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Let's Talk Condo...

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AUDREY LOEB RECEIVES AWARD OF EXCELLENCE

Miller Thomson is pleased to announce that Audrey Loeb has been awarded the Ontario Bar Association's Real Property Section Award of Excellence for 2008. The award recognizes Audrey's exceptional contributions to the field of Real Property Law.

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Reminder:

When calculating arrears of common expenses, don't forget to add interest (which is normally compounded) to the rate specified in your corporation's by laws.

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TAKING CONTROL OF DELIVERING BAD NEWS

by
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When a Board of Directors decides that the time has come for a significant project – the type that can severely impact the reserve fund and/or require a substantial special assessment – breaking the news to the owners can seem like a daunting task. How does a Board take control of delivering this type of bad news?

As a first step, the Board of Directors should always gather as much information about the issue as possible to show why a decision was made. This will often mean hiring engineers or other professionals to prepare reports detailing the nature, scope, necessity and cost of the project.

The Board will want to thoroughly review the reports and meet with its experts, seeking clarification on the expert's important findings and recommendations so that the Board becomes knowledgeable about the key aspects of the proposed work. It should strive to foresee any questions that may arise from its announcement of the proposed work and have answers prepared. For example, what is the time-line for the work? Why is it necessary to do the work now? How is the work going to affect the day-to-day activities of the residents and are there any solutions for dealing with this?

After the information gathering stage is complete, it is the Board's role to distill the information and present it to the owners in a clear and credible manner. We recommend that "bad news" be delivered in the form of a presentation by the Board to its owners, for example, at the annual general meeting or an owners' information meeting.

There should be a structure to the presentation. It should be interesting and engaging. Ideally, more than one Board Member should be prepared to

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speak. This can help apportion the workload. It can also demonstrate that this is a Board that works well together.

The Board should have its expert(s) attend at the meeting and encourage them to participate actively. The experts should prepare their own presentations which might incorporate charts, slide presentations, or any other medium that can help simplify complex issues. Experts will also be helpful in answering "from-the-floor" questions that are outside the understanding of the Board Members. This is much more effective than telling an owner "we don't know" or "we'll get back to you".

While all of this may seem like a great deal of work, the Board should remember that giving half of the story unsettles owners, is rarely effective and does not inspire confidence in the Board. A well planned presentation, on the other hand, accomplishes a number of things. It educates the Board, it informs the owners and, as a matter of perception, it shows a Board that is willing to take control of difficult matters.

RENOVATIONS: COMPETITIVE BIDDING

by
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A condominium corporation considering entry into a contract for renovation or construction work has a number of important things to consider and issues to resolve, including financing, acquisition and design. And, once these (and other) issues are resolved and settled, and once the design process is complete and you are ready to start the actual renovation or construction work, there is one more very important thing which must be decided: who will do the work?

The selection of a contractor is one of the most important decisions in the process. To do so, condominium corporations may use a bid process.

A bid (also called a tender) process is a means whereby an owner can obtain competitive bids for a particular project with a view to securing the lowest or best possible price. This bid process, however, often results in a contract – a contract separate and apart from the contract which the owner will sign with the successful bidder for the work.

In 1981 the Supreme Court of Canada decided a bidding case called *R. v. Ron Engineering & Construction (Eastern) Ltd.* and, in doing so, completely changed the rules for competitive bidding in Canada. Prior to *Ron Engineering* the bid process was made up of an offer (the bid) made by a contractor to do the work required by the owner. When the owner accepted a bid, a contract for the construction work was created.

In *Ron Engineering*, the Supreme Court of Canada took an entirely different view of the bid process. The Court held that the process leading up to the construction contract was made up of two separate contracts, which the Court called "Contract A" and "Contract B". The Court explained that an owner's invitation to bid (a bid call) represents, in law, an offer by the owner to consider the bids it receives and to enter into a contract to complete the project where a bid is accepted. So, when a bidder responds to the bid call by submitting a compliant bid, this represents acceptance of the owner's offer, at which point a contract is formed – the Court called it "Contract A". This contract is now commonly referred to as a "bid contract" and is separate and distinct from the construction contract to be awarded to the successful bidder (which the Court called "Contract B").

Both parties to a "bid contract" have contractual obligations to each other. These obligations are specified in the bid documents, and also include additional obligations which have been read into the "bid contract" by the Courts. For example, one such obligation is an owner's obligation to conduct the evaluation of the bids and to award the project only in accordance with the terms of the "bid contract". Another implied obligation is an owner's duty to treat all bids fairly and equally.

