

PUBLICATION

Duty of a Condominium Board Director

Jamie E. Polley

March 2, 2015

Duty of a Condominium Board Director

Bill 9 is the Condominium Property Amendment Act, (the “Act”) which has received third reading. It has yet to be proclaimed and is, therefore, not yet the law in Alberta. We don’t know when proclamation may occur or the extent of collaboration, if any, to precede proclamation. Numerous provisions in the Act are “subject to Regulation”, meaning the extent and effect of many of the amendments are not yet known.

There is one amendment that is not subject to the Regulations, and which may constitute a material change, the effect of which might not be fully appreciated. That change is in regards to the duty owed by a Director of the Condominium Corporation. Currently the duty of a Board member is set out in Section 28(2) of the Condominium Property Act:

28(2) Every member of a Board shall exercise the powers and discharge the duties of the office of member of the Board honestly and in good faith.

Therefore, whether or not a Director meets the required standard is a subjective test. Did the Director act honestly and did the Director act in good faith? While there is a legal maxim that “ignorance of the law is no excuse”, currently a decision made by a Board in contravention of condominium legal principles may be defensible from a Director liability standpoint if the Director acted honestly, and in good faith, albeit contrary to legal requirements.

That may change. As amended, Section 28 will read:

28. (2) Every member of a Board, while exercising the powers and performing the duties of the office of member of the Board, shall: (a) Act honestly and in good faith with a view to the best interests of the Corporation, and (b) Exercise the care, diligence and skill a reasonably prudent person would exercise in comparable circumstances.

This duty is the same as the duty that is owed by Directors to Alberta Corporations as set out in the Alberta Business Corporation Act.

The potential effect is twofold:

1. It may be that every Director may now be held to an objective standard requiring a basic understanding of condominium principles and the appropriate application of those principles. If there is any doubt that any decision is within the authority of the Condominium Corporation, or arguably constitutes a breach of any responsibility of the Condominium Corporation, it may be incumbent upon the Board to obtain informed advice before any such decision is confirmed. There are many resources available through condominium organizations, including the Canadian Condominium Institute, and Board members should consider investing the time to acquire a basic understanding of condominium principles.

2. Certain Directors may have a higher duty. The phrase “in comparable circumstances” was considered in the case, *Tyler v. Endacon Inc.*, 2012 ABQB 631, when the Court held:

The phrase “in comparable circumstances” has been interpreted in the context of ... the Income Tax Act ... to apply higher standards to Directors depending on the particular Director’s level of sophistication and a subjective-objective approach, which requires the Court to take into consideration such things as the knowledge, experience and general business sophistication of the Director.

Therefore, the more you know, the higher the standard may be.

In my experience, the vast majority of Boards already meet this duty and I do not anticipate an increase in potential Director liability. What we might see, though, is an increase in individual Directors being named as Defendants in legal actions now that objective criteria in assessing a Director’s actions will come into play.

For further information please contact the author, Jamie Polley at 403.873.3709 or any member of our Condominium Law Group.