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Fogler, Rubinoff LLP, Barristers & Solicitors

CONDO COMMENTARY

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Your **Business Law Firm**

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LIABILITY ISSUES: CONSTRUCTION SITES, TRADES PEOPLE AND VOLUNTEERS

By Lou Natale, B.A., LL.B

As we are all aware, condominium corporations and their directors are exposed each day to potential liabilities arising from the many duties and responsibilities under the *Condominium Act*, as well as other statutory and common law obligations. Although insurance is intended to protect and give some comfort to corporations and directors relating to certain types of liability, it is not recommended that they rely solely on insurance. Taking precautions and acting reasonably is a much better way to manage and avoid risks and liabilities. This advice certainly applies when dealing with trades people and construction activity on the common elements.

One way to avoid liability issues and potential problems relating to repairs to the common elements, is for corporations to deal with, at all times, reputable, competent and licensed contractors, such as plumbers, electricians, landscapers and window washers. It is also critical that any contractor who is hired to perform work on the common elements be properly insured and that they provide the required *WSIB* clearance certificate. Its amazing how often I discover that a corporation has hired an unlicensed trade person or "handyman" to deal with small little jobs around the condominium, presumably to save some money, instead of hiring a qualified and insured contractor. All it takes is an accident to occur while the unlicensed trade person is performing repairs in the condominium and the result could mean thousands of dollars in damages and another insurance claim for the corporation. In that case, any money that the corporation expected to save by hiring the unqualified contractor may well turn into a major loss and headache and some serious questions for the board to explain to the owners how this happened.

Lou Natale, Partner
Condo Group
and Real Estate

Serious issues can also arise if a board "recommends" to owners the use of certain trades people to perform work in the units. By recommending a list of handymen or contractors, the owners are relying upon the board to ensure that those people are qualified, licensed and insured. There is the potential for the corporation or board members to expose themselves to liability if the "recommended" handyman causes damage in a unit and it turns out that the person is

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unlicensed and uninsured. It is important for boards to consult with the property manager in putting together a list of qualified, licensed and insured contractors who are available to perform work at the condominium. It is very typical for experienced property managers to have a compiled list of reliable and qualified contractors who they have worked with over the years.

Corporations should also be aware of their obligations to maintain, at all times, a safe workplace for contractors and employees of the corporation. Ontario's *Occupational Health and Safety Act (the "OHS Act")* requires that an "employer" take every precaution reasonable in the circumstances for the protection of a worker in the "workplace". A "workplace" is considered to be any place where a paid worker performs work. As such, the common elements of a condominium is a workplace for a superintendent, landscaper, security guard, window washer, and an elevator contractor and many others. A "worker" also includes an employee of a contractor or sub-contractor.

According to the *OHS Act*, directors and officers can be held personally liable if they fail to take every precaution reasonable in the circumstances for the protection of a worker. Property managers should also take responsibility to take steps to ensure a safe workplace to avoid any potential liability for the corporation and its directors and officers. This includes taking reasonable steps to ensure that contractors comply with all safety requirements, such as the use of safety belts, helmets and eye protection, as the case may be, when performing work on the common elements. If a board member or property manager sees something that appears to be a safety hazard, the situation should be immediately brought to the attention of the contractor or the engineer who may be supervising the repair project. This does not mean that board members and managers are expected to know all of the safety requirements and codes, nor does it mean that board members are expected to walk through the garage when its under repair or go onto the roof to inspect the condition of the work. In fact, if a board member or property manager enters into a repair zone on the common elements they should be escorted by the contractor's supervisor or the engineer and they should also be wearing the appropriate protective equipment to avoid personal injury and a fine under the safety codes. There are a number of other requirements under the *OHS Act* and safety regulations. This Article is not intended to be an exhaustive review of those requirements.

Another potential area of liability for corporations and directors is the use of "volunteer residents" to perform work on the common elements. By recruiting volunteers to do little odd jobs around the condominium, such as planting flowers and pruning plants, or fixing a broken fence, a corporation can save some money and create a sense of community among the residents. However, volunteers are also entitled to expect a safe environment to perform their volunteer work. It is important that all volunteers have the right equipment to carry out the work and that they wear the appropriate safety equipment depending on the nature of the work. If a volunteer is injured, there could be some potential liability for the corporation and its directors.

