

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, C. C.43, AS AMENDED**

**AND IN THE MATTER OF THE ADMINISTRATION PROCEEDINGS
OF CARRIAGE RIDGE OWNERS ASSOCIATION**

Applicant

FACTUM OF LORI SMITH AND BRUCE FLEMING
(Motion returnable July 2, 2020)

June 26, 2020

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I — OVERVIEW

1. On this pair of motions, the Applicants seek to approve the form of survey of members proposed by the Court appointed Administrator, BDO Canada (the “**Administrator**”). The respondents, Lori Smith and Bruce Fleming who are both owners of intervals in the Carriage Ridge resort, oppose the survey proposed by the Administrator (the “**BDO Survey**”) for the reasons that:

- (a) it improperly requires owners who wish to exit to bind themselves to doing so on largely incomplete information;
- (b) its terms are certain to unfairly skew the results of the survey in favour of a restructured resort;
- (c) the survey will not yield accurate or representative results;
- (d) the survey unfairly imposes an exit fee on members who wish to vote to exit the resorts; and
- (e) the survey does not meet the spirit and intent of the Order of Justice Conway dated May 15, 2020 (the “**Initial Order**”), which requires the Administrator to conduct the survey.

2. Further, the practical effect of the BDO Survey is to ask members who wish to exit to pay an exit fee for the privilege of exiting the resort and escaping the perpetual nature of the Timesharing Agreements. Those who stay in the resort will also reap the benefit of escaping the perpetuity clause, and will end up with a more valuable asset on the backs of those who pay to exit.

3. Ms. Smith and Mr. Fleming propose an alternative form of survey which is likely to yield more accurate results, treats members fairly, and meets with spirit and intent of the Initial Order. They also request that delinquent members be entitled to vote on the survey, and that any non-

responsive members or non-votes be treated as such, instead of as votes to stay in a restructured resort, as has been proposed by the Applicants and the Administrator.

II — STATEMENT OF FACTS

4. Sub-paragraph 5(b) of the Initial Order requires the Administrator to determine the preferences of the members of the Carriage Ridge resort regarding whether they wish to remain in the resort or exit. In particular, sub-paragraph 5(b) provides:

(b) subject to Court approval, plan and propose a procedure to **ascertain the interests of the Members going forward with respect to the Resort**, whereby Members of the Applicant will be able to indicate, among other things, whether they wish to terminate their relationship with the Resort or continue their relationship with the Resort if a satisfactory restructuring solution can be developed; **(emphasis added)**

Initial Order, Paragraph 5(b)

5. Sub-paragraph 5(c) of the Initial Order provides:

(c) subject to Court approval for implementation, develop an exit strategy (the “**Exit Option**”) for those Members that wish to relinquish their membership with the Applicant and obtain a release of all future obligations to the Applicant, subject to certain terms and conditions to be developed by the Administrator, in consultation with the Applicant and the Consultative Committee (as defined below).

Initial Order, Paragraph 5(c)

6. The Administrator has put forward for Court approval, a survey of members which purports to bind those members who indicate that they wish to exit the resort. The survey also indicates that exiting members will have to pay an exit fee. By its own terms, the BDO Survey acknowledges that the information regarding exiting the resort is incomplete, as it indicates: “You will receive further information on precisely how to exit and the implications of exiting after the survey is completed and a final exit plan is approved by the Court.” However, members who indicate that they wish to remain in a restructured resort: (a) are not bound to their decision; and (b) may still opt to exit the resort at a later stage.

Motion Record, Tab 3, Schedule A to Draft Order

7. The responding parties on this motion, together with other members, are of the view that the BDO Survey is unfair and impractical in a number of ways. The Administrator is asking the Court to order those members who wish to exit to be bound to their choice on incomplete material information. Notwithstanding this, these members are also required to pay an exit fee. Since owners who vote to stay in a restructured resort can always change their answer to “exit” at a later date once more information is known, respondents who truly wish to exit will simply hold off on doing so, and will choose the non-binding option to “stay” for the time being.

Responding Motion Record, Tab 1, Affidavit of Lori Smith at para. 5

8. A number of members have written concise statements complaining about the BDO Survey. The common theme running through the statements of these members is that:

- (a) the BDO Survey does not constitute a survey due to its binding nature for those who wish to exit the resorts;
- (b) the BDO Survey is unfair because it purports to bind members who vote for one option and does not bind the members who vote for the other option;
- (c) non-responsive members should not be counted as votes to stay in a restructured resort;
- (d) delinquent members should still be entitled to vote; and
- (e) the exit fee is unfair.

