

BOARD OF DIRECTORS IN CONDO CORPORATIONS RULE

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In the recent decision, *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*^[1], the Ontario Court of Appeal found that the “business judgment rule” applies to decisions of boards of condominium corporations. As such, in applying the “business judgment rule”, the decision of boards of condominium corporation are owed deference similarly to for-profit corporations and non-for-profit corporations. The court will not determine whether their decision was the perfect one if a condominium corporation’s board’s decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests.

Competing Interests: Profits vs Safety

The appellant, Carleton Condominium Corporation No. 375 (“Carleton Condominium”), is a mixed use condominium of commercial and residential units located in the ByWard Market area in Ottawa. The respondent, 3716724 Canada Inc., owns commercial parking spots in the condominium and had been renting the spots on a monthly basis. To increase profits, 3716724 Canada Inc. wanted to start renting out the spots on an hourly basis but needed the condominium board’s approval to make changes to the common areas. The board of directors of Carleton Condominium (the “Board”) worried about the security implications. Therefore, the Board refused to approve the variations requested unless 3716724 Canada Inc hired a full-time security guard to mitigate the security risks.

As a result, 3716724 Canada Inc. commenced an application under section 135 of *Condominium Act*^[2] (the “Act”) asking the court find that the conduct of a condominium corporation is oppressive, unfairly prejudicial or unfairly disregards the interest of the applicant and make an order to rectify the matter. This is also known as the oppression remedy.

Both parties recognized that the changes requested would increase the risk of trespassers gaining access to the garage. Two expert reports indicated that a full time security guard would mitigate these security risks. However, 3716724 Canada Inc. was unwilling to pay the security fees associated with hiring a security guard and the condominium board felt that the security measures proposed by the respondent were insufficient. The application judge held that the Board had unfairly disregarded 3716724 Canada Inc.’s interest and ordered that it be allowed to make the changes and dispensed with the need for a vote of the unit owners.

The Ontario Court of Appeal overturned the application judge's decision because in making its decision the Board followed a fair process and had reasonable safety concerns.

Business Judgment Rule's Application to Condominium Boards

In its decision, the Ontario Court of Appeal considered the “business judgment rule” which recognizes that boards of directors and officers are in a better position to make decisions that affect their corporation than are the courts. As long as a board acts fairly and reasonably in making its decision a court should not overturn the decision.

The Ontario Court of Appeal established an analysis for a court's review of a condominium board's decision under section 135 of the Act. Firstly, the court must decide whether the directors of the condominium board acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If so, then the board should be accorded deference because the interests of a complainant under section 135 were balanced against competing concerns. Secondly, the court must determine whether the board reached a decision that was within a range of reasonable choices. If the decision is found to be reasonable it cannot be said that the board unfairly disregard the interests of a complainant.

The Ontario Court of Appeal concluded that the Board acted honestly and in good faith. Moreover, the Board's decision was reasonable because it was transparent as to the nature of its concerns and it requested a security audit which it considered when it was produced. The Board did not prohibit 3716724 Canada Inc. from changing its business model. Rather, the Board imposed conditions for approving the changes to the condominium's common elements to mitigate the increased security risks. As such, the Court of Appeal concluded that the Board's decision requiring a security guard as a condition for approving the changes to the common element fell within a range of reasonable alternatives.

Power to the Condominium Boards

It will now be harder to overturn a condominium board's decision because boards of directors are in a better position to make decisions that affect their corporation than are the courts. Moreover, if the board followed a fair process and its decision was reasonable among other reasonable alternatives, the court will likely approve the condominium board's decision. As such, a decision made by the board of directors of a condominium board will be supported by the courts if the board followed procedure, considered alternatives and was reasonable in making its decision.

by Ron Petersen and Anna Lichy, Student-at-Law

[1] 3716724 Canada Inc. v Carleton Condominium Corporation No. 375, 2016 ONCA 650.[ps2id id='1' target='']

[2] Condominium Act, SO 1998, c 19. [ps2id id='2' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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