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Fogler, Rubinoff LLP, Barristers & Solicitors

CONDO COMMENTARY

Fogler, Rubinoff LLP

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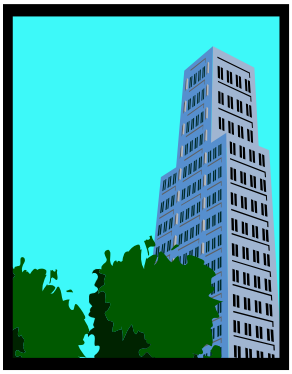

Proxies: The Good, The Bad and The Ugly

By Lou Natale, B.A., LL.B.

We have recently witnessed two national political elections (one in Canada and the other in the United States). The political slogans and rhetoric in both elections proclaimed that in one form or another "change" was needed and that the only way to effect such "change" was to exercise the right to vote. From the results of these two national elections, it can be said that the "people have spoken" and that the democratic process is alive and well. A fundamental pillar of our democratic process is the principal of "one person, one vote". This brings me to the discussion and analysis of proxy voting in condominium corporations – where a unit owner, who is entitled to vote in an election, chooses to give their right to vote to another person.

Does proxy voting promote democracy and voter participation in condominiums or does it hinder and undermine the democratic process? The answer, as spoken like a true lawyer, is that "it depends on the circumstances". In my experience, there are 3 view points relating to the proxy process – "the Good, the Bad and the Ugly".

"the Good"

Many commentators and industry stakeholders believe that the proxy process is an important component for the proper operation and effective administration of condominiums. Without proxy voting, there would be many instances where the quorum requirement to hold an owners' meeting (25% of unit owners) would not be attained and corporations would be put to the added expense and inconvenience of calling another owners' meeting. Without proxies, it would also be difficult in many cases to get enough owners to attend meetings in order to approve by-laws (majority of all owners) or to approve a substantial change to the common elements (two-thirds of all owners).

Many people believe that the proxy process in condominiums allows for a broader democratic participation by owners, particularly those owners who are not able to attend a meeting due to work or vacation schedules or because it is otherwise too inconvenient for a non-resident owner to attend a meeting.

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"the Bad"

We have all heard "bad" stories about how a small group of owners working together were able to collect and vote numerous proxies which resulted in a vote outcome that was either not in the best interest of the condominium and/or was in direct contradiction of the clear and stated intentions of those owners who took the time to attend the meeting in person. The best way to avoid such "non-democratic" results is to encourage more owners to attend meetings instead of giving their proxies to another owner whose motives and intentions are sometimes not clearly stated. As well, it is important for Boards to educate and inform all owners throughout the year of the happenings within the condominium so that those owners who are not able to attend the meeting and who wish to provide a proxy are able to do so based on an informed decision and not simply rely on "information" from those people who are soliciting and collecting proxies door to door.

"the Ugly"

Although the new *Condominium Act, 1998*, added some safeguards to reduce certain types of abuses relating to proxies which are used in the election or removal of directors, there is really no way to eliminate the many forms of proxy abuses which can arise. Too often, heated disputes and proxy

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battles between faction groups within a condominium result in proxy abuses. These abuses undermine the democratic system which has been established under the *Condominium A*ct and thereby undermine the confidence of the unit owners in the voting process within a condominium.

In addition to encouraging owners to attend meetings in person and to informing owners on an ongoing basis regarding matters within the condominium, Boards should also give consideration to passing a new by-law (or amending an existing by-law) dealing with the collection, solicitation and registration of proxies at owners' meetings. If drafted properly, a Proxy By-law would reduce the possibility of proxy abuse, manipulation and fraud and at the same time, provide more integrity and transparency to the voting process. For instance, the Proxy By-law may include provisions requiring (i) that only a certain type of proxy form (established by the Board) can be used at an owners' meeting, (ii) that the proxy form must be completed in the owner's handwriting and that the owner's initials must be placed next to the voting sections in the proxy and must initial the date and time that the proxy was signed, (iii) the proxies must be registered with the management office on or before a certain time in advance of the start of the owners' meeting, and (iv) that there be a reasonable restriction on the number of proxies that can be given to any one unit owner. A Proxy By-law of this nature would likely receive positive support from most unit owners.

Directors, owners and property managers must realize that the proxy process is an important element within the condominium industry and that to fully appreciate and understand the intended use and potential abuse of the proxy process, one must never forget that there will always be "the Good, the Bad and the Ugly".

Directors' Qualifications: Is the *Act* enough?

By David Thiel

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Condo Group

At the heart of the condominium concept is the democratic right of owners to elect a board of directors of their choosing to manage the affairs of the condominium corporation. The *Condominium Act, 1998* (the "*Act*") itself does very little to restrict the qualifications for those directors.

In fact, the only qualifications for directors found in the *Act* are that the director must be at least eighteen years of age and not be an undischarged bankrupt or a mentally incompetent person. The *Act* also states that a director ceases to be a director if a certificate of lien is registered against a unit owned by the director and the lien is not discharged within 90 days of the registration.

