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The Status of Electronic Status Certificates

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At a recent ACMO luncheon, a comment was made to the legal panel questioning whether Electronic Status Certificates were legal. There has been much misinformation circulated lately about this topic. GMA was recently asked to give an opinion on the legality of delivering Status Certificates electronically as well as the legality of contractors charging a fee for this. The following is a summary of our findings.

The Legality of Electronic Status Certificates

- The Electronic Commerce Act, 2000 allows for documents and information to be available in electronic form which would be equiva-

lent to the same document or information in writing, provided certain requirements are met.

- The Electronic Status Certificate should be organized in the same or substantially the same way as Form 13 provided in the regulations under the Condominium Act, 1998 (the "Act").

- The Electronic Status Certificate should be accessible so as to be usable for subsequent reference and capable of being retained. An Electronic Status Certificate in PDF form, for example, could be retained in an email or on a hard drive or a USB key and would be accessible to the recipient for subsequent reference.

- Form 13 requires that a Status Certificate be signed by two individuals on behalf of the Condominium Corporation. The Electronic Status

Certificate can be signed using an "electronic signature" which is "electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document". The electronic signature should be reliable for the purpose of identifying the person signing, and its association with the Electronic Status Certificate should be reliable as well. Two examples of electronic signatures in common practice are the signatory's name in a regular word processing font accompanied by the words "electronically signed" and a scanned electronic graphic of the person's actual written signature.

- Form 13 also requires that there be a seal or a statement

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Access to List of Owners Refused

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



A recent precedent case has finally clarified that condominium corporations need not disclose their record of owners' names and addresses to owners who request that information.

The case, *Lahrkamp v. MTCC 932*, also clarifies whether owners must provide a reason for each requested record and offers scenarios when a corporation can have a reasonable excuse to refrain from providing records.

The plaintiff Michael Lahrkamp, a unit owner in Metropolitan Toronto Condominium Corporation No. 932 ("MTCC 932"), sought damages of \$500 based on the failure of the condominium corporation to provide certain records he requested. The judge held that the request for the list of owners was properly denied by the corporation because subclause 55 (4) (c) of the *Condominium Act, 1998* (the "Act") as a general rule exempts the right to exam-

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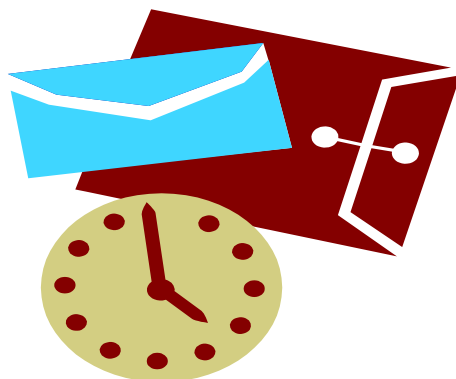
Status Certificates, cont'd from page 1...

saying that the persons signing have the authority to bind the corporation. Currently, the Electronic Commerce Act has no specific requirements for an electronic equivalent of a seal. So, for example, the word seal inside a circle printed near the electronic signatures would be sufficient. Alternatively, a statement printed that the persons signing have authority to bind the Corporation would also satisfy the requirement in Form 13.

- An Electronic Status Certificate that meets the above requirements would be valid and enforceable just as a Status Certificate in paper form.

Charging a Fee for the Delivery of the Electronic Status Certificates

- The Act and its regulations provide that the Condominium Corporation may charge up to \$100 for providing the Status Certificate. The Act and the regulations do not prohibit other service providers and intermediaries between the purchaser and the Condominium Corporation charging a fee for delivering the Status Certificate. The Act and the regulations are silent on any additional fees that Condominium Corporations or other parties may (or may not) charge for services provided in connection with providing the Status Certificate.
- The fee charged by a third party service provider for delivering an Electronic Status Certificate is a fee for additional services in relation to the Corporation providing the Status Certificate. A comparison would be an agent or courier charging pickup/delivery fees for its services to collect and deliver a paper Status Certificate from the Condominium Corporation to the purchaser.
- The Electronic Status Certificate delivery charge is not a mandatory fee that is charged by the Condominium Corporation. It is not a fee for the production of the Status Certificate



itself but a service charge for the convenience and advantage of being able to request, pay online and receive the Status Certificate in electronic form.

- Purchasers, agents and lawyers can still insist on a paper Status Certificate and pay for and receive it in the traditional fashion by simply paying the \$100 pursuant to the Act. They cannot be compelled to buy the Electronic Status Certificate and pay the delivery fee.

For these reasons, it is our view that a delivery charge for the Electronic Status Certificate over and above the \$100 charged by the Condominium Corporation is a valid fee that does not contravene the Act or its regulations.

In an age where most everyday transactions can be conducted electronically, Electronic Status Certificates certainly make a lot of sense.

