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Fogler, Rubinoff LLP, Barristers & Solicitors

CONDO COMMENTARY

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Fogler, Rubinoff LLP

Your Business Law Firm

Accessibility Standards

By David Thiel, B.A., LL.B.

Condominium corporations, management companies and other participants in the condominium industry should be aware that, beginning January 1, 2012, provincial regulations will come into force concerning accessibility standards for customer service.

Under the *Accessibility for Ontarians with Disabilities Act, 2005* (the "AODA") , regulations entitled "Accessibility Standards for Customer Service" (the "Accessibility Standards") were enacted requiring providers of goods or services to the public or other third parties, having at least one employee in Ontario, to comply with certain standards to make such goods or services to be accessible to persons with disabilities.

The Accessibility Standards have been in effect for designated public sector organizations such as municipalities, school boards and other government agencies since January of 2010. The Accessibility Standards are part of a larger framework of

requirements to be enacted by the provincial government in the future to promote accessibility, in recognition of the growing population of persons with disabilities. The goal of the provincial government is to make Ontario completely accessible for persons with disabilities by January 2025.

David Thiel, Partner
Condo Group

Beginning January 1, 2012, private sector providers with at least one employee will be required under the Accessibility Standards to:

- establish policies, practices and procedures governing the provision of goods and services to persons with disabilities
- use reasonable efforts to ensure that its policies, practices and procedures are consistent with the following principles:
  - Goods and services must be provided in a manner that respects the dignity and independence of persons with disabilities
  - Provision of goods or services to persons with disabilities must be integrated unless an alternate measure is necessary
  - Persons with disabilities must be given opportunity equal to

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that given to others to obtain, use and benefit from the goods or services

- Policies must deal with the use of assistive devices by persons with disabilities to obtain use or benefit from the goods or services

- communicate with persons with disabilities in a manner that takes into account the disability
- ensure persons using the premises are permitted to enter with a service animal, or that other measures are available to such persons if the service animal is otherwise excluded by law
- if a person with a disability is accompanied by a support person, ensure both persons are permitted to enter the premises together
- provide notification in a reasonable manner of any disruption to facilities or services which are usually used by persons with disabilities
- ensure that persons dealing with members of the public or other third parties have received training about the provision of goods and services to persons with disabilities
- establish a process for receiving and responding to feedback about the manner in which it provides goods or services to persons with disabilities.

Examples of policies, practices and procedures for condominium corporations with respect to persons with disabilities may include, depending upon the circumstances:

- Preparing notices of meetings or other documents in large print or Braille
- Installing Braille or tactile signage for elevators or other building areas
- Using assistive devices such as TTY

Employers with at least twenty (20) employees face additional requirements primarily concerning documenting the aforementioned procedures. In any event, we would suggest that smaller employers such as typical condominium corporations should, as a matter of prudent practice, document their steps to comply with the Accessibility Standards in case there is an issue concerning compliance.

In this regard, it is important to note that there could be substantial administrative penalties in the event of non-compliance with the AODA or the Accessibility Standards.

In light of the coming-into-force of the Accessibility Standards on January 1, 2012, condominium corporations and property managers should be planning and taking steps to comply in the very near future.

The condo commentary is published periodically by Fogler, Rubinoff LLP to provide information to clients.

Shared Facilities Agreements: so who's in charge?

By Lou Natale, BA, LL.B.

Lou Natale, Partner
Condo Group
and Real Estate

One of the most contentious and problematic area of concern within the condominium industry today relates to the management, operation and governance of shared facilities. Speak to any condominium lawyer or property manager and they will likely agree.

Disputes between condominium corporations relating to shared facilities can cause serious division and clashes not only between the representatives on the shared committee (the "Committee") but also among the members of the Board of Directors of the sister Corporations. Unfortunately, the residents are almost always dragged into these disputes as unwilling participants. Many times these disputes are no different than the typical problems encountered within individual Boards where there are personality clashes or strong differences of opinions on fiscal matters and priorities. The big difference with disputes involving shared facilities is that these disputes are much more difficult and cumbersome to resolve simply because there are multiple Boards and Corporations involved in the dispute resolution process.

One of the main reasons that these disputes arise in the first place and are so difficult to resolve is a direct result of the utter lack of legislative requirements and regulations governing shared facilities agreements (also know as "reciprocal", "mutual use" or "cost-sharing" agreements). Surprisingly, the *Condominium Act* barely recognizes the existence of shared facilities. In fact, the phrase "shared facilities" is used only once in the entire *Act*. As a result, the actual shared facilities agreement, and not the *Act*, plays a significant role in determining the framework and relationship between the sister Corporations. This is made more problematic because the shared facilities agreements are drafted and implemented in most cases by the developers and their lawyers well before the condominiums are even constructed.

