

Condo Alert!

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Special Points of Interest:

- GMA's Ontario Condo Law Blog runner up for CLawBie!
- New Accounting Guidelines for Condos
- Electronic status certificates

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Condo solves disputes by buying control

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

A Toronto condo's unit owners have approved a substantial alteration allowing the condo to acquire, control, manage and renovate the real estate in its building and the hotel operations of The Suites at 1 King West at a cost of \$17.9 million – 100% financed during the credit-crunch recession and with the expectation of reduced common expenses!

380 of TSCC 1703's 575 luxury residential kitchen/office/living/bedroom suites are enrolled by participant owners in the Rental Program. Once the head office of the Dominion Bank, The Suites at 1 King West is also an architectural marvel; the 51 storey-high, thinnest residential condominium in the world has magnificent views over Toronto's financial district and Lake Ontario. One King West is renowned for its magnificent Grand Banking Hall, the elaborately-coffered walnut, marble and gilded Chairman's Historic Boardroom as well as the Austin Gallery and meeting rooms which now constitute a prime meeting/presentation/banquet/wedding facility.

One King West achieved notoriety when it became the battleground of its developers, Harry Stinson and David Mirvish, forcing the condo's innocent unit owners to become pawns in their tumultuous receivership battles. TSCC 1703 had many incentives to take control of the building's realty and its own destiny: unit values had plunged during the instability and stigma of the receivership and third party control problems had to be overcome. TSCC 1703's board worked with Gardiner Miller Arnold LLP, which undertook extensive due diligence before submitting

TSCC 1703's Offer to Purchase the assets which was accepted by the receiver during August, 2008, beating 32 other initial bidders. Overwhelming support for the asset acquisition transaction was demonstrated at the initial and adjourned Special Meetings of Owners in October/November, 2008, using GMA's precedent adjourned voting procedures. 78% of all owners (93% of all the owners who bothered to vote) voted in favour of the asset acquisition [s. 18 of the Act], the borrowing by-laws [s. 21] and the substantial alteration [s. 97 (4) – (6)] – a rare and impressive outcome in condo-world, especially considering the high number of non-resident unit owners involved.

As of December 1, 2008, TSCC 1703 acquired control of all the key freehold real estate within its building through the magic of the loan common expense assessment financing provided by Morrison Financial Services Limited. Maxium Financial Services Inc. will finance the cost of valuable renovations and energy cost-savings initiatives. Events at One King West Ltd. now manages the rental program, which is achieving industry-high levels of occupancy after only 2 ½ years from start-up. Its function rooms and food and beverage operations have flourished under the guidance of Kosta Tomazos of CK Atlantis Inc.

Bob Gardiner, the interim President and sole director of Events is organizing an intricate web of agreements and leases having complex ramifications. Bob credits TSCC 1703's impressive board of directors for the wisdom, acumen, hard work and creativity to achieve such a resounding success: "Nobody but the board would'a think we could have over-

come all of the insurmountable hurdles we have plowed right through. TSCC 1703 is the only possible entity that could save its building and unit owners from the hazards of third party control."

Congratulations to TSCC 1703's remarkable board of directors – Brian Smith, Bob Verdun, Ken Grant, Beverly Snodgrass, Thomas Tyson, Gary Bateman and Alex Wilson, with the support of Yehudi Hendler and Maria Delgado, property managers of Y.L. Hendler Ltd.

For more about The Suites at One King West as a unique hotel experience at the centre of every-thing Toronto has to offer, go to <http://www.onekingwest.com>.



One King West, Toronto



New customer service accessibility standard may demand changes to rules and bylaws

Judy Bang, B.A., LL.B.

The *Accessibility for Ontarians with Disabilities Act, 2004* ("AODA") aspires to improve accessibility for all persons with disabilities across Ontario by implementing and enforcing accessibility standards. The AODA involves persons with disabilities and industry representatives in the development of accessibility standards. The government of Ontario suggests five standards that cater to the different aspects of life that are impacted by public and private sector organizations that provide goods and services: (1) Customer Service; (2) Transportation; (3) Information and Communication; (4) Built Environment; and (5) Employment.

