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Let's Talk Condo...

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in this issue...

Limits of Permissible Free Speech in Condominium Corporations

by
Patricia M. Conway
416.595.8507
pconway@millerthomson.com

Over the past several years, a modest body of caselaw has built up considering the circumstances in which members of a condominium corporation may be found liable in damages for statements made about other people in the condominium community. In this article, we will sum up some of the lessons which have been learned, and the parameters which have been set for acceptable speech.

The starting point for any such article must be that the law of libel and slander (together known as defamation) is complex and subtle. If you are concerned that something you are thinking of writing or saying may be defamatory, best to err on the side of caution, or get a legal opinion first. There are no easy answers, and each case is heavily dependent on the facts.

The concept of defamation is straightforward: if you make a statement about a person which will lessen his/her esteem in the minds of right-minded people, you have defamed that person. The complications arise in answering the question whether you can successfully be sued by that person for that statement.

If what you have stated is true, you are "in the clear". If you call someone a thief and you can prove that he or she stole something, you have not defamed him or her. If you cannot prove it and the allegation results in people thinking less of your target (as would any right-minded person), you are likely in some difficulty.

But courts have accepted that condominium corporations are small communities, where people have a common interest in knowing the business of the corporation. This common interest means that the notion of "qualified privilege" may apply to statements made by one person in the community about another. For example, if a unit owner states at an owners' meeting that members of the board are thieves because they are "stealing from the owners" by failing to get three quotes for large contracts, the statement may be protected by qualified privilege. The people to whom the communication is made have an interest in knowing this information. If the unit owner believes the statement to be true, and is communicating it not out of malice, but out of a desire to protect the community, there may be no liability. On the other hand, if the unit owner is acting out of malice, making the statement not with the intention of informing his fellow owners, but in order to wound or damage the reputation of the board or manager, qualified privilege may not apply.

It is for this reason that board members are cautioned that they must have thick skins as their actions are subject to scrutiny and to criticism by the owners, by virtue of their position and power as board members.

Board members have the same protection of qualified privilege where they are speaking or writing to a group of people who have the same interest – such as the unit owners, or other members of the board. In a recent case in British Columbia, a board member who wrote to the unit owners advising that the board was filing a complaint with the police against a unit owner,

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With offices in Toronto, Markham, Guelph, London and Kitchener-Waterloo, our Condominium Practice Group is part of a full service law firm which provides us with significant strengths in matching your legal needs to our resources. Our office systems and technology assist us in providing quick turnaround on a cost efficient basis.

Status Certificate Decision Affecting Disclosure

by
Audrey M. Loeb
416.595.8196
aloeb@millerthomson.com

A recent decision of the Ontario Superior Court is important news for those issuing Status Certificates. The decision brings home a position we have long held regarding a corporation's obligation to disclose matters which may affect a unit in Status Certificates. This case is significant in that it requires the disclosure of problems in units that are known to the corporation if the problem could result in an added charge against the unit which could be collected as a common expense.

This case involved a 35 unit industrial condominium corporation. In one of the units a 10 inch thick load bearing wall, supporting the roof trusses, made of concrete block had been removed between the warehouse and the office and the pre-existing 36 inch doorway had been widened to 10 feet.

The Corporation brought this application to obtain an order that the wall be restored or an order permitting the Corporation to do so at the unit owner's expense.

On Oct. 20 2008, the respondent agreed to purchase the unit. A Status Certificate was issued and signed by the President of the Corporation on Oct. 22, 2008. On Oct. 24, 2008, the President attended at the unit and conducted an inspection. The Status Certificate did not disclose any problem in the unit and the respondent completed the transaction on Oct.30, 2008.

Within two weeks after the transaction closed the Corporation's solicitor sent a letter to the new unit owner stating that the wall had been altered without approval. According to the purchaser this was the first indication that he had received of the problem.

The letter to the respondent indicated that the doorway had been widened without the permission of the Corporation. The declaration included a provision prohibiting the removal of any wall without the prior written consent of the Corporation on such conditions as the board of directors might wish to impose.

The President gave evidence that he brought this to the attention of a representative of the owner at the time of his inspection and also on Oct. 30, 2008, the date the purchaser took possession of the unit. The President did not have names of anyone to whom he allegedly spoke.

In 2010, the respondent hired an engineering firm and modifications were made to the wall to ensure that there was no problem with the structural integrity of the building. The drawings were forwarded to the Corporation's legal counsel.

The Corporation took the position that it did not have evidence that the wall was structurally sound and therefore it constituted a safety risk under S.117 of the Condominium Act.

At trial, Justice Lauwers directed counsel to contact the engineer to confirm whether the wall was structurally sound. The engineer confirmed that it was.