Being a director of a corporation is certainly not an easy "job". There are many pitfalls and potential liabilities for directors that can be avoided (or managed) if the appropriate precautions and reasonable steps are taken, especially when dealing with contractors and volunteers who perform work on the common elements.

Lou Natale is a senior member of the Condo Law Group at Fogler Rubinoff LLP which services the condominium industry throughout the Greater Toronto Area, the Golden Horseshoe and Cottage Country. Lou can be reached at 416 941-8804 or at lnatale@foglers.com.

STRATEGIES FOR DEALING WITH PROBLEMATIC OWNERS

By David Thiel, B.A., LL.B.

David Thiel, Partner
Condo Group

We live in what seems to be an increasingly hostile world, where personal interactions appear to have become less courteous and more confrontational. This is especially true in the context of condominium communities. Owners, directors, managers and others seem to be experiencing an unprecedented level of hostility from certain other owners and residents, often resulting in litigation. The purpose of this article is to examine some common types of challenging situations involving owners or residents together with some basic strategies for addressing same.

Records Requests

At one end of the spectrum of problematic situations would be requests for records from an owner. Most of the time these are straightforward matters for Condominium Corporations to address and records are provided without confrontation or controversy, as should be the case.

However, records requests can also be used in certain situations to harass the Corporation and have a potential to create a confrontation, and even litigation, between the owner and the Corporation.

Responding to records requests in some situations can be quite onerous and could involve for instance careful review of records for any personal information or information relating to actual or potential litigation, all of which would be exempt from disclosure.

The cost and inconvenience of responding to records requests is a 'cost of doing business' for Condominium Corporations in the interests of maintaining the principle, subject to certain exceptions, that the operations of the Corporation should be an 'open book' to owners. That being said, it is unfair if an owner is imposing upon the resources of the Corporation for improper purposes.

In the relatively recent Small Claims Court case of *Lahrkamp* v. *Metropolitan Toronto Condominium Corporation No. 932*, the Court recognized that a Corporation may have reasonable excuse not to provide certain records, for example when a request was a 'fishing expedition'. The Court also recognized that the Corporation will be entitled in a wide variety of circumstances to request that the owner state the purpose of the request, which could be relevant to a decision of whether or not to provide disclosure.

Accordingly, using the reasoning of the case, Corporations will have some flexibility depending upon the circumstances to deny records requests as part of a strategy for dealing with an owner or owners who use records requests for the purpose of harassing the Corporation or carry on a personal 'vendetta'.

As a final comment, Corporations should keep in mind that owners may be entitled to review certain records of the Corporation, but there is no corresponding explicit duty to respond to 'interrogations' from owners. We often see Corporations confronted by what seems to be an infinite number of requests, accusations and inquiries from certain owners. It is of course good practice to respond in order to express the Corporation's position, but at a certain point, the Corporation cannot permit its resources to be monopolized in responding to a particular owner. It would be in order in such circumstances to send a final letter expressing that the Corporation may not be in a position to respond to further inquiries.

Communications from Owners

We are often asked what a Corporation can do in response to hostile letters from an owner/ resident to the Board or management containing defamatory and/or insulting remarks aimed at the Corporation's representatives.

One simple strategy can be to respond with a very brief letter simply denying the statements and cautioning the person from repeating such statements to third parties. Even though a statement to the Board or management is defamatory, there is in essence no claim against such person

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unless the statement is communicated to third parties. Such statements can be aggravating and insulting but in many situations the best strategy is filing the statements away and carrying on with the other business of the Corporation.

If such statements are communicated within the condominium community, the Corporation should normally respond to correct any misinformation. Providing the community with the correct information is important in reducing the harmful effects of such communications.