On January 1, 2008, the Customer Service standard came into effect, becoming Ontario's first accessibility standard. Recently,

this standard became law through two regulations under the AODA: *Ontario Regulation 429/07*, which sets out the requirements of the Customer Service standard; and *Ontario Regulation 430/07*, which exempts organizations with fewer than 20 employees from certain requirements under the standard.

This Customer Service standard requires public and private sector organizations to make the provision of their goods and services more accessible and "to use reasonable efforts to ensure that its policies, practices, and procedures are consistent with the regulation's principles," with a compliance deadline of January 1, 2010 for the public sector and of January 1, 2012 for the private sector.

As private sector organizations, condominiums are required to comply unless specifically exempted under the AODA. Accordingly, condo board and management have a responsibility to educate themselves and the condo community about accessibility standards development, and to amend the condo's rules and bylaws or institute new measures or policies to ensure compliance. By doing so, present and prospective unit purchasers will be better served and, surely on the whole, the accommodations will enhance the condominium community's character and reputation.

Call Andrea Krywonis for further details on the requirements and exemptions that may apply to your condominium.

Bridging the GAAP: Bringing uniformity to financial reporting in the condo industry

Christopher J. Jaglowitz, B.A., LL.B., ACCI

The Institute of Chartered Accountants of Ontario has announced the release of an important document entitled *Accounting and Auditing Guidelines for Ontario Condominium Corporations*. This publication is the first major revision of the Institute's audit guidelines for condominium corporations since November 2001 and incorporates recent changes in accounting practice and the requirements of the *Condominium Act, 1998*. All in plain no-nonsense English, the guide aims to bring uniformity to financial reporting in the condominium industry. Indeed, according to the Institute:

"The result is a comprehensive guide that promotes best practices for the industry. It details considerations for both accounting and audits that range from budgeting and financial statements to tax issues and reserve funds."

Members of the committee that drafted these guidelines include the most prominent auditors on the local condo scene. Most have audited the books of hundreds of condo corporations and face the unit owners at their annual general meetings each year. Suffice it to say, these folks know their stuff.

The Guide comprises three parts: The first section acts as a general primer on condominiums. It outlines the history, purpose, operations, and financial structure of condominium corporations, and the role and duties of directors, management, and auditors.



The second section of the Guide delves into the financial realm of condominium administration by tackling accounting considerations. Here, the authors deftly explain concepts and provide practical advice about financial statements, budgets, reserve funds, and income tax considerations, just a few amongst a set of wide ranging topics.

The final section of the Guide teaches readers about risk-based audit considerations by engaging in a discussion about compliance with auditing standards, fraud, financial instruments, special assessments, record keeping, lien rights, and much more. The guide also includes a preferred specimen presentation for financial statements.

While the scope of these guidelines is limited in application to standard condominium corporations (and not the Vacant Land, Leasehold, and Common Elements types), there is no doubt that this booklet will be a valuable resource for any condominium manager, director, unit owner or professional who wants to better understand accounting principles and best practices for audit procedures for Ontario condominium corporations.

For a free copy of *Accounting and Auditing Guidelines for Ontario Condominium Corporations*, go online and check out the Institute of Chartered Accountants of Ontario website at www.icao.on.ca.

See our blog entry on this topic and more at www.ontariocondolaw.com.

Broken Records - Privacy Commissioner's comment on examination of records

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

When the *Personal Information Protection and Electronic Documents Act (Canada)* ("PIPEDA") was first introduced in 2000, some condo lawyers took the position that condominium corporations were exempt from its application because condos do not accumulate private information for commercial purposes. Instead, condos function within the authority of the *Condominium Act, 1998* (the "Act") to manage the property and assets of the condo, as a non-profit organization.

