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Canadian Condominium Institute CCI REVIEW

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The Canadian Condominium Institute is the Voice of Condominium in Canada. It is a national, independent, non-profit organization dealing exclusively with condominium issues. Formed in 1982, CCI represents all participants in the condominium community. Interested groups are encouraged to work together toward one common goal -- creating a successful and viable condominium community.

- Is the only national association to serve as a clearing house and research centre on condominium issues and activities across the country.
- Assists its members through education, information dissemination, publications, workshops, conferences and technical assistance.
- Encourages and provides objective research or practitioners and government agencies regarding all aspects of condominium operations.
- Lobbies provincial and federal governments for improvements to legislation.
- Advocates for higher standards in all services to the condominium client.

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Inside This Issue

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Top 10 Condo Law Cases of 2016

by Christopher J. Jaglowitz
Partner with Gardiner Miller Arnold LLP

#10 - ***Cheung v. York Region CC 759,*** 2016 ONSC 4236
Many condominiums have insufficient parking for occupants and guests, requiring the board to allocate available common element parking spaces in a way that balances various competing interests and respects local zoning bylaws. In this case, the condo corporation enacted a bylaw which leased 4 common element parking spots to each unit owner to distribute parking more equitably than "first come, first served." The bylaw was challenged by a unit owner whose tenant operated a popular restaurant requiring much more parking than was allocated. The owner argued that the bylaw was unlawful and oppressive but the court disagreed, upheld the bylaw as valid and found that the unit owner's expectation to monopolize most or all of the parking for the restaurant was arguably oppressive.

#9 - ***Daniels v. Grizzell***, 2016 ONSC 7351
Although it's not about condos specifically, this superior court decision clarifies the scope and effect of the court's new automatic dismissal regime that came into effect January 1, 2017 and terminated thousands of lawsuits aged 5 years or older that day. Under the new rule, lawsuits not set down for trial by their fifth anniversary will be dismissed.

#8 - ***Kamal v. Peel CC 51,*** 2016 HRTO 1282
A condo corporation held a special owner's meeting on *Eid-ul-Azha*, a Muslim holiday, to pass a borrowing bylaw for financing major repairs. Some owners who observe that holiday and vehemently opposed the borrowing bylaw (which passed with the support of 115 out of all 169 units, or 68%) made a human rights complaint alleging the condo corporation discriminated against them on the basis of creed by holding the meeting on that holiday. The Human Rights Tribunal rejected the application on several grounds, including the fact that all owners could vote at the meeting by proxy. This decision is a useful precedent but is not blanket permission to hold meetings on religious holidays. The outcome could have been different had the Tribunal discerned a deliberate intention to exclude Muslims from participating in the meeting or if the proxy vote was not available or easily accessible.

#7 – ***Ottawa-Carleton Standard CC 961 v. Menzies***, 2016 ONSC 7699
Any lingering doubt about whether a court will uphold a condo corporation's rules prohibiting short term leases or the "single family use" restrictions in declarations is now conclusively resolved. The court upheld a condo rule banning leases of less than 4 months and held that operating a short-term tenancy business (by leasing a condo unit through Airbnb) is entirely inconsistent with the "single family use" restriction appearing in many condo declarations. Condominiums without a "single family use" clause can easily pass a rule to ban short term leases while condos with the "single family use" restriction in the declaration need not necessarily pass a rule to ban Airbnb usage.

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#6 - ***Metro Toronto CC 673 v. St. George Property Management Inc***., 2016 ONSC 1148
A management firm was ordered to pay its condo corporation client $97K for issuing a status certificate to a purchaser who later successfully escaped the obligation to pay a special assessment arising from facts that should have been disclosed in the status certificate, but weren't. After spending $97K on the successful purchaser's litigation, the condo corporation sued the property management firm to recover that amount. The court relied on the indemnity clause in the management agreement to summarily grant the corporation's claim for breach of contract and award the corporation the $97K it spent because of the manager's faulty status certificate. The corporation also recovered legal costs of $42K.

#5 - ***M.S. v. Carlton CC 116***, 2016 ONSC 1848 (decision not yet available)
In an unremarkable application by a unit owner to discharge a condo lien securing an $800 repair chargeback, the court remarkably granted an order requested by the condo corporation requiring the owner to undergo a mental health examination. Such orders are rare, but may be given where the mental condition of a party to a lawsuit is in question. In this case, the owner's "bizarre" conduct and the content of materials filed in court gave the judge concern as to the owner's ability to conduct the litigation, to understand information relevant to making decisions in the litigation and to appreciate the reasonably foreseeable consequences of those decisions. A later court denied the owner's request for leave to appeal the examination order. Incidentally, the owner then sued the condominium corporation's lawyers, but that lawsuit was summarily dismissed as being frivolous, vexatious and an abuse of the court's process. In ***Toronto Standard CC 2395 v Wong***, 2016 ONSC 8000, a more recent unrelated case, the court refused a mental health examination order requested by a condo corporation seeking a Condo Act compliance order and injunction.

#4 - ***Wu v. Carlton CC X***, 2016 CanLII 30525 (Sm.Cl.Ct.)
After receiving a list of all the unit owners and their mailing addresses but not email addresses, a unit owner sued the condo corporation under Condo Act s.55 for production of all owners' email addresses. The small claims court judge concluded that e-mail addresses are not part of an address of service within the meaning of s. 55 and are therefore not producible. This aspect of the decision makes sense, but the comment that corporations are required to produce owners' addresses for service is erroneous, except where a corporation fails to call and hold a requisitioned meeting. In that case (and only in that case), owners are entitled to receive a list of owners and addresses for service so they may call and hold a requisitioned meeting. It is not clear that this happened in this case or why the corporation had already produced that list.

