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**Submission by the
OBA Civil Litigation Section
on
*Substitute Decisions Act***

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Submitted to:
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The Office of the Public Guardian and Trustee

OBA Civil Litigation Section Executive response to PGT's letter of July 3, 2008 and their request for input on the regulation proposed to be made under s. 83(1)(i) of the *Substitute Decisions Act*.

We would recommend that the following class of persons be added to the regulation proposed to be made under s. 83(1)(i) of the SDA (as set out in PGT's letter of July 3, 2008):

"A condominium corporation in which the person who is alleged to be incapable is an owner or occupant of a unit."

It is important to note that the terms "owner" and "unit" are defined in the *Condominium Act, 1998*, s. 1(1), and thus the words "owner" and "unit" should be used in the proposed clause. The wording proposed above matches the *Condo Act, 1998* very closely and would create the fewest problems that might be expected to arise. An "occupant" might be a tenant, or a guest or family member of a tenant or of the owner.

Prescribing condo corporations as a class of persons from whom PGT will be entitled to have access to records makes a great deal of sense for the following reasons, to name a few:

1. A condominium corporation is not always fully captured by section 83(1)(e) (i.e., "a person who operates a controlled-access residence"). This is for at least two reasons: First, condominium corporations do not "operate" the residences in the case of townhouse units and arguably do not include the various types of condominium corporations. Second, consider the situation where the allegedly incapable person owns a non-residential condominium unit, such as a commercial unit (which is a significant asset of the person), where the wording of clause 83(1)(e) does not apply;
2. A very large and growing number of people reside in condominiums and the number of condominium corporations is increasingly rapidly -- there are nearly 2,000 condominium corporations in the City of Toronto alone. It makes sense for condominium corporations to be a separate and specifically-numbered class of persons that might be required to produce records.
3. If an incapable unit owner is not paying common expenses, the condominium corporation has a power of sale, and it often happens that incapable unit owners are in danger of being thrown out of their units because they cannot manage their finances. PGT would clearly want to have access to the "ledgers" maintained by condo corporations showing the payment (or non-payment) of common expenses because such information would go a long way to determining whether subject persons are capable of managing their finances.
4. In addition to financial issues described in #3, condominium corporations often possess records that could aid in the investigation in terms of personal care or the potential for serious harm to self or others. Such records might include security reports, manager's reports, neighbour's complaints of unusual behaviour, etc. Because of the close proximity of their residents, residential condominium corporations also have a very

keen interest in the security and safety of everyone concerned. Further, residential condominium corporations are often closely-knit communities and generally have considerable information that would be critical to an investigation by PGT as to a person's capacity.

5. While condominium boards and managers invariably wish to assist PGT with investigations, section 55 of the *Condo Act, 1998* contains restrictions on what type records can be made available for examination by a condominium corporation, and to whom. Add to this the increasing restrictions on disclosing information as a result of the evolution of privacy law, such as PIPEDA, etc., which makes condominium managers and boards increasingly reluctant to release records for fear that doing so could earn them a lawsuit or other type of complaint or proceeding. Adding condominium corporations as a prescribed class of persons that can be approached and required to provide records under SDA s. 83(1)(i) would allow them to assist a PGT investigation by revealing and disclosing records that must otherwise be kept private. The regulation would make clear a condominium corporation's obligation to disclose records and would also protect the Boards and Managers from the most obvious subsequent repercussions. It would clearly remove ambiguity, minimize potential disputes, and would allow for speedier granting of access to records when time is of the essence.

6. In the case where a tenant or guest or family member of a tenant is allegedly incapable, the wording we have proposed (i.e., "owner **or occupant** of a unit") would allow PGT to obtain records that would be relevant to the investigation of that person without the need to involve the landlord (i.e., the owner of the unit, who is among the very few persons entitled to request most records from a condominium corporation, per *Condo Act, 1998*, s. 55(3)). This would be useful because condominium corporations would generally wish for investigations to be conducted quickly, often because allegedly incapable persons might pose a serious risk of harm to themselves or to neighbours (i.e., frequent flooding, risk of fire, or unsanitary conditions). The security reports or managers' reports or neighbours' complaints maintained by the condominium corporation would often be materially relevant and important to an investigation by PGT.

Please advise us if we can provide anything further. Thank you for considering this submission.