Heeding Professional Advice in Good Faith

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In December, 1907, the Honourable Mr. Justice riddell published a paper in *The Canadian Law Times* in which he commented,

> *It has been the fate of lawyers, ever since there were lawyers, to be the butt of cheap witticisms.*

How true this is.

On my first day of law school, our dean addressd the class commencing with the question, *"What is the difference between God and a lawyer?"* The answer: *"God doesn't think he's a lawyer."*

The purpose and message of this cheap (but funny) witticism was clearly dualistic: it reflected humourously a common public perception of lawyers as self-assuming and arrogant; it also was intended to direct our thoughts sardonically to the fact that, for some lawyers, that perception is unfortunately accurate.

The same, even more unfortunately, is true of many other professions. However, I am grateful to say that in my years as a lawyer I

have learned it is not true of many professionals.

That is, while professions as a whole suffer to be the butts of cheap jabs, the people who populate those professions, in my experience, barely ever deserve it.

Thus, the Hon. Mr. Justice Riddell concludes his comment quoted above with the following:

"…but no one has ever yet got into trouble, financial or otherwise, in which he must trust someone, and trust him implicitly, that he has not sought the lawyer."

Such trust is not without foundation. The Hon. Mdm. Justice Abella of the Supreme Court of Canada, while she was a judge in the Ontario Court of Appeal, once stated,

"There are three basic values which merge in a good lawyer; a commitment to competence, which is about skills, a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the other two values."

Such commitments to skills, decency and the public interest are the basis upon which trust can and should be, and generally is, given to members of the legal profession.

And, again, what is said here of good lawyers can and must also, with equal confidence, be said of all other good professionals.

It is for this reason, I believe, that the *Condominium Act, 1998*, (the "Act") accords a special place to professional advice in general.

Sub-section 37(3) of the Act provides as follows:

> *A director shall not be found liable for a breach of a duty mentioned in subsection (1) [these being: the duties to act honestly and in good faith and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances] if the breach arises as a result of the director's relying in good faith upon,*
> *(a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a manager under an agreement for the management of the property represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion.*

Not only do the directors thereby acquire the benefit for the condominium of receiving advice that should be grounded in specialized education and experience, but they also receive the personal benefit of protection from liability if it turns out that such advice was not as accurate, appropriate or reliable as it ought to be.

Accordingly, it is only to the advantage of boards of directors of condominiums to obtain and follow advice from a variety of professionals, including auditors, lawyers, accountants, engineers, appraisers and others, depending on the issues at hand.

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However, it must be observed that such protection is not absolute.

In one sense, this seems to be only a trite observation. It is well established that directors of corporations are only entitled to protection from liability in so far as they satisfy their statutory and fiduciary duties.

For example, in *Metropolitan Toronto Condominium Corporation No. 620 v. Bacres Wholesale Hardware Ltd. and Adriano Giudici, (2004) CanLI 2571,* Mr. Justice Cameron of the Ontario Supreme Court of Justice commented:

A corporate director, officer or servant, acting as the directing mind of the corporation, is ordinarily personally liable for his or her tortious conduct, even if the conduct was directed in a bona fide manner to the best interests of the corporation, …[particularly] where the objectionable conduct was fraudulent, deceitful, unauthorized or in furtherance of an interest separate from that of the corporation… [and/or] the use of the corporate structure is a sham or there is a principled basis for denying the protection of the corporate veil.

However, sub-section 37(3) of the Act appears to cover condominium directors with an additional layer of protection, provided they have received and relied upon professional advice. But there is also an additional requirement: the board members must rely on such advice "in good faith".

Simple reliance on professional advice involves little more than actually doing what the professionals have advised. If this is simple reliance, then reliance "in good faith," to have meaning, should impose additional requirements in order to relieve directors of liability. For one thing, it should involve doing all of what the professionals advise. Half-measures are rarely appropriate.

For example, implementing only some of the procedures recommended by auditors, accountants or lawyers with respect to handling the financial and other records of the corporation limits the extent to which the Board can claim protection for having relied on such professionals' advice when the security, confidentiality or accuracy of such records fails or is compromised.

But more than this, relying on professional advice in good faith should mean that the directors interact with such professionals and accept their advice with the same degree of honesty care diligence and skill that is required of them in all other circumstances.

Thus, while condominium directors can rely on their professionals to fill in gaps of knowledge, skill and experience the directors themselves do not possess, professional advice does not absolve the directors from satisfying the statutory standard of care up to the point that such gaps exist.

In this sense, good faith reliance on professional advice should also mean that the Board has with care sought to ask its questions to the right person having first given him or her the right information. Asking the right person involves having reasonable grounds to believe that the professional in question is competent to address the issue about which the advice is sought.

For example, it is doubtful that a lawyer specializing in family or criminal law, or even one whose practice includes consumer real estate purchasers and sales, is going to be very familiar with the provisions of the Act and able to instruct the Board competently with respect to such matters as the enforceability of rules and by-laws, the application of reserve funds or the interpretation of the declaration.

Likewise, the Board would be unwise to ask any lawyer about matters pertaining to such things as the interpretation of surveys (ask a surveyor), the reliability of structures (ask an engineer) or the accuracy of budgets (ask

an accountant) or records (ask an auditor) It is important to know what kind of professional is required to answer the question at hand.

Giving the right information includes not only understanding the nature of the issue at hand, having knowledge of the facts that are relevant to it (which should both be a natural result of a director exercising him or herself with care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances) and sharing those facts with the professional, but also not knowingly or carelessly saying or doing anything to mislead the professional as to the facts or nature of the issue in question.

Doing anything to manipulate a professional's advice so that you only get the answers you want is wrong. In addition, knowingly or carelessly, for example, giving a lawyer only half the facts, giving a surveyor only out of date documents, or misleading the engineer performing a reserve fund study as to what is or is not a common element or asset of the corporation, will undermine the correctness of the advice or report given and likely negate any assertion by a condominium director that he or she relied on it in good faith.

In my view, a responsible director acting in good faith will provide complete and honest information to the professional and only then can expect to receive advice, opinions or instructions that are comprehensive and correct.

Finally, good faith reliance should also mean not having any good reasons to doubt the professional's advice when relying upon it.

If a director is aware that the professional in question lacks knowledge of certain facts that are relevant to the opinion or report given, or observes clear errors or discrepancies in the professional's statements, that director cannot be said to rely on such professional's advice in good faith, even if such lack of information was accidental or the professional was purportedly competent. The fact that the director is aware of the problem negates the possibility of relying in good faith on the advice.

The Act appears to provide that where a director fails to exercise good faith in obtaining and relying on professional advice, that director will likely be no better protected from liability than if there was no advice obtained at all. In fact, in some cases it might even make the director's situation worse.

Therefore, while professionals, by and large, should be expected to strive to meet the standards of competence, decency and professionalism set for them, it is incumbent upon the directors of a condominium corporation not only to do as their professionals advise, but to hire, inform and rely upon them only in a manner that is consistent with their statutory standard of care. ■