By imposing only these very basic requirements upon directors, the legislature has left it to the owners to decide if a certain person should be elected to the board of directors and thereby trusted with the critical responsibility of managing the condominium.

To a large degree, this 'hands-off' approach of the *Act* makes sense because owners are presumably rational and self-motivated to elect the best candidates available.

This approach however works best if owners have full information concerning the candidates and that owners take an active interest in Board elections. These presumptions are not always true as candidates are typically not subjected to any questioning by owners and owners rely upon the information provided by the candidate him/herself. Furthermore, at many condominiums there are acclamations instead of contested elections and in some cases condominiums have trouble finding enough willing candidates to fill all vacancies on a board. As well, it is typical at many condominiums for actual attendance at owners' meetings where directors are elected to be quite low. This means that an ambitious candidate regardless of qualifications has a very good chance in many cases to be elected with even a modest effort to collect proxies from owners.

The *Act* does provide partial protection from some of these problems by permitting condominium corporations to establish additional directors' qualifications through the enactment of a by-law.

Historically, directors' qualifications have been located in corporations' general operating by-laws but in most cases these by-laws merely repeat the limited qualifications stated in the *Act*.

There has been a trend however in recent years towards more extensive qualifications being enacted, either in the initial by-laws for new condominiums or by way of by-law updates for older condominiums.

Each condominium is of course different and many condominiums will have operated for decades with no additional directors' qualifications without any problems. That being said, many condominium corporations, often in response to past specific problems, have enacted additional directors' qualifications.

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Some common examples of additional directors' qualifications include:

1. Requiring a director to be an owner (or the spouse of an owner). This is actually a common qualification found even in the by-laws of older condominium corporations.

2. Disqualifying a director from the board after being absent from a certain number of Board meetings in a given year without reasonable excuse.

2. Requiring a director to sign a code of ethics. The Canadian Condominium Institute has a Directors' Code of Ethics which is in widespread use and often referred to in such a by-law provision.

4. Disqualifying a spouse from becoming a director if the other spouse is already on the board of directors.

5. Disqualifying a director should the director commence legal proceedings at any time against the Corporation.

Of course, other directors' qualifications are possible provided that the qualifications are reasonable and consistent with the *Act* and the corporation's declaration. To date, the validity of various additional directors' qualifications is largely untested in the courts.

It is worth noting that should problems arise with a certain director, there are other applicable provisions in the *Act* which can be of assistance including the conflict of interest provisions and the general duties of the directors to act honestly and in good faith and to exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances. These provisions can be enforced through the general compliance section of the *Act* (Section 134) as well as the oppression remedy (Section 135).

All of that being said, in light of the growing use and acceptance of additional qualifications in condominium by-laws for directors, it is worthwhile for a board when updating by-laws to at least consider these additional options and to craft a solution, with the assistance of legal counsel where necessary, which will work for their condominium.

Caselaw Update – Cost Recovery by a Condominium against a Unit Owner

By Carol Dirks

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At the beginning of July 2008, an important decision of the Superior Court of Justice was released following an appeal of an arbitral award – *Toronto Standard Condominium Corporation No. 1507 v. Italiano*. The decision deals with the issue of recoverability from a unit owner of legal expenses incurred by a corporation with respect to a compliance dispute. This firm was involved on behalf of the unit owner.

The case involved numerous complaints made against an owner for excessive noise. The owner denied that he made noise which was disturbing other residents. Unfortunately, the unit owner ignored the mediation process. The matter proceeded immediately to arbitration at which time our firm became involved. Ultimately a finding was made by the arbitrator (after a 5 day hearing) that the owner had violated the noise provisions contained within the Declaration and the Rules.

All in all, the costs at the end of the process being claimed by the Corporation, including the arbitrator's fees of $25,000.00, was left to be determined. Relying on the provisions of the Corporation's Mediation/Arbitration By-law, as well as the Declaration, the arbitrator found that all costs incurred by the Corporation, including the substantial legal expenses, were recoverable against the unit owner. The matter was then submitted to the Superior Court of Justice on appeal. It has long been a question as to whether a condominium corporation can proceed to deem legal expenses incurred by it in obtaining compliance as a common expense to a specific unit and to recover those legal expenses by way of registering a Certificate of Lien. There were a number of issues under appeal. On the issue of the costs, the Court made various findings which are of assistance in clarifying the question of a corporation's ability to recover legal costs from an owner. There are three issues which have been clarified as set out below:

1. **Mediation Costs**

As part of his decision, the arbitrator had found that the Corporation was entitled to recover from the unit owner, the legal costs which it had incurred through the failed mediation process. The Corporation had not claimed those costs as damages. In any event, the arbitrator found that the mediation costs did qualify as being costs for which the arbitrator could order recovery. In this regard,

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the arbitrator relied on the provisions of the Corporation's Declaration, as well as the wording contained in a Mediation/ Arbitration By-law enacted by the Corporation.