#3 - ***Wexler v. Carlton CC 28***, 2016 ONSC 4162
After a 3-day trial, the small claims court dismissed a unit owner's claim against her condo corporation over a $255 chargeback to clean pigeon droppings on her balcony, $270 she spent on legal advice plus $2K for alleged harassment by the board. The court then awarded the successful condo corporation $20K in legal costs (out of $35K the corporation apparently spent to defend the case). The court cited the indemnity clause in the condo declaration as justification to override the statutory limit on small claims costs awards of 15% of the face value of the claim (being $2,525 in this case, meaning costs would be capped around $375). The Superior Court then granted the unit owner's motion for leave to appeal this costs order on the basis that it is "open to serious debate." The appeal has not yet been heard or decided, but we get a glimpse of the future from ***Hadani v. Toronto Standard CC 2095***, 2016 CanLII 58944, where another small claims judge cited and rejected the Wexler costs order and awarded only $3K to a different condo corporation that spent almost $33K to defeat a unit owner's claim for $16K.

#2 - ***3716724 Canada Inc. v. Carleton CC 375***, 2016 ONCA 650
A condo board rejected an owner's proposed changes to common elements intended to facilitate that owner's conversion of its commercial parking units to an hourly rental operation unless that owner agreed to hire a full-time security guard to mitigate the increased security risk from trespassers. The judge hearing the owner's application for an oppression remedy found it unreasonable for the board to require the owner to provide a security guard. The court of appeal overturned that finding and, for the first time, confirmed that condo board decisions are entitled to the same level of deference as those of business corporations as per the long-standing "business judgment rule." The court also set a new legal test for reviewing condo board decisions.

#1 - ***Toronto Standard CC 2130 v. York Bremner Developments Limited,*** 2016 ONSC 5393
Maple Leaf Square, one of Ontario's most complicated mixed use condominiums and shared facilities scenarios, wins the prize for ugliest fight between condo corporation and developer. Justice Fred Myers decided six separate legal cases by this condo corporation against its developer,

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covering a myriad of issues like s.23 notices, limitation periods, arbitration procedures and related management firms, and featuring plenty of complex claims like oppression remedies and construction deficiencies. Most notable, however, is that this is the first decision under Condo Act s.113 which permits courts to amend shared facilities agreements where declarants fail to disclose their terms AND the agreements are oppressive or unconscionably prejudicial. Even more remarkable is that the condo corporation successfully met the onerous test under s.113 and obtained an order amending its shared facilities agreement.

Summer Bonus: CIBC Mortgages Inc. v. York CC 385, 2016 ONSC 7343

When unit owners fail to pay common expenses, condo corporations must register a certificate of lien to secure those expenses within 90 days of default or else the lien right expires. In this case where a judge ordered an owner to pay fixed legal costs to the corporation within 30 days, the "default" for those fixed costs and the "additional actual costs" payable under s.134(5) of the Condo Act was the day after the 30th day per the judge's order, even if those costs were not posted to the owner's common expense ledger. As the condo's lien was registered over 90 days from default, the mortgagee's security had priority over the condo lien. As the owner was insolvent, this ruling on priority eliminated the condo corporation's recovery of the initial chargeback of $44K in legal costs and, as salt to the wound, the condo corporation was ordered to pay the mortgagee's legal costs of $63K.

Chris Jaglowitz is a UWindsor Law graduate practising condo law at Gardiner Miller Arnold LLP in Toronto. He publishes the Ontario Condo Law Blog (www.ontariocondolaw.com), where this piece first appeared.

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Frequently Asked Questions to the Auditor at AGMs

by Julia Lee, CPA, CA

Director of CCI-Windsor/Essex Chapter

The following FAQ's are common questions that are asked at Annual General Meetings (AGM's). AGM's is the right time to ask questions to your board, property manager, auditor and legal council (if present). The following is to assist Condominium owners in understanding their AGM package and financial statements. Please note that the answers to these questions might not be your condominium situation and it is best practice to ask your questions at your condo's AGM.

Q: Why do my Condo fees only go up? Will they ever go down!

A: The board determines the annual condo fees for the year during the time they are working on the budget. The budget is the best estimate of what operating costs the condo will incur for the year. The following expenses are the most common reasons why the condo fees stay the same or increase:

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1) Utilities are a significant item on the budget and these costs are increasing. Some Condo's have installed energy efficient light bulbs, updated HVAC system, reminders in Condo newsletters to turn off the lights and to keep windows and doors closed when the A/C on.

2) Reserve fund contributions require ments have increased per the Reserve Fund Study. Following the Reserve Fund study re quirements are very important to assist with proper funding of future capital replacement and repairs. Also it is important because your Auditor compares the amount that is allocated to the reserve fund to the amount that the re serve study states. It is an auditing require ment per CPA Ontario and if contributions are not followed per the study an additional para graph is required on the Independent Audi tor's Report.

Board members and property managers work hard to keep the condo fees as low as possible

Q: Why does the Reserve Fund go up and down from year to year?

A: The condominium follows the Reserve fund study and the contributions that are allocated to the Reserve Fund is to assist with making sure the condo has sufficient funds in the bank to replace or major repairs to reserve items. The Reserve Fund balance increases when you are accumulating for a reserve item that needs to be replaced and therefore after the item is replaces the fund.

Q: What is the difference between an operating expense and reserve expense?

