An Analysis of the Decisions in
TSCC No. 2130 v York Bremner Developments Ltd.
and
3716724 Canada Inc. v CCC No. 375
by
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Summary

1. Introduction

2. The Bremner Case

   i. The Facts of the Case

   ii. The Position of the Respective Parties

   iii. The Court's Ruling and Analysis

   iv. Critique of the Decision

3. The CCC 375 Case

   i. The Facts of the Case

   ii. The Issues on Appeal

   iii. The Court's Ruling and Analysis

   iv. Critique of the Decision

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1. INTRODUCTION

In the ever-expanding world of condominium jurisprudence, it is rare to have two cases whose judgments were released within the same week, and that establish new principles or benchmarks in condominium law that have not been previously addressed or considered. However, this past August witnessed two such cases, namely the decision rendered in *Toronto Standard Condominium Corporation No. 2130 v York Bremner Developments Ltd.*, 2016 ONSC 5393 (hereinafter referred to as the "**Bremner Case**"), which is the first reported case in which section 113 of the *Condominium Act 1998,* S.O. 1998, as amended (hereinafter referred to as the "**Act**") has been considered, as well as the appellate decision in *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*, 2016 ONCA 650 (hereinafter referred to as "**CCC 375 Case**"), in which the court applied, for the first time, the "business judgment rule" to condominium board decisions in determining whether a condominium's conduct towards an aggrieved unit owner was oppressive or unfairly prejudicial, sufficient to warrant the application of the oppression remedy under section 135 of the Act.

In the Bremner Case, the court was asked to determine the adequacy of the disclosure regarding the provisions of a shared facilities agreement, in light of the challenge to same being pursued under section 113 of the Act. The provisions of said agreement enabled the declarant to allocate the shared facilities costs in a discretionary way, unlinked to any objective formula or stipulated criteria, and in a manner which ultimately favoured the declarant to the detriment and prejudice of the condominium corporation, and the foregoing arguably triggered a higher standard of required disclosure (i.e. regarding the potential drawbacks and unfavourable or negative impacts that could result or emanate from the implementation of the

agreement's provisions), particularly where the results of the agreement were judicially viewed as unconscionably prejudicial to the corporation and its unit owners. In the end, the court was dissatisfied with the declarant's level of disclosure provided to all unit purchasers, and correspondingly availed itself of the broad remedial flexibility found in section 113(3) of the Act, and ultimately amended the shared facilities agreement to redress the condominium's major concerns.

In the CCC 375 Case, the appellate court expressly applied the "business judgment rule" to decisions rendered by boards of condominiums, and judicially confirmed that so long as the directors of a condominium have acted honestly and in good faith, and have endeavoured to balance competing interests (namely those interests of the aggrieved unit owner who claimed oppression, and who sought relief pursuant to section 135 of the Act, versus the interests of other unit owners or the interests of the collective condominium community), then the board's ultimate "balancing" decision will be accorded judicial deference, provided that such decision falls within the range of reasonable alternatives.

The purpose of this paper is to review and analyze the lower court's decision in the Bremner Case*,* and the appellate court's decision in the CCC 375 Case. Although the Bremner Case also involved other issues, including various construction deficiency claims against the declarant and related parties, this paper will focus solely on the court's reasoning with respect to the adequacy of disclosure relative to the shared facilities agreement, in the context of an application to amend or terminate the agreement under section 113 of the Act.

2. <u>THE BREMNER CASE</u>

i. The Facts of the Case

Maple Leaf Square is a mixed-use commercial/residential complex located in downtown Toronto, adjacent to the Air Canada Centre (hereinafter referred to as the "**Complex**"), developed by York Bremner Developments Limited (hereinafter referred to as the "**Declarant**" or as "**YBDL**"). The Declarant acted as

the nominee or agent on behalf of the three co-owners of the Complex, namely The Cadillac Fairview Corporation Limited (hereinafter referred to as "**CFCL**"), Maple Leaf Sports & Entertainment Ltd., and Lanterra Developments Ltd. (hereinafter collectively referred to as the "**Co-owners**"). The Complex comprises five distinct components, namely a boutique hotel, a freehold office component, a freehold retail component, and two residential high-rise condominiums containing 872 dwelling units in the aggregate.

On December 24, 2010, the Declarant registered a condominium declaration to formally create Toronto Standard Condominium Corporation No. 2130 (hereinafter referred to as "**TSCC 2130**"). Shortly thereafter, TSCC 2130 (under the control of the pre-turnover board appointed by the Declarant) entered into a shared facilities agreement with the Declarant and another party related to the Declarant (hereinafter referred to as the "**Complex Reciprocal Agreement**") to govern the shared use, operation, maintenance and/or repair of various shared facilities, amenities, building components and/or areas within the Complex (hereinafter collectively referred to as the "**Shared Facilities**"). The Complex Reciprocal Agreement appointed the Declarant as the Common Facilities Manager (hereinafter referred to as the "**CFM**") to manage the Shared Facilities, for and on behalf of each of the two residential condominiums, and the respective owners of the freehold office component, the freehold retail component, and the freehold hotel component. Since the Declarant was merely a nominee shell corporation, without any active business, it appointed CFCL, a co-owner of the Declarant, as its agent to perform and fulfill the role of CFM.

