

Dysfunctional condo boards

Time to work together for the benefit of the corporation

As a law student many years ago, I decided that I didn't want to practice family law. My reasoning went like this: I would be involved with unhappiness, occasioned by the raw and unpalatable emotions of clients. Family law, I told myself, was permeated by the anger, incivility, non-cooperation, and dysfunction of unhappy clients.

Instead of family law, I opted for the "safe harbour" of Condominium Law. Little did I know that volunteers on boards of condominium corporations could, on occasion, pose similar challenges for lawyers and property managers.

Dysfunctional boards are characterized by the inability or unwillingness of directors to work together for the benefit of the corporation and the owners who elected them. The dysfunctional behaviours for a

corporation can often be devastating.

For example, our law firm was involved in a claim against a condominium corporation for failure to pay a construction firm for work our client had undertaken on the common elements of the condominium in accordance with a contract with the condominium corporation. We sued the condominium corporation, which failed to defend. There appeared to be no functioning board. Our client obtained judgment against the condominium corporation, which under the Condominium Act, is also a judgment against each of the owners. Gradually, we collected our judgment in portions from each unit owner, many of whom had never heard of our claim or our client, none of whom had been served with the claim, or had an opportunity to defend.

When a newly elected director finds himself or herself on a dysfunctional board, there is rarely an easy solution.

Unless one or more of the directors are undischarged bankrupts, mentally incompetent, or their units are the subject of an undischarged condominium lien for at least 90 days, or otherwise become unqualified to be directors, for example, under your operating by-law (if additional qualifications are set out therein), they cannot be removed before the end of their terms except by a vote of 50 per cent, plus

one, of all of the owners in the condominium at a meeting duly called for such a purpose.

Directors cannot remove directors. In large measure, therefore, the newly elected director joins the board as she or he finds it.

And so, meetings are not held as required. Directors hive off into "camps" to discuss matters among themselves to the exclusion of the other "camps" at informal gatherings which may or may not constitute legally valid meetings.

Every decision, even simple decisions that involve compliance with property standards, safety, building or fire code matters, are cast against a larger backdrop of other unresolved issues, to be traded for concessions on other questions in respect of which no agreement has been reached.

The property manager becomes frustrated at her inability to get the board to approve a budget. Important decisions are put off. Meetings, when they occur, become shouting matches, and quorums are lost when directors walk out spontaneously. Sound familiar?

The advice of both the property manager and the corporation's lawyer are eyed with equal suspicion by some of the directors. No one will resign. No one will compromise. You're at a stalemate.

Here is what you should NOT do:

1. Do not engage in making decisions at "unofficial" board meetings. Even when a

majority of the directors get together and unanimously resolve to do something, that decision is not legally valid unless proper notice of a board meeting was given to all of the directors. And it doesn't matter if the majority could have carried the vote at a properly constituted board meeting. The decisions of the board, with very limited exceptions, may be made only at a properly called meeting of directors at which a quorum is present.

2. Do not engage in enlisting the assistance of unit owners to evidence the validity of the views of a group of directors. It's not that directors shouldn't listen to unit owners. But the decision is to be made by the directors alone. It's sometimes difficult for owners to understand that a "vote" at an owners' meeting, even if it is unanimous, if made in respect of a matter that is entirely within the legal purview of the board, is of no legal effect.

Owners are not legally responsible and will not be required to answer for such decisions. The directors are. That's why it's so difficult to remove duly elected directors. Sometimes, directors make unpopular decisions because they are obligated to do so.

In short, the Condominium Act makes it clear that it's supposed to be difficult to get rid of a director.

3. Do not just stop showing up. You will still be liable.

Here is what you SHOULD do:

1. Pay particular attention to the procedure for meetings set out in the declaration, bylaws, and in the Condominium Act. Informal procedures will work when the board is operating in a "friendly" environment, but you are asking for trouble if you don't comply with mandatory procedures for calling meetings, including compliance with notice requirements.

Become familiar with the operating by-law. 2. If your by-laws contemplate that the president should chair meetings, consider appointing a "neutral" chair. This could be the property manager, the condominium corporation's lawyer or, quite often, a third party lawyer.

A third party chair (who is unencumbered by any involvement with the history of the dispute) can save the condominium corporation thousands of dollars in legal fees if arbitration and recourse to the courts can be avoided. Chairing a meeting of directors who are not operating as a team can be very difficult.

3. Arrange for minutes to be taken at the meetings. If you are in the minority, ask that your objections or concerns be included in the minutes as a dissenting vote. The Act doesn't require it, but the by-laws might. If the matter becomes litigious, you might be glad that the minutes reflect your dissenting vote.

4. Rely on the advice of your professional advisor (lawyer, engineer, accountant, etc.). Section 37(3) of the Condominium Act deems you to have satisfied your obligation to act with the competence of a reasonable person if you have done so.

Acting against the advice of a professional advisor, even if you are in the majority, may be unwise where the issue is contentious. The Condominium Act contains very little guidance and direction for the conduct of directors' meetings. Most boards conduct themselves in a businesslike fashion without undue regard for the technical legalities associated with decision making, focusing more on the substantive decisions which they are required to make (and properly so).

However, where directors are not working well together, it is important for the board to ensure that the decisions are made in a manner that minimizes the risk of legal challenges to the validity of the process.

These challenges detract from the otherwise substantively important business of the board, and cannot help but redound to the detriment of owners and the community generally, by among other matters, creating uncertainty among the owners. Owners elected directors to do a job, whether or not they can get along as a group.

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