

# Let's Talk Condo...

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## Ontario's Condominium Law Experts

## Due Diligence and the Tendering Process



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As condominium buildings age, they all need repair and renovation. The property may need new windows, new elevators or new roofs, or the lobby and the corridors may need to be renovated.

When this happens the board of directors usually hires an engineer, designer or architect who then prepares a set of specifications for the work. Once the decision is made to proceed with the work, the engineer, designer or architect prepares a set of tender documents, including "Supplementary Conditions", for the contract to be signed by the condominium corporation and the contractor.

The tender package, which sets out the particulars of the work to be done and the conditions relating thereto, is then sent to prospective bidders. Bids are submitted and when the board decides on who is the successful bidder it issues a "letter of intent" to that bidder. Then, someone, either the manager or a board member says: "You know, maybe we should send the contract to a lawyer to review before we sign it."

That is where I come in. I am a construction law lawyer and I draft tenders, Requests for proposals, (RFP's) and contracts, which is exactly what the board needs. The problem is, asking me to review the contract after the work has been tendered is the wrong time to ask for my expertise.

It is too late. Why do I say this? Let me explain.

When a condominium corporation issues a tender to prospective bidders it is, in law, making an offer to each bidder. If the bidders submit a bid that is compliant or substantially compliant with the tender, the bid represents acceptance of the offer and creates a preliminary contract between the condominium corporation and the bidder. This contract governs the rights and obligations of both the condominium corporation and the bidders with respect to the evaluation of bids and award of the contract for the work.

One of the terms of the preliminary contract is that the corporation and the bidder must sign the form of contract included in the tender package. So, asking a lawyer to review the contract after it has already been tendered and awarded is too late – because by then the parties have already committed to signing the contract in the tender package. Even if the lawyer might suggest changes to the contract, no change can be made without the consent of the contractor. What is the likelihood a contractor will agree to changes suggested by the corporation's lawyer? In my experience, slim.

So, what should you do? Simple. Send the draft tender package to the corporation's construction law lawyer for review before the tender is issued to the bidders. That way the contract can be reviewed and, if necessary, revised to suit the corporation's needs. Reviewing a tender package to ensure that the needs of the corporation are met, in the contract the parties are obligated to sign, requires expertise in construction law.

This way when the successful bidder is selected, the form of contract the parties will sign has

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been reviewed and the corporation's rights have been protected, before the tender packages are sent out. All engineers, architects and designers should be recommending to their clients that a legal review be conducted at this stage.

If the corporation follows this process, the board of directors has done its due diligence at the right time and, when the board selects the successful bidder, the final contract that the parties sign will be the one that serves the corporation's needs.



## NEWSLETTER TIPS

**In order for liens for unpaid common expenses--whether for monthly fees, special assessment or charge backs--to be valid and enforceable, the notice of intention to register the lien (formerly the Form 14) must be sent to the unit owner at the address on the corporation's record no later than 75 days after the first default in payment, at the absolute latest. The lien itself must be registered within 3 months of the default date. If the corporation misses any of these time lines, it prejudices its ability to recover the total amounts owing. The other unit owners will then have to make up any shortfall.**

## CASE COMMENT

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# TSCC 1633 v Baghai Development Ltd. and Rabba Fine Foods Inc.



This recent decision of the Superior Court will encourage boards trying to enforce the condominium Declaration, bylaws and rules against commercial owners. It also warns corporations that the best way to avoid heavy legal costs, is to seek legal advice early.

### THE FACTS

Since registration in 2005, TSCC 1633 faced a problem with a commercial tenant, Rabba Foods. The developer-declarant, Baghai, entered into a lease with Rabba which allowed it to use part of the common element walkways for display purposes. However, Baghai failed to disclose this, and to insert the intended easement in TSCC 1633 Declaration. So what Rabba was allowed to do under its lease, it was prohibited from doing by the Declaration.