The commercial components of Maple Leaf Square (namely the hotel, the office building and the retail premises) were owned by or on behalf of the Co-owners. Accordingly, from the court's perspective, every provision in the Complex Reciprocal Agreement that gave the CFM various discretions to exercise and/or decision-making powers, effectively gave such discretions and powers to the Declarant and its Co-owners. Likewise, every provision in the Complex Reciprocal Agreement that obliged TSCC 2130 to pay or contribute monies, or to do or take some action, was viewed by the court as conferring a direct benefit upon the Declarant and its Co-owners. The very structure of the Complex Reciprocal Agreement anticipated

that the Declarant, in its capacity as both CFM (through its agent CFCL) and as the owner or co-owner of the remaining commercial components of the Complex, would be in an inherent conflict of interest position.

The draft Complex Reciprocal Agreement was included as part of the original disclosure statement issued by the Declarant to each of the unit purchasers in TSCC 2130. Prior to the final closing of the unit sale transactions, a near final draft of the Complex Reciprocal Agreement was appended to the disclosure statement that was once again provided to all existing unit purchasers in TSCC 2130. Both sets of disclosure documents contained two pages of text describing the provisions of the Complex Reciprocal Agreement. However, inexplicably, the disclosure statement did not specifically mention the office or role of the CFM and its contractual powers, including the power to allocate the Shared Facilities costs between or amongst the contributing component owners. Rather, the only reference to the CFM in the disclosure statement was in connection with its authority to make rules and regulations governing the use of the shared loading dock facilities in the Complex.

ii. The Position of the Respective Parties

TSCC 2130 argued that the Declarant used its initial control of the condominium corporation (through the pre-turnover board that it had appointed) to bind the corporation to a one-sided contract, without clearly disclosing all of the pertinent and salient terms and provisions of the Complex Reciprocal Agreement in advance. TSCC 2130 further submitted that the allocation of the Shared Facilities costs amongst the contributing component owners was not equitable, nor based on any commercially reasonable methodology or objective measurable criteria. TSCC 2130 argued that the non-arm's length CFM used the unbalanced provisions of the Complex Reciprocal Agreement to favour the Declarant and/or its Co-owners, instead of ensuring the fairness and reasonableness of the allocation of the Shared Facilities costs, and failed to give any substantive explanation in support of its ultimate allocation of costs. In order to restore a fair balance to the ongoing allocation of shared costs, and to instill accountability in the role of the CFM pursuant to the

provisions of the Complex Reciprocal Agreement, the condominium corporation submitted that it should be entitled to terminate the role of CFCL (and the indirect involvement of the Declarant in the overall management and administration of the Shared Facilities) as the CFM, without cause, and to appoint a completely independent and impartial manager of the Shared Facilities. Rather than terminate the Complex Reciprocal Agreement altogether, TSCC 2130 asked the court to amend same, pursuant to the powers outlined in subsection 113(3) of the Act, having due regard to the oppression remedy articulated in section 135 of the Act.

The Declarant argued that any suggestion that it failed to adequately disclose the provisions of the Complex Reciprocal Agreement would be incredulous and disingenuous, inasmuch as the entire agreement was appended to the disclosure statement delivered to all unit purchasers, not once but twice. In addition, the Declarant submitted that the Complex Reciprocal Agreement was not inherently unfair, since various provisions thereof actually protected TSCC 2130 from any abuse or oppression, including the right to challenge the ultimate cost allocations through binding arbitration.

iii. The Court's Ruling and Analysis

Section 113 of the Act provides that within one year of the turnover meeting, a condominium corporation may apply to the Superior Court of Justice for an order amending or terminating a shared facilities agreement, or any of the provisions contained therein. Justice Myers, the presiding judge in this case, confirmed that pursuant to subsection 113(3), any condominium corporation that wishes to successfully challenge or impugn a shared facilities agreement must first satisfy two requirements, namely that:

a) the disclosure statement did not clearly and adequately disclose the provisions of the agreement; and

b) the agreement, or any of its provisions, produces a result that is oppressive or unconscionably prejudicial to the corporation or any of its unit owners.

