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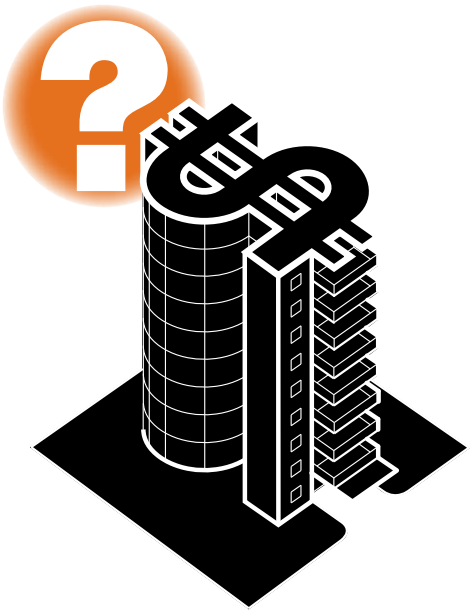

Competition Bureau Investigation

What Does This Alleged Bid-Rigging and Conspiracy Investigation Mean for Condo Corporations?

The Competition Bureau has launched a widespread investigation into alleged bid-rigging and conspiracy in Toronto's condominium renovation industry. The Ontario Superior Court issued an Order on May 10, 2016 compelling 141 condominium corporations across the GTA to produce records relating to "the budget, tendering, bidding, negotiating and awarding of a contract for renovations to the common areas of the condominium corporation's building(s)." Some of these contracts date as far back as 2007.

While most of the details of the investigation were sealed by the court, the Competition Bureau has stated that condominium corporations are not the subject of the investigation. Rather, the investigation appears to target contractors hired to oversee and carry out work on common areas such as lobbies, party rooms or parking garages, as well as suppliers who provide the goods used in such renovations. The Competition Bureau has explained that "the decision to seek the Orders was based on the fact that condominium corporations have, or are likely to have, information that is relevant to the investigation."

Since condominium corporations are not the target of the investigation, this process will likely end up being more of an inconvenience for condominium boards and property managers than anything else. However, nothing guarantees that the investigations will not expand if the Bureau ultimately discovers that there may have been other unlawful conduct in respect of these or other renovation projects.

At this stage, it is important for condominium corporations to comply with any Orders issued against them by providing all requested information within the 90 day period. Failure to comply may attract prosecution. The information and records obtained by the Order may be used to initiate proceedings. If a proceeding is initiated, the person who swears the affidavit, namely a director of the corporation, may be called as a witness in court.

Best Practices for Boards & Managers

Many condominiums hire professional engineering firms to manage their renovation projects and use a formal bidding process to award their contracts. However, in some cases, the procedures used by property managers and/or boards of directors to select contractors could be greatly improved. Implementing best practices will help condominiums reduce the potential for unfair trading practices among contractors and suppliers providing goods and services to their corporations, and could ultimately save condominium corporations substantial amounts of money.

To ensure that contracts are awarded in an appropriate manner, condominium boards should enhance or adopt guidelines and procedures for managing the tendering process, and be diligent in ensuring that such guidelines are followed. In some cases, this may involve sealed bids. Boards should do their own research, ask questions, and ensure that a sufficient number of companies are invited to bid on contracts. Design companies or engineers should be required to disclose any relationships they have with suppliers and contractors, so as to avoid non-arm's length contracts from being awarded. The forthcoming licensing requirements for property managers should further ensure that best practices are followed in the bidding process. CV



Condominium Law

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HOT OFF THE PRESSES:

A Huge Win for the Condo Community

Landmark Decision Allows Condo Corporation to Unilaterally Amend Oppressive Shared Facilities Agreement

In a huge win for the condo community, the Ontario Superior Court on August 26, 2016 upheld a Toronto condominium corporation's decision to amend a shared facilities agreement under s. 113 of the Condominium Act, 1998.

In TSCC No. 2130 v. York Bremner Developments Limited, the condo corporation applied for an order terminating or amending a shared facilities agreement. Under s. 113 of the Act, the court may make such an order if the application is filed within one year of turn-over and the court is satisfied that the disclosure statement did not clearly and adequately disclose the provisions of the agreement and the agreement produces a result that is oppressive or unconscionably prejudicial to the corporation.

With respect to the question of clear and adequate disclosure, the court found that the adequacy of the disclosure is tied to the oppressive outcome. As is increasingly common in new condo developments, the shared facilities were part of a large, complex development involving other commercial owners, including the developer, which continued to own the commercial components within the complex, and whose agent is also the manager of the shared facilities. The court found that the disclosure statement failed to adequately disclose important features of the shared facilities agreement that gave the declarant, or its agent, complete control over the management, repairs and budget of the shared facilities, with no input whatsoever by the condo corporation. Significantly, the court found

> **The court found that the disclosure statement failed to adequately disclose important features of the shared facilities agreement**

that the disclosure was inadequate despite the fact that the entire agreement was appended to the disclosure statement. "The statute", said the court, "requires more than just the disclosure of the document."

The court ultimately found that the shared facilities agreement was oppressive toward the condo corporation's rights because, among other things, it allowed for a powerful, non-arm's length shared facilities manager who was heavily biased in favour of the developer and commercial owners. Though the court confirmed it was not illegal to have a one-sided agreement in and of itself, the corporation had a reasonable expectation that the shared facilities manager would treat the corporation fairly under the terms of the agreement. Instead, the shared facilities manager took an unreasonable approach to the agreement and unfairly disregarded the corporation's legitimate interests.

In the end, the court did not terminate the agreement outright, as doing so would create a void that would not likely be filled. Rather, the court amended the agreement to insert a provision allowing TSCC 2130 to terminate the shared facilities manager.

The decision is an important victory for the condominium community. It opens the door for other new condominium corporations, which have been saddled with unfair and oppressive shared facilities agreements, to look to the courts for a remedy. CV