The unit had been owned by the previous owner since 1984 and at that time of its purchase the wall had been removed. The previous owner provided affidavit evidence that at no time during its ownership had anyone ever advised it that the removal of the wall was in violation of the Corporation's declaration.

Three issues needed to be considered:

1. Is the Corporation prevented from compelling the unit owner to restore the wall because the Status Certificate was silent on the issue?

The Corporation argued that the knowledge of the President does not constitute knowledge of the Corporation and since the Certificate was issued by the Corporation, it cannot be assumed to have the same knowledge as the President.

Given the role of the President and his authority under the by-laws of the Corporation, the Court dismissed this argument. Justice Lauwers stated: *"Mr Duval, as President, is responsible for signing Status Certificates. Actual knowledge that he obtains in his capacity as president carrying out executive functions as required by the by-laws, such as a "routine inspection" must be imputed to the Corporation. Since the president has authority to sign a Status Certificate on behalf of the Corporation, he is obliged to take into account personal knowledge he acquires in his capacity as president... It would have been more effective for him to have amended the Status Certificate, to have sent a revised Certificate, or to have sent a supplementary letter to the requestor or to the seller of the unit on a timely basis than it was for him to pay a random visit or two to the unit."*

His Honour found that the matter should have been disclosed in the Status Certificate as the Certificate is intended to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying decision.

The problem with the unauthorized change to the wall could have impacted the buyer's decision to purchase. Had he known about it he could have negotiated an abatement of the purchase price with the vendor of the unit.

The Corporation's solicitor argued that the information did not fall within the disclosure obligations set out in S.76 (1) of the Act. His Honour disagreed. He found that since the Corporation could rely on its authority in the Act to restore the wall and charge the cost back to the unit owner as a common expense that the disclosure should have been made in Par.12 of the Status Certificate. This section requires the Corporation to disclose particulars of any potential increase that it knows which may result in increased common expenses for the unit.

He stated: *"I find that the language used in Par.12, particularly the broad terms "a circumstance" coupled with the word "may" which in context connotes "might" is intended to push a*

40 King Street West Suite 5800, P.O. Box 1011, Toronto, ON, Canada M5H 3S1
Tel. 416.595.8500 • Toll Free 1.888.762.5559 ext.2968 • Fax 416.595.8695 • www.millerthomson.com

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condominium corporation to disclose more, not less, information that could be financially material to the requester's purchase decision. The problem with the wall was just such a circumstance, and in failing to disclose it in responding to Par. 12 of the Status Certificate or by a timely correction, the Corporation failed to comply with its duty under the Act…"

His Honour found that the Corporation was bound by its failure to disclose the problem in the Status Certificate and could not seek the restoration of the wall.

2. Does the unit owner have to restore the wall?

His Honour stated that the unit owner had paid to reinforce the wall even though he was not the one who removed it, and after reviewing S.134 of the Act, his Honour exercised his discretion to refuse to issue an order requiring the restoration of the wall on the grounds that it would be inequitable to do so.

3. Is the Corporation entitled to recover its legal costs?

His Honour referred to S.134 (5) of the Act which allows a condominium corporation to recover all legal costs it incurs if it receives an award of costs or damages against a unit owner on a compliance matter. The corporation's legal counsel argued that the remedial work done on the wall would not have been done had the Corporation not commenced these proceedings. His Honour said that *"this argument assumes that the unit owner was the one responsible to restore the wall to its original condition and I have found that he was not responsible".*

Justice Lauwers refused to make an order as to costs in favour of the Corporation and dismissed the application with costs in favour of the unit owner.

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NEWSLETTER TIPS

- **We are pleased to announce that we have now completed the arduous task of updating and completely revamping our standard rules precedent. Are you considering enacting new rules or updating old rules currently in effect? Ask us about purchasing a copy of our standard rules which can be customized to fit your needs.**
- **All condominium corporations, as employers, are required to be in compliance with the workplace violence and harassment provisions in Ontario's *Occupational Health and Safety Act*. Every condominium corporation should enact a workplace violence and harassment prevention policy which should be incorporated into the corporation's rules.**
- **The elimination of bed bugs normally entails the spraying of the unit and application of powder two weeks after the spraying. If a unit owner retains pest control to eliminate bed bugs from his or her unit, the corporation should inspect the unit two weeks from the initial spraying to ensure the bed bug infestation has been eliminated.**

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for certain actions which that owner had taken, was found to be protected by qualified privilege, even though the complaint with the police was not actually filed. In that case, the Court found that the director was motivated by concern that the community be kept apprised of difficulties the board was having in dealing with a trouble-making unit owner.

Notably, in that BC case, the Court did not address the issue of privacy, and whether the board is entitled to make public to the community information regarding an individual unit owner. In Ontario, S. 55 (4) prohibits owners from examining records of the corporation relating to specific units or owners. So in Ontario, the complaint of the board to the police concerning the individual unit owner could not be examined by other owners and it is questionable whether the board could tell owners that a report was being made, where the actual report could not be examined.