At the outset, Justice Myers noted that section 113 of the Act must be considered in the context of the consumer protection purpose of the statute. Although the common law tradition of *caveat emptor* still reigns supreme in real estate transactions generally in Ontario, the Act has imposed a regime of disclosure and other regulatory standards, in an effort to protect condominium purchasers and correspondingly restore balance and fairness in the condominium marketplace. Section 72 of the Act, for instance, requires a declarant to provide each purchaser of a unit or proposed unit with a disclosure statement that contains certain prescribed information about the particular condominium project. Although the former condominium legislation required that the disclosure statement shall "fully" and "accurately" set out specified matters, those adjectives are no longer present in section 72 of the Act. Subsection 113(3)(a), by contrast, continues to mandate that disclosure of the shared facilities agreement be clear and adequate. Justice Myers concluded that the deliberate inclusion of the words "clearly" and "adequately" indicate that for the purposes of section 113, simple disclosure of enumerated items under section 72 is not sufficient. Rather, the Act requires that the quality of the disclosure must be assessed to determine whether a prospective purchaser, on making diligent inquiries, will see (clearly) and understand (adequately) the provisions of the shared facilities agreement that may result in oppression or unconscionable prejudice into which he or she may be buying.

In this regard, Justice Myers referred to the case of *Abdool v Somerset Place Developments of Georgetown Ltd.* (1992), 10 OR (3d) 120 (hereinafter referred to as the "**Abdool Case**"), wherein the Court of Appeal held that section 52 of the predecessor Act (now section 72) does not contemplate or permit a disclosure statement which merely reproduces the accompanying documents or sizable portions thereof. Instead, a declarant must decide what items should be included or omitted, to satisfy the requirements of brevity, generality and significance. In assessing the adequacy of the disclosure, the Court of Appeal in the Abdool Case confirmed that a balancing of interests is required, based on a consideration of all relevant factors, including both the desirability of certainty to the declarant, and the consumer protection purpose of the legislative provisions. Bearing in mind that section 72 now provides standard form disclosure, Justice

Myers concluded that the reasoning in the Abdool Case applies more directly to section 113, since it expressly calls for an assessment of the clarity and adequacy of a declarant's disclosure regarding a shared facilities agreement that might have oppressive or unconscionably prejudicial results.

Justice Myers rejected the Declarant's submission that the inclusion of the Complex Reciprocal Agreement, in its entirety, within the disclosure statement (or as an appendix or schedule thereto), constituted clear and adequate disclosure. The court noted that the word "clearly", in its plain and ordinary meaning, requires no more than the transparent explanation of the important terms of the shared facilities agreement. The court also determined that the word "adequately" imports a subjective component to the declarant's disclosure obligation, and that adequacy cannot be addressed in the abstract, but must relate to the consumer protection purposes of the disclosure. Accordingly, in the context of a shared facilities agreement, and the consideration of whether the disclosure statement provided satisfactory information about the provisions of the agreement to justify precluding the amendment or termination of same pursuant to subsection 113(3) of the Act, the court confirmed that adequate disclosure requires, at a minimum, a sufficient degree of disclosure of those negative (or potentially negative) provisions in the shared facilities agreement that might result in oppression or unconscionable prejudice to the condominium and its unit owners, and that are known or readily foreseeable at the time of the disclosure. In other words, the disclosure must put all unit purchasers on notice of the foreseeable risks emanating from (or arising pursuant to) the provisions of the agreement that are being assumed and accepted. Therefore, where a declarant knows that it has the power under the provisions of the agreement to impose a harsh outcome that deleteriously impacts the condominium or its unit owners, then such an outcome is reasonably foreseeable, and in such circumstances the declarant shall be obliged to clearly disclose this power to impose such a result.

Accordingly, where the shared facilities agreement (as in the Bremner Case) provides for a conflicted manager with unilateral authority to operate or administer any shared facilities which comprise part of the condominium property, and to set its own fees, and to establish the cost-sharing proportions between itself

and the other contributing parties, subject only to arbitration, the risk of oppression or unconscionable prejudice arising from such key aspects of the agreement is reasonably foreseeable, and consequently should have been disclosed. The court specifically noted that the Declarant in the Bremner Case failed to disclose the following pertinent matters in respect of the shared facilities agreement, namely that:

a) the Declarant was the CFM;

b) the Declarant intended to appoint CFCL to fulfill the role of CFM, as its agent;

c) the CFM was solely empowered to manage the Shared Facilities, including those comprising part of the common elements of TSCC 2130, and the CFM had sole and complete authority and autonomy with respect to the manner in which the Shared Facilities were operated, administered, maintained and/or repaired, as well as the budgeting of the Shared Facilities costs, subject to the right to have any dispute with respect to same referred to (and resolved by) binding arbitration;

d) only the CFM could set or change the annual allocation of the Shared Facilities costs, absent arbitration;

e) the CFM would be paid a management/administration fee equivalent to ten percent of the aggregate gross annual amount of all Shared Facilities costs, and had the power to unilaterally change said fee;

f) there was no formal process for component owners or contributing parties to meet with the CFM, in order to discuss, direct and/or instruct the CFM with respect to ongoing operational or policy matters of concern regarding the Shared Facilities;

g) if TSCC 2130 believed that its proportionate share of the Shared Facilities costs was unfair or unreasonable, then its only recourse for resolving any dispute regarding same would be through binding arbitration;

h) the CFM retained the unilateral power to appoint contractors to maintain and repair the Shared Facilities, including those comprising part of the common elements of TSCC 2130, without any input by or from TSCC 2130, and without any required communication to TSCC 2130 regarding the

identity and qualifications of the contractor(s), nor the cost of the maintenance and/or repair work involved; and

i) no component owner or contributing party, other than TSCC 2130, was required to provide audited financial statements to the CFM, or to create a reserve fund to cover future Shared Facilities costs, or any portion thereof.

