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Condo Commentary

November 2016

THE DEVIL IS IN THE DETAILS – TOP TEN ISSUES FOR THE REGULATIONS UNDER THE CONDOMINIUM ACT, 1998

By David Thiel

Bill 106 (*Protecting Condominium Owners Act, 2015*) was introduced for first reading in the provincial legislature in May 2015 and ultimately received Royal Assent in December 2015. However, Bill 106's changes to the *Condominium Act, 1998* (the "Act") have not yet been proclaimed into force, presumably in large degree to the fact that regulations under the Act have not been finalized.

As anyone who has read through the Act will see, much of the substantive content in the provisions will actually be found in the regulations (look for 'prescribed' requirements – that's a reference to regulations). Regulations, even in draft, have not been released. Accordingly, analysing portions of the Act without the regulations is futile at worst and frustrating at best.

There may be a light at the end of the tunnel. In September 2016, it was reported that Premier Kathleen Wynn delivered a directive to Ministers, including a goal that 'key elements' of Bill 106 to be implemented by the fall of 2017. Does this mean that circulation of regulations is imminent? Hopefully that is the case, and in anticipation of seeing those regulations, here is a Top Ten list of regulations which could have a significant impact upon the operation of the Act.

10. Standard Unit

Where a condominium has not passed a Standard Unit By-law, and subject to the regulations, the regulations are to prescribe a form of standard unit. What will the content of such a standard unit be? Will it be suitable for all condominiums, or will there be various versions? Should condominiums currently considering enacting a Standard Unit By-law wait to see the content of such regulation and/or wait for the Act to be proclaimed into force?

9. Chargebacks

The regulations will prescribe which types of 'chargebacks' (additions to common expenses) will invoke a procedure for objection by the unit owner. The procedures will also be governed in various aspects by regulations.

8. Requisition Meetings

The regulations may specify additional purposes for which an owners' meeting may be requisitioned, beyond those named in the Act. The requisition itself must be in a form governed by regulations and include the information required by the regulations. Currently, there is no prescribed form.

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7. Borrowing

Corporations will need to enact a by-law to authorize a specific borrowing under the Act, unless the regulations provide otherwise. This is a substantial issue left to the regulations, potentially providing exceptions to the borrowing by-law requirement.

6. Records Requests

The regulations may specify:

a. the process by which an owner makes a request for records;

b. the process by which the condominium responds;

c. fees relating to examination and copying of records; AND/OR request forms.

Clearly, a potential 'game-changer' for handling records requests if implemented, as opposed to the limited guidance on such issues in the Act itself.

5. Procurement Process

The regulations shall define which contracts and transactions entered into by condominiums must be governed by a procurement process. Furthermore, the regulations will define the applicable procurement process. Not much detail in the Act itself here, and the regulations alone will essentially govern this process.

4. 'Deemed' Provisions

The regulations may also specify provisions that are deemed to be included in declarations or descriptions registered before May 5, 2001. Similarly, regulations may set out provisions that are deemed to be included in the Declaration, By-laws or Rules unless amended or repealed in accordance with the Act. Such regulations could have profound effect upon the existing documents of condominiums.

3. By-laws

A majority of all owners must approve a by-law in order for it to be enacted, or such other number of owners as the regulations may require. Will there be differing thresholds for differing sizes of buildings potentially? That makes some sense and it will be interesting to see how this is handled in the regulations, if such regulation is made.

2. Reserve Fund Adequacy

The regulations are to 'determine' the 'adequacy' of a Reserve Fund. This is a long awaited response to the common problem of whether a Reserve Fund funding plan is in fact 'adequate'. For example, must ongoing projected contributions to the Reserve Fund be limited to inflationary increases only in order to be 'adequate'?

1. Condominium Authority / Tribunal

One of the central changes in Bill 106 is the creation of the proposed Condominium Authority, which would then in turn appoint members of the Condominium Authority Tribunal. However, even the existence of the Tribunal is subject to having a regulation to create same. Furthermore, it is unclear which disputes may proceed to the Tribunal, as these are also to be determined for the most part by regulation.

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HUMAN RIGHTS LEGAL UPDATE -- CAN THE HOLDING OF A CONDOMINIUM OWNERS' MEETING CONSTITUTE DISCRIMINATION UNDER THE ONTARIO HUMAN RIGHTS CODE?