A: An reserve item is a major repair or replacement of a common element. The Board of Directors review the most current reserve fund study to ensure the item is incurred in the reserve fund study. Examples of replacement items are; roof, elevator, lobby flooring and furniture, party room etc… There have been extra ordinary items that come up that Board concerns to be a reserve item. An example, tree removal is required to extended the life of a common element. As Auditors, we enquiry about these items to document why this unusual item and how did they determine it is a reserve item. The Boards also assesses if the expense will be a benefit to the condo for more than one year. Regular maintenance, snow removal, window washing, are examples of operating expenses.

Julia Lee. CPA. CA

Professional Qualifications
- Honours B. Comm. (University of Windsor)
- Chartered Professional Accountant, Chartered Accountant of Ontario

Business Experience
- Partner at Gordon B. Lee Chartered Accountants 2010
- Manager at Gordon B. Lee Chartered Accountants 2008
- Staff Accountant 2006

Community Involvement
- Past President of Essex Kent Chartered Professional Accountants Association
- Board Member CCI
- Member of Rotary Club of Windsor (1918)

Condominium Insurance - The Basics

by Bruce Rand, BA, CAIB
Director of CCI-Windsor/Essex Chapter

Insurance for condominium corporations in Ontario involves at least two types of insurance policies. These policies are subject to the Condominium Act of Ontario, the Declaration, By-laws and Rules/Regulations for each corporation. The latter three must not contravene the Act.

The Corporation, under Section 99, shall obtain and maintain insurance, on its own behalf and on behalf of the owners and all registered mortgagees, for damage to the units and common elements that is caused by major perils or other perils that the declaration or bylaws specify. The insurance contract insures the complex as originally constructed and includes the interiors of the units excluding betterments and improvements made or acquired by the owners (refer to the description of the standard unit in the Declarations or the standard unit by-law) and owners' personal property. Subject to a reasonable deductible the insurance required shall cover the replacement cost of the damaged property subject to the perils insured. Thus the need for an accredited appraisal to estimate the cost to rebuild the entire complex.

The Corporation, under Section 102, shall also obtain and maintain insurance against its liability from breach of duty as occupier of the common elements and land as well as liability arising out of ownership, use or operation, by or on behalf,
of its boilers, machinery, pressure vessels and motor vehicles.

The Corporation, under Section 105 (2) & (3), is permitted to pass on the Corporation's insurance deductible as a common expense to an owner whose unit is damaged through an act or omission by the owner and may extend the circumstances by passing a by-law no matter the cause other than an act or omission of the Corporation.

The Corporation, under Section 39, shall purchase, if reasonably available, directors' and officers' liability insurance on behalf of present and past directors and officers.

While these are the requirements as set out in the Act the Corporation may seek to obtain broader or more comprehensive insurance coverages. There are a number of excellent commercial insurance packages available through independent insurance brokers who specialize in this type of business. Note that the Condominium Act supersedes the Insurance act so it is essential for the insurance expert to review the condominium declarations and by-laws as there may be archaic and unusual insurance requirements or obligations that may affect coverages.

Unit Owner's Insurance is not a subject of the Act. However, Sections 99, 101 and 105 of the Act along with the owner repair and maintenance obligations in the Declaration lead the prudent owner to obtain and maintain comprehensive unit owners insurance.

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This insurance product is available through multiple sources most of which include the following insurance coverages:

1) Personal Property – Personal belongings while in your unit, storage locker or temporarily away from your residence. Replacement valued insurance against "all risks" is recommended with the caveat that it is subject to certain exclusions, conditions and limitations. The limits for jewellery, furs, artwork, precious metals, collectibles and other such property may require more specific coverage.

2) Improvements & Betterments – Recall that the corporation's policy does not insure the units other than as described in the standard unit by-law. So, this coverage includes the value of any alterations, betterments and improvements to the standard unit acquired by or made by the owner.

3) Loss of Use of Your Unit – Also referred to as additional living expenses. To insure for the additional expenses due the cost of living elsewhere as a result of an insured loss to the owner's unit.

4) Building Contingency Coverage – Provides coverage for the unit due to damage caused by the perils insured. This coverage would apply where the corporation's policy coverages are inadequate to repair or replace the unit.

5) Common Element Assessment – Common elements include all property other than the units. Should property damage or bodily injury occur and the corporation's insurance is inadequate each owner may be assessed a portion of the financial loss. The unit owner policy sets a limit of insurance for each of these potential occurrences.

6) Water Damage – The corporation may insure for water damage due to flood, sewer back-up or storm - related water. Most residential insurance policies will insure sewer back-up losses subject to limits, higher deductibles and additional premium costs. Flood insurance is rarely available on unit owner policies but some insurers now offer "overland" water coverage.

7) Deductibles – The corporation's policy is subject to deductibles which can vary in magnitude. Over the past few years deductibles have been increasing particularly those related to water damage. When the corporation's policy is triggered due to an insured claim the deductible becomes a common expense to all owners. However, where an owner may be liable for a deductible under the Act (Section 105) or the Declaration (repairs after damage) the financial burden can be onerous. The unit owner policy may cover this under the Contingency or Assessment Coverages or perhaps by a specific endorsement. The issue at hand is the definition of assessment – does it also include contractual liability for the charge-back of the corporation's deductible?

8) Personal Liability – Individuals are subject to personal liability arising from their ownership of property and their actions in their daily lives. The liability may result from property damage, bodily injury, neglect of duty or possibly contractual obligations. The standard unit owner's policy insures primarily for liability arising out of bodily injury or property damage.