Justice Myers concluded that the Declarant did not clearly and adequately disclose the provisions of the Complex Reciprocal Agreement to the unit purchasers, and then went on to consider whether the Complex Reciprocal Agreement produced a result that was oppressive or unconscionably prejudicial to TSCC 2130, or any of the respective unit owners. Justice Myers reviewed the oppression remedy outlined in section 135 of the Act, and cited the Supreme Court of Canada's decision in *BCE Inc., Re*, (2008) SCC 69, which affirmed that the oppression remedy protects a party's reasonable expectations, and confirmed that TSCC 2130 had a reasonable expectation that the CFM would deal with it lawfully and in good faith, in a fair and commercially reasonable manner, as an equal owner sharing property, and in accordance with the terms of the constating documents of the condominium corporation. Instead, the CFM used its office or position to insulate itself from fair reporting, and to prevent or thwart TSCC 2130 from obtaining the financial information it required regarding the allocation of the Shared Facilities costs in order to carry out the stewardship of its own property. Justice Myers noted that it took a court proceeding, an appeal, and an arbitration (which collectively took more than a year and over $74,000 in cost awards), to get the CFM to finally disclose the basis for the allocations of the Shared Facilities costs, as required of the CFM under the terms of the shared facilities agreement. Justice Myers confirmed that there is nothing inherently unreasonable or illegal in parties entering into a one-sided contract, and that there is no requirement in law that the manager of shared facilities must be an independent or unrelated party or an unbiased fiduciary. Nevertheless, the conduct of the Declarant through its agent CFCL, in relation to its management of the Shared Facilities as the CFM, demonstrated that the provisions of the Complex Reciprocal Agreement

created a structure that was capable of being used oppressively, and that ultimately was used oppressively. Even though CFCL, in its capacity as the CFM, was obliged to implement fair and reasonable allocations of the Shared Facilities costs amongst the five contributing parties or entities, the fact remains that CFCL was also an interested party who profited (either directly or indirectly) from every dollar allocated to TSCC 2130, thereby creating an intrinsic bias against the interests of TSCC 2130 which the court viewed as oppressive or unconscionably prejudicial.

In the end, the court decided not to terminate the shared facilities agreement, primarily because doing so would create a void that, based on the past conduct of the disputing parties, would likely not be filled by them on their own initiative acting commercially reasonably towards one another. Moreover, the court recognized that the shared facilities agreement involved multiple parties with different interests at play, and that the existence of such disparate interests consequently dissuaded the court from considering the termination of the agreement as a fair or reasonable option under the circumstances. As a result, pursuant to the provisions of subsection 113(3) of the Act, the court formally amended the Complex Reciprocal Agreement so as to allow TSCC 2130 to terminate the Declarant and/or CFCL as the CFM, without cause on 60 day's notice, and to appoint a new independent CFM, unrelated to the contributing parties. Justice Myers was satisfied that this amendment, as sought by TSCC 2130, would not only help to restore the balance between the parties moving forward, by eliminating the primary source of friction regarding the operation and administration of the Shared Facilities and the allocation of the Shared Facilities costs, but would also instill a level or standard of accountability and objectivity in the role of the CFM under the Complex Reciprocal Agreement.

iv. Critique of the Decision

At the outset, there are two discrete requirements outlined in subsection 113(3) of the Act that must be satisfied in order to trigger the amendment or termination of a shared facilities agreement, namely that: (i) the disclosure of the provisions of the shared facilities agreement was not clear and adequate; and (ii) the

shared facilities agreement (or any provision thereof) produces a result that is oppressive or unconscionably prejudicial. Accordingly, if the provisions of a shared facilities agreement are clearly and adequately disclosed, then it is irrelevant whether the implementation or enforcement of the agreement's terms creates or produces an oppressive or unconscionably prejudicial result, and there will be no relief whatsoever in favour of the aggrieved condominium corporation or its unit owners, irrespective of the extent or duration of the hardship incurred or the prejudice suffered. From the authors' perspective, there is no doubt that the aforementioned constraint imposed on the court's jurisdiction to amend or terminate such an agreement is intentionally restrictive, inasmuch as a shared facilities agreement is typically the critical document underpinning and governing the basis upon which mixed-use and multi-phased condominium projects are marketed, sold, developed and operated. In other words, the burden of proof upon the applicant to successfully challenge or impugn the provisions of a shared facilities agreement is deliberately more onerous than in any other case where the court's equitable jurisdiction to amend or terminate an agreement is invoked.