Qualified privilege would not protect a unit owner who makes defamatory comments about another unit owner (not a board member) at an owners' meeting. Another British Columbia case, involving not a condominium, but a similar closely knit community, involved two individuals who had different views on the merits of an indoor tennis court. Mr. Weatherall, a proponent of the scheme, wrote to members of the community regarding Mr. Best, who was against the scheme, that "His credentials (all supplied by his own overactive verbiage) are irrelevant to the project… He absolutely does not deserve to have his rather gargantuan ego further inflated..." Mr. Weatherall's remarks can best be summed up as follows: "It is a tale told by an idiot, full of sound and fury, signifying nothing" (thanks to William Shakespeare).

The trial judge decided that the language clearly was defamatory, as it demeaned Mr. Best. But, he found that the community itself was one where fierce and opinionated debates went on, on every topic. As a result, in the circumstances of this case, the behaviour was not such as would cause right-minded people to think worse of Mr. Best.

On appeal, the Justices rejected that finding. Close-knit the community might be, and given to strong debate on topics. But this debate had focused not on issues, but on character. This was not permissible. The remarks were not true and were motivated to harm Mr. Best, rather than inform others with a common interest. Damages were awarded.

This last case, Best v. Weatherall, should be instructive on the limits of acceptable speech among unit owners concerning the matters affecting their communities. Owners are entitled to be opinionated, and strongly spoken, regarding issues of common concern. But personal attacks are not sanctioned by the courts.

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40 King Street West Suite 5800, P.O. Box 1011, Toronto, ON, Canada M5H 3S1
Tel. 416.595.8500 • Toll Free 1.888.762.5559 ext.2968 • Fax 416.595.8695 • www.millerthomson.com

Changes in Miller Thomson's Condominium Practice Group

We are excited and pleased to welcome two new members to our group, **MARKO DJURDJEVAC** and **JASON RIVAIT**.

Marko comes to us from another condominium law firm. He has extensive experience in condominium law, having represented numerous condominium corporations as both a litigator and corporate counsel. Marko is also a Certified Arbitrator (ADR Institute of Ontario). He has written articles on legal matters for condominium publications and has been interviewed by The Globe and Mail and Citytv on condominium law issues. Marko has also been a speaker, instructor, and moderator at CCI, ACMO, and PM Expo conferences and seminars.

Jason has been with our group since October and comes to us from the Ontario Government where he articled at the Ministry of the Attorney General in the Government Services/Consumer Services sector and most recently worked at the Ministry of Government Services in the field of labour relations. Jason completed his B.A. (Honours) in Criminology, M.A. in Sociology and LL.B in his hometown of Windsor, Ontario while attending the University of Windsor. What Jason lacks in experience he makes up for with enthusiasm. He is a quick study.

Unfortunately as excited as we are to welcome Marko and Jason, it is with great sadness that we say goodbye to **WARREN KLEINER**.

Warren has been with us for nine years and has been a tremendous asset to bour group. He has decided to make a complete life change. Warren will be leaving Miller Thomson at the end of February and moving back to Montreal, where he grew up, to start an exciting new chapter in his life. He will be going into the restaurant business, specializing in smoked meat. As soon as we have full details on the name and location of the restaurant, we will publish it in our next newsletter in case you are in Montreal and want to sample what we expect will be great deli food. We wish him well.

Warren will be greatly missed by all of us, but we expect that our new team will continue to provide you with the same level of excellent service you have grown accustomed to over the years.

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OUR CONDOMINIUM PRACTICE GROUP

TORONTO

Audrey M. Loeb
General
aloeb@millerthomson.com
416.595.8196

Warren D. Kleiner
General
wkleiner@millerthomson.com
416.595.8515

Marko Djurdjevac
General
mdjurdjevac@millerthomson.com
416.595.8517

Jason Rivait
General
jrivait@millerthomson.com
416.595.8503

Patricia M. Conway
Litigation
pconway@millerthomson.com
416.595.8507

Patrick Greco
Litigation
pgreco@millerthomson.com
416.595.2982

Dražen Bulat
Construction
dbulat@millerthomson.com
416.595.8613

André Nowakowski
Employment
anowakowski@millerthomson.com
416.595.2986

Alexandra White
Litigation
awhite@millerthomson.com
416.595.8667

Megan Mackey
Litigation
mmackey@millerthomson.com
416.595.8623

LONDON

Tiffany Koch
General
tkoch@millerthomson.com
519.931.3512
416.595.8500 x43512

LIEN DEPARTMENT

Dana Zhang
Lien Clerk
condoliens@millerthomson.com
416.595.2959

Lizann McInnes
Lien Clerk
condoliens@millerthomson.com
416.597.4370

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