In a 2009 issue of Condo Alert!, we wrote a brief article introducing one of our condo industry clients D-Tech Consulting Inc., and reporting its release of the first ever fully electronic Status Certificate delivery system. D-Tech Consulting Inc. is a Toronto-based provider of IT services whose Conduit division is the innovator that has brought us the E-Status Certificate. For a fee Conduit will deliver the Status Certificate electronically from the Condominium Corporation to the agent, purchaser and purchaser's lawyer in the blink of an eye. No more couriers, driving around or wasting time - Just a nominal fee to receive the Status Certificate conveniently in your e-mail. Conduit is now available on Teranet's GeoWarehouse which has made ordering certificates accessible to all real estate agents in the GTA and beyond. The legality of such a service is sound and the convenience cannot be denied.

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Access, cont'd from page 1...

ine records relating to specific units or owners. The plaintiff's reason for wanting the list was described as a need to communicate with others. The judge also noted that the reason provided was clearly too vague and infringed on the privacy rights of the communal owners.

Since access to the corporation's record of owners has been such a contentious issue in the past, GMA has developed a system which allows the corporation to control circulation of a unit owner's information to other owners, whether in the case of a requisition petition or otherwise. This system precludes defamatory and misleading statements, as well as circulation of commercial information which is not necessary for the purposes of the Act. That topic and other criteria applicable to confidentiality, privacy and other issues are included as enhancements in GMA's Condo Privacy Policy.

The condominium corporation claimed that Mr. Lahrkamp was obligated to provide a reason for each requested record, but the judge disagreed that every request for documents must be accompanied by reasons for the request. Section 55 (3) of the Act provides that certain persons can request records "for all purposes reasonably related to the purposes of this Act". The judge pointed out that the reason for the request "may be self-evident from the surrounding facts, or may be reasonably inferred from the nature of the record requested. The right of a corporation to refuse records may be appropriate where the actual motivation behind the request is being challenged, or the burden and expense to the corporation is in issue. To create a universal rule to apply to every conceivable request is impossible. It is necessary to look at the facts surrounding each request to determine whether the condominium corporation had a reasonable excuse in not providing the records for examination." As a result, the judge examined each record request separately.

The judge held that Mr. Lahrkamp's request for the front lobby expenditures, letters of representation and 2006 General Ledger could clearly involve a significant burden and expense to the condo-

minium corporation. Mr. Lahrkamp did not provide a reason for requesting those documents. Apparently Mr. Lahrkamp wanted to satisfy himself beyond standard auditing procedures. He was deemed to be on a pure "fishing expedition" without a shred of evidence to support his suspicion of impropriety with respect to those expenditures. "The weak basis for the requested records together with the burden on the defendant (the condominium corporation), both in time and money, allows me to conclude that the defendant had reasonable excuse not to provide the aforementioned named records", the judge noted.

The judge also held that the corporation had a reasonable excuse to deny records relating to Mr. Lahrkamp's own residence from 2003, on the basis that a general search would have been expensive and too time consuming for the corporation.

The judge allowed Mr. Lahrkamp to review the proxies and ballots used at the 2009 and 2010 AGMs and rejected the condominium corporation's argument that Mr. Lahrkamp was a litigious person and that the corporation should be entitled to rely upon litigation privilege, as being one of the exemptions set out in sub-clause 55 (4) (b) of the Act which would prohibit an owner from reviewing records which could be subject to litigation. The only evidence was that Mr. Lahrkamp had said that he wanted the proxies and ballots "for validation of election results", but that statement alone did not allow the judge to conclude that litigation was likely to ensue. Mr. Lahrkamp had been a candidate as a director and had a legitimate interest in seeing the results of the election vote. The judge also refused to accept the corporation's argument that Mr. Lahrkamp had waived his right to examine the proxies after he was given the opportunity at the AGM to review them in a separate room which would have caused him to miss portions of the AGM.

Mr. Lahrkamp was deemed to be entitled to obtain a copy of a notice to the owners pertaining to a rule regarding a restriction on dogs. Subsection 58 (6) of the Act requires notice of a rule to be given to

owners. "Accordingly, the entitlement of the plaintiff to such a record is an example of a request where a reason should not initially have to accompany the request." In this case, the corporation had been unable to satisfy Mr. Lahrkamp of the existence of notice of the rule having been given to the owners, in a situation where there were two differently-worded rules. The corporation was unable to provide a reasonable excuse for not providing the records of the house rules to the plaintiff.

The judge also held that the corporation was obligated to provide minutes of board meetings from December, 2007 to the present to Mr. Lahrkamp. The judge explained that "The availability of minutes of the Board meetings seems so fundamental to the rights of the individual unit owners, that I see no basis initially that a reason should be provided. If the corporation claims to have a reasonable excuse not to provide these records, then they must establish a foundation to refuse the request (e.g. communal rights are being infringed, or a statutory exemption applies)."

The judge pointed out that "each side must be prepared to have a rational, open and sympathetic dialogue of their respective potential competing interests. Without such a dialogue, avoidance of a court application is likely to be remote." The judge awarded judgment to Mr. Lahrkamp for \$500 plus court costs of \$175 and pre-judgment interest. The corporation was required to produce the proxies and ballots, the minutes of the board meetings and the notices of house rules.

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Let us sort it out.



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