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Condo Alert!

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Remembering Tendering!

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

A good indication that the law on a particular area is working well is when a system works so smoothly, you forget that the law is even there. The law of tendering is a good example of this. Using basic contract law principles, the Supreme Court of Canada has created an effective system for tendering (*R. (Ont.) v. Ron Engineering*; *M.J.B. Enterprises Ltd. v. Defence Construction* (MJB Enterprises); and *Martel Building Ltd. v. Canada*, (Martel Building)). And, this law is worth remembering because if you do, you can make it work well for your condominium corporation.

Tendering, or procurement as it is also called, is a practice where a buyer invites multiple sellers to submit offers for a good or service. The idea is to have each seller compete with one another to submit the best offer (or bid). The buyer then chooses which offer suits its needs. It is very common for governments, public agencies and large businesses to tender. And the law of tendering has evolved accordingly. In the condominium world, we often see condominium corporations sending large construction work to tender.

Tendering law consists of two contracts – Contract A and Contract B – which work together to ensure that the participants in a tendering process are accountable to each other. Contract A is an agreement between the buyer and each contractor (as a seller) submitting a bid. Contract A's terms are in the instruction to bidder found in the Request for Proposal or Invitation to Bid prepared by the buyer. The buyer promises to set up the bidding process and consider bids. In turn each contractor agrees to accept the tendering process terms and to submit a bid that conforms to the requirements in the Instructions to Bidder.

Contract B is the actual contract between the buyer and the contractor selected at the end of the bidding process. For example, for a lobby renovation Contract B would be the construction contract (be it CCDC-2 or in some other form). Contract B would contain the work specifications, the price, the payment terms, the work timeline and all other items normally found in a service contract.

The whole tendering process is very competitive. Every so often, a losing bidder will scrutinize the Instructions to Bid and sue both the buyer and winning contractor over a perceived breach. As a result of such cases, a number of legal issues and principles concerning the interpretation and implementation of Contract A have emerged. For example:

- Contract A does not arise in every case. It all depends on whether the tendering instructions show that the parties intended to create a binding contractual relationship. (The Ontario Court of Appeal does a great analysis of this principle in *Toronto Transit Commission v. Gottardo Construction Limited)*

- When Contract A does form, its terms are encapsulated in the tendering instructions prepared by the buyer. The terms are binding on both the buyer and contractor. Typical terms will address issues like withdrawing or amending a bid, deposit requirements, and when the contractor is deemed to have forfeited that deposit to the buyer. It is also a very good idea to include a "privilege clause", which provides that the lowest bid will not necessarily be accepted.

- Courts may imply terms into Contract A, but they tread carefully. Judges are not in the business of rewriting contracts. For a court to imply a term, it has to be so obvious that without it the entire tendering process simply could not work. In legalese, the implied term must give "business efficacy" to Contract A (para. 27 of MJB Enterprises).

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In the past, Courts have been willing to imply the following terms into Contract A:

- The buyer shall only accept a bid that complies with the tender instructions (para. 30 of MJB Enterprises. The implied principle fairness is so deeply embedded that it can override the buyers exclusion or liability limitation clause in the instructions to bidder, like in *Tercon Contractors Ltd. v. British Columbia*).

- The buyer is under a duty to treat all bidders equally. The buyer must be fair and consistent in assessing the bids with due regard for the terms in the tendering instructions (para. 88 of Martel Building).

The law of tendering is designed to use contractual liability to hold both buyers and contractors accountable to one another. It puts an onus on the buyer to set up a fair and equal tendering process, and it requires the buyer to follow its own rules. It also puts an onus on the contractors to review the tendering instructions and submit compliant bids. If done right, the result is a cost-effective, first class contractor chosen through a process that is both efficient and impartial.

The law of tendering provides helpful insight to condominium boards who want to tender their projects. A condominium board should consult their lawyers, engineers and property managers to determine what their tendering process should look like, depending on the size and scope of the work. For a small project, like a minor plumbing job or a snow-plough contract, it is likely sufficient to simply call on a trusted contractor with whom the condominium corporation has enjoyed a long relationship. For bigger jobs, such as a multi-million dollar lobby or garage renovation, it makes sense for the Board to provide detailed instructions to bidders in the form of Contract A and undergo a proper tendering process that results in a sophisticated final Contract B.

Whenever a Board decides to tender a contract, it should remember that the law of tendering is operating in the background. It is a good system – so good that it is easy to forget that the law is there. That is why it is really important to understand these tendering principles. Not only does understanding make it easy to remember, it also gives Board the ability to make the system work for the corporation. This can result in better quality work at less cost, and that is something that everyone will remember.

Hoarding in condo units: Aftermath of 200 Wellesley fire

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Condominium corporations now have another option for addressing the difficult and uncomfortable subject of hoarding in multi-unit residential buildings.