Shortly after registration, the Board made a Gentlemens Agreement with Rabba allowing Rabba a limited display area on the common elements, in exchange for Rabba's removing some signage and agreeing to improve their control of garbage. This informal arrangement, memorialized in an exchange of emails, was almost immediately breached by Rabba.

In 2007, when Rabba's disregard of the Gentlemens Agreement became flagrant, such that it was spreading quantities of baskets and bags of produce across the common area walkway, the Board demanded a clear enforceable agreement which would allow Rabba to use display tables of a specific size, holding specific types of product. The Board also wanted some measures in the agreement to compel compliance.

The trial judge noted that the Board was unaware of the availability and formal requirements for a lease of part of the common elements or a section 98 agreement. Evidently, the Board failed to obtain legal advice on whether, and how, the enforceable agreement it sought could be structured. In the result, the arrangements, described as temporary, were set out in another email exchange.

Inevitably, Rabba soon slipped back into its former habits: its displays spread and the products on the display tables included potentially dangerous items, such as barbecue starters. By 2009, when a resident was injured trying to make her way past the piled up produce, the Board demanded that all display trays outside of the store be permanently removed.

### COURT PROCEEDINGS

Rather than proceeding under s. 132 of the Condominium Act through mediation and arbitration the condominium corporation brought a court application for compliance against Baghai the owner of the commercial unit, and Rabba, the tenant. Baghai brought a counter-application under the oppression remedy, arguing that the corporation could not withdraw permission to use the common walkway for display after 5 years of allowing it. Baghai also argued that the limitation period had expired, since Rabba's use of the common elements had been ongoing for more than 2 years.

The Court, faced with conflicting affidavit evidence on the application, ordered a trial.

### THE GOOD NEWS

The condominium corporation was completely successful.

On the limitations issue, the Court ruled that Rabba's conduct constituted multiple ongoing breaches of the Declaration, rather than a single breach which occurred in 2005. The judge also noted the standard provision in TSCC 1633's Declaration, stipulating that a waiver of a breach of its provisions does not prevent the corporation from thereafter demanding full enforcement against future breaches.

Dealing with Rabba's argument that the 2005 and 2007 agreements prevented the corporation from demanding that Rabba completely

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remove its displays from the common elements, the Court found that Rabba had breached the 2005 agreement, and brought it to an end. The 2007 agreement was a temporary agreement, which all parties intended to be followed by a permanent agreement, which, however, never materialized. As it was temporary, and as Rabba had not complied with it, the condominium corporation could terminate that agreement at any time.

More importantly, the Board did not have the power to enter into a binding agreement with Baghai or Rabba allowing them to occupy the common elements without undertaking the process stipulated in the Condominium Act for a section 98 agreement. Even if there had been a permanent agreement, it would have been unenforceable against the corporation, absent the requisite unit owner approval. (The judgment does not specify what this would be, probably because evidence on the issue was not led at trial.)

In rejecting Baghai's position that the condominium corporation's conduct in demanding that Rabba remove its wares entirely from the common elements was oppressive, the Court points again to the absence of required procedure under the Condominium Act for permitting such use. Baghai could have no reasonable expectation that it had acquired the right to allow its tenant to use the common elements for display purposes, when these procedures were not followed.

#### **THE BAD NEWS**

The condominium corporation spent \$200,000 on the court proceedings. This was a compliance application, so ss. 134(5) of the Condominium Act entitled the corporation to court costs and additional actual costs incurred. The corporation asked for complete indemnity for all of the costs it had incurred.

While accepting the argument that ss 134(5) applied to the compliance proceeding, the Court ruled that it maintains a discretion,

even when ordering full indemnity costs under ss 134(5), "to determine what amount of costs is fair and reasonable and to award no costs where appropriate". The Court describes some of the time spent by the corporation's litigation team as overkill. The Court also states that "the applicant could have avoided the incursion of much of the added expense and trouble...by trying to negotiate a practical resolution...or arbitrating the dispute, instead of embarking on a scorched earth campaign."

