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Editor:
Andrea Lusk

Elected to the Board...now what?

Warren D. Ragoonanan, Hon. B. Comm., LL.B.



At your condo's Annual General Meeting, you decided that it would be a good idea to run for the Board. You submitted your name, made your speech and – surprise – you won. Now what? What is expected of you? All too often owners only have the vaguest idea about the Board's role in the condominium community. They know that people get elected to it, and that the Board has a lot of power (especially over common expenses). They also realize that being on the Board gives them some kind of input in how the community is run. But the nature of that input remains a mystery. Indeed, many directors find that it takes a couple of years' worth of Board meetings before they have a good sense as to their role. Luckily, the *Condominium Act, 1998* (the "Act"), along with the common law of corporate governance, can shed some light on this.

Section 27 of the Act gives the Board the responsibility to "manage the affairs of the corporation." There is a lot of power packed into that sentence. Those words make the Board the corporation's supreme decision making body. In fact, those words confer on the Board the most important leadership role within the entire condominium, and, at the same time, give the directors all the powers needed to fulfill that role. So important is the Board's responsibility that the directors are each individually accountable to the corporation for their conduct. They are under a duty of loyalty, requiring them to act honestly and in good faith (s. 37(1)(a)). This means that Board members are to be straight-forward in their condominium dealings – they cannot lie, steal or act in bad faith. The directors are also under a duty of care, which according to s. 37(1)(b), requires them to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The duty of care is a duty of competence. As a director, you are expected to perform to a certain standard. You are to read the material, show up at meetings, participate in the discussions and exercise your vote in an informed manner. In the case of the duties of loyalty and care, if you fall short you can be held personally liable. It may seem that these duties are overly broad, and that is by design. In conjunction with the duties of loyalty and care, there are also a number of statutes that also impose liability on directors in much narrower circumstances. For example the *Income Tax Act* makes directors liable for failing to deduct taxes, employment insurance and other source deductions from employee salaries. In theory, a condominium corporation's by-law could also impose additional duties and liabilities on the Board so long as they were reasonable and consistent with the Act. However, this is rare.

Personal liability may seem like a scary thing. However, it is entirely avoidable. With the right advisors (e.g. good property managers, lawyers, engineers and auditors), Boards will find that there are a multitude of condominium industry practices already in place to facilitate compliance and inform decisions. Once you meet these relatively low standards, the law generally gets out of the way and lets the directors run the condominium.



This is no accident. In our system of corporate law, there is a common law rule known as the Business Judgment Rule (a common feature to all kinds of corporations, including business corporations and not-for-profit entities). It says that directors are not to be held liable under their duty of care if they act prudently and on a reasonably informed basis (e.g., see *Peoples Department Stores Inc. (Trustee of) v. Wise* [2004] 3 S.C.R. 461 at pg. 493). The rationale behind the rule is that judges should not second-guess Board decisions using 20/20 hindsight ... even if the Board is wrong. Courts will look at how prudent and reasonable the directors were when they made the decision. But as long as decision has a reasonable basis (preferably recorded in minutes) courts will not substitute their opinions for that of the Board. Far from imposing onerous liability on condo directors, our system of corporate law does the opposite. All the Board needs to do is meet the relatively low bar set by the duties of loyalty and care. If the directors can do that, the Business Judgment Rule will insulate them from judicial scrutiny, and the liability that comes with it.

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The Act and your average condominium general by-law go on in detail about things like directors qualifications, notices, meeting conduct and voting. But they say next to nothing about important issues like:

- How do we set the budget?
- Should we sue the declarant for deficiencies?
- Is it worth it to spend money on social functions?
- What contractor do I use to do the big lobby renovation?
- Are we spending too much on [insert expense here e.g. snowplowing, landscaping, electricity, etc.]?
- Do we need to special assess?

