Bad faith

BY JEANETTE BICKNELL

Section 37 (1) of the Condominium Act specifies that every director and officer shall act "in good faith." What does this mean and how might it apply? "Bad faith" is a slippery concept and is difficult to define precisely. Basically, a person acts in bad faith when he or she intentionally infringes upon another's rights, or intentionally fails to honour legal or contractual obligations. The role of "intention" is key. Acting in bad faith is different from failing to understand that you have obligations or being mistaken about them.

"Bad faith" is more than an abstract legal issue, as some condo board members have found out at their own expense. In two recent decisions judges have held condo board members personally responsible for court costs because they were found to have failed to act in good faith. A look at these cases helps clarify condo board members' legal responsibilities, as well as their obligations to unit owners.

The first case (Boily vs. Carleton Condominium Corporation 145) began innocently enough, with modifications to a courtyard. The board took the position that the changes were "simple repairs," so they required approval from a simple majority (50 per cent) of unit owners. A group of owners took a different view when it saw the proposed changes. To these owners, the modifications looked like "substantial changes" that would require the approval of two-thirds of the owners, so they attempted to organize a special owners' meeting to present their concerns to the board. The special meeting would be held at the same time as the meeting the board had already scheduled to vote on the courtyard modifications.

This was when things started to heat up. The board refused to recognize that the owners had the correct number of signatures to requisition the meeting, and it initially refused to hand over the list of registered owners. The board did not move from its position that the approval of 50 per cent of owners would be enough for the changes to go through and advised that demolition would begin the day after the meeting. The group of owners who opposed the changes sought an injunction to stop the demolition. This was granted by a judge on June 22, 2011, with a promise to decide on the rest of the application on June 29, 2011.

It seemed as though cooler heads had prevailed after the injunction was granted. The board and the group of owners, together with their lawyers, reached an agreement formalized in Minutes of Settlement. The board agreed not to proceed with the modifications unless it received the approval of two-thirds of the owners.

But the dispute did not end there. When the board failed to receive the two-thirds majority that it needed, the board took the position that the Minutes of Settlement were not binding, and that it would wait for the decision on June 29. The group of owners brought a motion to enforce the Minutes of Settlement, which the judge granted. He also decided that the costs incurred to enforce the settlement ($13,560) were to be paid by the board members personally because they had acted in bad faith. The two main factors in his decision were the board's actions regarding the special meeting (its refusal to recognize the special meeting's legitimacy and its delay in providing the list of owners) and its attempt to wriggle out of the agreement that the board's own solicitor had negotiated on its behalf.

The second case (Middlesex Condominium Corporation 232 vs. Owners) is similar to the first. Again, problems arose out of proposed repairs to the condominium — repairs that everyone agreed were necessary. The board had decided on a repair plan that would cost $750,000 and require the corporation to borrow $600,000. A group of owners asked to see the relevant documents, to have time to study them, to post notices about the proposed repairs, and to have the

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board suspend negotiations with its chosen contractors. While the board's lawyer provided supervised access to the documents, the other requests were denied. At the annual general meeting, the board's bylaw to authorize the $600,000 loan was defeated. Then the owners held a specially requisitioned meeting where a new board was voted in.

The old board refused to recognize the legitimacy of the new board. In an attempt to get around the fact that it had been voted out, the old board filed an injunction with the court to have an administrator appointed. The judge refused. He said that the owners' attempts to get a board more responsive to their concerns was "entirely understandable and reasonable," and that the injunction was brought with the sole purpose of preventing the owners from exercising their rights. Because the application for the injunction was "tenuous and without merit," he found the five members of the old board personally responsible for $15,000 in costs.

What are the lessons here? The members of both boards (Carleton 145 and Middlesex 232) probably thought they were doing the right thing and acting in the best interests of owners — but that's not the point. Condo boards serve at the behest of owners. Acting without the support of owners, or attempting legal maneuvers to thwart the will of owners, will not be looked upon favourably by the courts. Board members must understand that if they appeal to the courts without a legal basis for their actions, they may be held personally responsible for costs if their actions are unsuccessful. Obtaining reliable legal advice is absolutely crucial, as is keeping an open mind. Any group of people that works together can develop a tendency to group-think, such that it is difficult to see the flaws in a plan that the group has adopted. Being "certain" that one is doing the right thing is not enough. And acting on that feeling of certainty, despite owners' clear lack of support, is a bad idea. □

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