The Curious Case of Director Emails: **American Case Law**

By Robert Mullin

The Case

Lori Benedict v. Kemeys Cove Condominiums and Stillman Management Inc., 2013 NY Slip Op 32835

Consider this scenario: On a cold wintry day, a unit owner walking her dog regrettably slips and falls in the parking lot, causing serious injuries. As the condominium's president, you are immediately made aware of the situation by the condominium's property manager. Sitting at the office during your work day, you decide to contact your fellow board members via an email. Having run for the board with the desire for disclosure and transparency, this action appears entirely appropriate. Emails erupt in reply. "What are the nature of the injuries?" "Is a lawsuit expected?" "What steps were taken to avoid this slip and fall?" "What steps should be taken to avoid another?" Before the emails trail off, some personal observations of the injured unit owner ebb into the emails. The matter is then left to the next board meeting. Some months later a lawsuit is filed and the injured unit owner's lawyer seeks all emails exchanged between the board members pertaining to the slip and fall. As the board slips into a panic the question remains, "Are those emails producible?"

That very question was asked in a 2013 New York State case, Lori Benedict v. Kemeys Cove Condominiums and Stillman Management. A unit owner suffering a slip and fall sought a variety of documents, including the personal emails exchanged between directors relating to the incident. The condominium opposed this production and the issue was ultimately resolved via the Court. The Court held that, like Ontario condominium law, condominiums have a broad duty to disclose records. Like Ontario, however, no clear law speaks specifically to email production. The Court struggled with the competing demands of privacy and disclosure. Ultimately, the Court held that personal emails exchanged between board members were not producible, but emails held by the condominium likely were. The Court demanded emails kept by the condominium were to be provided to the Court; if the emails were not shielded by a rule against production (i.e.: solicitor-client privilege) they could be produced.

Ontario Law

Given this, what is the law in Ontario, and more importantly, what are directors to do? First, the law is ever changing in Ontario. With the passage of Bill 106, *Protecting Condominium Owners Act*, 2015, and its phased-in approach, unit owners' rights are only expanding. The Condominium Authority Tribunal, ("CAT"), now with jurisdiction to resolve record disputes, is anticipated to be a forum favourable to production.

Second, there are no current provisions or cases in Ontario that speak to this topic. Section 55(3) of the *Condominium Act* does state that upon request and reasonable notice the corporation shall permit an owner, purchaser or a mortgagee to examine the records of the corporation, but we do not have a comparable case in this province to provide much needed guidance. While the CAT may follow the same logic as the Court in *Benedict* did, being personal emails are not producible, emails maintained by the condominium may be, this gives rise to the risk of production.

Director Emails

One idea may be that once elected to a board, each director should set up an email, which by its address, user name and function, is clearly and only used for condominium matters. For example, hotmail may permit an email 'waterlooCC1@hotmail.com'. I will leave such an address to your imagination, but one's personal or unrelated professional email used for the condominium board's affairs it is not. With this policy adopted by all directors, any and all communication pertaining to the condominium flows via such email addresses. While directors may exchange vacation ideas, investment tips or recipes via their own email account, the 'condominium email account' is only used for such business, and saved by the condominium's property manager as a record. If directors keep dedicated condominium email accounts, knowing production is possible, later disclosure may be without debate, subject to the standing exclusions being records relating to employees of the corporation, actual or pending litigation involving the corporation, and records relating to specific units or owners. If properly created, a standing email footer could be created always stating, "This email is a record of the condominium", thereby reminding everyone of the terrain.

However, if directors inter-mingle their personal/professional emails with condominium business those records may not be producible, unless they fall into the condominium's possession, thereby posing the risk of disclosure and production. Having a dedicated email avoids the stress and anxiety that may arise when trying to untangle that knot. By keeping a dedicated email account and such emails preserved by the condominium, such practice would demonstrate greater transparency by the condominium; directors would know upfront that production may occur and act accordingly. Exceptions and exemptions to production would still continue, however, without the murky discussion of what were personal emails, who kept them, were they a maintained record, and the like. Those debates are enjoyed by lawyers, while billing handsome hourly rates.

The alternative from the *Benedict* case could be to always keep emails on personal accounts, and never have an email land in the hands of the condominium's records. It might be said that would be a narrow approach, and likely not to last very long. With the use of email rapidly eclipsing the traditional letter/stamp/envelope paradigm of yesteryear, emails are no longer a novelty and will likely be a dominant mode of communication. In addition, with the ongoing theme of unit owner protection, a condominium stating that all emails have passed through personal accounts and not one email exists in the condominium's records would raise eyebrows. Having formal email accounts, with everyone upfront knowing their use and being eligible for production would equally protect directors and unit owners, the former being spared embarrassment, the latter receiving more disclosure. A clear set of 'condominium' emails would likely avoid costly litigation to determine production.

Bottom Line

Director emails, by their nature, are not automatically provided in Ontario condominium law. If such emails are kept by a condominium, the likelihood that they will be producible appears high and this trend is likely to continue. Anticipate the curve and be prepared now. Create a dedicated director email account and avoid time consuming and costly disputes later. ■

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