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Governance/Confidentiality

To Speak or Not to Speak, That Is the Question

Board Members are Under Increasing Pressure to Share Information With Owners and Residents Outside of the Board

In managing the affairs of a condominium corporation, a board of directors will inevitably come across sensitive information about the corporation and its owners, residents, agents and employees.

Heightened owner engagement, proliferation of third-party information on social media, and recent amendments to the *Condominium Act, 1998* relating to greater corporate transparency have placed considerable pressure on board members to share information with owners and residents outside of the board – some of which information ought to remain confidential.

Despite the recent statutory amendments, the *Condominium Act, 1998* and its regulations still do not expressly state that board members are subject to confidentiality vis-à-vis information that they have acquired in their capacity as directors.

Does this mean that directors can divulge any information to anyone as they see fit?

Not quite. Section 37(1) of the *Condomini-*

um Act, 1998 requires directors to act honestly and in good faith, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In short, directors have a statutory fiduciary duty to act in the best interests of the corporation.

Luckily, courts have provided some details about the nature of this duty. In particular, the Supreme Court of Canada noted that the duty to “to act honestly and in good faith with a view to the best interests of the corporation” as found in section 122(1) of the *Canada Business Corporations Act* (which section is identical to section 37(1) of the *Condominium Act, 1998* except for the reference to “with a view to the best interests of the corporation”), requires that directors:

- act honestly and in good faith vis-à-vis the corporation;
- respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation;
- avoid conflicts of interest with the corporation;
- not abuse their position for personal benefit;
- maintain the confidentiality of information they acquire by virtue of their position; and
- serve the corporation selflessly, honestly and loyally.

Inherent in the directors’ fiduciary duty is an obligation to maintain confidential information. Generally, this obligation



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prohibits directors from divulging information they have acquired by virtue of their position on the board of directors, including director deliberations at board meetings.

Maintaining director confidentiality is an important task. It allows directors to speak freely at board meetings and protects the privacy interests of owners, residents, employees and agents of the corporation.

If a director is found to be in breach of confidence, then he or she may be personally exposed to liability and costs. This is because directors cannot be indemnified by the corporation for any liability or costs resulting from a breach of the duty to act honestly and in good faith pursuant to section 38(2) of the *Condominium Act, 1998*.

But what information attracts the principle of confidentiality?

It depends. Unfortunately, there is no simple rule to identify confidential information. However, courts generally consider information to be confidential if it has the necessary quality of confidence about it, namely that it is not within the public domain (i.e. it cannot be something which is public property and public knowledge). However, something may still be considered confidential, even if it was created from materials that are available to the public, so long as it was brought into existence by the application of the skill and ingenuity of the human brain.

Other factors that the courts consider include the reasonable man test to determine whether the information was imparted in circumstances in which an obligation of confidence arises, the likelihood that disclosure of the information will harm or injure the corporation, and the reasonable expectations/beliefs of the parties.

Not all information can therefore be treated as confidential.

That being said, there are statutory restrictions on what information can be ac-

cessed by and disclosed to owners. For example, sections 55(4) and (6) of the *Condominium Act, 1998* and section 13.11 of O.Reg 48/01 strictly prohibit a corporation from disclosing records relating to employees of the corporation (except for contracts of employment between any of the employees and the corporation) and records relating to specific units or owners such as email addresses and telephone numbers. This suggests that the *Condominium Act, 1998* views these records as being of a confidential nature.

It is suggested that board deliberations take place in private and out of earshot. Discussions of confidential information should never take place in public settings

Can certain steps be taken by directors to avoid disclosure of confidential information?

Certainly. For one thing, directors can sign and comply with a Directors' Code of Ethics, a suggested form of which is available on the Canadian Condominium Institute's ("CCI") website. The Directors' Code of Ethics expands on the broad standard of care set out in the *Condominium Act, 1998* by setting out specific values, expectations and conduct of behaviour. To this end, many aspects of the Directors' Code of Ethics are really just reflections of common law principles concerning duties of directors. With respect to confidentiality, CCI's suggested Directors' Code of Ethics provides that:

Confidentiality – I will not disclose to any person (including my spouse) information decided by the Board to be confidential or privileged or which reasonably ought to be deemed confidential. When in doubt, I will request determination by a resolution of the Board.

Support – I will abide by decisions of the majority of the Directors even

though I may disagree, but I reserve the right to express my own views to owners upon non-confidential issues.

While this is not mandatory under the *Condominium Act, 1998*, many corporations have chosen to pass by-laws requiring directors to sign and comply with the Directors' Code of Ethics as a qualification to serve on the board, where failure to comply can lead to the director being disqualified.

As a matter of good governance, the board of directors can also follow the guidelines set out in the Personal Information Protection and Electronic Documents Act ("PIPEDA") to protect the personal information of owners and residents. Although PIPEDA is a federal statute that governs how private sector organizations collect, use and disclose personal information in the course of commercial business, there is a growing debate in the condominium industry as to whether PIPEDA applies to condominium corporations. It is clear, nevertheless, that PIPEDA applies to condominium management service providers and corporations would be remiss if they did not require their management service provider to comply with PIPEDA.

It is suggested that board deliberations take place in private and out of earshot. Discussions of confidential information should never take place in public settings where curious owners and residents can easily eavesdrop.

Concluding Thoughts

Confidentiality is at the heart of a director's fiduciary duty to act in the best interests of the corporation. External forces can compound the difficulties in maintaining confidentiality of information acquired by virtue of a director's position on the board. Nevertheless, complying with a Directors' Code of Ethics and maintaining confidentiality practices can significantly reduce the likelihood and consequences of breaching a director's statutory fiduciary duty to act in the best interests of the corporation. **CV**