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Best practices before, during and after construction projects

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In Part II of our two-part series on construction contracts and projects, we're exploring best practices and tips for construction projects from start to finish. The following are general comments for condos that are considering or undertaking a construction project:

Initial Steps

- Ensure that the contractor inspects the work site, reviews the existing as-built building plans to identify any hidden utility or other issues and fully understands the scope of the work before signing a contract;
- Check if any additional drawings, plans or specifications need to be provided to or by the contractor;
- Obtain the contractor's current WSIB Clearance Certificate, insurance certificate or policy and performance bond or labour and materials bond (as applicable);
- Provide the contractor with the condo's rules applicable to the work such as use of service elevators, parking, storage or any other applicable rule provisions;
- Inform the contractor of any hidden or other hazards, such as any applicable WHMIS materials safety data sheets that may be encountered by any of the contractor's personnel in the course of their work;
- Provide the contractor with any existing policies or programs of the condo applicable to the work such as a mask or COVID-19 safety policy. Get a copy of the contractor's applicable health and safety programs;
- Consult the condo's lawyer about contractual aspects including the concepts discussed in Part I;
- Ensure that the contract documents are signed by the parties and that signed copies are retained;

During the Work

- Inspect the work site and performance of the work on a regular basis as may be appropriate or recommended by the consultant or lawyers;
- Retain a 10% holdback on all payments;
- Ensure that the condo's personnel and contractors follow the COVID-19 health and safety program of the contractor and vice-versa;
- Diarize payment of the contractor's invoice within 28 days of receipt or submit a Notice of Non-Payment to the contractor within 14 days of receipt of the contractor's invoice;

Post Construction

- Obtain final inspections, closed permits and clearance certificates as appropriate;
- Obtain contractor's as-built plans for the completed work and any warranties or operational manuals;
- Consult the condo's lawyer to search title for construction liens before releasing the holdback;
- Record deposits and expenditures into/from the condo's operating or reserve fund, and maintain records detailing transactions.

Condos should refer to property management, the project consultant, the condo's lawyer and other professionals for the specific criteria and steps applicable to each separate type of construction project.

Our complimentary expanded version of this construction checklist is available on request.



Free speech – Say, it ain't necessarily so!

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“Free Speech” is a bit of a misnomer – what can legally be said is the leftover, after various legal concepts have chipped away at the original idea. Generally established and guaranteed by s. 2 (b) of the *Canadian Charter of Rights and Freedoms*, a person is entitled to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

Not every statement is protected by “free speech”. An umbrella of laws applies to prevent various types of harmful statements. The right of freewheeling debate on matters of public interest does not overcome the following restrictions:

Discrimination ~ s. 2 (1) of the *Human Rights Code* prohibits discriminatory conduct and constructive discrimination applicable to five social areas with respect to 17 grounds of discrimination (e.g., race, religion, sex, family status, disability and age) subject to appropriate accommodation by both parties, treated with dignity and respect. Often spoken words are used to prove discriminatory conduct.

Hate Speech ~ ss. 318 and 319 of the *Criminal Code* prohibit public statements inciting hatred of an identifiable group. Section 298 prohibits defamatory hate libel and s. 302 prohibits extortion by libel, hate propaganda or promotion of genocide.

Threats ~ s. 423 of the *Criminal Code* prohibits intimidation by making a threatening statement or behaviour threatening violence, injury or punishment that instills fear or alarm to compel a person to do something they don't have to do.

Extortion ~ s. 346 of the *Criminal Code* prohibits a person from inducing another to do anything by threats, accusations or violence, with intent to obtain something, without reasonable justification. Leave it to your lawyer to exert any legal threat.

Defamation ~ The common law tort of defamation protects the reputation of a person who has erroneously been disparaged by a statement made by the defamer to a third party, where the untrue statement would tend to lower the person's reputation in the estimation of right-thinking members of society generally. Such a false statement, rumour or innuendo can be defamatory where it publicly questions or implies suspicion of a crime, dishonesty, immoral conduct, inability to pay debts, imputation of a disease, mental incapacity, or a sexual deviation.