In light of the fact that clear and adequate disclosure effectively bars an aggrieved condominium corporation or its unit owners from seeking judicial relief, Justice Myers concluded that the assessment of the adequacy of a declarant's disclosure under subsection 113(3)(a) "must consider whether the disclosure provided purchasers sufficient information about the provisions and their likely results to justify precluding the purchasers from terminating the agreement where it results in oppression or unconscionable prejudice".[1] However, with the greatest of respect and deference to Justice Myers, the authors submit that the court's analysis of subsection 113(3)(a) essentially tied the adequacy of a declarant's disclosure of the provisions of a shared facilities agreement on the one hand, to the oppressive outcome or effect of the agreement's implementation on the other hand, thereby conflating what should, in the authors' opinion, be two separate and distinct considerations. It is respectfully submitted that by requiring a declarant to not only disclose the significant or important provisions of the agreement per se, but to also disclose all known or reasonably foreseeable oppressive or unconscionably prejudicial results that might arise therefrom, the court has

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[1] *TSCC No. 2130 v York Bremner Developments Ltd.*, 2016 ONSC 5393 at para 33.

effectively elevated the level of required disclosure, and thereby imposed a higher burden upon declarants than the statute mandates.

The authors agree with the court's ruling that the inclusion of a shared facilities agreement, in its entirety, within a disclosure statement does not (in and of itself) constitute clear and adequate disclosure. Indeed, decisions must be made as to what particular provisions of the agreement should be highlighted and disclosed to assist a prospective unit purchaser in making a fully informed decision on whether to proceed with the purchase transaction. In this regard, the legislation has already provided some guidance regarding the basic ground rules for disclosure, and subsection 72(3)(n) of the Act expressly confirms that a disclosure statement must contain a "brief" description of the "significant" features of all agreements or proposed agreements mentioned in section 111, 112, 113 or 114, and of all agreements or proposed agreements between the corporation and another corporation. In the authors' view, subsection 113(3)(a), when read in conjunction with subsection 72(3)(n) of the Act, requires a determination of what constitutes the significant features or provisions of a shared facilities agreement, and whether said features or provisions were transparently and sufficiently disclosed. Here, the word "significant" (like the words "clearly" and "adequately") should be given its plain and ordinary meaning (i.e. "noteworthy"; "essential"; "consequential"). In the authors' opinion, in the context of a shared facilities agreement, the paramount purpose of disclosure is to ensure that purchasers know what facilities are being shared, how that sharing arrangement impacts their use and enjoyment of the facilities, and what the financial implications are to the condominium, in terms of its share of the costs to operate, maintain and repair same, and who will decide (or have input in) the manner in which those shared facilities are operated and the budgeting of the shared facilities costs associated therewith.

Justice Myers focused on the disclosure of those provisions in the agreement that had negative implications for the condominium, from a cost, use or benefit perspective, and the authors concur with that approach. However, Justice Myers went further than that, by also requiring the disclosure of all known or reasonably foreseeable risks arising from the operation of the agreement or its provisions, and this level of

disclosure introduces a somewhat speculative element to the disclosure obligation, because even though the agreement may repose or devolve various discretionary powers upon the declarant, that does not necessarily mean or entail that those powers will ultimately be exercised, utilized or availed in a negative way, to the detriment or prejudice of the condominium. In other words, Justice Myers seems to require not only the disclosure of the declarant retaining the discretionary power over the determination and allocation of the shared facilities costs, but also the potential for the condominium corporation to be negatively impacted or prejudiced by the potential abuse of such power, even though such abuse is purely conjecture, and may never materialize. In turn, this elevated level of disclosure would require a detailed analysis of each and every provision in the shared facilities agreement and its potential for being used, exercised or relied upon in a way which might be unduly burdensome to the condominium or its unit owners, and such an exercise is not only exceedingly onerous, but is arguably not contemplated by the statute, which makes no mention in section 113 (nor in any other provisions of the Act governing or pertaining to disclosure) of the words or concept of "reasonably foreseeable risks".

The authors respectfully submit that the disclosure of the discretionary power to allocate costs is sufficient, in and of itself, to convey the message to the purchaser that the shared facilities costs are not based on some clear objective formula or predicated on fixed percentages, but rather variable and open to the potential for the costs being allocated in a manner which the condominium might ultimately object to, or wish to challenge. Requiring the disclosure of the significant provisions, as well as all reasonably foreseeable risks emanating therefrom, makes the purchaser's task of sifting through the disclosed information (i.e. to determine what is relevant and impactful to that particular purchaser) more difficult, and arguably defeats the underlying purpose of the disclosure in the first place, which is to highlight the significant provisions of the agreement in a summary way. If this elevated level of disclosure is ultimately affirmed on appeal, then inevitably some declarants will endeavour to create a list of disclosed potential negatives that are so extensive that purchasers will either be scared away from the project altogether, or alternatively will become enured to same, to the point where purchasers may not (and will not) focus on the real issues or concerns