Responding Motion Record, Tab 1, Affidavit of Lori Smith at paras. 11-18

9. Some of the members who sent written statements have also cited specific financial hardships, caused either by COVID-19 or by family circumstances, that require them to exit the resorts imminently, and without the requirement to pay an exit fee.

Responding Motion Record, Tab 1, Affidavit of Lori Smith at para. 13, 17

Responding Motion Record, Tab 2, Affidavit of Michael Deegan

10. The Applicants and the Administrator have proposed that a non-response to the survey be treated as a vote in favour of remaining in a restructured resort. They also propose that delinquent members who are behind in the payment of their resort fees not be entitled to vote on the survey.

11. Based on the concerns they have with the survey proposed by the Administrator, Ms. Smith and Mr. Fleming have prepared an alternative form of proposed survey (the “**Alternative Survey**”) which avoids the problems caused by the Administrator’s survey.

Responding Motion Record, Affidavit of Lori Smith, para. 7, Exhibit C

12. The Alternative Survey provides the following two options for members to vote for, with an optional “add on” vote for obsolescence for those members who are voting to exit:

1(a) I would like to exit from the resort in accordance with an exit plan to be determined by the Administrator.

1(b) I also vote in favour of obsolescence, in accordance with section 11.05(b) of the Timesharing Agreement, meaning that the resort will be deemed obsolete and liquidated and closed in the event that 75% of interval owners so vote.

2) I would like to remain in a restructured resort. You will be provided with further information on what a future restructured resort will look like, together with the annual cost, after the survey is completed and an exit plan for those wishing to exit is approved by the Court (in the event that there are insufficient votes for obsolescence). Note that depending on the results of the survey, it may be that a restructured resort is not feasible if not enough owners wish to remain in a restructured resort.

Responding Motion Record, Tab 1, Affidavit of Lori Smith, Exhibit C

13. The Alternative Survey also expressly provides that it is not binding on members, and that it is for the sole purpose of assisting the Administrator in determining the owners' preferences. It also expressly provides that delinquent members may still vote.

Responding Motion Record, Tab 1, Affidavit of Lori Smith, Exhibit C

14. Section 11.05(b) of the Timesharing Agreements contains the obsolescence vote provision, which provides as follows:

The Resort will remain in effect in perpetuity unless any one of these things happen:

- (a) All Units are destroyed and the decision not to rebuild them has been made, or are condemned; or
- (b) If, at any special meeting, the Owner of at least seventy-five percent (75%) of Intervals then in the Resort vote to a declare that Obsolescence has occurred. "Obsolescence" means that the Property, or a substantial portion thereof, has reached an undesirable state of disrepair or is obsolete, such that the Property is no longer an attractive, sound, functional and desirable time share resort.

Motion Record of the Applicant dated April 30, 2020, Tab C, pg. 38

III — ISSUE

15. The issue on this motion is whether the form of survey proposed by the Administrator should be approved by the Court, and if not, what alternative form of survey is appropriate.

IV — LAW AND ARGUMENT

16. Court-appointed administrators are officers and instruments of the Court. Their powers are set out in, and limited by, the terms of the appointment order.

[York Condominium Corp. No. 42 v. Hashmi](#), 2011 ONSC 2478 at para. 32

BDO Survey Impractical, Unfair, and Not a “Survey”

17. Ms. Smith and Mr. Fleming submit that the BDO Survey does not constitute a survey or a proper means to determine members’ preferences, as contemplated by sub-paragraph 5(b) of the Initial Order.

18. The website Dictionary.com defines the word “survey” as follows:

to take a general or comprehensive view of or appraise, as a situation, area of study, etc.

to view in detail, especially to inspect, examine, or appraise formally or officially in order to ascertain condition, value, etc.

<https://www.dictionary.com/browse/survey?s=t>

19. The Merriam-Webster Dictionary defines the word “survey” as follows:

1a: to examine as to condition, situation, or value : APPRAISE

b: to query (someone) in order to collect data for the analysis of some aspect of a group or area

2: to determine and delineate the form, extent, and position of (such as a tract of land) by taking linear and angular measurements and by applying the principles of geometry and trigonometry

3: to view or consider comprehensively

4: INSPECT, SCRUTINIZE - he *surveyed* us in a lordly way— Alan Harrington

<https://www.merriam-webster.com/dictionary/survey>

20. Item 1b from the Merriam-Webster Dictionary is the most applicable in the circumstances, as the task the Administrator is faced with is to collect the views of the members, being a large group of people.