Nonetheless, court and Privacy Commissioner's rulings have taken the opposite stance and equate the operation of condominium corporations to commercial activity. The Privacy Commissioner's Case Summary #301 found that a condominium corporation must implement practices to protect personal information and ensure that there is a complaint and inquiry process available with respect to privacy. In *Rodgers v. Calvert*, the Ontario Superior Court found that any organization, whether non-profit or for-profit, that collects, uses or discloses personal information in the course of commercial activity is subject to PIPEDA. If we apply the *Rodgers* principle to condos, the hiring of a property manager or maintenance contractor can be considered commercial activity and most condos collect, use or disclose personal information in the course of administration. Therefore, in most cases where a property manager is hired (and in most condos, such is the case), PIPEDA correspondingly applies and creates restrictions on disclosure of personal information. What then, of requests for examination of records under section 55(3) of the Act? While access to records came before the courts under the Old Act in the context of the provision or appropriateness of disclosure, it has not yet been adjudicated in the context of PIPEDA.

A colleague of ours has circulated a copy of a letter from the Acting General Counsel of the Office of the Privacy Commissioner of Canada. This letter provides the Privacy Commissioner's comment on PIPEDA and its interaction with section 55 of the Act. An excerpt from the letter states:

"Section 55 of the provincial [Condominium] Act sets out a list of records that a condominium corporation is required to keep, and gives the owner of a unit the right to examine the records of the corporation, subject to specified exceptions. I note under the exception in paragraph 55(4)(c), a unit owner does not appear to be entitled to records relating to specific unit owners.

To the extent that records requested by a third party contain personal information about other individuals, and do not fall within the exception in paragraph 55(4)(c) of the Ontario [Condominium] legislation, the relevant provi-

sion under PIPEDA is paragraph 7(3)(i). This provision permits an organization to disclose personal information without the knowledge or consent of the individual if the disclosure is "required by law". This provision has been interpreted by our Office to include provincial laws. Thus, to the extent that a condominium corporation is required under Ontario legislation to disclose personal information to a third party requester, PIPEDA enables that disclosure to take place.

As noted however, it appears that at least some categories of personal information are protected under Ontario's Condominium Act."

This commentary is not groundbreaking. Moreover, the Privacy Commissioner's letter and Case Summary are not binding precedent. They are, nonetheless, helpful in reinforcing what we have come to accept about how PIPEDA and condos interact and emphasize the need for condominium corporations to have a privacy policy.

PIPEDA has crept into the condo world and it appears that disclosure of records relating to specific owners, normally excepted by s. 55(4)(c), must be made if "required by law." "Required by law" could mean required under provincial or federal laws or legislation and we suggest that the definition is easily be expanded to federal statutes such as the Criminal Code or Income Tax Act. Hopefully, a condo will not be put into the position to make such a judgment call – as always, take heed and consult your lawyer should you have any concerns with a request to examine records or to implement a privacy policy in your condo.

The dawn of electronic status certificates

Gerald T. Miller, B.A., LL.B.

GMA is pleased to announce that one of our condo industry clients, D-Tech Consulting Inc., has released the first ever fully electronic status certificate delivery system. CONDUIT takes the antiquated process of paper and manual processing into a new era. By logging into www.statuscertificate.com one can find their unit and request an electronic status certificate. When the property manager has completed the request, credit card payment is processed and the entire status certificate and attachments can be downloaded in PDF format.

Quintin Johnstone, Associate Broker and Condominium Specialist for Sutton Group, indicates that CONDUIT's electronic status certificate delivery system is innovative and will make the purchase and sale cycle of a real estate transaction much easier.

D-Tech has also launched a new website dedicated to its condo software products. You can visit www.condosoftware.ca for more information.

CONDUIT
Provide. Access. Secure. Save.



The GMA team at One King West

This newsletter is provided as an information service to our clients and colleagues. The information contained herein is not meant to replace a legal opinion and readers are cautioned not to act upon the information provided without first seeking legal advice with respect to the unique facts and circumstances of their situation.

Please contact us for further or specific information and we would be pleased to assist you.

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Condo service contracts - Think first then sign

Warren D. Ragoonanan, Hon. B. Comm., LL.B.

"It is impossible to unsign a contract, so do all your thinking before you sign."