9) Investors – While there are some exceptions insurance products for investor - owners tend to be quite limited in their coverages. They face the same exposures to financial loss but have less opportunity to transfer the risk to an insurer. Lease agreements with their tenants are required under most Declarations but ultimately the liability falls back on the landlord – the unit owner!

Condominium living continues to grow and changes occur whether they be a result of legislation (Revisions to the Act & Human Rights), shared accommodation, or investment opportunities. Insurance products must be dynamic in order to deal with change so work with insurance professionals who are experts in this industry.

Bruce Rand is a Commercial Account Executive with PBL Insurance Limited. He may be reached at 519-254-1633 x 241 or brand @pblinsurance.com

Lien Registration: Is this lawyer's work?

by Erica Gerstheimer, B.A.(Hons.), J.D.
Lawyer at SmithValeriote Law Firm LLP

An interesting case recently came out that seems to have sparked a considerable amount of discussion around who can register liens against a unit owner's unit when that owner defaults in his or her payment toward the common expenses. The case appears to suggest that the registration of liens may be most appropriately carried out by lawyers, rather than in-house paralegals of management companies.

Page v. Maple Ridge Community Management Ltd., 2017 CanLii 21772, arose when a unit owner neglected to pay a special assessment that was issued by the Condominium. Proper notice of the unpaid amounts was issued to the unit owner in accordance with the Condominium Act, 1998 (the "Act:"), and a lien subsequently registered when the amounts stated in the notice were not paid. There was no evidence provided that suggested the Condominium had not followed the requirements of the Act as it relates to liens. It is important to note that the lien included legal fees incurred for the preparation and registration of the lien, as is generally permitted by the Act.

The main issue in this case arose when the unit owner discovered that the lien against her unit had been prepared and registered by a paralegal employed by the Condominium's management company. The unit owner took the position that registering liens and charging fees for same is outside of the scope of work permitted to be completed by paralegals. The unit owner submitted a complaint with the Law Society of Upper Canada (the governing body of all lawyers and paralegals in Ontario), and commenced an action in court demanding reimbursement of any legal fees charged to her that were related to the preparation, registration and discharge of the lien. The unit owner also sought punitive and special damages.

The Law Society of Upper Canada investigated this matter and ultimately concluded that the preparation and registration of liens falls outside of the scope of work of a paralegal. A warning letter was issued to the paralegal, but no further action was taken against the paralegal.

Based on this finding, the Court deliberated as to whether the legal fees charged in connection with the lien could be reimbursed to the unit owner. At trial, the Court took the position that the Law Society of Upper Canada is ultimately charged with the authority to seek remedies against paralegals that are not complying with the standards and rules imposed by it, including fines. It does not appear that a plaintiff in a court case can seek such remedies against a paralegal.

As a result, the Court found that the unit owner was not entitled to be reimbursed for the legal expenses related to the preparation, registration and discharge of the lien. The Court also found that the unit owner was not entitled to punitive or special damages in this case. However, the Court did award $500.00 to the unit owner, noting that bringing cases of unauthorized practice to the attention of the appropriate governing bodies (in this case the Law Society of Upper Canada), was a matter of public importance.

Although this case does not overtly confirm that only lawyers can prepare and register liens, it can certainly be interpreted to mean that this type of work may be most appropriate for lawyers to complete. Management companies that may be employing non-lawyers to register and discharge liens may wish to re-evaluate its practices after consideration of this case.

Erica Gerstheimer, B.A.(Hons.), J.D. is a lawyer at SmithValeriote Law Firm LLP in Guelph. Erica practices exclusively in the area of condominium law, assisting property managers, directors, and developers with a variety of condominium matters. She can be reached at egerstheimer@smithvaleriote.com.

Know Thy Documents: How to Avoid Common Element Repair Disputes

by Stephanie Sutherland and Stefan Nespoli, P.Eng.

Determining who is responsible for the costs of repair and maintenance of common elements, such as windows, is a common issue. So - who pays? The Corporation? The Owner? How is this decided? Fortunately, a recent court case in London, Ontario provides some clarity.

We're going to tell you how this could affect your Corporation by discussing relevant sections of your Declaration, the Reserve Fund Planning process, and updates coming with the new Condominium Act, expected to be released sometime in 2017.
Let's start by taking a closer look at a recent case:

Middlesex Condominium Corporation No. 195 vs Sunbelt.

This case dealt with multiple issues, but the decision that we are looking at was with respect to a summary judgment motion that the Corporation brought, asking a Judge to decide on two specific issues within the larger action. The building in this case had aluminum-framed windows that were set into the exterior concrete wall. As a result of lateral movement of the building walls, stress had been placed on the window openings, causing damage to the windows. The Corporation obtained an engineer's report, which found that the windows would need to be replaced with a different opening style to allow for natural movement of the concrete and so that the window framing did not sustain further damage.

The Corporation claimed that the windows and window frames were common elements over which Sunbelt (the owner of the commercial units) had exclusive use, and therefore Sunbelt was responsible for the costs of the repairs. Sunbelt argued that the windows were not exclusive use common elements and that the Corporation was responsible for the costs of the repairs. The Judge found that because the Corporation's Declaration did not include a Schedule F – which would specify exclusive use common elements – and the Corporation's description did not include an exclusive use portions survey, the windows were common elements and not exclusive use common elements, and the Corporation was therefore responsible for the costs of the repairs.

The parties were ordered to agree on costs or make written submissions, so no decision about costs has been made public with respect to this case.

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However, a motion for summary judgment is a complex and costly type of motion, and likely cost the parties tens of thousands of dollars each. The problem in this instance is that the Declaration was somewhat ambiguous when it came to repair and maintenance provisions. This case is a perfect example of a situation where a more clearly written Declaration, that was understood by all relevant parties, would have made a huge difference and likely would have prevented the parties from having this dispute in the first place and incurring significant legal costs.