Because the "bid contract" is a real contract, if either party breaches it they can be liable to the other for breach of contract damages, which can be substantial.

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In the case of an owner, if it breaches the "bid contract" and awards the project to the wrong bidder, it could be liable to pay the "entitled" bidder the profit that bidder would have earned had it been awarded the project.

Bidders also have obligations, including an obligation to sign the contract for the project if it is awarded.

The law on bidding has continued to evolve. For a condominium corporation considering a construction project it is therefore critical to ensure that the bid process is well understood and, most importantly, is properly and correctly reflected in the bid and contract documents. To avoid problems and potential litigation – before the project even begins – consider having a lawyer review or revise the bid documents. In fact, since the bid documents could result in a "bid contract", consider treating them like any other contract and having them drafted or reviewed by a lawyer.

OFF TO COURT? NOT SO FAST!

by
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Since May 2001, when the *Condominium Act 1998* (the Act) came into force, compliance matters must go through mediation and arbitration before a court application can be brought — if mediation and arbitration are available. Section 132 of the Act states that where a disagreement arises between a unit owner and the corporation with respect to the declaration, by laws or rules, these avenues must be exhausted, before a court application is brought.

While it is sensible to try to resolve disputes privately where there is a long term relationship (as there often is between an owner and the condominium corporation), the time and cost involved in taking these extra steps has often led us, as counsel for the corporation, to try to find a way to take a non-compliant unit owner straight to court. [Note that the mediation and arbitration requirements do not apply to a tenant.]

Since mandatory mediation and arbitration do NOT apply where the *Condominium Act* has been breached (as opposed to the declaration, by laws or rules of the corporation) we have successfully added to the request for compliance a request for declaratory relief under section 135 (the oppression remedy) or section 117 (dangerous activities).This allowed us to apply directly to court.

In addition, where the unit owner has not responded to requests for compliance, we have taken the position that there is no "disagreement" with respect to the declaration by laws or rules, but rather simple non-compliance, and applied directly to the court for an order.

In a recent case, Justice Patillo of the Ontario Superior Court of Justice has ruled strongly against such a practice. In a case called *MTCC 1143 v. Peng*, the facts were that a unit owner who kept unusually late hours consistently disturbed his neighbours below, both of whom had very demanding daytime jobs. The complainants alleged that their sleep was continually disrupted by Mr. Peng's stomping, moving furniture, opening and closing doors, and running the shower or the clothes or dishwasher in the dead of night. First the corporation, and then counsel for the corporation, wrote to Mr. Peng numerous times, without effect.

Counsel wrote asking Mr. Peng to submit the dispute to mediation, there was no reply. Counsel wrote stating that the complaint should therefore be submitted to arbitration. Again, there was no reply. Eventually, a court application was commenced, on the theory that there was no "disagreement". However, when the court materials were served on Mr. Peng, he retained counsel who stated that the matter should be arbitrated.

Notwithstanding the long history of non-response, Patillo J. agreed with Mr. Peng's counsel, and dismissed the application. He stated that while the corporation could not force Mr. Peng to mediate, it could pursue arbitration, even without Mr. Peng's cooperation. This

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is what the corporation should have done, he ruled. The corporation should have proposed an arbitrator, and when Mr. Peng did not respond, have selected the arbitrator and proceeded with a hearing. The arbitrator was entitled to make an award, notwithstanding Mr Peng's non-participation. Only then could the court be applied to for an order, which would allow the corporation to enforce the award.

Not having done so, the corporation was not entitled to apply to the court,

This ruling will undoubtedly increase the time and cost involved in obtaining an enforceable order for compliance. Happily, since all of the costs are collectible from the unit owner in the same manner as common expenses once the court has made an order which includes payment of costs [s. 134(5) of the Act] it is ultimately the non-compliant unit owner who will bear the increased cost.

Does this decision mean that the corporation can never go to court against an unresponsive unit owner? No, it does not. Section 7 of The *Arbitration Act*, 1991, allows a judge to refuse to stay a legal proceeding, if the proceeding is not opposed (i.e. a default proceeding) or if the facts are so clear and obvious that the matter can be decided on a summary basis.

But undoubtedly, caution would dictate going to arbitration instead, even in the case of a non-responsive owner. If we don't, we are taking the risk that the unit owner may wake up at any time, appear in court, and attempt to scupper the process.

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