Aside from some notable exceptions in the Act, the law is intentionally silent on substance (examples of exceptions include: the reserve fund requirements (section 94); the owner's alternation agreement requirements (section 98); and the insurance requirements (section 99)). In fact, when you read a condominium's by-law, you will find very little – almost nothing really – on substantive decision making. There is a lot on decision-making procedure, but very little on what decisions to actually make. Why? Because figuring out substance is the Board's job. The Act gives both the responsibility and the power to the Board to make the big decisions. It then sets the duties of loyalty and care as the baseline for director performance and establishes minimalistic standards. Once the standards are set, the common law then kicks in via the Business Judgement Rule. As long as the Board meets the standards, its decisions are shielded from the courts. The intention behind the Act is for the Board to be the ones running the condominium – not judges, not lawyers, not politicians, not property managers, not auditors and not engineers. The less the law has to say, the easier it is for the Board to set a vision for the condominium community and lead based on that vision. This is what the Act intends.

There is another vital point to emphasize. It is the intention of the Act that the *Board* lead, and not any one director or group of directors. This difference is subtle but very important. The directors only have the power to make decisions at a meeting with a quorum, because the decisions must reflect the collective will of the directors working together (section 32(1)). The directors must be able to speak to each other and receive instant feedback. This is why section 35(5) of the Act allows for meetings by teleconference or by another *concurrent* communication medium, so long as this communication method is authorized via by-law and all directors consent to the means used. E-mail or text communication is not concurrent and therefore not authorized. In practice, this saddles each director with quite a challenge. Multiple decision-makers means multiple points-of-view. If a Board member strongly believes himself or herself to be right, he or she needs to be persuasive. At the same time, the directors need to be open-minded, reasonable and always ready to negotiate. And, once the directors reach a decision the entire Board must be prepared to implement it and stand by it, even if some disagree. That is what the Act means when it says that it is the Board as a whole who manages the corporation's affairs.

You may look at the role of the Board and ask yourself, what then is the point of having a President? If the Board elects a President from among themselves under section 36(2) of the Act, does it not stand to reason that the President is the leader. This is a common misconception in the condominium world. In truth, it is the President who answers to the Board, not the other way around. In the corporate hierarchy, the Board appoints the President and other officers to implement its decisions. Once appointed, the President becomes the chief executive officer with the job of making sure that all the other officers, employees and contractors in the condominium carry out the collective will of the Board. In the eyes of the law, the President's role, and indeed the role of each officer, is separate and distinct from that of the directors. When a director is acting as a President, he/she is, in a sense, taking off the "director's hat" and putting on the "President's hat". And once the "President's hat" is on, the President is expected to wade into the day-to-day tasks as needed to put in place the overall vision that the Board has set. When doing so, the President should never forget that he/she is answerable to the Board first and foremost.

The role of the Board, its individual directors and its officers is not as mysterious as you may think. The Act gives each a distinct role in making the community work smoothly. As a Board member, you should always keep in mind that you are one of several leaders, with input into the Board's collective will. If you are lucky enough to be President, you have the additional responsibility of making sure that the Board's will is carried out in the condominium's day-to-day decisions. It is not easy, especially when the Board makes a decision with which you may not agree. Remember that you and your fellow directors are examples to other owners. You are at the top and you set the tone. Sometimes that means letting go of personal feelings and supporting your fellow Board members. It always means doing everything you can to show your owners that their Board is working for them.

**Ontario Condo Law Blog celebrates 5 years**

Just in time for its fifth anniversary, the Ontario Condo Law Blog is being re-launched this month with a sleek new design and added functionality. Improvements include optimized viewing on mobile devices and a modern view of Toronto's beautiful (and condo-filled!) skyline.

We're really proud of our blog and are grateful for the feedback and comments we've received from our readers over the years. Stay tuned for another 5 years of top-notch news, commentary and insight.

Human Rights ~ Preventative Measures

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI



Human Rights Code ~ Directors and property managers must be vigilant to avoid direct and constructive discrimination against a person or group with respect to the 17 grounds of discrimination applicable to any of the regulated social activities (such as the provision of goods, services and facilities, living accommodations, employment and harassment scenarios).

Accommodate Solutions ~ When discrimination could arise, figure out how to accommodate an appropriate solution.

Change Rule ~ Promptly change and refrain from enforcing any declaration, by-law or rule provision having discriminatory implications. If a human rights claim arises, all such provisions will be scrutinized to ascertain whether the corporation has a practice of discriminating on any prohibited grounds.

