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Condo Alert!

Volume 1, Issue 3 Spring 2009

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The Supreme Court on directors' fiduciary duties

Christopher J. Jaglowitz, B.A., LL.B., ACCI

In December 2008, the Supreme Court of Canada released written reasons for its ruling in the landmark case of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 (CanLII). This important case discusses directors' duties and the application of the oppression remedy in business corporation law. Because these business law concepts are applicable to condominium law, the Court's decision in the *BCE* case contains important lessons for condominium directors.

The first lesson is simple but critically important: *Directors owe a fiduciary duty to the corporation and only the corporation.* The Court found that, in cases where the interests of the corporation and those of stakeholders do not coincide,

"[I]t is important to be clear that directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation."

The second lesson is that directors must make decisions in a manner that considers the interests of all affected stakeholders. Failing to do so may give rise to a claim that the directors are acting in a manner that is "oppressive or unfairly prejudicial or that unfairly disregards the interests" of a stakeholder, contrary to section 135 of the *Condominium Act, 1998*. After considering the cases on oppression, the Court found that:

"[T]he duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."

While lawyers will continue analyzing its impact for a while, the Supreme Court's decision in the *BCE* case offers guidance to condominium directors who routinely make tough decisions that may not please all of their unit owners: The directors' main duty is to the corporation, and their decision-making must be even-handed and treat parties fairly. This ruling also helps explain to unit owners and other stakeholders the criteria that must ultimately guide the directors' decisions and it sets a benchmark to help stakeholders determine if their rights have been infringed.

A Fair Hearing of Owner Disputes

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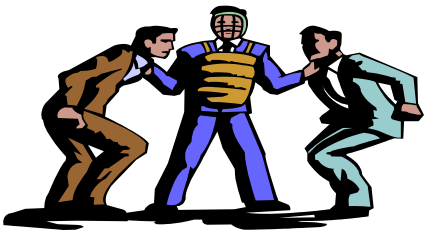
Condominium boards should solve unit owner disputes in accordance with principles of natural justice, by providing for a fair hearing and an opportunity to make a representation in front of an unbiased board of directors who have not predetermined the outcome of the dispute. The Court of Appeal decision of *Struchen v. Burrard Yacht Club [2008] B.C.J. No.1178* addresses the requisite degree of fairness that must be afforded to a member in such situations.

Predetermination: Burrard Yacht Club faced a mess of corporate governance issues and Mr. Struchen (a member of the yacht club) protested. A legal dispute erupted, and eventually, this led to the expulsion of Mr. Struchen, pursuant to the club's disciplinary procedures. In accordance with its bylaws, the board of directors sent a letter to Mr. Struchen that outlined his misconduct and required his presence at a meeting to determine his expulsion. Specifically, the letter stated as follows:



"…the Board has determined that, contrary to Club Bylaw 10(3), you have:

willfully infringed the Bylaws, Rules and Regulations of the Club

interfered with the use of Club property…

conducted yourself in an unseemly manner…"

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The Court of Appeal held that a reasonable person would perceive this letter as amounting to the board's predetermination of the factual issues without hearing all the evidence, thereby preventing Mr. Struchen from having a chance to fairly respond to the allegations.

Judicial review of decision-making by social clubs: The degree to which a court reviews the disciplinary proceedings of voluntary organizations depends on the nature of the organization and the seriousness of the consequences of the discipline. Generally, a court will merely see to it that the discipline committee has observed the procedure laid down in its rules and by-laws, and will not otherwise interfere with the club's decision making. So, in respect of expulsion hearings, a court will only see whether there has been fair play; that the person had notice of the charge; and that the person was given a reasonable opportunity to be heard.

Procedural Fairness: The applicable standard of procedural fairness takes into account three requirements of natural justice: (1) notice, (2) an opportunity to make a representation, and (3) an unbiased tribunal. Notice was not an issue in this case. Mr. Struchen was given an opportunity to make a representation, but that right presupposed that the issue had not been predetermined and that a reasonable person would not conclude that it had been determined. So, a letter outlining the board's determination of Mr. Struchen's misconduct prior to the hearing was deemed to amount to a predetermination of the factual issues and a denial of Mr. Struchen's right to make a representation.

