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Condo Alert!

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Apologize!

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Sorry no longer seems to be the hardest word.

The *Apology Act, 2009* came into force in Ontario in April 2009. Now, you can apologize to a person you have caused harm without fear that the apology would be used against you as evidence of liability in a civil lawsuit. In the past, doctors, hospitals, persons involved in automobile accidents and condo boards were always instructed by their lawyers not to apologize because it would appear to be an admission of guilt which would lead to financial damages claims payable by them or their insurer. Now the *Apology Act* encourages apologies in a wide range of scenarios, with a few exceptions, by making an apology inadmissible in a civil proceeding as evidence of fault or liability.

We all make mistakes deserving of an apology to friends, family members and strangers who our words or actions may harm. Feeling free to make a justly-deserved apology to your victims may help smooth over the occasional rocky road. That is made easier by the *Apology Act* with the result that many contentious battles that may have been initiated by an annoying event can be headed off at the pass by a sincere apology.

Often, lawsuits escalate into an event of their own, long after the initial dust has settled. Sometimes suing as a "matter of principle" to "stand up for my rights" is often an inflamed ego trip where a plaintiff wants revenge because someone else slighted them or did more seri-

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Small Claims Court Update

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On January 1, 2010, the maximum amount that can be claimed in Small Claims Court will increase from $10,000 to $25,000.

This change, announced in December 2008, is intended to provide a faster and more affordable option for bringing civil disputes before Ontario courts. The cost of filing a claim or other documents in Small Claims Court is relatively low, the rules of that court are less complex and the process is normally much simpler and sometimes quicker than in the Superior Court of Justice. Legal fees for small claims proceedings are typically much lower as a result.

It is difficult to predict the effects of the increased monetary limit in small claims proceedings, but there is a strong possibility that a greater number of litigants will bring claims. Condominium boards and managers should therefore be prepared for an increase in the number of claims made by unit owners, service providers and other condo stakeholders and know how to deal with them effectively.

Because a defence must typically be filed within 20 days of being served with a claim, every corporation should notify the corporation's lawyers as soon as possible after being served with a claim, and to have ready all information and documents relevant to the case. In cases covered by an insurance policy, written notice of claims should be given to the corporation's insurer, and all claims should be disclosed on status certificates and referred to in the annual audit enquiry letters to the corporation's lawyers.

Condominium corporations can also take advantage of the increased small claims limit to commence their own claims to recover money owing by unit owners and third parties. As always, they should get legal advice to help weigh the benefits and costs of legal proceedings in small claims court as compared to other available options. Often a stern letter seeking compliance or registering a lien against a unit owner is sufficient to obtain your objective.

Remember that lawsuits must be commenced within 2 years from the date the debt became due or that damage occurred, after which time the right to sue is forever lost. What used to be a 6-year limitation period was reduced to 2 years in 2004.

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ous harm and "shouldn't be able to get away with it". Often the art of negotiating resolution of a dispute requires face-saving negotiating tactics, "getting to yes" and other strategies used by skillful negotiators and mediators in an effort to remove personal antagonisms and flared emotions so as to be able to disarm the anger to reach a realistic solution to the problem in dispute.

Having the courage to apologize for your mistake is the sign of a person with integrity, goodwill and confidence in his/her own skin. Often, the emotional portion of a plaintiff's attack can be diluted and even eliminated when the plaintiff receives acknowledgement by a wrongdoer that harm has been done to them and that the wrongdoer acknowledges responsibility. An honest and sincere apology may provide an explanation for the cause of the harm, as well as a recognition that the wrongdoer did not get away with "putting one over" on the victim. An apology may also help reduce the wrongdoer's feelings of guilt and raise his self esteem and personal integrity. Doing the right thing makes both parties feel that some measure of justice has been rendered. Surprisingly, victims often respond to an apology much more favorably than the wrongdoer ever expected.

If previously lawyers could be justified for protecting their defendant clients by insisting they do not apologize, now the shoe is on the other foot. Already, on several occasions, I have carefully crafted apology letters on behalf of condo boards or managers to angry unit owners which have taken the wind out of their sails. It is certainly a strategy I will be recommending in appropriate cases in future as a very potent means to avoid and move beyond all of the expensive and prolonged litigation that can result in legal fees far exceeding the monetary value in dispute or the final award of damages.