Although many shared facilities agreements look the same, there can be some significant differences in the way in which these agreements are structured and the degree of authority and duties delegated to the members of the shared committee . Some versions of these agreements provide the Committee with full responsibility to make all decisions relating to the maintenance, repair and operation of the shared facilities, and in which case, the Boards of each sister Corporation must comply with those decisions. In other versions of these agreements, the Committees simply acts as an advisory or "liaison" committee where all "recommendations" of the Committee must first be ratified by each Corporation before being implemented. In other words, each Board has a "veto" on all decisions thereby requiring unanimity among sister Corporations. In my view, these types of shared facilities agreements are a recipe for big problems, especially in cases where the "veto power" is used by one Board to control or frustrate the Committee.

In the 2006 decision of *Ruperts Landing (SCC No. 78 v. SCC No. 50, et. al.)*, the Ontario Superior Court upheld the findings of an Arbitrator and confirmed the validity of a shared facilities agreement which gave the Committee the full power and responsibility to make decisions relating to the shared facilities based on a majority vote of the Committee members. In the case of Ruperts Landing, there are eight Corporations sharing a number of facilities. SCC No. 78 was unsuccessful in arguing that the framework of the *Act* did not permit the shared facilities agreement to "delegate" to the Committee the decision-making authority of each Board and that all decisions of the Committee must be ratified by each Board of the sister Corporations.

The Judge in the *Ruperts Landing case* agreed with the Arbitrator who stated in his decision that "requiring the unanimous approval of the Board of Directors of all eight corporations to make decisions regarding the Shared Facilities would create an unworkable, if not chaotic environment" and that it would be wrong, in this case, to allow one Board to have the "veto power over the rest of the Ruperts Landing Community".

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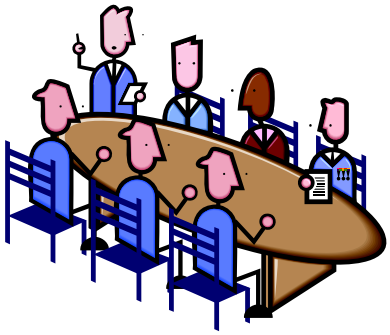
There is no doubt that in those cases where shared facilities agreements refer to "liaison committees" who merely make "recommendations", that there is a much greater possibility for disputes to arise between sister Corporations. Although unanimous consensus among Corporations who share facilities is a most desirable result, the reality is that not all issues can be decided through a unanimous vote. Furthermore, it is unclear how the arbitration process can be effectively used to resolve a "dispute" between Corporations if the terms of the agreement allows each Board to choose whether or not to ratify the recommendations of the "liaison committee". What happens if one Board chooses for its own good reason not to ratify a "recommendation"? Is an arbitrator expected or able to second guess the Board?

One thing is for sure, and that is until the *Act* is amended to include some base requirements and framework for shared facilities agreements, lawyers will continue to be busy handling disputes involving shared facilities.



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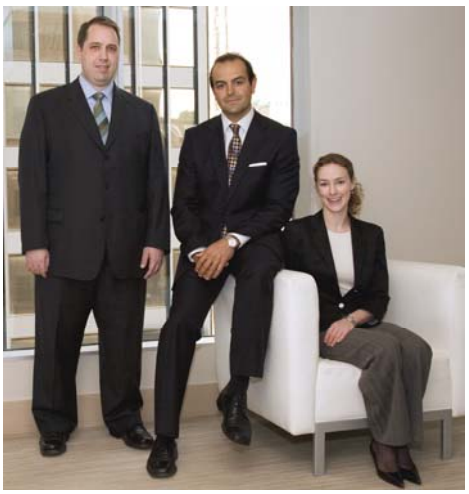

Your Condominium Law Group

News & Notes

- Lou Natale will be speaking at the 15th Annual Condominium Conference (November 4th and 5th) being held this year at the Toronto Congress Centre, 650 Dixon Road, Toronto

- Did you know? -- In September 2011, the provincial government made a number of changes to the regulations under the Condominium Act, 1998. In particular, the various forms which used to form part of the regulations have been removed and replaced, in essence, with a general discretion for the Ministry of Consumer Services to change the forms from time to time. The following is a link to various forms on the Ontario Government's website: http://www.ontario.ca/en/information_bundle/land_registration/content/ONT06_026719.html ".