

## **Never release funds before closing without meeting security requirements under the *Condominium Act***

Not infrequently, LAWPRO sees claims related to the release of condominium purchasers' deposits to a vendor prior to closing. The circumstances under which these deposits can be released are strictly limited under the [\*Condominium Act, 1998, S.O. 1998, c.19\*](#) (the "Act"), and the legislation does not permit contracting out of security requirements.

Prior to the final closing of a condominium unit, purchasers may have made several deposits or even have elected to pay the entire purchase price on interim closing. Subsection 81 (1) of the Act mandates that "a declarant [usually the vendor] shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment" *inter alia* on account of an agreement of purchase and sale for a proposed unit. Subsections 81 (4) and (5) provide that the trustee or the declarant's solicitor, as the case may be, must hold the money in an Ontario trust account while subsection (6) requires the declarant to provide written evidence that the aforementioned requirements have been met within 10 days of the payment.

But when can the funds be released?

Subsection 81(7) provides that the money shall be held in trust until,

- (a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act and an agreement that the person who paid the money has entered into with respect to the proposed unit; or
- (b) the declarant ensures that security of a prescribed class is provided for the money . . . <sup>1</sup>

Of course, the vendor is not "entitled" to the money until the transaction contemplated by the agreement of purchase and sale is concluded and the purchaser receives a registrable transfer of title. Accordingly, pursuant to the Act, security must be posted as set out in subsection 81(7)(b) if funds are to be released prior to closing. As section 176 of the Act provides that the Act applies "despite any agreement to the contrary," security is required even if the parties to the transaction have agreed otherwise.

LAWPRO encourages lawyers to strictly follow the above requirements. We have seen claims from failed attempts to contract out of the legislation. Lawyers should be aware that a payment of trust funds out of a trust account contrary to the provisions of the *Condominium Act* constitutes a breach of trust. Although coverage is generally available in respect of such claims, there are circumstances that may arise where no or only partial or limited coverage would be available.

*Martine M. Morin is Senior Claims Counsel at LAWPRO.*

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<sup>1</sup> Except if the money has been received under clause (1)(a) [reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit] and has not been credited to the purchase price under the agreement.

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