The Corporation's Legal Documents

In many cases, an experienced engineer can flag these ambiguities during the preparation of your Reserve Fund Study (RFS), which includes a review your Corporation's legal documents. These typically comprise the Declaration and Amendments, as well as any By-Laws, Rules and Regulations, as well as the survey drawings, and Reciprocal or Cost Sharing Agreements that relate to shared facilities.

Within the Declaration, the Boundaries of Units are described in a section called "Schedule C". This section defines the unit boundaries; any building components outside of this boundary are typically common elements. For example, if Schedule C indicates that the vertical unit boundary is "the interior or unit side surface of all windows and window frames," that means that the windows are not a part of the unit – they are a common element. Of course, it is not always this simple. Further clauses in Schedule C may indicate for example "notwithstanding the above, each and every glass panel in each and every such window shall form part of the unit", meaning the glass is unit owned, but the window frames are common elements.

To complicate matters further, the Maintenance and Repairs section of the Declaration describes who (unit owner or Corporation) is responsible for maintenance and repairs of specified building components. This section may indicate that "each owner shall maintain the exterior surfaces of windows". Does this mean clean the glass? Repaint the frames? Replace the window? What does "maintain" even mean? More on that in a moment.

The survey drawings do help to clarify unit boundaries better than the Declaration alone. In many cases, however, the drawings are not available. The case above is an example of this: if the survey drawings had been available and had shown the windows of the commercial units as exclusive use common elements, the Corporation would likely have been successful in its claim that Sunbelt was responsible for the costs of repairing the windows.

Interpreting which building components are common elements can sometimes lead to disputes. In some cases, a Corporation may have been acting under one understanding of the Declaration for many years, only to learn later that their understanding was not correct.

> "Interpreting which building components are common elements can sometimes lead to disputes."

Reserve Fund Study Updates: The Role of Your Engineer

When your engineer reviews your Declaration and realizes there may be an difference in common element interpretation from your previous study, they should inform you immediately and in the Draft Study. Further, for significant costs such as windows, your engineer will likely recommend the Board obtain a legal opinion. It is not the responsibility of the engineer to interpret the Declaration. In these cases, it is always best to obtain a written interpretation from a qualified condominium lawyer.

The Current Condominium Act

As the Condominium Act stands now, there are several sections that set out the repair and maintenance obligations of Corporations and unit owners:

- Section 89 of the Act states that a Corporation must repair and/or replace the units and common elements after damage;
- Section 90 states that a Corporation must maintain the common elements and unit owners must maintain their units, and this includes the obligation to repair, BUT this does not include the obligation to repair after damage (only after wear and tear); and
- Section 91 allows a Corporation to alter the obligations in sections 89 and 90, through its Declaration.

If you're feeling confused, you're not the only one.

Planned Changes to the Condominium Act

Some of the many upcoming changes to the Condominium Act include changes to the repair and maintenance provisions, which will hopefully make things clearer:

- The new section 89 will require Corporations to repair the common elements (with no specification about wear and tear versus after damage);

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- The new section 90 will require Corporations to maintain the common elements and unit owners to maintain their unit, and specifically states that this does not include the obligation to repair (whether after wear and tear, or damage);
- The new section 91 will still allow Corporations to alter these obligations through their Declarations – ideally, Corporations (and the lawyers drafting the documents) will take care with the wording if and when they make these alterations, so that the obligations remain clear.

Overall, these changes mean that the obligation to repair is set out in section 89, and the obligation to maintain is set out in section 90, and there is no overlap unlike in the current provisions. Hopefully this will make things more clear for everyone.

At the end of the day, though, the important thing to remember is that the Board needs to be familiar with the Declaration that governs their Corporation, and needs to know and understand the provisions relating to repair and maintenance when considering who is responsible for repairing and maintaining which portions of the Corporation. If it is not clear, or if there is disagreement, it can be very helpful to get an opinion from engineers and lawyers, because they have expertise in interpreting the documents and will hopefully (although not always) be able to help to avoid disputes.

Stephanie Sutherland is a partner with Sutherland Kelly LLP, which is located in Guelph, Ontario. Stephanie and her business partner Michelle Kelly represent condominium corporations across Ontario. Stephanie assists condominium corporations with dispute resolution and court matters, including enforcement issues, contract disputes, and construction deficiency matters. Stephanie is a member of CCI's London and Area Chapter, Huronia Chapter, and Golden Horseshoe Chapter, where she sits on the Professional Partners Committee. Stephanie can be reached at 519-265-6755 or stephanie@sutherlandkelly.com. For more information about Stephanie's practice or about Sutherland Kelly LLP, you can visit the firm's website at www.sutherlandkelly.com.

Stefan Nespoli, P.Eng. is a Project Manager with Edison Engineers Inc., a communication-focused professional engineering and project management firm specializing in the repair and restoration of existing buildings. Stefan is a current Board member with both the CCI London & Area and Windsor-Essex County Chapters, and is the vice Chair of the CCI National Communications Committee. He can be reached at snespoli@edisonengineers.ca. For more information, visit www.edisonengineers.ca.

What is the CondoSTRENGTH Program?

It's a FREE program for CCI Condo Corporation Members in Toronto that is For Directors, By Directors.

The CondoSTRENGTH program helps condominium directors come together and share their condo experience during free networking events hosted by local condo communities.

The program provides members with access to an online toolbox of resources which includes: checklists, templates & guides, success tories, and a collection of helpful and informative articles.

