to owners in the opposite camp. In the same uneven manner, when he circulated letters to unit owners, he left out those on the old Board who disagreed with his position on Rule 44A.

[113] Despite the conciliatory tone used in MacMillan's affidavit in response to this Application, there was nothing conciliatory in the reams of documents MacMillan produced during the saga relating to the single family residence rule. His emails to other Board members were aggressive, highly critical, and, at times, threatening. His emails of October 12, 2012 and January 9, 2013 are particularly apt in this regard. His letters to owners and his postings on his website showed the same level of disrespect to his fellow Board members, and his utter distain for the steps they were trying to take to deal with the single family residence restriction in the Corporation's Declaration. He thought nothing of accusing fellow Board members of dishonesty and bad faith, and of knowingly contravening the law. In fact, he considered himself more conversant in the law than anyone else at CCC 111 and, most significantly, than the Corporation's lawyer, Davidson, a widely-recognized expert in the field of condominium law. In countless communications to other Board members, to other owners, and to Davidson, he expounded on legal principles and purported to give legal advice, dismissing the legal advice obtained from Davidson if it did not suit his purposes. See, for example, MacMillan's email of December 8, 2013. In addition to asserting that Davidson did not know the relevant law, MacMillan thought nothing of accusing Davidson of acting purely out of self-interest, rather than in furtherance of his professional duties to the Corporation.

[114] The evidence is clear that, when Rule 44A was originally proposed by the old Board, MacMillan engaged in an active campaign to ensure that it was voted down. On January 3, 2013, he circulated a letter to all unit owners, except the other board members, outlining his objections to the proposed Rule and urging unit owners not to support the Board. The letter outlined several reasons why MacMillan thought the Board's decision was wrong and erroneously identified himself as the sole dissenting voice on the Board for an expanded definition of family. MacMillan continued his attack on the Board on March 4, 2013, when he circulated another letter to unit owners, accusing the Board of needlessly consulting with legal counsel and thereby incurring unnecessary expenses. MacMillan subsequently sent two further letters urging unit owners to vote against Rule 44A. I reject MacMillan's evidence that he was sending these letters solely in his capacity as a unit owner, and not as a director. He identified himself as a director in all of the letters and held out this status as giving him greater knowledge and insight than his fellow unit owners possessed.

[115] A reasonably prudent director of a condominium corporation, attempting to meet his responsibilities as a director, would not undermine Board decisions, mislead unit owners as to the Board's responsibilities and their efforts to meet those responsibilities, encourage unit owners to distrust the Board, undermine the legal advice from the Corporation's legal counsel, mislead unit owners as to what that advice entailed, provide his own legal advice to unit owners, and on one occasion post to his personal website legal advice received by the Board without the consent of the Board. A reasonably prudent director, acting in good faith, would not make the Board dysfunctional,

would not promote antagonism and dissent on the Board, and would not threaten other Board members. A reasonably prudent director would not put his own economic interests ahead of the legitimate interests of all categories of unit owners. A reasonably prudent director would seek a compromise that respected the disparate, but legitimate, interests of all unit owners in the context of the community established by the Corporation's Declaration, By-laws, and Rules. It was not until this litigation was commenced that MacMillan started to act in the way he was required to act under s. 137 of the *Act*.

[116] For these reasons, I find that MacMillan breached his obligations as a director under s. 137(1)(a) and (b) of the *Act*. More specifically, I find that from his election to the Board in June 2012 until the commencement of this litigation, MacMillan did not act in good faith in regard to the Board's obligation to enforce the single family residence restriction in the Declaration in a way that took into account the legitimate interests of all unit owners.

Costs

[117] The parties may contact the trial coordinator to arrange for a date within the next 30 days to argue the issue of costs.

Aitken J.

Released: April 21, 2015

CITATION: Ballingall v. Carleton Condominium Corporation No. 111, 2015 ONSC 2484

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MIREILLE BALLINGALL, MARK HAIART, STEPHEN PILON, and DENISE THOMPSON

Applicants

– and –

CARLETON CONDOMINIUM CORPORATION NO. 111 and JOHN MACMILLAN

Respondents

REASONS FOR JUDGMENT

Aitken J.