In July, Ontario's Office of the Fire Marshall (OFM) released its report on a large fire at an apartment building at 200 Wellesley Street, Toronto in September 2010. Fighting this blaze was especially difficult because the unit at issue was occupied by a hoarder and jam-packed with junk. The fire forced the evacuation of 1,200 people, some for many weeks, and injured 17.

Because hoarding was a deep-rooted problem at this particular address, the 200 Wellesley fire brought the dangers of hoarding into the public spotlight. The Toronto Star reports that fire crews mopping up found another 15 units in the same complex with hoarding problems, and that another hoarder's unit had gone up in flames a year earlier.

In its report, the OFM laid the blame on a tossed cigarette landing on a balcony full of combustible materials but focused on the inherent dangers of hoarding, saying:

> The tremendous growth and spread of the fire was a result of the excessive amount of combustible materials stored on the balcony and in the suite of origin. Therefore, the OFM is urging landlords and property owners to inform local fire departments of instances of hoarding where they believe it poses a fire safety risk. Local fire departments can help to address these instances of hoarding through the Ontario Fire Code and their partnerships with other community mental health and supporting agencies.

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> In the context of this large multi-unit dwelling, the intensity of the fire hampered firefighting efforts of Toronto Fire Services and created a significant risk to first responders and those attempting to evacuate the building. This was due to the excessive amount of materials stored on the balcony, which well exceeded the height of the safety railing, and combustible materials that were stored at a significant depth throughout the apartment. Given the amount of these combustible materials, the dwelling was no longer being used for its intended purpose and could have physically trapped an individual inside.

In a further quote, the OFM said:

Ontarians are urged to contact their local fire departments if they are aware of dwellings where an excessive amount of combustible materials are present that may pose a fire safety risk.

For condo corporations, this report and advice to call local authorities brings welcome news. Rather than expend time and effort proving in a court of law that an occupant is a hoarder creating an unsafe condition, a simpler option may be to follow the OFM's invitation to lodge a complaint with the local fire department. If the fire department is satisfied that the situation is unsafe, it can order the unit owner to alleviate the dangerous situation. Regardless of whether the problem is solved with an order, the fire department can also lay charges under the *Fire Protection and Prevention Act*.

Enlisting the local fire department to deal with a hoarder may at first seem like a slam dunk for condos, but three uncertainties remain:

1. Will the fire department actually investigate a complaint and give an order?
2. Could the order require the condo to do the work for the unit owner or make the condo and its board liable to face charges?
3. Could the fire department find additional violations around the building and issue orders or lay charges against the condo for these other problems?

These three questions should be considered before making a complaint about hoarding in a condo unit. Here's why:

First: Will the fire department investigate?

It is a well-known fact that most city agencies shy away from problems in condominium buildings, citing that the condo corporation is responsible for dealing with most issues. For this reason, property managers and condo boards are rightly skeptical about whether local fire departments will actually do anything in response to reports of hoarding in condominium units. Only time will tell, but we would think that municipalities may be subject to lawsuits for damages where fire departments fail to respond appropriately to cogent, written reports of hoarding and demonstrable fire safety risks. The OFM report is convincing evidence that fire departments have a duty to act when given reliable information of a problem.

Second: Could the fire department name the condo in the work order?

Given the established practices of most city departments, it is fair to assume that the fire department will order not only the unit owner, but also the condominium corporation and even the management company to rectify a hoarding situation. This "shotgun approach" to municipal by-law enforcement is common, and involves naming every person in sight, even where it's incorrect to do so. City officials typically fail to appreciate that while the condominium and its manager have the legal right to undertake work in a unit (as per Condominium Act, 1998, section 92), that work cannot practically be done without the owner's cooperation or a court order. Regardless, if the condo or manager is named in the work order, those parties are liable to be charged if the required work is not performed. Realistically, then, condo boards should not make complaints about hoarding unless they are ready to undertake the necessary work. Boards might try to minimize the chance of being named in the order by including in their written complaints the applicable provisions in their declaration that allocate the respective obligations of the corporation and owners when it comes to maintenance and repair of units. The better approach is to be prepared to be named as a party in the work order and to get the lawyers involved to get access to the unit to perform the work.

Third: Might additional violations be found?

It is common for a complaint to the city about an owner's infraction of a local ordinance to give rise to work orders or charges against the condo and sometimes its manager for unrelated violations observed by the inspector. The inspector will write up any and all violations in sight, even those unrelated to the complaint. For this reason, condo boards should make sure that all aspects of their fire safety systems and plans in relation to the common elements are in top shape before making a complaint of hoarding in a unit.