regarding the shared facilities agreement. In light of the critical importance of shared facilities agreements to all integrated mixed-use or multi-phased projects, and the unquestioned dependence and reliance upon the enforceability of such agreements by the declarant, the construction lender, and all other parties involved in the overall project, the development industry needs certainty and clarity from the appellate court on this important disclosure issue, because the nature, level and extent of the disclosure must be reasonably ascertainable on an objective basis, and not dependent on the subjective concerns or whims of each unit purchaser, nor for that matter, on the subjective considerations of relevance or significance of each judge scrutinizing same. Furthermore, if a declarant is only willing to proceed with a project on the basis that the condominium corporation will contribute 99% of the shared facilities costs, while the declarant contributes no more than 1% thereof (in its capacity as the owner of the freehold component sharing the use and enjoyment of certain facilities with the condominium), and provided that all unit purchasers are advised (through the disclosure statement) of this formula for allocating the shared facilities costs, then it is respectfully submitted that the shared facilities agreement ought to be judicially upheld, and should not be amended or terminated, notwithstanding that it creates an inherently unfair allocation of costs to the detriment of the condominium, and despite the fact that the disclosure statement did not expressly confirm this resulting inequity or prejudice. Simply put, the disclosure of the formula should, in and of itself, be the antidote, cure or panacea for unconscionability, and if those purchasers who are told about this formula nevertheless proceed to complete their respective purchase and sale transactions notwithstanding same, then they should be forever estopped from subsequently arguing that the agreement is oppressive or unconscionably prejudicial, and the marketplace will dictate whether such unbalanced cost-sharing agreements will be viable.

Applying the authors' analysis of the sufficiency of the disclosure statement in the case at bar, the court could have readily concluded that the Declarant failed to disclose the significant features of the Complex Reciprocal Agreement, because of its failure to mention that the Declarant was the CFM, or that it intended one of the Co-owners (namely CFCL) to fulfill the role of the CFM as its agent, and also failed

to disclose that the CFM had the unilateral authority to establish (and change) the annual allocation of the Shared Facilities costs, subject only to arbitration in the event of a dispute regarding same. After concluding that the Declarant failed to highlight and describe the notable or important provisions of the shared facilities agreement in the disclosure statement, the court would then be correct in thereafter focusing on the second prong of subsection 113(3), to determine whether the agreement, or any of its provisions, produces an oppressive or unconscionably prejudicial result. Therefore, although the authors arrive at the same destination as Justice Myers, in terms of concluding that the Declarant's disclosure of the shared facilities agreement was inadequate in the Bremner Case, the authors nevertheless believe that the distinction in the analysis of adequacy is (or could become, depending on the facts of the case under consideration) critically important.

Finally, it is worth noting that Bill 106 (formally entitled the *Protecting Condominium Owners Act, 2015*)[2] introduces section 21.1 of the new Act, which provides that if a proposed condominium will be sharing the use, maintenance, repair, insurance, operation or administration of any land, assets, facilities or services with another party, then it must enter into a shared facilities agreement that meets the prescribed requirements, and ensure that said agreement is registered on title. The regulations to the new condominium legislation will prescribe provisions that must be included in such agreements, and it is the understanding of the authors that the regulations will require every shared facilities agreement to clearly outline or specify the formula or basis upon which the shared facilities costs will be allocated amongst the contributing parties. Therefore, it is likely that the discretionary power to allocate costs (i.e. unrelated to a formula that is predicated on relative size or gross floor area, or based on relative dwelling unit count, or some other objective and ascertainable criteria or measurement), will be eliminated, along with the potential prejudice arising therefrom. In other words, section 21.1 of the new Act, and the corresponding regulations that will be promulgated in connection therewith (which are currently being drafted and finalized by the Ministry of Government and Consumer Services) will endeavour to promote more equitable cost-sharing arrangements

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[2] Bill 106 received Royal Assent on December 3, 2015.

involving condominiums that are clear, transparent and non-discretionary, in an effort to minimize future disputes regarding same.

3. THE CCC 375 CASE

i. The Facts of the Case

Carleton Condominium Corporation No. 375 (hereinafter referred to as "**CCC 375**") is a mixed-use condominium, containing both commercial and residential units, located in the Byward Market area of Ottawa. 3716724 Canada Inc. (hereinafter referred to as "**371**" or the "**Applicant**") is the owner of a number of commercial parking units in the condominium building, which it has rented out on a monthly basis since it purchased same. However, according to 371, renting the parking spots on a monthly basis was no longer profitable, and it therefore wanted to convert its business to a "pay and display" hourly parking operation. The declaration creating the condominium corporation expressly permits the operation of a commercial parking business within the confines of the condominium, on an hourly or daily basis. In fact, when the condominium was constructed in 1986, the commercial parking area was operated as an hourly parking business, albeit with a parking attendant on site.