21. Neither of these two dictionary definitions of the word “survey” include anything contractual or binding in any regard. This is because a survey is intended as a data collection tool, not as a tool to bind someone to a certain result (i.e. a contract or waiver).

22. While sub-paragraph 5(b) of the Initial Order does not use the word “survey”, it is clear from the wording of the provision, and from the Applicants’ and the Administrator’s styling of the document as a “Member Survey”, that all stakeholders agree that the Initial Order requires the Administrator to conduct a *survey* to determine the members’ preferences regarding staying or leaving the resorts.

23. The construction of the Initial Order also makes it clear that there are a number of steps that have to occur in a certain sequence. For instance, the first was for the Administrator to create an updated member contact list. The second is to survey the members to determine their preferences about staying or leaving the resorts. The third is to come up with an exit plan for those members who wish to exit. What the Administrator proposes to do instead is to partially combine these latter two steps, by including both a survey per sub-paragraph 5(b) of the Initial Order, and also a portion (albeit largely incomplete) of the exit plan per sub-paragraph 5(c) of the Initial Order.

24. As set out above, a Court-appointed administrator’s powers are prescribed by and confined to those set out in the appointment order. In this case, the Administrator was not empowered by the Initial Order to distribute a binding survey.

25. Not only is the BDO Survey not truly a survey since it purports to make those who select the exit option permanently bound to that choice, this, along with other terms, give rise to a survey that is completely skewed in favour of a restructured resort. This is because those who do not vote to exit initially can still exit later on if they so choose. Further, since the BDO Survey

acknowledges by its own terms that the information regarding exiting is incomplete and will be provided at a later date, it is obvious that members who wish to exit will simply either not respond to the BDO Survey at this time, or will vote to restructure, to reap the obvious benefit of not having to commit to exiting now on incomplete information regarding what the implications of exiting are (*plus* committing now to payment of an exit fee).

26. Since the Applicants and the Administrator wish to treat a non-vote from members as a vote in favour of staying in a restructured resort, the BDO Survey is again unfairly skewed toward a restructured resort. It is abundantly obvious that the results of the BDO Survey are not going to be reliable, accurate, or useful. Ms. Smith and Mr. Fleming submit that a non-vote or non-response to the survey should be simply treated as exactly what it is. There will be inherent unfairness either way if any other result is permitted for non-votes.

27. As is evidenced by the exhibits to the Affidavit of Lori Smith and the Affidavit of Michael Deegan, numerous members have already begun to complain that an exit fee is unfair. Mr. Deegan, a member of the Consultative Committee, has deposed that he cannot afford to vote for any other option other than restructuring, which is an option he does not believe in.

Responding Affidavit, Tab 2, Affidavit of Michael Deegan at para. 9

28. In addition, the Applicants have failed to state a specific reason why an exit fee is necessary, appropriate, or even how the funds will be applied. All the Applicants have said is that the exit fee is payable in exchange for a termination of the members' obligations. It is worth recalling that the Administrator's sizable fees are being paid with the members' own money. Members should be entitled to expect and count on full transparency in this process, especially if they are going to be asked to pay an additional fee just for the privilege of leaving an obviously unfair and untenable situation. These concerns have also been identified by numerous concerned

members who have taken the time to express their worries in writing. The unfairness of an exit fee was perhaps summed up best by the member Lois Brisbois, who wrote as follows:

As a paid up owner (no mortgage and all fees paid on time for 20 years) I expected to be asked if I desired exit at this time. I THEN expected to be made aware later of ALL the terms. **I also expected to be allowed to exit for \$00.**

Why would I have that expectation?

Here are my reasons:

1. The resort has value in a prime area of Ontario. Living here I know that. Horseshoe Valley is slated for huge development.

2. **My investment for my one red week over the 20 years has been nearly \$40 000. My Timeshare was sold to me as an investment. It's not the Owners' fault that the Managers deemed it unmarketable.**

3. Wyndham has a program called Ovations. **Paid up owners in USA resorts may exit under that program for \$00. For reasons unknown to us, Wyndham does not offer the program to owners of Canadian resorts.** I have been challenging that unfairness on my own and Wyndham head office has given me a case number and a case worker to explore my requests.

4. I have no proof but a very strong feeling that Wyndham has a Master plan to get most of us out at a cost to us, to fix up the resort with our funding and then to take it over, in whole or in part, for themselves as a profit making hotel destination in a prime location. The new VETTA Spa being built is just across the road from the Resorts and it will bring huge business into the area with a need for nearby rooms. Living near the resort and being aware of what is going on in the Valley leads to my speculations.