Released: April 21, 2015

CITATION: Ballingall v. Carleton Condominium Corporation No. 111, 2015 ONSC 4129
COURT FILE NO.: 14-60620
DATE: 2015/08/13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MIREILLE BALLINGALL, MARK HAIART, STEPHEN PILON, and DENISE THOMPSON Applicants	Rodrigue Escayola and Jocelyn Duquette, for the Applicants
– and –	
CARLETON CONDOMINIUM CORPORATION NO. 111 and JOHN MACMILLAN Respondents	Christy J. Allen, for the Respondent, Carleton Condominium Corporation No. 111 Howard Yegendorf, for the Respondent, John MacMillan
	HEARD: June 18, 2015 (at Ottawa)

SUPPLEMENTARY REASONS RE COSTS

AITKEN J.

Position of the Parties

[1] The Applicants claim total success on the Application and seek partial indemnity costs until May 27, 2014, the date of their first offer to settle, and substantial indemnity costs thereafter, for a grand total of $76,523 ($65,000 in fees, $2,799 in disbursements, and $8,777 in HST). They seek an order against Carleton Condominium Corporation No. 111 ("CCC 111" or "the Corporation") and John MacMillan ("MacMillan") on a joint and several basis, but ask that 60% of costs be assessed against the Corporation and 40% be assessed against MacMillan.

[2] The Corporation and MacMillan take the position that success was divided and there should be no order as to costs.

Should a Costs Award be Made?

[3] The Corporation gave the Applicants little choice but to commence litigation if they wanted the single family residence provision in the Declaration enforced. On March 13, 2014, Stephen Pilon ("Pilon") wrote to MacMillan asking what the Board of Directors' position was concerning the single family residence rule and what steps the Board was taking to enforce it. On April 2, 2014, MacMillan, then President of the Board, responded that the *status quo*, as it existed prior to June 17, 2013, remained in effect in regard to the single family residence rule. The essence of his response was that the Board's position was that "single family" included any number of unrelated persons, as long as they were living "as a family", but did not include roomers or boarders. This position was inconsistent with the latest Ontario jurisprudence regarding the meaning of "single family residence".

[4] It was only after this litigation was commenced that the Board, as then constituted, grappled with the single family residence issue and proposed a new rule to deal with it.

[5] The Applicants took no issue with the wording of the new rule, aside from the grandfathering provisions which, in essence, abrogated enforcement of the new rule for a period of ten years. In my Reasons for Judgment, I found the grandfathering provisions to be unreasonable. Therefore, the Applicants cannot be faulted for refusing to accept a new rule with those grandfathering provisions.

[6] There were six issues that I had to decide in regard to the actions of the Board, and two issues in regard to the actions of MacMillan. In regard to the first six issues relating to the Board, the Applicants were successful on five. To summarize, I found that: (1) owners and occupiers of units at CCC 111 were bound by the Corporation's Declaration, and the Applicants were entitled to the protection of that Declaration; (2) the Board of Directors had an obligation to enforce the Corporation's Declaration; (3) the Corporation was not estopped from enforcing its Declaration because it had failed to effectively do so in the past; (4) the Applicants took no issue with the Board passing a new rule 44A, as long as it was consistent with the provisions in the Declaration regarding "single family residence"; and (5) the grandfathering provisions in the proposed rule were unreasonable and not consistent with the Declaration. It was only in regard to the Applicants' claim for an oppression remedy that the Corporation was successful in that I found that the evidence was inadequate to persuade me that the Board's passage of rule 44A had been oppressive.

[7] The Corporation's counsel argued that the Applicants had not been successful on the majority of the claims for relief in the original Notice of Application because I did not make some of the orders that the Applicants originally requested. Those orders were not made, not because the Applicants were not entitled to them, but because they were not necessary once it became clear that the only objection the Applicants had with the proposed rule 44A was with the grandfathering provision. The Applicants were successful in getting what they wanted from the litigation, and it was the Respondent Corporation that had to change its course of action.