In order to convert its business into an hourly parking operation, various changes to the common elements would be required, including the installation of a garage loop detector on the garage ramp, to allow access for approaching vehicles, as well as the replacement of the hardware on an exterior door which would provide free access to a stairwell leading to the garage. On May 14, 2012, the Applicant sought the condominium board's approval to make the necessary changes to the common elements. From the outset, the board made clear that it had concerns with respect to the safety of residents of the condominium and the users of the commercial parking lot, since the condominium is located in an area with a high crime rate and a significant transient population. Both parties acknowledged that some of the changes requested by 371 would increase the risk of trespassers gaining access to the garage. In light of the potential security implications, the board requested that 371 obtain a security audit at its own expense. At a meeting held on August 15,

2012, the condominium board voted not only to reject 371's proposed changes, but also to treat same as "substantial" pursuant to the provisions of section 97(6)(b) of the Act, thereby requiring the approval of at least two-thirds of the unit owners.

Several months after the board's meeting, 371 retained Paradigm Private Investigation Services to prepare the requested security audit. In its report, Paradigm advised that consideration should be given to the use of additional security personnel, and suggested that this could be accomplished by the addition of one extra security officer whose primary duties would be to maintain enforcement and act as a visible deterrent for anyone considering loitering or engaging in illicit activities on the property. The condominium board informed 371 that the report confirmed its key concerns, and that it would not approve the common element changes unless the latter agreed to provide either (i) a parking booth at the parking lot entrance, with a full-time attendant; or (ii) a full-time security officer who would patrol the parking lot area. The Applicant indicated that it was willing to hire a security guard to monitor the pay and display parking area, if CCC 375 would share the costs of same, or provided that 371 was no longer required to make any contribution towards that portion of the overall common expenses attributable to the condominium's security fees. The board refused this proposal and noted that it did not have the legal authority to exempt 371 from its obligation to pay any portion of the common expenses.

Although 371 put forward various measures to attenuate the increased risk, the board continued to insist that 371 hire a security guard, before it would approve the requested changes. In response, 371 brought an application alleging that CCC 375's refusal to approve the desired changes was unfairly prejudicial, and unfairly disregarded its interests, contrary to section 135 of the Act. While the application judge "had no doubt" that the concerns of the condominium board were reasonable, he concluded that CCC 375 unfairly disregarded 371's interests by insisting on a "prohibitively expensive" full-time security guard.[3] The application judge acknowledged that a dedicated, full-time security guard would be the best option, but found

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[3] *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*, 2015 ONSC 6626 at para 46.

that "based upon the evidence" it was not viable.[4] He therefore ordered that 371 should be permitted to make the requested changes without the approval of the unit owners, notwithstanding the requirements of subsections 98(1)(c) and 97(4) of the Act.

ii. The Issues on Appeal

The issues on appeal boiled down to two specific points:

a) Whether the application judge relied on evidence not properly before him; and

b) Whether the application judge erred in concluding that CCC 375 unfairly disregarded the interests of 371.

iii. The Court's Ruling and Analysis

CCC 375 argued that the application judge's decision improperly relied upon financial information that was contained in a supplementary affidavit which the parties had advised the application judge not to consider. The only evidence regarding the economics of 371's business that was properly before the application judge, and that was before the condominium board when it made its decision, was that renting the parking units on a monthly basis was no longer profitable, and that a short-term parking operation would be far more profitable. Accordingly, without the supplementary affidavit, the application judge could not have concluded that hiring a full-time security guard would be prohibitively expensive, which finding underpinned his ultimate conclusion that the condominium corporation unfairly disregarded 371's interests. The Court of Appeal agreed with CCC 375 that the application judge's decision turned on evidence not properly before him and, on that basis, the decision could not stand.

CCC 375 further argued that even if the evidence contained in the supplementary affidavit was properly before the court, the application judge erred in law by assessing the board's decision on a subjective basis, and substituting his judgment for that of the board, which had been exercised following a fair process,

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[4] *Ibid* at para 38.

after having due regard to the reasonable safety concerns of the condominium residents. Writing on behalf of a unanimous appellate court, Justice Hoy noted that the Canadian jurisprudence involving decisions rendered by directors and officers of for-profit corporations has been guided by the "business judgment rule", which recognizes the autonomy and integrity of corporations, and the fact that directors and officers are often better suited to determine what is in the best interests of the corporation, than a court reviewing a matter after the fact. Provided that the directors' decision lies within the range of reasonable alternatives, the court will generally not interfere with the board's decision, nor endeavour to substitute the decision of the board with that of the judge. Justice Hoy pointed out that although the business judgement rule was developed in the context of for-profit corporations, Ontario courts have also applied the rule to not-for-profit corporations, and courts in other jurisdictions have applied the rule when reviewing decisions rendered by condominium boards. Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations, inasmuch as the directors, who are mandated under subsection 27(1) of the Act to manage the affairs of the condominium corporation, are in a better position to make judgments about the condominium's interests as a whole than are the courts. In addition, pursuant to subsection 37(1) of the Act, directors are required to act honestly and in good faith, and to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Justice Hoy concluded that these provisions, like their counterparts in corporate statutes, suggest that courts should be careful not to usurp the functions of the elected boards of condominium corporations.