Program members also have exclusive access to an online survey tool developed to help Boards identify areas to improve and gauge the impact of their efforts.

Drones

by Richard A. Elia, B. Comm., LL.B., LL.M.(ADR), ACCI
and Patricia Elia, B. Comm, LL.B., Adler Trained Coach

Partners at Elia Associates

With the impending settlement of Mars, the rise of drones and their use commercially and recreationally on Earth seems like a natural progression in the evolution of humans, especially where large structures such as oil rig platforms, bridges and sports stadiums exist in countries such as the United States, China and Canada but… condominiums really?? Drones were first used by the military as unmanned aerial vehicles and later by the international civil aviation organization as remotely piloted aircrafts systems. Drones come in various shapes and sizes and can be piloted remotely through complex systems which operate at high altitudes and long distances. Established commercial uses for drones include surveillance, construction, agriculture, resourcing exploration, meteorology, mapping and photography. There are many other uses contemplated for drones such as organ donation/package delivery, building and equipment replacement purposes and building inspection for repair and maintenance purposes.

Drones are also being used for real estate and movie production, racing sports, hunting and personal use. Consumer drones have video and photographic capabilities. The smallest drone currently available in the Canadian market was 55 grams, equipped with photographic technology, and syncs with iPhones; alternatively, the United States Navy has created a drone the size of a Boeing 747. Canada is looking at large drones to transport food to the remote north. As drone use becomes more widespread, individuals, condominiums and businesses should be aware of the legal ramifications and who has the rights to be associated with drones. At Elia Associates, they have been having some interesting discussions on drone technologies (as recently recorded by this CONDOCENTRIC drone):

Richard: Drones are a heck of a lot of fun! I really want one! Better yet I think I will build one!

Patricia: What on earth do could you possibly need a drone for?

Richard: Aside from the fun aspect, they are a step towards improved performance and efficiency so let people have their fill. They have the potential to be valuable tools for all types of businesses of all types and sizes, including those who service the condominium industry. The ability to invest in and access drones, pilots and analysis software and from there create or enhance business opportunities is becoming more and more of a reality both in terms of technology and in cost so I think it is also inevitable. Why wouldn't a savy business integrate use of drones into its business plan? The more cost effective the better. Why would a reserve fund study planner not use a drone to do the site inspection if a condominium happens to be multiple stories high and shaped like Marilyn Monroe. Arguable any type of building inspection above the ground floor would be made easier. A drone can record real time performance or failure and access areas that are more difficult and/or dangerous for human beings. It seems to me you would have more accurate performance audits and reserve fund studies every three years if you had a drone. It seems like a very logical application to allow for the continuous and rigorous inspection of certain components of multi-storey buildings or even townhomes where the townhome complexes are of a significant in size and space. Can you imagine a property manager being able to do an inspection of the 2nd floor window caulking or a roof anchor review with the roofer in a townhouse complex without leaving his or her office? Come on, drones mean efficiency and making more money.

Patricia: But at what price? Not everything fun is safe. While I agree that drones are highly utilitarian and fun, there is a line between being toys and not being toys. As robots, drones can collect, store and use data and perform functions which may present dangers to urban populations. Cars are great inventions but you still need to put limits on the use of cars because people inevitably want to challenge boundaries. I agree that the invasion of the drones is inevitable. So perhaps we need to understand what we are dealing with and then think ahead to managing the risks drones present to condominiums. What do you think the risks are of drones?

Richard: The way I see it, the key risks of drones are: privacy breaches, injury to property and persons and the commission of torts (wrong doing) such as trespass, nuisance and negligence. I can see where the lawyers would go if a 55 pound drone just dropped out of the sky onto a sidewalk in downtown Toronto - It would probably be much like the conflicts we have about falling glass, if not worse. So how do we avoid the dispute and manage the conflict if we cannot make them fail safe.

…… *continued on page 13*

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Patricia: I think that you avoid the dispute and manage the risk by thinking ahead. I would put the risks in two broad categories: those within the control of the condominium and those outside of the scope of the condominium's influence. I also think it is hard to assess the full risk of something while it is still relatively new and unexplored. Even federal legislators are not yet as up to speed as they need to be in managing risk created by drones to air traffic, which has material risks for passenger aircrafts. However, Transport Canada has put in place a variety of pieces of helpful information on Flying Your Drone Safely and Legally, Getting Permission to fly your Drone and Reporting a Drone Incident [https://www.tc.gc.ca/eng/civilaviation/drone-safety.html]. Generally, current regulations limit Unmanned Air Vehicle ("UAV") use in Canada. A UAV is defined as a power driven aircraft, other than a model aircraft, that is designed to fly without a human operator on board. A "model aircraft" means an aircraft, the total weight of which does not exceed 35 kg (77.2 pounds), that is mechanically driven or launched into flight for recreational purposes and that is not designed to carry persons or other living creatures. A UAV may not be flown without a special operations certificate or an operator's certificate. Failure to be licenced may include fines or jail time where an aircraft is put at risk, flying occurs in no fly zones or anyone's safety is risked. Special Flight Operations Certificates contain conditions on where and how to fly, including maximum altitudes, minimum distances form people and property and coordinate requirements with air traffic services.