By Carol Dirks

Condominium corporations are a microcosm of society, made up of individuals with divergent beliefs, practices and needs. What if boards of directors were required to select dates for annual general meetings (AGMs) or special owners' meetings that all unit owners could attend based on their religious beliefs, family obligations, or other personal needs? This was precisely the issue that the Human Rights Tribunal of Ontario recently considered in the case of *Kamal v. Peel Condominium Corporation No. 51*.

The Case

In the Kamal case, the board of PCC 51 obtained a condition survey from its consulting engineer indicating that major exterior repairs were urgently needed at a cost of $2 million. PCC 51 only had $200,000 in its reserve fund account. PCC 51 had previously levied a special assessment to raise funds to cover a budget shortfall, which was financially difficult for many owners. The board of PCC 51 was concerned about the financial impact of levying a further special assessment, and opted instead to look into borrowing the $2 million for repair work. In the end, PCC 51 was able to secure financing on favourable terms so long as the approval, including passing a borrowing bylaw, was completed by the end of the year.

A special owners' meeting was called for the unit owners to discuss and vote on a borrowing bylaw. The board of PCC 51 made a point of trying to choose a date which would allow owners to attend as the borrowing bylaw would not pass unless a majority of all units voted in favour. In selecting the date for the meeting, the board specifically sought to avoid scheduling it on Eid-ul-Ahza, an important religious holiday for persons of the Muslim faith within the condominium community.

At the time the meeting packages were mailed out, Eid-ul-Ahza had not yet been declared for those Muslims who celebrate this day based on the moon sighting, as opposed to a fixed calendar date. In the end, for some Muslims, Eid-ul-Azha fell on the same day as the special owners' meeting. Given the limitations associated with the financing, the board decided to proceed with the meeting on the scheduled date. Three unit owners subsequently filed an application with the Ontario Human Rights Tribunal against PCC 51 (who the writer of this article represented) and its property management company. The application alleged discrimination based on the unit owners' creed due to the holding of the special owners' meeting on Eid-ul-Azha.

The Decision

In a decision released in late September, the Ontario Human Rights Tribunal found that holding the meeting on Eid-ul-Azha did not discriminate against the applicants and dismissed all three applications against both PCC 51 and its property management company.

The tribunal rejected the applicants' contention that the corporation's decision to hold the special owners' meeting on Eid-ul-Azha deliberately targeted owners who were Muslim by excluding them from attending the meeting. Further, the tribunal found that there was evidence of past owners meeting held on other religious days, including Hindu holidays. The tribunal also found that PCC 51 had in good faith tried to avoid calling the meeting on Eid-ul-Azha, and that the fact that this religious day fell on the date of the meeting was unforeseen and unintentional.

No Disadvantageous Impact

The tribunal also found that the meeting did not have any disadvantageous impact on any of the applicants because it did not interfere with their ability to observe the tenets of their faith. Based on evidence concerning the religious obligations of each of the applicants on Eid-ul-Azha, the tribunal held that it was instead other factors within the applicants' control that interfered with these religious observances.

Even if there was a disadvantageous impact on these three owners because of their creed, there may not have been a finding of discrimination. That's because the tribunal found that the ability to participate in the special owners' meeting by way of proxy, as opposed to in person, represented reasonable accommodation by PCC 51 under of section 11 of the code. Accordingly, the tribunal found that there was no infringement of any of the applicants' rights under the code.

Proxy as Reasonable Accommodation

Importantly, the tribunal's decision in *Kamal v. PCC 51* recognizes that the ability of owners to participate in a condominium meeting by proxy constitutes reasonable accommodation for owners who may be unable to attend the meeting in person for code-related reasons. In addition to religious holidays, there may be many other scenarios where a condominium owner is unable to attend a meeting for reasons protected by the code, such as child care obligations, or even disability or health-related reasons.

In its reasons, the tribunal left open the possibility that a finding could be made that a religious group (or other recognized group protected under the code) had experienced distinct and disadvantageous treatment because of their creed by the holding of an owners' meeting. For example, if a corporation made a practice of calling owners' meetings on the religious holidays of a specific creed, then it is conceivable that there could be a finding that the owners of that creed have experienced discrimination because of their religious beliefs.

However, again, there may not be a finding of discrimination even if holding an owners' meeting disadvantageously affected some owners because of creed (or other code-related grounds). The Kamal decision suggests there would be no violation under the code as long as these owners were allowed to participate in the meeting and vote by way of proxy.

