QUEEN'S BENCH FOR SASKATCHEWAN

Date: **2022 02 15**
Docket: QBG 672 of 2021
Judicial Centre: Saskatoon

BETWEEN:

DENNIS MICHAEL TOFIN

APPLICANT

- and –

SPADINA CONDOMINIUM CORPORATION

RESPONDENT

Counsel:

Dennis M. Tofin — on his own behalf
Jay D. Watson — for the respondent

JUDGMENT — CROOKS J.
February 15, 2022

Background

[1] The applicant, Dennis Michael Tofin [Applicant], is the owner of two condominium units at Spadina Towers [Units]. The respondent, Spadina Condominium Corporation [Respondent], is the legal entity which represents the collective interests of the condominium unit owners in Spadina Towers, allowing individuals to own property while sharing the cost of maintaining the common elements with the other Unit owners through condominium fees.

[2] When the Applicant purchased the Units, condominium fees were payable by unit factor, a scheme which apportions fees according to square footage of

the respective condominium. This was reflected in the Respondent's bylaws.

[3] Spadina Towers consists of 29 residential condominium units and three commercial condominium units. The unit factors are divided as 5,569 residential and 4,431 commercial. The commercial condominium units occupy the first three floors of the building with the 29 residential condominium units occupying the upper 10 floors. Each of the 10 residential floors contain three units ending in 01, 02 and 03. There is an exception on the fourth floor where there is a meeting room, condo office and guest bedroom and, consequently, there are only units ending in 01 and 02.

[4] The unit factors are divided as follows: two units ending in 01 are assigned 226 unit factors; eight units ending in 01 are assigned 228 unit factors; the ten units ending in 02 are assigned 161 unit factors; and the nine units ending in 03 are assigned 187 unit factors.

[5] In a memorandum to condominium owners dated April 23, 2021 [April 2021 memo], the Respondent's Board of Directors proposed an amendment to the bylaws from a unit factor scheme to a per unit basis. If passed, the result would be that each condominium unit owner would pay the same condominium fees, regardless of the square footage of their unit. The practical result of the amendment would be that condominium owners with smaller units would see an increase in the condominium fees while those owners with larger units would see a decrease.

[6] The April 2021 memo set out the following approach to conducting the vote:

> We are following this approach:
>
> 1. A memorandum of explanation circulated to all owners
> 2. Zoom Information Meeting to discuss and answer questions on Wednesday May 5, 2021 at 2:00pm.

3. Following the meeting, a Ballot will be provided to all owners.
4. The property manager will co-ordinate the collection of all Ballots such that the votes can be tabulated by May 14, 2021.

[7] On May 13, 2021, a Residential Consent Form was circulated to condominium owners. The accompanying letter corrected some of the misinformation set out in the April 2021 memo, now indicating that 75 percent consent of all condominium owners was required in order for the amendment to proceed. In part, that letter reads:

> **C. Voting**
>
> - As mentioned in the April 23 Information Package, residential units represent 5,569-unit factors (or 55.7%), so it is impossible for this Bylaw amendment resolution to pass if the commercial voters abstain from voting.
> - Therefore, the commercial unit votes are required.
> - **The commercial owner does not want to be influencing the vote and believes the outcome should reflect the will of the residents.**
> - The commercial owners have agreed to the following approach. The consent forms received from residents will be tabulated prior to the commercial owner completing their form. If the tabulation of resident consent forms indicates 75% or more of the unit factors represented consent to the amendment, then the commercial owner will case a consenting vote. If that threshold is not met, then the commercial vote will be non-consent.
> - By this method, the decision of the residents will determine the outcome.
> - This residential apportionment Bylaw amendment is being separated from the other proposed Bylaw amendments clauses you saw in the April 23 Information Package because of the special voting arrangement with the commercial units being used in this instance.
> - In order to ensure we hear the voice of all residents; we implore you to return the attached form.
>
> [Emphasis in original]

[8] The attached Residential Consent Form specifically stated that it was to be returned "to the attention of Joe Kowbel at Colliers by Friday May 28th, 2021."

[9] The proposed deadline was confirmed in correspondence by Jeff Barnes, Treasurer for the Respondent. In an email to the Applicant on May 28, 2021 [May 2021 email], he states:

> Hi Dennis,
> We were just aggregating the Consent Forms received.
> We noticed that you returned a form for 603 but not for 402. Was that intentional?
> The deadline is 5:00pm today.
> Thanks
> Jeff Barnes

[10] On May 31, 2021, condominium owners received the results of the vote. The May 31, 2021 letter of Jeff Barnes, Treasurer, confirmed that 27 of 29 consent forms were returned, reflecting 5,195-unit factors. Of these 27 votes, 20 were in favour of the proposed amendment and 7 did not consent. The letter states that of those residential unit factors, 77.3 percent provided their consent to the proposed bylaw amendment. As a result, the resolution was passed, and the condominium fees would be collected on a per unit basis.

