

CONDO BUSINESS

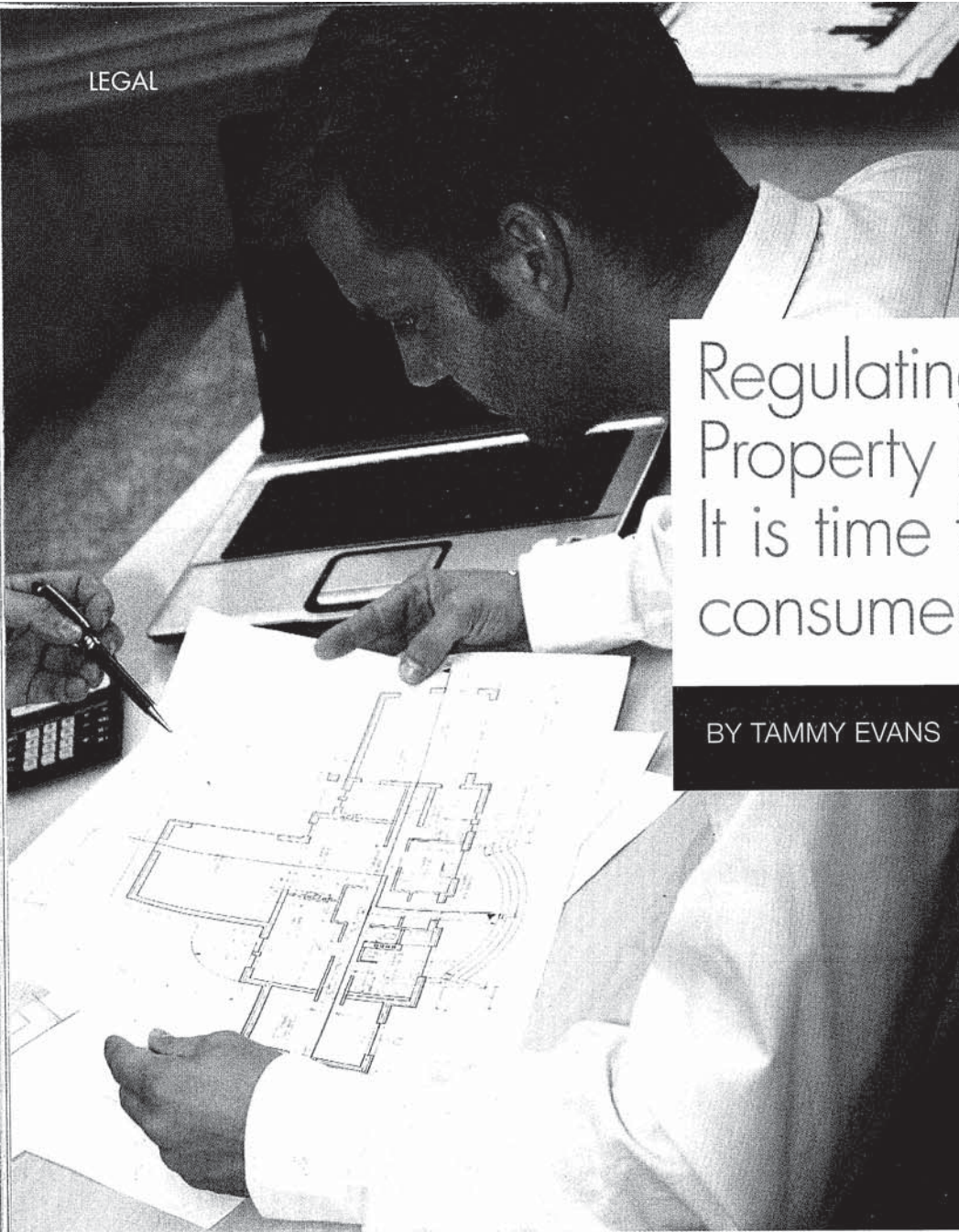


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Regulating Condo Property Managers: It is time for better consumer protection

BY TAMMY EVANS

The Province has permitted registration of more than 500,000 condominium units across Ontario. One of the primary objectives of the *Condominium Act, 1998* and associated regulations (the "Act") and of the Ministry responsible for its administration was to address consumer protection concerns. Together with complimentary and supporting provincial legislation and systems – for example, the automated land registration system, the *Ontario New Home Warranties Plan Act (ONHWPA)* and the *Real Estate and Business Brokers Act (REBBA)* – one could argue that the Province has addressed the more substantive consumer protection concerns throughout the lifespan of a condominium development. For the most part, we have come a long way in the past decade to address many material and valid concerns regarding condominium development, ownership and operation, while at the same time being careful to avoid too much interference in the marketplace.