[8] In regard to MacMillan, I set out in paragraphs 103 to 116 of my Judgment all of the reasons why I found that MacMillan had breached his obligations as a director under s. 37(1)(a) and (b) of the *Condominium Act 1998*, S.O. 1998, c. 19 and, more specifically, why I found that

he had not acted in good faith and had not exercised the care, diligence, and skill that a reasonably prudent person would have in comparable circumstances. I did not consider it necessary to decide whether MacMillan had acted oppressively once I had made these other findings.

[9] In these circumstances, I see no reason why the Applicants should not be successful in getting a costs award against both the Corporation and MacMillan.

Factors to Consider

[10] The factors to consider in a cost award are set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[11] The Applicants felt that they had no option other than commencing litigation to force the Corporation to do what it was legally obliged to do so as to protect the integrity of CCC 111. The litigation brought no financial gain to the Applicants. On the contrary, in addition to paying their own lawyers' costs, they are obliged to contribute to the Corporation's legal expenses through their condominium fees.

[12] The proceeding was reasonably complex, as indicated by the length of the Reasons for Judgment. There were 16 affidavits and 186 exhibits. There were seven issues requiring analysis. The Applicants had to present information about the history of the condominium complex and the actions of the Board over an extensive period of time, and they did so at a time when none of them was on the Board or had easy access to relevant documentation.

[13] The Applicants' counsel originally set down the Application for a two-hour hearing in October. Clearly, this was not a short motion and should never have been scheduled for a short-motion day. The Applicants will not receive any costs for this appearance.

[14] The documentary evidence which the Applicants had to produce for this litigation was more extensive than was truly necessary as a result of various spurious and irrelevant assertions made by the Respondents in the affidavits they filed in response to the Application. Those spurious assertions were identified in my Reasons for Judgment.

[15] The issue was an important one, not only to the Applicants, but also to the Respondents and to all unit owners and occupiers. The underlying issues involve the peace and sanctity of the condominium community at CCC 111, as well as the financial well-being of all unit owners.

[16] Important considerations are the principle of indemnity and the amount of costs that an unsuccessful party could reasonably expect to pay. In regard to the latter point, counsel for CCC 111 did not file a costs outline prior to the issue of costs being argued. Had she done so, the Court would have had a better idea as to what the unsuccessful party thought the reasonable legal costs of the Applicants might be. I accept the evidence that, ultimately, the Corporation was charged total fees, disbursements, and HST relating to this litigation in the amount of $62,450. That being said, in a letter to owners regarding 2015 condominium fees, the Board advised that unusually large legal fees exceeding $90,000 were incurred in 2014, and it was anticipated that a further $25,000 would be incurred in 2015. This suggests that the Corporation was prepared to

pay at least $115,000 to enable itself and MacMillan (whose legal fees the Corporation originally covered) to respond to the Application.

[17] The Bill of Costs prepared by the Applicants' counsel showed full indemnity costs at $89,815, substantial indemnity costs at $81,147, and partial indemnity costs at $56,204. How reasonable are these figures? I note that the total number of hours worked on the file by lawyers for the Applicants was 259. The total number of hours worked on the file by lawyers for the Corporation was 228. The hourly rates charges by the senior counsel for the Applicants and the senior counsel for the Corporation were basically the same, with the hourly rates charged by junior lawyers for the Applicants being less than that charged for junior lawyers for the Corporation. This comparison helps me to conclude that the hourly rates and the hours charged by the Applicants' lawyers were not out of line.

[18] A significant factor is that the Applicants made four offers to settle, while the Respondents made none. That being said, on May 22, 2014, the Corporation's counsel sent a conciliatory letter to the Applicants' counsel asking if the Applicants would be prepared to meet, mediate and/or exchange comments about the proposed rule 44A that the Board was hoping to pass. The tone of the letter was very positive.

[19] On May 27, 2014, the Applicants offered to accept a resolution whereby the Board would pass a new rule 44, broadening the definition of "single family" along the lines that was eventually done, but with the grandfathering provision applying only to existing tenants. Part of the offer was that the Applicants' legal fees had to be paid by the Respondents. This offer was not as favourable to the Respondents as my eventual ruling in that I accepted the Respondents' position that limiting the grandfathering clause to existing tenants would be unreasonably restrictive. But at the very least, it was an attempt to engage in settlement discussions and to focus everyone's attention on the only contentious issue – the grandfathering clause. This offer was served only on the Corporation. The Corporation's counsel responded on June 3, 2014, with a conciliatory letter aimed at keeping discussions ongoing while, at the same time, explaining why the Applicants' offer was not acceptable. That cooperative attitude was also exemplified in a letter dated June 17, 2004 from one of the Corporation's lawyers to the Applicants' counsel.