Unbiased tribunal: The court held that it was difficult to uphold Mr. Struchen's right to an unbiased tribunal in this case, given the close relationship amongst the voluntary members of the yacht club. Further, the Court of Appeal noted that, in this context, Mr. Struchen would not be entitled to be heard by persons unknowledgeable of the dispute. However, he had the right to be heard in front of a board that had not already gone on record (i.e., in the letter) stating that the allegations of misconduct had been determined to be true.

Reasonable Apprehension of Bias: The issue of predetermination is inextricably tied to the principle that a decision-making body should not proceed where there is a reasonable apprehension of bias. The Court asked itself:

"What would an informed person, viewing the board's letter realistically and practically—and having thought the matter through—conclude? Would he/she think that it is more likely than not that the decision maker, whether consciously or unconsciously, predetermined the matter?"

The Court of Appeal found that was the case and reinstated Mr. Struchen's membership.

Condo Disputes: Since associations and social clubs are expected to apply principles of fundamental justice in carrying out their disciplinary hearings against unit owners, condominium corporations would also probably be held to the same standard in a case where the board is considering suspending a resident's rights to use the recreational facilities or where the board is asked to choose which of two residents with a continuing noise dispute should be held accountable. Condo boards should ensure that they comply with principles of fairness and natural justice. It is a preferred practice to invite a resident accused of misconduct to attend a directors' meeting so that the board can canvass all perspectives before deciding contentious issues which may affect a resident's rights.

Curb Appeal: Don't forget easements!

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

The difficult thing about an extensive easement review is that it is sometimes like looking for a needle in a haystack. It is a fact that when planners assign Parts to Lots, they do not do it with any rhyme or reason. It is not surprising that condos sometimes put off checking the easements affecting the land on which they wish to put planters, benches and other decorative (and sometimes immovable) items. While it is a minor consideration, a review could save the time and cost of having to move an item should it be found that it encroaches on an easement.

Typically, easements are contained in Schedule "A" to the corporation's declaration and, in some cases, the number and wording of easements can be overwhelming. You can get a general idea of the types of easements that may affect the land by consulting Schedule "A," the description plans and using common sense to determine whether a curb appeal project in a specific area would cause any encroachment.

For example, typically a "subject to" easement over the condo's common elements (i.e., a "servient easement") in favour of a neighbouring property (a "dominant tenement") will exist for the purposes of access of automobiles, emergency vehicles and persons, or for maintenance or repair purposes, or for rights of support of the neighbouring structural components, or with respect to services, utilities and facilities. "Together with" easements allow the condo property, as the dominant tenement to have equivalent rights over a neighbouring servient property when applicable.

When a contractor is hired to undertake a maintenance, repair or landscaping project, be sure to disclose and provide a copy of any relevant easement. It is particularly important to warn the contractor of any potential hidden hazard in the workplace before the contract is signed, as required by the *Occupational Health and Safety Act*. Remember the concrete driller who was not made aware of a buried high-power electrical line easement within the garage slab. His estate was entitled to hold each of the manager, directors, management company and condominium personally liable.

Checking Schedule "A" to your condo's declaration will let you know, generally, that these easements exist. The task of actually reviewing description plans is daunting. Generally knowing that, for example, a Repair or Emergency Access easement exists could result in any planters, benches, fountains, etc., being placed in locations where, reasonably, such access would not be impeded. The tricky easements are the Service/Utility Access easements, in that they often relate to underground items such as water mains, gas mains, sewers and sump pumps. If you know the location of these utility items, steer clear of them. If not then be mindful that such an easement exists and err on the side of moveable decorations. If you plan on enhancing your curb appeal with permanent fixtures, such as fountains, gazebos or gardens, a detailed review by your lawyer of easements affecting the property might be warranted.

Just in time for Spring - First pool rule case reported under the new Human Rights Tribunal

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The first reported condo decision under the new Human Rights Tribunal regime was published 2, 2009. *Dellostritto v. York Region Condominium Corporation No. 688, [2009] O.H.R.T.D. No. 212* is an "adult lifestyle" and "pool rules" case.

Background: Mr. Dellostritto, a father of two teenaged children, complained that the description of the condo as an "adult lifestyle" building and pool rules, restricting swimming hours of 16-year-olds and under, resulted in a systemic pattern of discrimination against him on the basis of age and family status. Mr. Dellostritto claimed against two condominium corporations who shared the pool and the property management company.