Notwithstanding the decision of the tribunal in the Kamal case, condominium corporations should strive to respect the individual beliefs and needs of the owners who make up its community. More specifically, corporations should not to consciously seek to hold owners' meetings on dates and times that may unfairly limit the ability of some of its members to participate.

There may be circumstances when the corporation should reschedule an owners' meeting, or at least consider the impact on a particular owner or group of owners. For example, the board of PCC 51 did make an effort to contact other members of the Muslim community after it became aware that the special owners' meeting was to be on Eid-ul-Ahza. PCC 51 tried to determine whether the meeting would interfere with any religious rites before the corporation decided to proceed with the meeting as scheduled. The tribunal noted this effort and consideration by the board members of PCC 51, as well as others, in its decision.

"Occupancy" or "Service"?

The original applications regarding the holding of the owners' meeting on Eid-ul-Ahza alleged discrimination with respect to "occupancy of accommodation," contrary to section 2 of the code. Whether a unit owner is able to attend a condominium meeting really has no impact on that individual's ability to use and occupy his or her residential unit.

Rather, the ability to attend an owners' meeting, and to exercise a right to vote, is "political" in nature and forms part of the ownership rights as a shareholder of the corporation. The tribunal indicated that if the applications were improperly brought under section 2 of the code, they could be amended to be brought under section 1 of the code, which deals with equal treatment with respect to "services, good and facilities."

In the end, because the tribunal found that there was no discrimination, the tribunal did not have to decide whether a condominium owners' meeting is considered either a "service" or "occupancy of accommodation" under the code.

Accordingly, while it appears evident that an owners' meeting does not fall within section 2 (occupancy), whether an owners' meeting would qualify as a "service" under the code remains unresolved.

Note: At the time of writing this article, the deadline for the applicants in Kamal v. PCC 51 to file a request for reconsideration has not expired, which is 30 days. There is no right to have a decision reconsidered by the Human Rights Tribunal. In granting such a request, the Tribunal must be satisfied that there is a proper basis to re-open the case based on specific criteria, such as conflicting jurisprudence.

***A version of this article was first prepared for publication in CondoBusiness magazine*

GREEN LOANS AND ENERGY EFFICIENCY UPGRADES FOR CONDOS

Co-written by Lou Natale and Paul Pittana, Equitable Bank

There is a trend happening in the condo industry centered on energy cost savings and conservation. We've heard buzz words such as, "Green Loans" and "Energy Retrofit Financing" being bounced around, but what is the difference between these terms? How does a developer-initiated Green Loan work? How does a Condo Board go about paying for energy efficiency upgrades? This article will provide a high-level overview of financing green energy initiatives in both new and existing condos.

Green Loans for New Condos

Let's first take a look at developer-initiated Green Loans for new condos. The concept of Green Loans for condos is becoming increasingly popular among condo developers. In recent years, a number of developers have been building condos that surpass building code standards for energy efficiency. While the intention is to create significant energy savings that will benefit unit owners during the life of the installed equipment, the predicament developers are faced with is how they will pay for these extra energy-efficient upgrades, while continuing to be sensitive to pricing new units.

An effective way to solve this developer's dilemma is a "Green Loan". Green loans for condos are an innovative financing tool for developers looking to finance energy efficiency upgrades, which are over and above building code requirement. The developer's desire to enter into a Green Loan (on behalf of the proposed condo corp.) with a lender is fully disclosed in the condo documents (the Disclosure and the proposed Declaration), so that potential condo purchasers are made aware of this loan before making their buying decision.

Here's how the Green Loan works: The Disclosure and Declaration clearly spell out the developer's intention to incorporate energy-efficient equipment, building materials and systems in the construction of the condo. On, or

shortly after the registration of the condo, the newly formed condo corporation enters into a loan agreement with the lender, and the loan proceeds for the green loan are advanced directly to the developer in order to reimburse the developer for any incremental costs incurred as a result of its acquisition of any energy-efficient equipment. Payments of the Green Loan are included in the common expenses of the condo, and are reflected in the annual operating budgets of the condo corporation during the term of the Green Loan.

A key characteristic of Green Loans is that in order for the loan to be advanced by the lender, the developer must obtain and provide to the lender a third-party authentication (typically from an engineer) of the condo's energy performance from a third-party agency. The purpose of this is to demonstrate that the condo has been designed and constructed to meet the level of energy reduction, which the lender has established as a condition for making the Green Loan.

