

Condominium Law

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HOT OFF THE PRESSES:

A Huge Win for the Condo Community

Landmark Decision Allows Condo Corporation to Unilaterally Amend Oppressive Shared Facilities Agreement

In a huge win for the condo community, the Ontario Superior Court on August 26, 2016 upheld a Toronto condominium corporation's decision to amend a shared facilities agreement under s. 113 of the Condominium Act, 1998.

In TSCC No. 2130 v. York Bremner Developments Limited, the condo corporation applied for an order terminating or amending a shared facilities agreement. Under s. 113 of the Act, the court may make such an order if the application is filed within one year of turn-over and the court is satisfied that the disclosure statement did not clearly and adequately disclose the provisions of the agreement and the agreement produces a result that is oppressive or unconscionably prejudicial to the corporation.

With respect to the question of clear and adequate disclosure, the court found that the adequacy of the disclosure is tied to the oppressive outcome. As is increasingly common in new condo developments, the shared facilities were part of a large, complex development involving other commercial owners, including the developer, which continued to own the commercial components within the complex, and whose agent is also the manager of the shared facilities. The court found that the disclosure statement failed to adequately disclose important features of the shared facilities agreement that gave the declarant, or its agent, complete control over the management, repairs and budget of the shared facilities, with no input whatsoever by the condo corporation. Significantly, the court found that the disclosure was inadequate despite the fact that the entire agreement was appended to the disclosure statement. "The statute", said the court, "requires more than just the disclosure of the document."

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The court ultimately found that the shared facilities agreement was oppressive toward the condo corporation's rights because, among other things, it allowed for a powerful, non-arm's length shared facilities manager who was heavily biased in favour of the developer and commercial owners. Though the court confirmed it was not illegal to have a one-sided agreement in and of itself, the corporation had a reasonable expectation that the shared facilities manager would treat the corporation fairly under the terms of the agreement. Instead, the shared facilities manager took an unreasonable approach to the agreement and unfairly disregarded the corporation's legitimate interests.

In the end, the court did not terminate the agreement outright, as doing so would create a void that would not likely be filled. Rather, the court amended the agreement to insert a provision allowing TSCC 2130 to terminate the shared facilities manager.

The decision is an important victory for the condominium community. It opens the door for other new condominium corporations, which have been saddled with unfair and oppressive shared facilities agreements, to look to the courts for a remedy. CV