The Tao of Warren Buffet, New York: Scribner, 2006

Warren Buffet's mantra seems simple enough but it is easy to forget when faced with umpteen pages of legal gibberish. When it comes to service contracts, your "thinking" should comprise two steps: understanding the deal and then making sure that it works for unit owners.

While service contracts can range from hiring a snow-plow service to an interior designer, the steps leading up to signing any service contract are standard.

Prepare an Overview: Think about the big picture. List the parties to the contract and their respective roles (e.g. buyer or seller). Note what each party will be providing for the deal. For the buyer, list the price and payment terms; for the seller, list the service to be provided.

Think about the Buyer: Ask yourself "what rules govern the Buyer's contracting authority?" Under the *Condominium Act, 1998*, most contracts are not binding on the corporation unless approved by the Board. Further, since directors owe a fiduciary duty and a duty of care, they must review the terms of the deal and have an honest, frank, and good faith discussion about whether it is in the corporation's best interests to sign the contract. For larger contracts, the corporation's best interests could mean subjecting the job to a tendering process. Contracts to add, alter or improve the common elements or to change the assets or services rendered to owners may require a s. 97 notice or approval by the owners. Also, some property management contracts give managers

authority, as agent, to bind the corporation without Board approval. This agent-authority must meet certain parameters set out in the Management Agreement (e.g., the contract is less than \$5,000.00 and less than 6 months in duration). The method of authorizing performance may need to be addressed in the service contract, for example stating that the Manager may authorize certain steps, while other steps must be authorized by Board resolution.



Think about the Seller: The seller can be an individual, partnership or limited liability corporation, and there may be multiple sellers. The contract should set out the qualifications and experience of the people who will actually do the work, and the terms governing the involvement of subcontractors. Where applicable, contractors should provide proof that they are duly licensed and carry adequate insurance, certificates (e.g., WSIB) and approvals prior to commencing the contracted work.

Define the Service: The contract should clearly define the service provided, a timeline for completion, and any applicable specifications, diagrams or charts. Long-term projects, in particular, should list project milestones and estimated completion dates. A good contract will also contain binding service standards and details about the materials that the contractor will use. Taken together, the contract should clearly set out what services you are getting; who is providing them; how

they will be completed; where on the property they will be performed; and when they will be done. If the contract doesn't provide all of this, something is missing.

Determine the Price: Once the service is agreed upon the Board can establish whether the condo is paying a fair price. A good price clause will show the total price along with a breakdown for different items (e.g. labour, materials and taxes). Scrutinize these payment terms to ensure that they do not contain any unexpected deposit requirements or the need to pay the entire price up-front. It may also be useful to shop around to see whether the price is reasonable according to industry standards.

Call a Lawyer: The abovementioned steps should bring to light the contract's key "business terms." Besides the "business terms," contracts usually contain a number of additional "legal terms" that kick in if the parties end up in a dispute. Typical legal terms include indemnity, limitation of liability, and dispute resolution (mediation and arbitration) clauses. While the meaning of legal terms often corresponds to wording of the business terms, the meaning of many terms may not be so obvious. Consider forwarding the contract to the corporation's lawyer for advice. A lawyer can help make sure that the terms of the contract are clear, reflect the condo's intent, and are enforceable.

The bottom line: Board and management must understand the contract; otherwise, the condo cannot sign it. Such an understanding requires sufficient time and consideration of the various factors and sufficient opportunity to negotiate with the contractor before signing.

Firm and Professional News

GMA's **Ontario Condo Law blog** named a runner-up for the Best New Law Blog category in the 2008 Canadian Law Blog Awards.

Gerry Miller to speak at Ontario Bar Association seminar on the topic of Negotiating Commercial Agreements, March 25, 2009. The discussion will include: Objectives of Negotiation; Negotiation styles and stages; Preparation and organization strategies and tactics; and Responding to challenging situations and parties.

Chris Jaglowitz has been appointed to the Condominium Management Standards Council, which oversees the ACMO 2000 certification program.

GMA also offers a wide range of services including: Real Estate Law, Business Law, Estates Law, Litigation and Dispute Resolution. You can learn more about these services and even fill out instruction forms online by visiting us at www.gmalaw.ca.



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