Prior to filing his formal complaint with the Tribunal, Mr. Dellostritto and the condo boards attempted internal resolutions without success. Prior to the Case Resolution Conference being held, a settlement was negotiated between the parties. The condos agreed to remove "adult lifestyle" signage and extend family swim hours.

The Tribunal Hearing: At the Case Resolution Conference, Mr. Dellostritto stated that the "adult lifestyle" signage and marketing of the building made him and his family feel unwelcome. As a result, they often used other recreation facilities. With respect to the pool rules, he felt that there should be no age restriction and that pool rules should be enforced against everybody equally. Mr. Dellostritto claimed that family swim hours violated the *Human Rights Code*.

The condos argued that the pool rules were required for children under the age of 16 for safety reasons and to preserve the quiet enjoyment of other people using the pool during adult swim hours.

The Tribunal dismissed Mr. Dellostritto's complaint with respect to age discrimination, finding no evidence of any discrimination - direct or otherwise - experienced by Mr. Dellostritto due to his age.

With respect to Mr. Dellostritto's claim that the pool age restriction discriminated against him based on family status, the Tribunal upheld the finding in *Leonis v. Metropolitan Toronto Condominium Corporation No. 741* which confirmed that a restriction on the use of a pool could be discriminatory on the basis of occupancy of accommodation.

In the *Leonis* case, the hours that children could access the recreational facilities were limited. It was found that such restricted hours effectively precluded a family with children from accessing the pool and therefore had a discriminatory effect on families with children. The Board of Inquiry (which is called the Tribunal under the new regime) found that the restrictions on children's access to the recreational facilities were not reasonable although the Board of Inquiry also concluded that no restrictions at all would impose an undue hardship on the other residents who wished to use the facilities. The Tribunal in *Dellostritto* followed this rationale and found that Mr. Dellostritto had been discriminated against on the basis of family status.

An important factor in *Dellostritto* is that, as a part of settlement reached prior to the Case Resolution Conference, the condos had removed all "adult lifestyle" signage and had changed the pool rules to allow more family swim time. Therefore the Tribunal found that when the complaint was *first* made, the pool rules *did* discriminate against Mr. Dellostritto based on family status, but once the new "settlement" rules were implemented there was no discrimination. Therefore, technically, at the time of the Case Resolution Conference, there was no discrimination found against the condos based on age *or* family status.

Nonetheless, because the old pool rules were found by the Tribunal to have a discriminatory impact, the Tribunal awarded monetary damages. Mr. Dellostritto asked for $4,000, for his legal fees to challenge the rule. The Tribunal awarded him $1,000, taking into account the condos' good faith steps to resolve the complaint and that the claim with respect to age discrimination had been dismissed.

Considerations in light of *Dellostritto*: *Dellostritto* confirms the rationale in the *Leonis* case and a brief expansion is warranted. In *Leonis*, the Board of Inquiry recognized the need to balance the rights of individuals and those of the condo community. The Board of Inquiry analogized condos to unions in examining the balancing act:

"... The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer the expense to or disruption of the business of the union but rather the effect on other employees. ... Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted."

This analysis comes from a Supreme Court of Canada decision called *Central Okanagan School District No. 23 v. Renaud.* Applying this analysis to children's access to condo facilities, the Board of Inquiry in *Leonis* was satisfied that allowing children unrestricted access at all times and having no rules at all with respect to children would occasion undue hardship to the condo corporation, having regard to the impact on other unit owners who use the facilities.

Undue hardship is a complicated concept. Generally, if a person claims discrimination based on one of the grounds in the *Human Rights Code*, there is no discrimination so long as accommodation is made to the point of undue hardship. Undue hardship takes into account the cost, outside sources of funding and health and safety aspects of the accommodation.

Dellostritto and *Leonis* are reminders that condos should ensure their rules are transparent and do not, effectively or systemically, discriminate. Each Human Rights Complaint is dealt with on a case-by-case basis and the legal costs are impossible to predict. If your condo does not pay premiums for Human Rights Defence insurance, it is highly recommended that it start to do so. Condo corporations should also have a Human Rights Policy that either reinforces mediation under the *Condominium Act, 1998* or prescribes an in-house manner of dealing with human rights complaints. In these ways, much of the cost of defending such a complaint can be reduced.