Any good lawyer woodsheds her clients to become realistic as early as possible in a lawsuit. That does not of course mean that an apology is always the best strategy. Apologies ought to be framed in various ways appropriate to the circumstances. Often it would not be expected that an apology would actually resolve the issues and in fact, in negligence, defamation or other tort lawsuits and contract disputes, proving fault and blame remains the key for a plaintiff to obtain a damages award. Nonetheless, in cases where an apology is appropriate (especially before commencement of litigation), it can encourage early resolution of the case at a substantial cost saving to both parties, particularly in scenarios where the value of an explanation and apology for wrongdoing may be even more important to the individual than monetary compensation.

Lawyers will still caution their clients not to apologize while testifying in court. Ontario's legislation specifically does not apply to apologies made in a scenario which may result in a criminal trial or a provincial offence proceeding. Also, an apology made while testifying at a civil or administrative proceeding or an arbitration is admissible in that particular proceeding as evidence of fault or liability. Such an apology must be carefully assessed in advance by your lawyers to ensure that it does not amount to acceptance of fault or evidence of liability. Other provinces have different kinds of apology legislation.

The Ontario government, lawyers, the medical profession and others have recognized that the *Apology Act* can be expected to remove barriers to settlement discussions, healing and reconciliation, while promoting civil relationships among antagonistic parties.

In day-to-day life, don't be afraid to apologize as soon as you have goofed. If litigation appears to be imminent, involve your lawyer in crafting a written response.

Erich Segal ("Love Story") said "Love is never having to say you're sorry." It sounds like a nice phrase, but in reality, sometimes "sorry" is the kindest word, especially to those who deserve your love.

Have a CCDC-2 in Your Future? Don't Forget the Consultant!

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

Excited about that new lobby renovation? Did your Board just put a new chiller out for tender? Or maybe you are planning major maintenance work on the underground garage? For these or any other major projects, well-managed condos will have a bidding/tendering policy. That policy would require the directors to select a contractor from a menu of bidders and then typically customize and complete a CCDC-2 (Stipulated Price Contract). For some projects, the condo may use the CCDC-3 (Cost Plus Contract) or the CCDC-4 (Unit Price Contract). However, the CCDC-2 is by far the most commonly used throughout the condominium industry and using it for larger construction projects has become an industry-wide standard practice.

But, in the rush to start the project, don't forget that that CCDC-2 requires the condominium corporation to have a "Consultant." Who? In the CCDC-2 world, the Consultant is the contract administrator hired by the condo corporation. The Board can select an architect, engineer, designer or anyone else it decides has the expertise to fit the role. CCDC-2 sets out several duties for the Consultant including supervising compliance with the specifications and quality requirements, reviewing the contractor's progress, preventing deficiencies or correcting them immediately, making sure the contractor sticks to the contract and overseeing progress payments and the budget.

Here are some tips to help you get the best Consultant for your needs. At the same meeting where the directors decide to undertake a project, they should discuss what kind of Consultant the corporation requires. Request proposals from several Consultants and select one from a menu of bidders.

Before you put out the request for proposal, decide on the Consultant's scope of work. Will the Consultant prepare specifications and diagrams? Make site visits? Only deal with progress payments? If the Board wants to narrow or widen the scope of work, the time to do it is before inviting Consultants to submit proposals to the condominium corporation. Make sure you understand the Consultant's payment terms. Is it flat fee? Hourly Rate? Some combination of the two? A Board should be prepared to accept a fair fee based on the scope of work it has established.

The scope of work, payment terms and other items should be set out in a written consulting agreement between the condominium corporation and the Consultant. This agreement should be finalized and signed well before the Board selects a contractor for the project. The Board should, of course, get legal advice before signing the consulting agreement.

The Steps to Guaranteed Lien Collection

Andrea C. Krywonis, B.Sc. (Hons), LL.B. and **Christopher Dominaux,** Lien Clerk

Section 84 of the *Condominium Act, 1998* (the "Act") provides for the mandatory payment of common expenses by owners - no exceptions. At GMA, we have developed a streamlined system for the collection of common expense arrears at a competitive cost. We guarantee that we will collect our legal fees if accurate and timely information is provided. Below, is an overview of the steps and deadlines in the lien collection process, as it takes place from the moment we receive our instructions to enforcement by a writ of possession. Let us know if we can be of assistance in any stage.