[11] However, the Applicant was concerned with the calculation of this result. He provided a letter to the Board of Directors, confirming that calculation required 75 percent of the owners, not 75 percent of the unit factors. By his calculation, the proposed bylaw amendment did not reach the required consent threshold. As such, his view was that the proposed bylaw amendment failed to pass.

[12] Upon being notified of the error in calculation, John Beckman, President of the Board of Directors, attempted to contact the two condominium owners who did not return their consent forms. One condominium owner returned his consent to the proposed bylaw amendment on June 8, 2021. On June 29, 2021, the Board of Directors communicated that 21 of the 28 returned consent forms provided consent to the

proposed bylaw amendment. This reflects the consent of 75 percent of returned forms, but only 72.4 percent of all condominium owners.

[13] On June 30, 2021, Brent Dunlop, member of the Board of Directors, reached out to the remaining condominium owner. In his evidence, he avers that they briefly discussed the content of the amendment and met in person briefly prior to this remaining condominium owner endorsing his consent on the consent form. As a result, the Board of Directors secured consent of 22 of 29 unit owners, and the proposed bylaw amendment "passed" with the consent of 75.9 percent of the condominium owners.

[14] A further communication on behalf of the Board of Directors was sent to the condominium owners on July 5, 2021. This letter provided the following explanation:

> On June 30, 2021, subsequent to the distribution of our last letter to you, we received the final outstanding written consent form. We are pleased that written consent forms have been returned for all 29 residential units. With this final form we can say, with total certainty, that we have the opinion of the residential owners on the matter of the Bylaw amendment. This last form indicated consent which brings the final tally to 22 residential units consenting to the amendment and 7 residential units not consenting. Meaning that 76% of all residential units have provided their direction to amend the Bylaw.
>
> On May 28, when the returned consent forms were tabulated on a unit factor basis, we noted that two owners did not respond. Given the overwhelming consent on a unit factor basis (84.5%) we were not concerned about those two missing consent forms, for even if they both were non-consenting, their inclusion would not have changed the outcome.
>
> Upon realizing the possible error in using the unit factor tabulation method, we saw those missing consent forms differently. Not because the tabulation was now to be done on a unit basis as opposed to a unit factor basis, but because in this situation abstaining owners are considered to be non-consenting. …
> We were concerned that such misunderstanding may have impacted the action of those owners and they needed to be contacted and informed. We contacted the two owners to express: the importance

> of receiving their opinion either way on the proposal; the consequence of abstaining; and, encouraged them to return their consent forms. …
>
> For this reason, we are pleased that every residential owner has now provided their opinion. As stated above, 100% return of written consent forms leaves no doubt as to the decision of the residential owners. …

[15] As a result, the Applicant sought the assistance of this Court. He requests the decision to amend the bylaw to a per unit contribution be quashed, including the subsequent allocation of condominium fees under the impugned bylaw.

Issues

[16] At issue here is the proposed bylaw amendment, purportedly passed with over 75 percent of the condominium unit owners, to provide for a new scheme of apportionment of condominium fees. The sole issue for determination is whether the Respondent complied with s. 48 of *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2, in establishing a new scheme of apportionment.

Law

[17] Relevant provisions of *The Condominium Property Act, 1993*, SS 1993, c C-26.1, include:

> **99.2**(1) An owner, a corporation, a developer, a tenant, a mortgagee of a unit or other interested person may apply to the court for an order if the applicant alleges that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.
>
> (2) On an application pursuant to subsection (1), if the judge determines that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests

> of the applicant, the judge may make any order the judge considers appropriate, including:
>
> (a) an order prohibiting the conduct alleged in the application; and
>
> (b) an order requiring the payment of compensation.

[18] Relevant provisions of *The Condominium Property Regulations, 2001*, include:

> **48**(1) Subject to subsection (2), a corporation may establish a scheme of apportionment for owners' contributions to the common expenses fund or a reserve fund that is not in proportion to the unit factors by amending the bylaws of the corporation to include that scheme of apportionment and by filing those bylaws with the Director.
>
> (2) A corporation shall not amend its bylaws to include a scheme of apportionment unless written consent to that scheme has been obtained from at least 75% of the owners.