The Green Loan concept is a win-win for both developers and unit owners. From a developer's viewpoint, constructing an energy-efficient building is creating a higher quality building with greater long-term capital appreciation. From a unit owner's perspective, funds that would have otherwise gone towards paying rising utility bills can instead be applied to paying down the loan and the unit owners will benefit from the ongoing savings on their utility bills. Once the green loan if fully paid, unit owners will continue to benefit from the cost savings. The environment is also a "winner" as a result of the reduced utility consumption.

Energy Retrofit Financing for Existing Condos

While new condo developers are effectively using Green Loans to finance the installation of energy efficient equipment, older condos are faced with a different type of challenge with respect to how they pay for energy retrofits and improvements in order to achieve energy cost savings and conservation.

As energy costs continue to escalate, many condo boards are seeking ways to save on their energy bills. Some older condos are enlisting the services of engineers or energy management firms to conduct an energy audit of the facility and identify measures to save on energy costs. Quite often, the energy savings will exceed the implementation costs, making payback periods well under ten years in some cases. Although the costs may be partially offset by government financial assistance programs, the dilemma for condo boards is how to pay for the up-front costs of these energy efficiency projects. There are essentially three methods for financing a retrofit project in a condo:

1. Reserve Fund
2. Special Assessment or Operating Budget
3. Financing (borrowing)

Reserve Fund: Section 93 of the Condo Act states that the reserve fund shall be used only to fund "major repairs and replacements of the common elements and assets of the corporation". While it is quite noble of a Board to want to pay for energy retrofits through existing reserves, the reality for many condos is that funds are not adequate for a Board to embark on a large energy retrofit project because the funds are simply not available, or that the reserve funds are needed for other "non-energy" related major repairs and replacements (e.g. roof replacement or underground garage waterproofing).

Special Assessment or Operating Budget: Funding all or a portion of an energy retrofit project can be achieved through a special assessment levied against all owners or an existing accumulated surplus from the operating fund. It is also possible to fund an energy retrofit project through the annual operating budget but this would likely involve a substantial increase to the annual budget, depending on the size of the energy retrofit project. Although the decision to fund an energy retrofit by way of a special assessment or through a large increase to the annual budget is within the Board's sole authority, such a decision would likely be highly unpopular with the owners and could result in a significant backlash against the Board and property managers. With this funding option, prior consultation and communication with the owners is critical.

Financing (borrowing): A common and generally accept way of funding all or a portion of large energy retrofit projects is to borrow money from a third party lender (such as a bank or other financial institution specializing in condo lending). The borrowed money used for energy retrofit projects may be used for both major replacements and improvements to the common elements. Pursuant to Section 56(3) of the *Condominium Act*, a borrowing by-law specifically dealing with the energy retrofit financing must first be passed by the Board of Directors and then approved by a majority of all owners (50% + 1) at a meeting duly called for that purpose.

The new by-law must set out all of the basic details of the proposed loan: the principal amount, interest rate and term of the loan. As a condition of the loan, most lenders require the Corporation to enter into a Loan Agreement and a General Security Agreement which set out all of the basic terms and conditions relating to the funding and repayment of the loan. As well, the condo corporation must comply with s. 97 of the *Condominium Act* which deals with situations where the condo is considering making a "change" in the common elements or assets of the corporation (as maybe the case with an energy retrofit).

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THE CONDOMINIUM LAW GROUP AT FOGLER, RUBINOFF LLP IS PLEASED TO WELCOME KHALID KARIM TO OUR TEAM.

Khalid’s practice involves providing advice on all areas of condominium law, serving condominium corporations, developers, owners, property managers and other members of the condominium community. Khalid attended law school at the University of Windsor where he obtained the degree of Juris Doctor. While at law school, Khalid was extensively involved in student government. Khalid was President of the Students' Law Society, founded the Corporate Commercial Club and was a tutorial assistant for Professor Marcela Aroca. Khalid won multiple mooting awards, including Best Team and Best Advocate at the 2015 Donald G.H. Bowman National Tax Moot. Khalid previously worked at a renewable energy company in the sales and contractual negotiation of residential rooftop solar products. Khalid joined the firm as a summer student in 2014 and articled with the firm in 2015-2016. He was admitted to the Ontario Bar in 2016.