Exemptions exist under the Aeronautics Act, section 5.9(2) for non-recreational UAVs. http://www.tc.gc.ca/civilaviation/regserv/affairs/exemptions/docs/en/2880.htm

Richard: Patricia, you need to be realistic – drones are being sold at the mall and many have very advanced digital cameras attached and yet most will be considered "model aircrafts" and people can build them themselves. At the same time, I do understand that with the increased popularity of drones and the pushing of boundaries. Transport Canada is developing new regulations to address the safety requirements, growing popularity, and economic importance of UAVs. Transport Canada's proposed changes include new flight rules, aircraft marking and registration requirements, knowledge testing, minimum age limits and pilot permits for certain UAV operations. Transport Canada published a Notice of Proposed Amendment in May 2015 to highlight these changes.

More rules! The only way that humans advance is by trial and error and humans like to find the easy way to do things. Practically, what we really need to do is identify the risks and manage the risks in a reasonable fashion.

Patricia: I think that is what the rules are trying to anticipate. In speaking with one very intelligent, well-educated drone builder and enthusiast, Mr. Sultmanis, he told me that the biggest problem is pilot error. People do not understand their drone's performance parameters well enough. Hence the need for knowledge testing, new flight rules and pilot permits. Further, the only way to attribute liability will most likely be to tie it back to the pilot subject to manufacturer's defect and insist on mandatory insurance. In the exemptions under the Aeronautic Act, a quick read shows the government has taken a lot of time to ensure that pilots need to be really aware of the environments they are flying in.

Richard: Okay, so regulation is necessary to ensure reasonableness and balance interests in privacy personal safety and safety of property. My expectation is that the federal government because of air space and aviation regulation will set the bar for the overall consistent management of the rules governing the performance of drones. However, I can see that provincial and municipal regulators, together with condominiums may put in place parameters around drone use. For example, municipalities could put in place "no fly zones" for drones or put in specific parameters via geo fencing. Further, our condominiums may address these issues in their rules and in their contracts with suppliers where their suppliers use drones. The latter issue is dealt with by making the contractor responsible for ensuring that where a drone is used, that adequate training, licencing and insurance exist as a covenant in the agreement to hold the condominium harmless.

In the rules, condominiums could limit the use of or even prohibit drones on the property including model aircraft. A possible exception would relate to the use of drones in relation to operation, maintenance and repair of the property. Alternatively, a condominium may require that all drone and model aircraft operators in the building be made aware of Transport Canada safety rules and operate within the same.

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The rules could address the fact that no drone operator shall interfere with another resident/owners right of quiet enjoyment and should not present a physical threat. The rules may also address the fact that any photography, storage of data and use of any collected data from within a unit is strictly prohibited. The challenge remains enforcing the same and even taking on the responsibility for managing the same on behalf of an individual. Practically, damages for breaches of privacy in such cases belong to the individual. Thus, a condominium may address this issue generally within its privacy policies. In addition, the condominium may also set up "no fly zone" parameters, i.e. inside the building, within 30 feet of the building and over common element spaces such playgrounds, pools and areas where the risk of injury because of drone or pilot failure increases. Drones for recreational purposes should be managed to ensure that the condominium has acted reasonable. Condominiums have to be proactive together with perhaps their municipalities on ensuring that no fly zones are very clearly delineated to community participants and their guest. Further, there could be fly safe areas where drones may be operated, which comply with federal aviation requirements. Obligations under the condominium declaration should be reviewed to determine and ensure that the obligations for any injury caused by the drone operator are borne by the unit owner.

Further, condominium may ultimately have to insist on having drone registries to understand who has a drone and who is accountable. Very similar to our dog registries, we like to know who's got a dog on the leash or who's flying a drone. This is really the only way to ensure people take responsibility for their acts or omissions. However, this may be taken care of with further regulation of drone use and pilot licensing and training.

Patricia: On privacy, do drones really present a privacy threat greater than from people on scaffolds or boson chairs, or platforms that scale down the sides of buildings and happen to be washing the windows and intrude upon the private moments of people in their units? I think a condominium should have a communication programme to make people aware of drone use, the limits on the same, how the same can negatively impact neighbours and how everyone should minimize interference with each other.

Richard: But what about those drones that are not being operated by residents or unit owners of the condominium just flying around taking pictures?

Patricia: This brings up a really good point. People who are looking inside the condos may not be people who reside there or have ownership right. So how does the condominium enforce? Under the Criminal Code, there are criminal sanctions for "peeping Toms" but the same only work if you can catch the person who is doing it. This is why registries of drone operators both for recreation and for commercial purposes should be mandatory. As drones become more common, it is important to manage even those people who recreationally use drones.

Here is the conundrum we currently are thinking about: Amazon's announcement of its proposed drone delivery program and the recent claim that the technology is ready and that they plan to use "Amazon Prime Air" drones to deliver packages to consumers in 30 minutes or less once the legislature catches up. It is probably only a matter of time before condominium owners can have packages delivered by drone technology. The question will be how will customers pick up their packages? Off the landing pad on the roof or from their balcony or the concierge? The parameters of human creativity are limitless and so (for better or worse) are the way lawyers see the risks.

Richard A. Elia,
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Richard has been actively involved in the area of Condominium Law for over 20 years, advancing the objective of effective and ethical advocacy. In 2001, Richard opened Elia Associates, which has grown to have offices in Ottawa, Barrie, Toronto and Oakville. Richard actively participates as a member of several chapters of the Canadian Condominium Institute. He holds a Masters of Law and the ACCI designation.

Patricia Elia
B.Comm. LL.B., Adler Trained Coach
Patricia Elia is a senior lawyer with Elia Associates. In her role as a lawyer, she brings expertise in business and condominium law, together with a unique perspective as a condominium director and owner. She believes in empowering communities to grow and thrive.