[20] On July 2, 2014, the Applicants expanded their offer to include in the grandfathering provision, for a two-year period, owners who were leasing when the Application was commenced. Again, the Applicants were seeking full indemnification for legal fees. The offer was served only on the Corporation. In early August, the Board of Directors passed rule 44A with the ten-year grandfathering provision. At no time prior to passing this rule did the Board, or the Corporation's lawyer, engage in meaningful negotiations with the Applicants' lawyer regarding specific wording for the grandfathering provision.

[21] On August 19, 2014, the Applicants again expanded their offer by extending the grandfathering provision to five years. Full indemnification for legal fees continued to be in the offer. The offer was served on both Respondents.

[22] On September 2, 2014, the Applicants submitted their final offer which was the same as the previous offer, subject to a change in the costs being sought. The Corporation was to pay the Applicants' costs, as agreed or as assessed. The offer was served on both Respondents. This

offer was as favourable to the Respondents as my Judgment. Costs on a partial indemnity basis to September 2, 2014 and on a substantial indemnity basis thereafter would amount to $73,220.

[23] The Corporation asserts that this final offer was not a r. 49 offer because it was incapable of being accepted by the Board on behalf of the Corporation. Ultimately, it was for the unit owners to decide on the acceptability of the proposed rule 44A. What this argument ignores is that, in each of the Applicants' offers, the Applicants' counsel specifically acknowledged that the wording of rule 44A would have to be put to a vote by the owners. Any accepted offer was subject to this confirmation. This litigation could have been resolved if the Board of Directors had accepted the Applicants' last offer and had presented rule 44A with a five-year grandfathering provision to the owners for acceptance. Once my Reasons for Judgment were released, this is precisely what happened, and the Corporation now has a new rule 44A with a five-year grandfathering provision.

[24] MacMillan is in a different position from the Board in regard to the issue of costs. The only issues that applied to him on the Application were the questions of whether he had acted oppressively, whether he had met his obligations as a director of the Corporation, and whether he had acted in good faith. As well, MacMillan was not in a position to accept any offers or carry out their provisions; therefore, the offers have no effect on his liability for costs. On the other hand, although I made no finding as to whether MacMillan had acted oppressively, I did make a finding that he had not acted in good faith as a director and, in fact, much of the dysfunction of the Board of Directors during the years when rule 44 was being considered, and much of the acrimony that festered at CCC 111, can be attributed to MacMillan's belligerence. Due to my finding that MacMillan had not acted in good faith, the Corporation is under no obligation to pay any of his legal expenses relating to this litigation.

Disposition

[25] Taking all of these factors into account, I make the following order as to costs:

(1) The Applicants are awarded costs against the Respondents on a joint and several basis in the amount of $50,000.
(2) Of this total amount, MacMillan shall be responsible to pay $15,000 and the Corporation shall be responsible to pay $35,000.

[26] This litigation should be a reminder to all concerned that being stubborn and unwilling to compromise when parties have different, but legitimate, interests and concerns is a costly and unwise endeavour. Looking for common ground, and working hard to find solutions, is always the better way. This award also provides a strong message to condominium owners to take an interest in the management of their corporations and to seek leaders who are able to work constructively and effectively with all owners in seeking reasonable resolutions to difficult issues.

Aitken J.

Released: August 13, 2015

CITATION: Ballingall v. Carleton Condominium Corporation No. 111, 2015 ONSC 4129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MIREILLE BALLINGALL, MARK HAIART, STEPHEN PILON, and DENISE THOMPSON

Applicants

– and –

CARLETON CONDOMINIUM CORPORATION NO. 111 and JOHN MACMILLAN

Respondents

SUPPLEMENTARY REASONS RE COSTS

Aitken J.

Released: August 13, 2015