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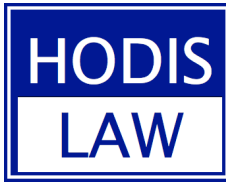
Other areas of practice include estate administration and disputes, property law disputes and employment law issues.

### **To Enforce or Not to Enforce: A Board's obligation under s. 17(3) of the Condominium Act, 1998**

In my practice, I constantly get asked by Condo owners and boards - why does the Board have to enforce the Act, declaration, bylaws or rules? Wouldn't it be easier and cheaper to just look the other way in "this" situation? While no one usually takes issue with perceived "big" breaches as they are usually offensive to the general community; it is usually the perceived smaller less offensive breaches where Boards question whether it worth the effort as it doesn't really bother anyone at the time. It is very tempting to look the other way sometimes; however, under s. 17(3) of the Condominium Act, 1998, *"the Corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules."* Turning a blind eye to what one may view as a "little" breach now could result in the corporation's inability to enforce a more offensive version of the same breach later. I usually give my client's this example. If your condominium documents state that the colour of your front door or garage must be a certain colour and the Boards continually allows people to use different, although not offensive colours, the corporation is going to have a very difficult time telling the unit owner who decides he wants to express himself and paint his door pink with purple polka dots that he can't do this.

The corporation, which is run by the Board, has the responsibility to manage the assets and property of the corporation on behalf of the owners. The owners have put their trust in the Board to make sure that the Act, declaration, bylaws and rules are complied with. There is more than just an expectation that the Board will do this - there is a legal duty on the Board to take all reasonable steps to ensure compliance. Since the Board is required to fulfill this responsibility on behalf of the owners, the Board is placed in a fiduciary position and is accountable to the owners for their actions or inactions. A fiduciary is someone who is in a position of authority and is obligated to act on behalf of another in good faith, with diligence and loyalty. The failure on the Board to fulfill their duty under s. 17(3) can have many negative consequences for the corporation as a whole and for the Board members individually.

Section 17(3) requires that the Board take "all reasonable steps" to ensure compliance. How does this phrase affect how the Board should act? There are many ways to ensure compliance and not every method must be used all the time. On one end of the scale, a written request to the owner to comply may be all that is needed. At the other end of the scale, the corporation may decide to



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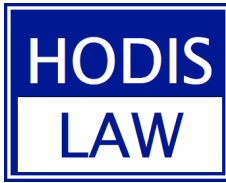
take matters into their own hands such as removing items that are not where they should be. In the middle the Board has mediation, arbitration or court proceedings available. The Board should be careful not to use the most extreme method first without obtaining proper legal advice as this could leave the Corporation open to civil or criminal liability. In one instance, the Board ordered that an unit owner's vehicle be towed which was parked in the wrong space without first checking the license plate and informing the owner of her mistake. The court found these actions unreasonable. Unless there is imminent danger to life or property, the corporation should always start with a simple written request for compliance. If the owner refuses to comply, the Board should then seek legal advice on the next step to take.

On one hand the Board needs to be careful that they do not act too quickly and harshly. On the other hand, the Board does need to make sure that it takes action. Failure to take action with one owner could result in the Board being stopped from taking action against another owner for the same breach. The corporation may be found to have acquiesced in the prohibited conduct. A common argument that will be made against a corporation that tries to enforce a provision of their rules, bylaws or declaration that they have not enforced in the past is that they have "slept on their rights". Justice Gray in *Peel Condominium Corporation No. 108 v. Young* stated:

*"the argument regarding selective enforcement raises issues of fairness on both sides. On the one hand, unit owners as a group, and their representatives, the Board of Directors, have an interest, and indeed a duty, to enforce the Declaration. On the other hand, the individual unit holder who violates the Declaration has a legitimate cause for complaint where the Board of Directors have permitted other violations to occur without consequence. The task of the Court is to balance these competing interests in a specific case."*

Sleeping on your rights will make future enforcement difficult if not impossible and could be characterized as unreasonable or unjust. In order to fulfill their duty to the owners, the Board must be consistent. Although the court in *Peel Condominium Corporation No. 108 v. Young* found that the corporation did engage in some degree of selective enforcement it was not to the degree of rampant non-enforcement which would warrant denying the corporation the compliance order it sought. However the court did state that the selective enforcement issue would be taken into account when deciding the issue of costs.

In another case, the condominium removed a satellite dish that an owner erected as they believed it was installed contrary to the bylaw. In addition to this owner there were 2 other owners who had satellite dishes that were previously installed.



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These dishes were not removed. The Court held that even if the satellite dish was installed contrary to the bylaw, the bylaw was not enforced prior to this unit owner installing his. In addition, the inconsistency of prior enforcement made the Board's actions oppressive and unreasonably prejudicial to the unit owner. The Court did not require the unit owner to remove the satellite dish and required the corporation to pay the unit owner's legal costs and exempted the unit owner from any special assessment in relation to the legal costs.

There have been cases where a new Board has been able to enforce provisions of the Declaration, Bylaws or Rules that had not been enforced in the past. However, in these cases, the Board has had to take very carefully planned steps and put the owners on notice that the provision would be enforced again. A Board who decides to change their mind on a whim will not be successful in enforcing rights that they have previously slept on.

The next time you are considering whether to ignore the unit owner who painted his door brown instead of black, remember that if you ignore the brown door you may not be able to do much about the pink one with polka dots. Being reasonable in the manner in which you enforce and consistent with your enforcement of the Act, Declaration, Rules and Bylaws will ensure that the Board is complying with its duty under s. 17(3).

Sonja Hodis is a litigation lawyer based in Barrie that practices condominium law in Ontario. She advises condominium boards and owners on their rights and responsibilities under the *Condominium Act, 1998* and other legislation that affects condominiums. She represents her clients at all levels of court, various Tribunals and in mediation/arbitration proceedings. Sonja can be reached at (705) 737-4403, [sonja@hodislaw.com](mailto:sonja@hodislaw.com) or you can visit her website at [www.hodislaw.com](http://www.hodislaw.com).



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