There is a very dangerous gap in consumer protection in Ontario – the growing industry of unregulated condominium property managers that handle in the aggregate approximately \$900 million or more in condominium funds. Virtually all of the parties involved in the development and completion of a condominium are subject to regulatory requirements – vendors, developers, builders, architects, engineers, contractors, real estate agents, lawyers etc. Yet a very important group – property managers – are not regulated.

Pre-development concerns

The life cycle of a condominium can be divided into three distinct stages – pre-development, construction and operation. In identifying the parties that have a direct influence on the consumer in his purchase of a condominium unit throughout these three stages, several substantive

consumer protection mechanisms are in play.

At the pre-development stage, the purchaser interacts with a developer/builder and a real estate agent – and hopefully a lawyer – in assessing whether to enter into a binding contract to purchase a particular condominium unit. Both the developer and builder are required to be registered under ONHHPA as are all new home builders and vendors across Ontario. The Act requires substantive and detailed initial and ongoing disclosure to the purchaser in the condominium documentation and agreement of purchase and sale, which describes the project in detail and the obligations of the parties to the agreement, along with significant additional mandated information disclosure, notice and reporting requirements, as prescribed under ONHHPA.

If the developer does not provide the required disclosure under the Act, the purchaser can walk away from the deal. Further, the purchaser has the 10-day cooling off period in which to review all of the mandated information provided by the developer once the signed back agreement is in his hands, and to consult with his lawyer to obtain legal advice regarding the

agreement. If a vendor does not register (or maintain his registration) with Tarion Warranty Corporation (www.Tarion.com), that vendor cannot go to market (or continue) to sell condominium units in Ontario, and if he does, he will be subject to financial penalties. Tarion regulates the builder in a similar manner – if the builder does not register (or maintain registration), the builder cannot build (or continue to build), and may be subject to financial penalties. Mandatory registration under ONHHPA is intended to ensure that the vendor and builder are both financially and technically capable of completing the project – ie. consumer protection for the purchasers.

Another source of protection for purchasers is that under the Act, all deposits paid by the purchaser toward the purchase of a unit are required to be held in trust by a prescribed trustee or vendor's law firm and cannot be released to the vendor/developer unless and until prescribed security is put in place by the developer to ensure these deposits remain protected. Tarion insures the first \$20,000 of each unit's deposits.

The real estate agents acting for the purchaser and the vendor are required to be registered and in good standing under

REBBA. Even a quick review of REBBA reveals a solid regulatory and licencing infrastructure that incorporates consumer protection measures in many areas. The lawyers acting for the vendor and purchaser are also required to be licenced and in good standing with the Law Society of Ontario to advise and represent the parties in the transaction, and are subject to their own comprehensive licencing regime.

Thus the purchaser's financial investment and contractual benefits during the pre-development stage are protected and a wealth of information about the unit being purchased, the developer and builder and the project as a whole is made available to allow the purchaser to make an informed decision to purchase.

Protection during construction

The vendor and builder are required to maintain registration with Tarion until the last condominium unit is sold. They are often required to post significant financial security to "guarantee" their respective performance and project completion obligations, including attending to any deficiencies within the units or common elements. Tarion may require a Tarion-approved project monitor be retained



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by the vendor or builder to independently review and report to Taron on the progress of construction. Taron also mandates regular milestone reporting throughout the construction phase, as well as notice to purchasers by the vendor of critical dates along the way. Significant financial and other consequences to the vendor or builder can be triggered where these obligations are not followed.