1. A Form 14, (Notice of Lien to Owner) is issued no later than the 15th day of the 3rd month of default.
2. Once the deadline for payment has passed on the Notice of Lien, a subsearch of title is done on the unit in arrears.
3. A Lien Notice is prepared, to be sent to the owner(s) as named on the title search.
4. A Notice to Encumbrancer(s) is prepared, notifying the mortgagee(s) of the lien registration.
5. The Certificate of Lien is registered against title to the unit(s) in arrears prior to the end of the 3rd month after the due date for payment.
6. If no contact or payment is received from the unit owner or mortgagee within 30 days of the Notices described in points 3 and 4, above, a letter is issued to both demanding payment.
7. After the deadline on the demand letter has passed (usually 16 days), the lien may be enforced in the same manner as a mortgage [s. 85 (6)] and Power of Sale procedures are commenced. Note that at this point, the Corporation also has the option of issuing a Statement of Claim for an order of possession in the Ontario Superior Court of Justice. This process is described below at steps 16-19.
8. Section 32 of the *Mortgages Act* provides that notice of the exercise of a Power of Sale cannot be given until the default has continued for at least 15 days. The sale itself cannot be made until a Notice of Sale is properly delivered to all interested parties.
9. Before the Notice of Sale is issued, title is sub-searched and any persons having an interest in the liened property are noted.
10. A draft Notice of Sale is prepared – the addresses of the Notice recipients should be available from the title search or otherwise from the Corporation's records. Notice must be given to every person appearing on title who has an interest in the property, other than prior encumbrancers. The format of the Notice of Sale is prescribed by the *Mortgages Act*.
11. On the day the Notice is to be issued, a further search of title to the liened property is done to ensure that no other instruments have been registered prior to 4:30 p.m. on the preceding day and to see whether any additional parties require notice of the impending power of sale.
12. On the day the Notice is to be issued details concerning the amount then due under the registered lien, inclusive of interest and reasonable legal fees and collection fees, are completed based on final information from the Corporation. The date by which payment must be made is also be confirmed and completed.
13. After the Notice of Sale is finalized, it is signed and delivered to the individuals entitled to notice. A statutory declaration confirming service of the Notice of Sale is prepared and sworn.
14. A copy of the Notice of Sale is kept on file. We must wait out the time for payment set out in the Notice of Sale. This period is called the "redemption period" and although it is 35 days under the *Mortgages Act*, lawyers allow 45 days to account for weekends, holidays and spouses' rights. If the amount owed is paid within this period, the owner can "redeem" the lien.
15. If payment is not received by the Corporation after the redemption period has expired, the Corporation can sell the liened property.
16. The process to sell the liened property is as follows: Upon the expiry of the redemption period, the Corporation issues a Statement of Claim for an order of possession in the Ontario Superior Court of Justice. By this time, the mortgagee or owner has paid all amounts 99% of the time.
17. The defaulting owner then has 20 days from service of the Statement of Claim to file a Statement of Defence or Notice of Intent to Defend (which must be served 20 days after service of the Statement of Claim and which extends the date a Defence must be filed by 10 days). If the owner does not defend the action a default judgment for possession can be obtained.
18. A motion is made to the court, asking for leave to issue a Writ of Possession. A Writ of Possession is then issued by the court.
19. A Writ of Possession orders the owner to leave the property and gives the Corporation the right to possess the property. The Writ of Possession is filed with the sheriff, who then arranges for eviction of the owner(s) from the property.
20. The property can then be sold by the Corporation through auction, private contract or tender. A real estate agent should be retained for this step, as certain guidelines apply to the listing and sale.
21. Once the property is sold and if there is any surplus, the Corporation must account to the owner and other subsequent encumbrancers. The *Mortgage Act* requires that the proceeds of the sale first be applied to the cost of the sale, then to interest and all costs owing under the lien, then to principal money owing under the lien. Subsequent encumbrancers are then paid out and the owner receives the balance.

The Condolawyers™

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.

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