Patricia is passionate about the condominium industry because of the important role condominiums play in the lives of real people. Currently, she is working on a variety of industry related programs and committees with a view to facilitating awareness and knowledge for unit owners, directors, property managers and condominium communities as a whole.

CondoSTRENGTH

Director Success Story

Exclusive Resources for Program Members ***For Directors, By Directors***

Category: Finance – Common Expenses – Special Assessments
Contributor: Rainer Vietze, Director of MTCC 601
Chapter of Origin: Toronto & Area
Date: 2016

Catering a Special Assessment to Your Community

The Situation:

Our building is on the southern fringe of Yorkville, at least the street sign says that's where we are. We have 101 residential units and 6 commercial units at street level. We're 30 years old.

30 years ago, single-pane windows were the norm. I know because the sliders in our windows were single-pane. They were also extremely large, and when opened all the way you could likely fit two people through the opening if they crouched a bit and if they didn't mind the drop. Limiters had been installed so that those sliders would only open so far, but those disappeared almost as soon as they were put in place. To top it off, the screens were on the outside of the outside window – when windows were being washed, owners would have to remove those screens and pull them into the unit. It often took a considerable effort and we were truly lucky no one was injured or killed by falling out of the unit or by having a screen land on their head.

In 2013, our last reserve fund update - prepared in 2011 - told us it would be another 10 years before we needed to replace them. Increased condensation and severe icing issues in a number of units suggested otherwise and the subsequent review by a building engineering firm confirmed that we didn't have ten years – we needed to undertake some action now.

Something became apparent very quickly – not only did we need to start the project 10 years earlier, but today's cost would be significantly higher than the estimates used in the last update. This was more than was projected in the 2011 update after adjusting for inflation!

One saving grace was that our 2014 update was in progress. This allowed us to drop in the actual costs and then quickly model the results under various financing scenarios.

In the end, we concluded a special assessment was required.

The Implementation Strategy:

The starting point for this exercise for us was identifying some key success factors. Things we needed to get right to ensure easier acceptance.

We identified the following key success factors. Remember, each building is unique and your building may have other drivers

- **Determining the appropriate assessment amount** – *too low and we would need another one, too high and we would face questions about our choice*

For our building, both the proposed plan for funding and a special assessment must be sufficient at the time of implementation to ensure the estimated ending fund balance for any subsequent year remains above specific thresholds.[1]

- **Clear and concise communication** – *we needed to ensure owners had the same information the board had available so they could reach a similar conclusion*

The Board's presentation and actions should reflect the seriousness of the situation and the deliberations that went into the final decision. Also, each director has a duty to support the decision regardless of how they voted on the matter; they should not speak directly or indirectly against it.

After reviewing the reports from our building engineers in detail, we carefully considered our best communication strategy. We held a Town Hall to announce the special assessment and discuss why it was needed. We released portions of the report to the community prior to the Town Hall to help everyone understand the technicalities in play to reach the same conclusion regarding the fix.

- **Assessing financial impact on unit owners** – *we came up with ways of reducing the pain mainly by spreading it over a longer period*

We also took some time to think about how the special assessment would impact owners. For instance, we recognized that we had three groups in our building who might have trouble dealing with a large one-time payment: retired individuals who couldn't handle a large payment in a short amount of time; new unit owners; and people with minimal cash reserves. So, we built some flexibility into the assessment by breaking the assessment into three equal instalment payments.

The Result:

1. Not one official objection was raised.

2. 99% of each instalment was paid within 15 days after each due date and we had completely collected the full special assessment within three months after the last instalment date.

Special assessments are not a measure of last resort, nor should they be a knee-jerk reaction to deal with a current shortfall. They will only become more prevalent as first and second generation buildings age. Ongoing education, along with specific consideration of the realities of your community and communication are vital.

[1] Please see the "Determining How Much Your Special Assessment Should Be" success story for more about this.

Condo Word Puzzle

I N S U R A N C E C O M M U N I T Y Z A
Z V H U K L H J E O V Q C G W R J N B M
L M A N A G E M E N T K I P C O A C T E
E L M A L F R Y Z D Y B N Q B H E D O D
B R R R Q C U C R O A U D I T O R I H I
F E T R A O Y N C S D C E E I K X S Z A
P Y O E W N E E D T E Q M N N U P P L T
V W O A S D T I E R C C N G U N P U O I
Y A Z R P O N C N E L B I I V U E T W O
R L T S R C U I O N A F F N N J F E A N
E O Q P O L P F R G R E I E T M J S L I
G F F D P T W E D T A T C E Q E Q C Y C
U T S L E E R D X H T I A R H A R Q B O
L G D T R N U M N C I C T O W C K E F U
A W B B T A L E Y G O C I L W A F N S R
T L N M Y N E N C O N D O M I N I U M T
I N B O G T S Z E W M B N X B A E Y L E
O U R D Z A X I N I H G H B T D R R V J
N K I K Z V P E Q G L P E F E A B Y U P
S L A F D H J S H S Q E V R E S E R Y U

ACT
AGM
AIRBNB
ARREARS
AUDITOR
BYLAW
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CCI
COMMUNITY
CONDO
CONDOMINIUM
CONDOSTRENGTH
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UPCOMING EVENTS

EDUCATIONAL SEMINAR & AGM

Special Guest Presenter: Armand Conant
Armand is a Partner with Shibley Righton LLP, as well as a founding member of the Condominium Authority of Ontario (CAO)

WHEN: September 20, 2017

TIME: 7:00 pm to 9:00 pm

PLACE: WFCU CENTRE, ONTARIO ROOM
8787 McHugh Street, Windsor, Ontario

COST: $15 for members and **$25** for non-members

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