If a complaint with respect to human rights is made, the condo should take immediate steps to communicate with the individual and schedule a meeting. Prior to the meeting, check with the condo's lawyer as to the validity of the complaint so that you can attempt a constructive solution to any real or perceived discrimination. Even if it turns out that the claim is not valid, the individual will appreciate having their concerns heard. The condo would be wise to ask its lawyers to examine its rules and policies in light of a complaint to advise the board on a range of human rights issues and solutions.

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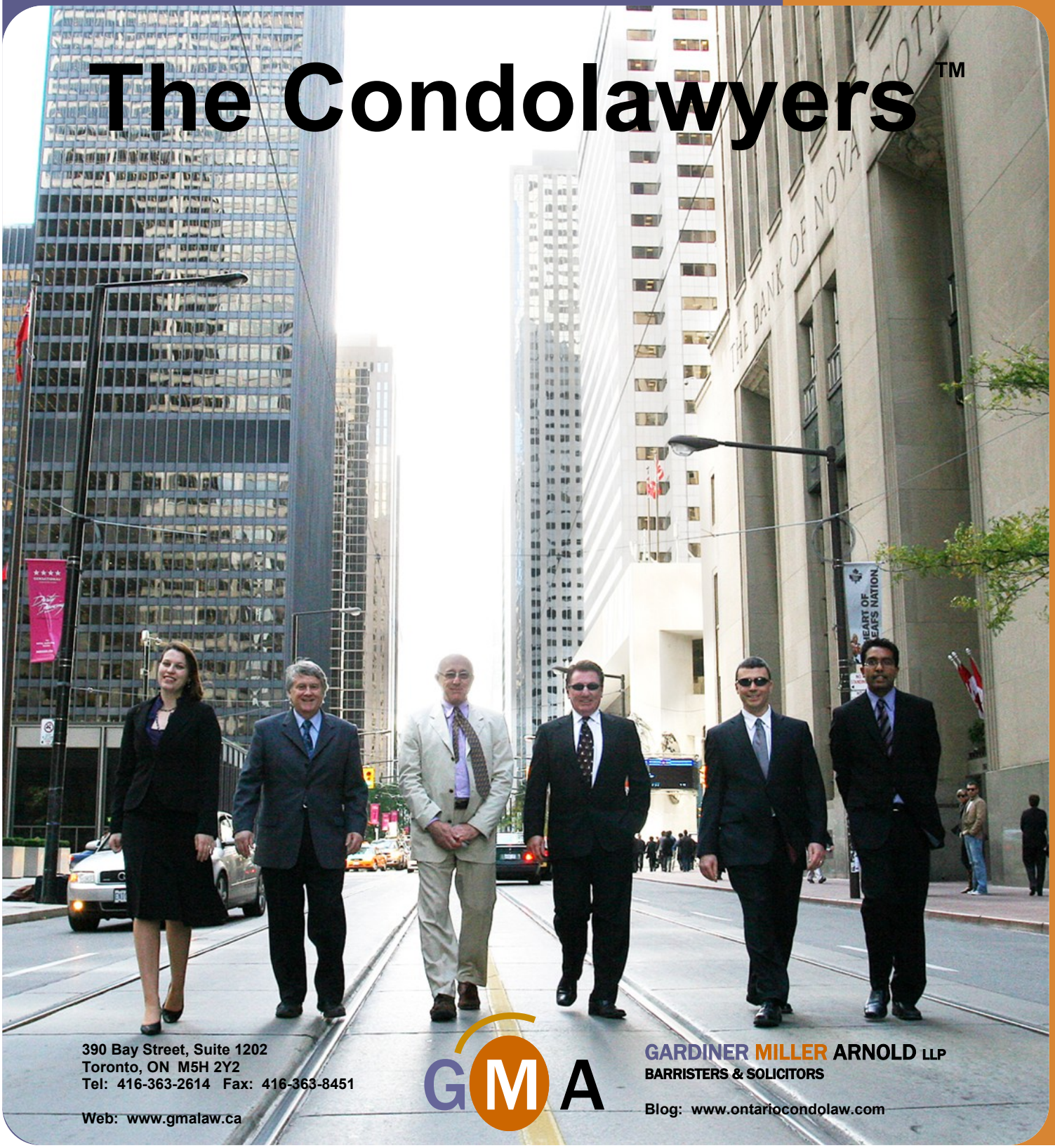

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