There is some protection of speech against defamation claims within the condominium community, but if statements are made with malice or otherwise fall outside the parameters of such protection, additional legal action commencing with a demand for an apology and/or retraction may be in order. Legal counsel should be consulted in such cases.

In cases where incorrect statements made by an owner are causing a disruption within the condominium community and the Corporation's representatives are having to spend an inordinate amount of time and expense in responding to same, commencement of legal proceedings against the owner/resident may be appropriate.

Corporations should show some patience in dealing with such statements but ultimately if the statements continue to interfere with the Corporation's operations, there would be grounds for commencement of legal proceedings against the owner.

Threatening or Violent Interactions

At the other end of the spectrum from seemingly benign records requests, owners and residents can be extremely abusive and at times threatening or even violent towards Corporation representatives or other residents.

These are situations where often the only solution is to seek the intervention of the Courts. A lot of media attention and industry comment was directed in late 2010 to the case of *Metropolitan Toronto Condominium Corporation No. 747* v. *Korolekh*, with good reason, where the rather extreme threats and other behaviour of an owner resulted in the Court ordering the owner to sell her unit.

More recently, in April 2011 and without much attention, the Court made a similar order requiring an owner to vacate and sell his unit (*Waterloo North Condominium Corporation No. 168* v. *Webb*). The point is that there are powerful remedies for Corporations in dealing with owners who are threatening or abusive. There were similar cases before the *Korolekh* case, and undoubtedly and unfortunately, in this atmosphere of hostility there will be more.

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Hopefully, in the vast majority of cases, interactions with owners will be courteous and without incident. However, in those cases where an owner or resident is behaving in a problematic manner as discussed above, there are strategies for dealing with same. The focus of course should be on resolving the issues without having to commence legal proceedings, however, such an option is available in appropriate cases.

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HOARDERS – A REAL LIFE CONDOMINIUM STORY

By Carol Dirks, B.A., LL.B.

Carol Dirks, Partner
Condo Group

After two years of efforts to gain entry into a highrise condominium unit in an attractive condominium complex, the Board of Directors was taken aback by what was eventually discovered – a serious hoarding issue within the unit. The owner, a long-time building resident, complained of various physical ailments. Notices given by the Corporation to enter the unit for semi-annual fan coil maintenance were averted by the owner typically for health related reasons. The Board of Directors' efforts to accommodate the owner were not met with any success in gaining entry to the unit. Ultimately, this firm on behalf of the Corporation filed an Application with the Superior Court of Justice seeking a Court Order to enter the unit and to enable the Corporation to address any necessary maintenance and repairs. The Corporation was successful in obtaining the Order. However, this was just the beginning…

Hoarding is a real live issue in condominium corporations, as with any multi-dwelling unit complex. It is estimated that as much as five percent of the population have a hoarding issue to varying degrees. This is no different for individuals living in a condominium.

Following the extensive fire which occurred last September at a highrise building on Wellesley Street in Toronto, the Ontario Fire Marshall's Office confirmed the cause of the fire to be a tossed cigarette landing on a balcony which was loaded with combustible materials. Aside from the cause of the fire, the extensive hoarding situation in the unit significantly contributed to the spread and intensity of the fire. A class action lawsuit has been filed by building residents against Toronto Community Housing and the property management company of that building. The claim alleges that TCH and/or property management were aware of a hoarding issue in the unit where the fire started, but failed to take proper steps to address the situation and thereby jeopardizing the life safety of the other residents.

Condominium corporations' and their management companies could conceivably be faced with similar allegations in relation to units where there is a hoarding issue. What can corporations and management companies do to protect the condominium community and themselves?

1. Be on the Alert

Condominium corporations are typically not aware of what goes on behind the unit door. In the case of a resident who breaches the condominium corporation rules by accumulating garbage and other debris on the balcony area, this may be a sign of a much larger hoarding issue within the unit. Steps can be taken to enforce the Rule violation and to ascertain any related hoarding issue. There may be other factors which are indicative of a hoarding issue within a unit such as a bad odour in the hallway or an infestation problem. However, even with infestation issues, it is typically difficult to ascertain the source as the resident who complains is generally not the cause.