Also, in the condo context, it may be defamatory where an owner circulates a newsletter or knocks door-to-door accusing a director or manager of incompetence, mismanagement, reckless spending, use of the position to acquire personal benefits or secret commissions from contractors, fraudulent conduct or breach of fiduciary duties. Knowledgeable directors are often falsely accused by owners ignorant of condo legal, financial, management or construction criteria. Monetary damages increase where a person's job or business interests are disparaged. Directors are given better legal protection in Canada than on U.S. TV. Yes, a court can order an internet provider to disclose the identity of an anonymous internet defamer in Canada.

A defamer can escape liability to pay monetary damages if a defense of justification (the truth), fair comment (a statement made without malice and after reasonable due diligence as a matter of opinion – not as an alleged fact), or qualified privilege (where the person has a special duty to disclose information to other persons who have a special interest in knowing that information, after due diligence to ascertain the truth, made without malice).

A new SLAPP (“Strategic Lawsuit Against Public Participation”) defence is intended to prevent libel chill. Any person who issues a newsletter or signs a requisition containing untrue disparaging information or repeats a false rumour about another, can be held liable for defamation.

A further defamation defence of responsible communication on matters of public interest can apply to a person publishing in any media who acted responsibly to verify the information to a “reliable journalist” standard when reporting facts regarding matters of public concern.

Harassment Rule ~ Although there is currently no common law tort of harassment (except “internet harassment”), a condominium is uniquely entitled to enact a rule protecting owners, directors, staff, agents and contractors from many different types of obnoxious, harassing communications, fully enforceable under s. 58, 117 and 119 of the *Condo Act*.

Internet Harassment ~ A brand new tort of internet harassment can occur, where a person uses the internet or social media to make extremely outrageous and malicious repeated communications with the intent to cause fear, anxiety or emotional upset, or to impugn the dignity of another person.

Intrusion Upon Seclusion ~ This new common law tort applies when a person intrudes unreasonably into another’s private life in a deliberate, offensive and repeated invasion, causing distress, humiliation or anguish.

A guy’s girlfriend used her work computer to spy 174 times on a co-worker who was the guy’s ex-wife. When discovered, she was sued for an invasion of privacy and breach of fiduciary duty as an employee of the same bank. Monetary damages were capped at \$20,000, lacking proof of any financial loss. Employers need to establish computer privacy policies for a number of reasons.

Right of Privacy ~ The *Personal Information Protection and Electronic Documents Act* (PIPEDA) requires each organization (such as a condominium) to preserve the privacy of its members, staff and other personnel pursuant to a privacy policy.

Record of Owners of Units ~ s. 55 (4) (c) and (5) of the *Condo Act* allow a corporation to let an owner, purchaser or mortgagee of a unit (or their agent duly authorized in writing) to examine and obtain copies of most of its records, including records relating to their own unit, but not other units. Only an owner can review records specific to that owner.

Contractual Provision ~ An employer or party to a contract might impose a provision in a contract requiring certain business, financial, client or personal information to be designated as private, confidential or secret information which may not be disclosed to any other person.

Tender Information ~ A contractor who has tendered a bid is entitled to non-disclosure of its information to competitors or any person other than the client and its professionals.

Trading Off a Brand ~ Common law torts prevent a person from engaging in economic communications promoting and trading off against another person’s copyright, business name or a publicly recognized personality’s name and reputation.

Obscenities ~ In some cultures, obscene words used to describe your mother are a sign of friendship, but the same words would get you suspended from school or ex-communicated from church, so bonds of culture create their own rules.

Rudeness ~ My wife has her own version of free speech if I don’t properly pack the dishwasher – but there’s nothing illegal about rude speech (and nothing’s to be gained by a clever rude retort).

We have a new address!

Our new address is Suite 1400, 390 Bay Street, Toronto.
Our email, phone numbers and extensions have not changed.