Taron also administers the construction warranties applicable to the units and common elements, and frequently intervenes

to resolve disputes between developers and owners/condominium boards. It is quite common for the Taron security posted by the developer/builder to guarantee its performance and completion of the project to not be available for release or reduction until at least two years from registration. In this way, the consumer is protected in the event a developer fails to complete or address construction deficiencies, or does not honour its warranty obligations, and Taron would have on hand a solid source of financial security that can be accessed if necessary.

The protection gap

At the operational stage, the level of protection will necessarily change, as possession and control moves from the developer to the individual owners. At this point, the developer/builder is on his way out, having virtually finished construction, the real estate agent is paid his commissions and will likely have no further involvement with the unit or the owner, the construction lender will soon be paid out, final Taron reporting is being submitted, closings are taking place and purchasers are moving in and project lenders are being paid out.

The primary relationship in play at this stage of the condominium life cycle is the relationship between the new owners/board and the property manager. Under the Act, the owners elect the Board members and the Board members direct or delegate to the property manager the daily operation of the condominium, as well as certain technical and fiscal compliance obligations under the Act. Therefore, at this stage, the greatest financial and investment risk shifts to the individual owners, as the condominium has or will be turned over to a new board of directors chosen by the owners, made up primarily of owners/residents who may not necessarily have any experience in financial and technical management of a multi-unit building with shared services and building systems (notwithstanding that the daily work of managing, operating and maintaining the condominium has begun).

This is where the purchasers – now collective property owners – are at their most vulnerable, exposed by the lack of regulatory legislation to protect the owners' asset (the property) and their financial resources (monthly common expenses and reserve fund accounts) from neglect, mismanagement or fraud. It is also the point where the property manager has the greatest influence and control over the owners' asset/financial resources. Often, the developer's property management team put in place on occupancy and for the first year of operation is terminated with a manager of the new owners/board's own choosing. This can be the beginning of a very risky financial and technical disadvantage for the owners. In Ontario, there are no mandatory educational requirements for property managers and no training, background checks, financial audits or other independent review or regulation of property managers. None.

As noted above, condominium managers

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across Ontario handle an estimated \$900 million or more annually of owners' hard-earned money. Would you place even \$10 thousand of your personal investment funds in a stranger's account with little to no formal qualification or experience to manage your investment and no guarantee or insurance that the stranger wouldn't disappear with or mismanage your money? Placed in this context, most of us would hesitate. Yet we continue, as condominium owners, to gamble with our collective investment in condominiums. Without mandatory licencing and regulation of property managers, any person can manage a condominium, without any relevant experience or training.

I am not suggesting that all condominium property managers are untrained and unqualified to undertake this responsibility. There are many excellent property management firms out there – I am referring to those that invest in background checks and mandatory financial and technical training for their managers and staff. But the steady rise in condominium developments has led to a very lucrative business for condominium managers – a business without regulation.

Finding a solution

Throughout most of the life cycle of the condominium, the Province strives to protect the consumers from the potential bad guys with implementation and administration of regulatory requirements, technical and financial obligations upon developers, real estate agents, builders, architects, engineers, lawyers, contractors – those primarily responsible for delivering the project to completion. What is lacking is consumer protection at the operational stage – a critical point where the greatest risk sits with the unit owners, a risk that is higher in value, and will last longer than the first two stages combined.

There is a gap in Ontario's consumer protection practices for the growing condominium management business sector. But there is a potential solution – one that does not require an overhaul of the Act and in my view is a more appropriate legislative vehicle.

We have an existing complementary regulatory regime in place in Ontario that incorporates the requisite infrastructure. Let us consider expanding the application of the *Real Estate and Business Brokers*

Act to include property managers, similar to British Columbia's *Real Estate Services Act*. The regulatory infrastructure and licencing regime are already in place, and the Province might consider leveraging existing technical educational programs.

In its September 2011 pre-election survey, ACMO asked all provincial party candidates three important questions that affect condominium owners, one of which was whether these candidates would support regulation of property managers (through a program similar to the ACMO RCM

course). The responses of the provincial candidates' "Party Headquarters," as revealed in ACMO's survey results, appear to support some form of regulation, if only in principle. Of course, this is a non-partisan issue; it is a common sense approach to a fundamental consumer protection gap that is long overdue for correction. It is time. Let us address the gap before more condominium owners' funds go missing. □

Tammy Evans is a partner with Blaney McMurtry LLP.

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