[19] In *Ehman v Albony Place Condominium Corporation*, 2017 SKQB 82, Elson J. discussed the scheme of voting for a bylaw amendment specific to apportionment:

> **25** In my view, the matter raised in this application can be decided solely on the interpretation of the *Act* and the *Regulations*. Specifically, it is not necessary for me to consider whether Albony's actions were oppressive or unfairly prejudicial to the interests of those owners whose units reflect lesser numbers of unit factors. In my view, the applicable provisions of the *Act* and *Regulations* address these concerns, expressly. My analysis in this respect follows.
>
> **26** There is no dispute that the assessment and collection of contributions toward common expenses is properly the subject of a condominium corporation's bylaws. Section 47(1)(i) recognizes this. Apart from this recognition, s. 57(1)(b) of the *Act* obliges a condominium corporation to determine owners' contributions to the common expenses fund by apportioning the amount required in accordance with the procedure prescribed by the *Regulations*.
>
> **27** Section 57(1)(b) brings into play s. 47 of the *Regulations*, which sets out the procedure prescribed for apportionment. In effect, it stipulates that there is one of two possible apportionment schemes available. The default apportionment scheme, described in s. 47(a)

> contemplates apportionment of common expense contributions solely on the basis of unit factor. An alternate apportionment scheme, as provided for in s. 47(b), is available only if it is established pursuant to ss. 48 and 49 of the *Regulations*.
>
> **28** Section 48 of the *Regulations* is noteworthy in that it sets out specific requirements for the establishment of an alternate apportionment scheme, one not in proportion to unit factors. Specifically, it requires a bylaw amendment that sets out the alternate apportionment scheme. In addition, the provision requires written consent to the alternate apportionment scheme from at least 75% of the owners.
>
> ...
>
> **34** In the absence of a requirement that the consent of the owners is to be calculated by unit factor, I am satisfied that s. 48 of the *Regulations* requires the consent of the 75% of the registered owners, without regard to unit factor. In this instance, the court was not provided with evidence of written consent by anyone. Rather, Albony's position was premised on the view that the minutes of the meeting, which recorded the vote of more than 75% of the total unit factors, was sufficient.

Analysis

[20] In this case, the Board of Directors set out the specific procedure for voting, including a clear deadline by which time votes were to be returned.

[21] Under the process set out and at the deadline established by the Respondent, they had secured the consent of only 20 of 29 condominium owners. This reflects 69 percent of the condominium owners and does not meet the threshold 75 percent required in order for the proposed bylaw amendment to pass. If the Board of Directors intended to secure votes beyond the deadline they themselves established, this required a new process. To do otherwise was, in my view, a breach of reasonable expectations and a breach of s. 48 of *The Condominium Property Regulations, 2001*.

[22] The May 2021 email confirms not only that representatives of the Board

of Directors were reaching out to owners in advance of the deadline, but also confirms the established deadline for returning their consent form continued to be imposed upon the condominium owners.

[23] While the originating application did not make a specific claim based on oppression pursuant to s. 99 of *The Condominium Property Act*, this ground is referenced within the application. In my view, it bears relevance as it provides guidance as to the nature of conduct this Court may consider in the process utilized in the conduct of this vote. In this context, I considered *Harvard Developments Inc. v Park Manor Condominium Corp.*, 2017 SKQB 83, where Justice Kalmakoff (as he then was) set out at paragraphs 17-19 a detailed discussion of oppressive conduct in the context of s. 99.2 of *The Condominium Property Act.*

[24] When I reviewed the procedures set out by the Board of Directors, the failure to obtain the requisite consent by the deadline established, and the notice provided by the Applicant, I am of the view there was an unfair disregard by ignoring the concerns and interests of the Applicant as well as unfair treatment of the votes of the condominium owners.

[25] Essentially, the Board of Directors set out the process that would be followed in the conduct of this vote. It is a reasonable expectation of the condominium owners that this process would be followed. The result may be the same if another vote is held; however, any vote must be conducted in a fair and transparent manner.

[26] In the circumstances before me, the Respondent did not receive 75 percent of the condominium owners consent by the deadline established for the vote. Any vote not returned by a condominium owner at the deadline was a vote against the amendment. As such, the proposed bylaw amendment failed.

Costs

[27] The Applicant seeks costs in this application. The Applicant was clear that he did not seek to put the individual condominium owners to additional expense as a result of the approach taken by the members of the Board of Directors for the Respondent. However, these members have been elected to represent the interests of the condominium owners. As such, the Respondent is responsible for the payment of these costs.

[28] As the successful party, the Applicant is entitled to costs. I award costs of $1,000 on the application payable by the Respondent.

Order

[29] I order the following:

1. The application is granted and the bylaw amendment changing the apportionment of condominium fees to a per unit basis is quashed.
2. The Respondent shall pay to the Applicant costs in the amount of $1,000 forthwith.

J.

N.D. CROOKS