Update Rules ~ Ask your lawyer to review and update your rules to benefit from a wide range of improved provisions and to comply with case law precedents.

Record Justified Inconsistencies ~ Enforce rules consistently. Where a rule has not been enforced in a particular case to avoid discrimination, keep detailed notes on the unit file and record the justification for non-enforcement, to prevent others from arguing waiver, acquiescence, delay, administrative discrimination or detrimental reliance.

Human Rights Policy ~ The board should adopt, post and circulate to owners the Corporation's Human Rights Policy prohibiting discrimination with respect to any of the listed grounds of discrimination pertaining to any of the regulated social activities. The Policy should establish procedures to respond to a human rights complaint.

Pass Non-discrimination Rule ~ Pass a non-discrimination rule which imposes an obligation upon owners, residents and their guests to refrain from any discriminatory act with respect to the regulated social activities.

Non-Harassment Policy ~ Undertake a Risk Assessment and adopt a Workplace Violence and Harassment Policy, as well as Procedures protecting staff, management, directors, officers and contractors.

Pass Non-harassment Rule ~ Pass a non-harassment rule prohibiting harassment by any person against all others at the condo with respect to living accommodations, employment, sexual and general harassment.

AODA Policy ~ Adopt an AODA Policy and procedures to enhance access throughout the common elements for disabled persons.

Appoint Officer ~ The board should appoint a director as the officer who should be vigilant to supervise, update, receive and address any complaints arising with respect to any of the forgoing policies.

Review Committee ~ Some corporations have established a Review Committee to address complaints arising from human rights and other situations.

Addressing Complaints ~ Discrimination complaints and requests for accommodation should be submitted to the board in written form. The board should reply within a reasonable time. Assess whether a valid claim of discrimination has occurred. Respect the dignity and privacy of the person requesting accommodation. Handle the matter discretely, with empathy and with respect. Follow procedures set out in the Human Rights Policy. Be willing to meet with the person and engage in meaningful discussions regarding possible options and solutions. Fully canvas all of the concerns of a complainant. Be flexible and creative in discussing and finding good solutions. The applicable impacts, the actual needs of the complainant and reasonable solutions should be considered and accommodated, as well as the effects upon other residents. Follow up with a complainant to ensure that any measures taken constitute reasonable accommodation. Do your best to settle with the complainant at the outset because, at a later stage, settlement can become much more difficult.

Avoid Emotional Response ~ Remain impartial and avoid becoming emotionally involved – egos should not supersede solutions.

Records ~ Keep appropriate records including minutes of board meetings, file notes, letters and emails (they are evidence).

Prejudicial Behaviour ~ Careless comments or prejudicial conduct can cause a corporation to lose a case.

Discrimination Insurance ~ Check the corporation's liability and errors and omissions insurance policies to ensure they cover claims of discrimination and human rights defence costs. Add a discrimination/human rights rider if deemed appropriate.

By-law Indemnification Provision ~ Has your condo's by-law indemnification provision been upgraded to provide broader indemnification to directors (including protection from breach of a statute, such as the *Human Rights Code*)?

Amend Act ~ GMA drafted a massive number of proposed revisions to the Act on behalf of the CCI/ACMO Legislative Committee, including a provision allowing a condo to fund the cost of installing accessible facilities from its reserve fund.

Article ~ Ask for our complimentary article explaining the Human Rights Code's core concepts.

Summary ~ Plan ahead by considering various types of improvements to address accessibility, board policies and rules.

17th Annual Condominium Conference - November 15 and 16, 2013

Look for the following GMA speakers:

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| Bob Gardiner | Session 2B, November 15, 2013, 11:15-12:30
Human Rights and Wrongs |
| Warren Ragoonanan | Session 4B, November 16, 2013, 10:15-11:00
Avoiding Icebergs & Mutinies: Keys to Successful Navigation by Your Condominium Board |
| Chris Jaglowitz | Closing Session, November 16, 2013, 1:15-2:45
Living Under a New Condominium Act |



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