The Court awarded costs of \$100,000.

#### **LESSONS LEARNED**

This case offers some important reassurance, and some valuable lessons. First, in an ongoing relationship between the condominium corporation and owners or tenants, the fact that the corporation has not strictly enforced the Declaration, bylaws and rules for some time is not necessarily fatal to a demand for strict compliance.

Second, it is vital to seek legal advice early on in a problematic relationship. Had the corporation's legal counsel been involved in 2005 or 2007, appropriate steps could have been taken to create and enter into agreements which would have protected the corporation, and made the costly legal battle unnecessary. A carefully drafted agreement, with clear consequences for non-compliance might have kept Rabba under control, or at worst make non-compliance easy to identify and correct.

Third, however frustrating the management of a long-term relationship between the corporation and a third party may be, it is almost always better to try to find a negotiated resolution, rather than throwing down the gauntlet and heading to court. The result in this case appears to have been a soured relationship with the commercial owner and its tenant, and a heavy hit to the corporation's finances.



### **NEWSLETTER TIPS**

**One of the many positive aspects of creating new by-laws for your corporation is that the by-law can include provisions which allow the board of directors, acting reasonably, to prohibit persons who are in breach of the Act, declaration, by-laws or rules from using the facilities and/or other parts of the common elements. This is a valuable enforcement tool.**

### **CASE COMMENT**

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# **Hillview Park Condominium Corp 8120257 v Exit Realty Fort McMurray**

Hillview is a small residential condominium corporation in Fort McMurray. It was managed for many years by a small management company, Fort Management. When Fort was purchased by Exit Realty, Exit entered into a new contract with Hillview, but maintained the same staff and essentially took over the existing operations of Fort.

A year into the new relationship, Exit fired the staff servicing

Hillview. Hillview's board had a long term relationship with some of the staff, and felt the termination was unjust. As a result, Hillview's board decided to terminate Exit, and enter into a management contract with a newly formed company, operated by Exit's recently terminated employees.

The fallout from the termination was messy. Hillview demanded their records; Exit extracted payment of a full month's manage-

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ment fees, \$3,500, before turning over the records it held. Hillview paid under protest.

Hillview went through the records provided by Exit, and stated that some were missing. In addition, Hillview did not receive plans and drawings, a filing cabinet, and an electronic data base it had paid for during Fort's time as manager.

Hillview made several demands; Exit stated it had nothing more to turn over. Hillview paid its new manager \$7,500 to create a new data base from scratch, and commenced legal action, claiming the \$3,500 it had paid under protest, \$7,500 for recreating the data base, and the filing cabinet and drawings and plans.

Faced with legal action, Exit issued a counterclaim stating that under the terms of the management contract, it was entitled to 90 days' notice of termination.

Although the trial was completed in a day, the judge took 3 months to render his decision, no doubt in some part as a result of the unsatisfactory nature of the evidence. The witnesses for the condominium corporation were unable to say what records they did not have, nor when they had last had the plans and drawings they sought. Faced with this, and Exit's assertion

that they had nothing, the judge could not conclude that anything was missing.

As to the parties' obligations when their relationship ended, the judge did something that evidently no member of Hillview's board had done: he looked at the termination clause in the management contract. That document clearly stated: no electronic data base was to be returned; and: termination before the end of the contract required 90 days' notice.

For their pains, Hillview got back an empty filing cabinet, and an order to pay Exit an additional \$7,500 in management fees, plus court costs.

The lessons to be learned from this sad tale are obvious, but worth restating. The corporation's relationship with its management company is a vital one. The terms of that relationship must be carefully thought through. The Board should seek legal advice before signing the management company's form of contract. Just as importantly, before terminating this relationship, the Board should again seek legal advice. The termination must be planned. Wherever possible, it should be negotiated.



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