5. **I have NEVER been in arrears, so why must I pay to exit? Why must I pay to support a restructured resort for those who want to stay?**

6. **Although I never agreed to pay extra fees to make up for delinquent owners, I have had to do just that for a number of years.** There has been no added value for paying those extra fees, not even the offer of an extra night now and again. Many of the Owner perks have disappeared over the years. I could go on.

(emphasis added)

Responding Motion Record, Affidavit of Lori Smith at Exhibit G

29. A further skewing of results will be caused by the BDO Survey based on the proposed idea of depriving members who are delinquent (about 26% of members) in their fees from voting. It is

submitted that it can be reasonably inferred that members who are delinquent in their fees wish to exit the resort. Given the number of delinquent members, there are numerous reasons why members may be delinquent in their fees, from outright refusals to make payment (even though some members may have the means to do so) to true impecuniosity, and everything else in between.

Responding Motion Record of BDO Canada, Tab 1, First Report of the Administrator, pgs. 2, 16

30. It is worth noting that the Timesharing Agreement does not actually contain a *mandatory* provision that delinquent members may not vote. Rather, this is an *optional* default remedy provided for at section 8.05 of the Timesharing Agreement.

Motion Record of the Applicant dated April 30, 2020, Tab C, pg. 38

31. Insisting on strict enforcement of default remedies contained in the Timesharing Agreement and ignoring the voice of delinquent members ignores the practical reality that this matter is now before the Court in a very unique situation. Clearly, the Applicants and the Administrator are aware of this and similarly seek relief from the Court to make possible that which would not ordinarily be possible (such as making a survey binding when, without relief from the Court, the survey could not possibly constitute a legally binding contract). Ignoring delinquent members is certain to unfairly skew the survey results toward staying in a restructured resort. Ms. Smith and Mr. Fleming submit that the Court should exercise its discretion to permit delinquent members to vote, recognizing that the Timesharing Agreement does not impose a mandatory restriction on voting.

32. Importantly, under the BDO Survey, exiting members have to pay to get out of the perpetuity clause of the Timesharing Agreement, while those members who opt to stay in a restructured resort will also get the benefit of getting out of the perpetuity clause, *without* having

to pay such a fee. The Administrator also suggests that a successfully “restructured resort” will not see any significant escalation in annual maintenance fees. This may or may not be feasible, but this factor is also likely to skew the results of the survey.

33. Instead of paying an exit fee to exit the resort and be free of the perpetuity clause now, some members will simply remain in the restructured resort, avoid the exit fee, still receive the benefit of being freed of the perpetuity clause, and will then have a more valuable and transferrable timeshare unit if they wish to dispose of it. In this way, exiting members are being required to fund the future benefits (and maintenance fees) of those who stay. The influx of money from exiters is likely one of the reasons why the Administrator thinks that it will be able to avoid any sizeable escalation in maintenance fees for the restructured resort.

Alternative Survey Fair, Balanced, and Likely to Yield Accurate Results

34. The Alternative Survey proposed by Ms. Smith and Mr. Fleming is not binding. It simply and fairly sets out the two realistic options available to the members in light of the Initial Order, with a sensible “add on” option for obsolescence for those members who are voting to exit. The Alternative Survey therefore aims to make the choice and the process as simple and fair for the answering members. Put simply, the Alternative Survey provides the option “stay” or “go”. In this way, the Alternative Survey is likely to yield the most accurate, reliable, and useful results for the Administrator.

V — RELIEF REQUESTED

35. Ms. Smith and Mr. Fleming therefore request that the BDO Survey be rejected by the Court in favour of the Alternative Survey, and that all members, including delinquent members be

permitted to vote on the Alternative Survey, with any non-votes or non-responses to simply be treated as such.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,



Lou Brzezinski and Varoujan Arman

BLANEY McMURTRY LLP

Lawyers for Lori Smith and Bruce Fleming

SCHEDULE A - LIST OF AUTHORITIES

Tab No. Case

1 [York Condominium Corp. No. 42 v. Hashmi](#), 2011 ONSC 2478

SCHEDULE B - STATUTORY PROVISIONS RELIED UPON

Dictionary.com – Definition of “Survey”

to take a general or comprehensive view of or appraise, as a situation, area of study, etc.

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b: to query (someone) in order to collect data for the analysis of some aspect of a group or area

2: to determine and delineate the form, extent, and position of (such as a tract of land) by taking linear and angular measurements and by applying the principles of geometry and trigonometry

3: to view or consider comprehensively

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(MOTION RETURNABLE JULY 2, 2020)**

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