Under the *Arbitration Act, 1991*, the arbitrator only has jurisdiction to award costs of the proceeding. On behalf of the unit owner, it was argued that to order costs of the mediation process was outside of the jurisdiction of the arbitrator. Further, the *Condominium Act, 1998* specifically provides that the fees and expenses of the mediator are to be shared equally unless the parties agree otherwise. Because the mediation had failed there was no agreement to pay any other costs and as such, it was submitted that the Corporation could not recover those costs.

"In the Italiano case, the Corporation had an extremely broadly worded indemnity

Ultimately, the Court agreed and ordered that the mediation costs were not properly costs of the arbitration. Ironically, the mediation costs claimed by the Corporation were a large stumbling block as to why the matter could not be settled early on.

2. Legal Expenses as a Common Expense

It has been a point of discussion as to whether a Corporation can deem the legal expenses incurred in enforcing the condominium documents against an owner as a common expense and therefore recoverable as by registering a Certificate of Lien.

Previously, the only case which had shed some light on the issue was *Basmadjian* which case was decided in the early 1980's. In that case, it was held by the Court that a provision in a By-law deeming a cost or expense to be a common expense was contrary to the then *Act* and accordingly was unenforceable. The Judge in *Basmadjian* had also commented about the indemnity provision contained within the Declaration of the Corporation's documents. Reference was made to such costs not being enforceable as a true common expense as these costs were not charged proportionately to all unit owners in accordance with the percentages expressed in the Schedule "D" to the Declaration.

It seemed from *Basmadjian* that unless the legal expenses were charged to all unit owners in the prescribed proportionate shares, then it could not be deemed to be a common expense. Justice McWatt dealt with this issue in the *Italiano* case and clarified the circumstances in which the Corporation could recover legal expenses as a common expense from the offending owner. Specifically, the Court determined that the definition of common expenses within the *Condominium Act, 1998* could include expenses which are specified as such in a Declaration. Moreover, the Court found that to be chargeable the Declaration provision did not require that the common expenses be charged in the proportionate share for each unit owner. So long as the Declaration deemed the cost or expense to be a common expense (and recoverable against the owner as such), that would be sufficient to satisfy the requirements of the *Condominium Act, 1998* to be a common expense.

In the *Italiano* case, the Corporation had an extremely broadly worded indemnity provision in its Declaration which made specific reference to legal expenses being a common expense and recoverable against the unit owner as such. In other condominium declarations where the wording of the indemnity provision is not as broad or where the wording does not deem the legal expenses or costs to be a common expense, then the wording may not satisfy the test established in the *Italiano* case and as such the corporation may not be able to recover for these costs.

3. Recovery of Legal Costs by way of By-Law Provision

In the *Italiano* case, the Corporation had enacted a Mediation/ Arbitration By-law which made specific provision for the recovery of all legal expenses, as well as arbitration costs, as a common expense against the unit owner and recoverable as such. Ultimately, Justice McWatt based her decision on the broad wording of the Declaration provision in finding that the corporation could recover its costs from the owner and lien for the costs if unpaid. The Court did not rely on the By-law provision at all.

Based on the Court's findings in *Italiano*, it is likely that by-law provisions enacted by condominium corporations which seek to broaden the definition of common expenses and the collection methods against an offending unit owner would not be valid unless they comply with the specific exceptions under the *Act* – being the exceptions for occupancy standards, insurance deductible recovery or the recovery of repairs which are the responsibility of the owner.

In the writer's view, all other provisions in a By-law which purport to extend the definition of common expenses would likely not comply with the *Act* and accordingly would not be enforceable.

What is clear from the *Italiano* case is that Corporations should focus on the wording within the Declaration in order to be able to recover from unit owners for costs incurred by the Corporation (and not By-laws or Rules) as the result of the actions or omissions of that owner. Where possible, Corporations may wish to give consideration to amending the Declaration in order to properly extend the circumstances for which it may recover such cost and expenses from a unit owner. The costs incurred by the Corporation in amending the Declaration will likely be offset by the ability of the Corporation to recover costs from an offending owner where it has a broadly worded Declaration provision.

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News & Notes

1. ***"Know Your Client"*** - Our clients should be aware that, effective December 31, 2008, all lawyers in Ontario will be required to comply with additional 'know your client' rules established by the Law Society. These rules are intended in part to protect the public against potential fraudulent client activities. Essentially, this means that lawyers will be required to obtain specified personal and business information concerning clients and to verify that information in certain cases. To a large degree, we already collect the information required although as new files are opened, we will be requesting certain additional information. In order to verify personal identities, in many cases we will need to obtain copies of identification documents, such as a driver's licence, from those managers (or directors in some cases) who communicate instructions to our office. We will be providing another update to our clients concerning this new Law Society rule with a view to ensuring compliance while minimizing any inconvenience for all concerned.

2. PM Expo - On December 3, 2008, Lou Natale will be speaking at the PM Expo on the topic of legal aspects of *"Building Value in Your Aging Condo: Keeping up with major repairs and replacements."*

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