To that end, the Court of Appeal indicated that when reviewing a condominium board's decision, the first question to consider is whether the directors have acted honestly and in good faith, and have exercised the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board's balancing of the legitimate interests of an aggrieved unit owner (who seeks relief or redress under section 135 of the Act), against the competing concerns of other unit owners, or of the condominium community as a whole, should be accorded deference. Importantly, the

question in such circumstances is not whether a reviewing court would have reached the same decision as the board, but rather whether the board's decision was within the range of reasonable alternatives.

Justice Hoy determined that CCC 375 had acted honestly and in good faith, inasmuch as it was transparent as to the nature of its security concerns, and had requested that 371 obtain a security audit to evaluate the legitimacy of its apprehension, and carefully considered the audit when it was produced. Moreover, the evidence confirmed that the condominium is located in a high-crime area, and the application judge accepted that the board's concerns were reasonable. The board considered 371's desire to increase its profit, and balanced that interest against the competing security interests of the condominium residents, as well as those persons using the commercial parking lot. As the deemed occupier of the common elements, the board was entitled (and legally required) to consider the security implications for users of the common elements. Justice Hoy noted that the fact that the board's decision had the effect of rendering 371's proposal less profitable, does not mean that the board unfairly disregarded the interests of 371. Rather, the board simply determined that the increased security risk outweighed 371's commercial interests. The Court of Appeal thus dismissed the application against CCC 375, holding that the board's decision was within the range of reasonable alternatives, and accordingly was not oppressive or unfairly prejudicial to the Applicant.

iv. Critique of the Decision

The authors agree with the appellate court's extension of the business judgment rule to the decisions of condominium boards, inasmuch as the court's ruling was clear and well-reasoned, and consistent with the jurisprudence in both Ontario and other jurisdictions. Although (surprisingly) not referred to in its decision, nearly two decades earlier the Court of Appeal in *York Condominium Corp. No. 382 v Dvorchik*, [1997] OJ No. 378 (hereinafter referred to as the "**Dvorchik Case**") had recognized that courts should give deference to the views of elected condominium boards respecting the propriety of rules enacted for the condominium community. In the Dvorchik Case, the appellate court was asked to uphold the enforcement of a rule that prohibited unit owners from having pets that weighed more than twenty-five pounds. After acknowledging

that condominium boards are responsible for balancing the private and communal interests of unit owners, the court confirmed that there are undoubtedly different approaches that the board could have taken to regulate the keeping of pets by residents of the condominium, and that the "twenty-five pound rule" may not be the best or the least arbitrary rule to enact or enforce. Nevertheless, the appellate court confirmed that the threshold for overturning a board's rule, reasonably made in the interests of all the unit owners, is a high one, and should not be supplanted by the court unless the rule is clearly unreasonable, or contrary to the legislative scheme of the Act.

The authors also wish to point out that in the case of *Metropolitan Toronto Condominium Corp No. 545 v Stein*, 2006 CarswellOnt 3768, the Court of Appeal chose not to extend the principles established in the Dvorchik Case (i.e. involving the enactment or adoption of rules) to other decisions rendered by a condominium board, and based on the facts of that case, the appellate court held that there was "no statutory or principled reason why deference should be afforded to a condominium corporation's decision".[5]

The decision of the Court of Appeal in the CCC 375 Case articulates a new framework for future courts when reviewing an application brought against a condominium corporation under the oppression remedy provisions of section 135 of the Act. By formally importing the business judgment rule into the realm of condominium law, the Court of Appeal's decision empowers condominium boards by granting judicial deference to their decisions, in recognition of the fact that they are often better suited to evaluate what is in the best interests of the condominium community than the judiciary. This deference will prevail and subsist so long as the directors comply with the standard of care imposed under section 37 of the Act, and provided their decision falls within the range of reasonable alternatives, after giving due consideration to all legitimate competing interests.

In the aftermath of the CCC 375 Case, unit owners wishing to challenge the decision of a condominium board will clearly be facing an uphill battle, and will bear the onus of proving that the board did not act honestly and in good faith, or that the directors did not exercise the care, diligence and skill that

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[5] *Metropolitan Toronto Condominium Corp No. 545 v Stein*, 2006 CarswellOnt 3768 at para 50.

a reasonably prudent person would exercise in comparable circumstances, or that the board failed to properly consider and weigh the competing interests at play in arriving at the board's ultimate decision, in light of all of the reasonable viable alternatives.

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