



**Patrick Greco**  
B.A. Sc., LL.B.  
Partner, Shibley Righton LLP

## Kickback Seminar

# Condo Conflicts, Contracts and Kickbacks

### Improper Inducement? Property Managers are Encouraged to Use the “Sniff Test”



Some people will say that it is only mean-spirited slander; others will insist that it is a pervasive cancer. But there can be no denying that kickbacks and similar activities are always on the minds of those in the condominium industry. This was the topic of discussion of the CCI Toronto educational event on June 18, 2019. The presenters for the evening were John Warren, Tania Haluk, Patrick Greco and Mario Deo.

John Warren led off by defining some commonly-heard terms such as “conflict of interest” and “kickback”. Warren also stressed the importance of board members, property managers and others not only avoiding actual conflicts of interest, but also perceived conflicts. Kickbacks can be very difficult to uncover, but some clues include a director or manager who strongly promotes one supplier/contractor over another, especially if there is no clear reason for doing so and/or there is some other unusual circumstance, such as that individual having recommended the supplier/contractor in the first place.

While there is no fail-safe way to avoid conflicts, it is crucially important that Board deliberations on contracts be properly-minuted, especially declarations of conflict, and that proper closed bidding be conducted for all substantial contracts.

Tania Haluk followed with the condominium management perspective. With property managers under more scrutiny than ever, including by the Condominium Management Regulatory Authority of Ontario (CMRAO), it is crucial that managers put in place clear policies, along the lines of those recommended by Warren, to ensure transparency and, in the process, protect both the communities they serve and their own reputations. Foremost in guiding these policies should be the reminder that all actions must be in the best interests of no one other than the condominium corporation and its unit owners.

When in doubt, directors and managers should put themselves in the shoes of a stranger and ask themselves whether

their actions would “pass the sniff test”. If they do not, then they should be re-evaluated.

The provisions under section 40 of the Condominium Act regarding director conflict of interest are often misunderstood. Patrick Greco closely scrutinized them and emphasized that a conflict can arise where a director’s interest in a contract or transaction is direct or indirect but that the contract or transaction and the director’s interest in it must be “material”, that is, of such a nature that it would reasonably influence a person’s decision-making process. Similar to Warren’s advice, Greco emphasized that directors must be fully transparent in making sure that their conflict disclosures are properly minuted.

However, Greco advised that directors must also govern their conduct by the general Condominium Act duties to act honestly, in good faith and to exercise the care, diligence and skill that a reasonably prudent person would exercise. These duties are built upon and added



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to by the CCI Directors' Code of Ethics, which makes explicit duties such as confidentiality. Greco closed by offering examples of different situations in which director conflicts could arise, and what a continuum on which these exist.

Mario Deo closed the formal presentations by looking at two key issues: bidding and tendering law, and property management duties under the Condominium Management Services Act (CMSA) and the CMRAO which it created. Every condominium corporation should have a formal policy, included in its property management contract, requiring that every contract over a certain value, usually \$25,000 or \$50,000 must be put to a formal bidding and tendering process. Bid packages should contain detailed language regarding how bids will be handled and evaluated, and giving the board discretion to choose bids other than the lowest bidder. Deo reminded those in attendance that, in return for a supplier/contractor submitting a qualifying bid, a board is legally bound to treat the bidder fairly and in accordance with the stated conditions of the tender process or else risk liability.

Deo then reviewed the very broad powers granted on the CMRAO to investigate property manager conflict, stating that they are actually more powerful than those given to the police. These powers govern the new property manager conflict of interest provisions which prevent CMRAO licensees from accepting gifts which could reasonably be seen to influence their decisions as property manager. Similar to board members, property managers are encouraged to use the "sniff test"

to consider whether receipt of a gift could be seen as an improper inducement.

The session closed with a barrage of questions from audience members in attendance, the majority of who were directors. This level of interest showed that there is certainly a pent-up interest in this topic within our condominium industry. Hopefully this session was not a one-time thing, but will instead be part of an ongoing dialogue about this very important issue. **CV**

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