Once these three issues are considered, filing a report with the local fire department may be an effective way to start dealing with known hoarding situations. To maximize the odds of it being favourably received by the fire department, have the draft report reviewed for completeness by your condo's lawyer. Additionally, given that mental health issues are sometimes at play in hoarding situations, obtaining legal advice at an early stage will increase the odds of obtaining a more predictable and economical positive result.

Human Rights and the "Health and Safety" Defence

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A condominium faced with defending a human rights complaint is usually defending alleged discrimination by the Board or the operation of the Declaration, By-laws or Rules. Occasionally, condominium rules have been challenged under human rights laws because they allegedly discriminate on the basis of family status with respect to unit owner use of recreation facilities. A defence often put forward is that of "health and safety" . A condominium may succeed in that defence if it can show that without the rule or restriction it would face undue hardship, considering cost, outside sources of funding and health and safety requirements.

In 1998, the Ontario Board of Inquiry (now the Human Rights Tribunal of Ontario ("Tribunal")) made the following comment in *Leonis v. MTCC 741* ("*Leonis*"), a case about an age-based restriction in the use of the condominium's amenities:

"I am also concerned that not all Children are at the same stage developmentally such that they should have unrestricted access to all of the Centre's amenities. Some differentiation between Children based on their age or size, or whether or not they are toilet trained, may be advisable. I was, however, not provided with an evidentiary basis for proscribing Children's use of the amenities on this basis."

In the 2011 Tribunal decision in *Pantoliano v. MTCC 570 and YCC 531 ("Pantoliano")*, a shared facilities rule prohibiting children under two years of age and persons requiring diapers from using the whirlpool and swimming pool was challenged on the basis of family status. The mother of a diapered infant was asked to leave the swimming pool. She subsequently filed a complaint of discrimination on the basis of family status.

Using the guideline from *Leonis* as a starting point and supplementing that with various guidelines from health organizations, the condominiums submitted a health and safety defence. They hired individuals from the medical field to present evidence on water-bourne illnesses, developmental milestones in children based on their age, risk to the community of a water-bourne infection and specifically the risk to the mostly senior population living in the complex from a health and safety perspective. Although the Tribunal refused to accept the health and safety defence and found that the condominiums had discriminated against the mother, the case provides insight into the Tribunal's analysis which should be considered when bringing on a health and safety defence.

In assessing risk, the Tribunal looked to its *Policy and Guidelines on Disability and the Duty to Accommodate*:

> In determining the serious or significance of a risk, the following factors should be considered:
>
> - the nature of the risk - what could happen that would be harmful?
> - the severity of the risk - how serious would the harm be if it occurred?
> - the probability of the risk - how likely is it that the potential harm will actually occur? is it a real risk, or merely hypothetical or speculative? could it occur frequently?
> - the scope of the risk - who will be affected by the event if it occurs?
>
> The seriousness of the risk is to be determined after accommodation and on the assumption that suitable precautions have been taken to reduce the risk.

Furthermore, on the basis of two Supreme Court decisions, the Tribunal looked at the health and safety goal of the condominiums in having the incontinence rule and whether their goal was "absolute" health and safety, to show no concern with respect to health and safety or "reasonable" health and safety.

The Tribunal recognized that the condominiums were pool operators, and governed by Reg. 565 of the *Health Protection and Promotion Act*, which requires that every owner and operator ensure that pool water is free from contamination that may be injurious to the health of bathers (Subsection 7(1)). However, the Tribunal opined that while Reg. 565 requires swimmers to take cleansing showers and the pool operators to post signs prohibiting people from polluting the water, it does not mandate that pool operators must ban diaper-aged children from their facilities.

Based on the above, the Tribunal found that: there was no clear health and safety goal with respect to the health and safety of the residents and guests who might use the pool facilities; there was no protocol in place for reducing pool-fouling incidents and the use of facilities was self-regulated; because the condominiums had newsletters and notices, it would be easy to educate residents about pool hygiene; when the pool rule was challenged, the condominiums did not undertake a scientific study to determine whether the prohibition was justified.

The Tribunal inferred that the condominiums did not aspire to a goal of absolute safety in their swimming pools and that the goal of eliminating all risk was not realistic given that compliance with rules is imperfect and accidents do happen. The overall goal of the condominiums was inferred by the Tribunal to be reasonable health and safety, i.e. the condominium operated on the principle that some risk is acceptable. Finally, the Tribunal found that the needs of families with children in diapers *could* be accommodated without undue hardship on the condominium. It held that the burden on the condominiums to establish that a total ban on children in diapers was reasonable and *bona fide* was not met.

We've come a long way since *Leonis*. The Tribunal's analysis in *Pantoliano* shows the burden that condominiums will face when asserting a health and safety defence. It is important that condominiums periodically review any restrictions in their governing documents which might be grounds for discrimination. Otherwise they should be prepared for scrutiny if the restriction ever comes before the Tribunal.