Corporations may consider implementing some form of annual unit inspection which coincides with other safety maintenance, such as the testing of the fire safety equipment. The contractors who perform the maintenance should be explicitly instructed to report any issue of suspected hoarding to the Corporation for further investigation. In the case of owners who refuse to grant access to their units, active steps must be taken by the Corporation to ensure that entry to the unit is enabled in accordance with the Corporation's legal right under Section 19 of the *Condominium Act, 1998*, including if necessary, obtaining a Court Order in special circumstances where all other efforts to obtain the owner's cooperation fails.

2. Be Reactive

Hoarding can have serious and devastating consequences. When a hoarding condition is discovered in a unit, a report should be filed with the local fire department where a fire safety issue is believed to exist. The Ontario Fire Marshall's office can issue an order against the owner and the Corporation under the *Fire Protection Act* requiring that the clearing of items from the unit, and in particular the passageways to the exit points in the unit. However, it can often take time to enforce the order.

The fire department also has the authority to involve local

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public health where it believes the condition of the unit is such that there is a risk to public health. In fact, in a recent crackdown by the City of Toronto on hoarding, as of April 1, 2011 the City of Toronto has directed that public health be notified of a situation where a person is living in "excessive clutter". The public health inspectors however can only enter into the unit with the resident's consent, which in many cases is refused. Once in the unit, the public health inspectors can issue an order to clean-up the health hazards in the unit, which order would be issued against not only the owner of the unit, but also the Corporation and its directors.

The reality is that a Condominium Corporation likely has more power to enforce an expedient clean-up of the hoarded unit than local authorities. Pursuant to Section 92 of the *Condominium Act, 1998*, the Corporation can proceed to enforce the maintenance and repair of a unit where the owner fails to do so within a reasonable time and to charge back the costs to the offending owner. Depending on the extremity of the condition, the Corporation also has the right pursuant to Section 117 of the *Condominium Act, 1998* to take action where the condition in the unit is such that is likely to damage the property or cause injury to an individual.

It is advisable that notice be first given to the owner giving an opportunity to voluntarily clean-up the unit and that the owner be required to furnish the Corporation with confirmation as to who will be performing the clean-up and when the clean-up is to occur. Depending on the condition of the interior of the unit, the Corporation may be justified in taking immediate action where there exists an urgent health and life safety issue. Where entry to the unit is not enabled, it may also be necessary for an application to be filed with the Superior Court to obtain a Court Order on an expedited basis.

3. Dictating the Method of Clean-up

The manner in which the clean-up of the hoarded unit is carried out can conceivably result in further issues. Garbage and other items in the unit may have become infested with bed bugs, cockroaches, or other pests, or similarly contaminated with mould. If the items are not disposed of in a sealed environment, there is the potential for pests or mould spores to be spread to other units and to the common elements. It is therefore extremely important that a professional contractor be utilized who has experience in dealing with hoarding issues. The Corporation should obtain written assurances from the contractor, whether the contractor is retained by the owner directly or by the Corporation, as to the manner of the removal and disposal of items from the unit, as well as proof of appropriate liability insurance.

There are other issues which it is advisable to review with the Corporation's solicitor relating to the hoarding issue, such as who should go in the unit, whether photographs ought to be taken, possible mental health considerations.

Compulsive hoarding is a type of mental disorder. The Board of Directors and managers should be aware of the likelihood of the individual to continue hoarding in the unit is very high. In the absence of prolonged therapy, and without the assistance of community agencies and family involvement, in most cases the individual will continue to compulsively hoard. The Corporation will need to be alert to this fact, and may need to consider additional follow-up with the owner after the initial clean up process.

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Fogler, Rubinoff LLP
Barristers & Solicitors
95 Wellington Street West
Suite 1200
Toronto-Dominion Centre
Toronto, ON M5J 2Z9
Tel: 416.864.9700
Fax: 416.941.8852
www.foglers.com

Contact the Condominium Law Group

Lou Natale
Direct Line: 416.941.8804
lnatale@foglers.com

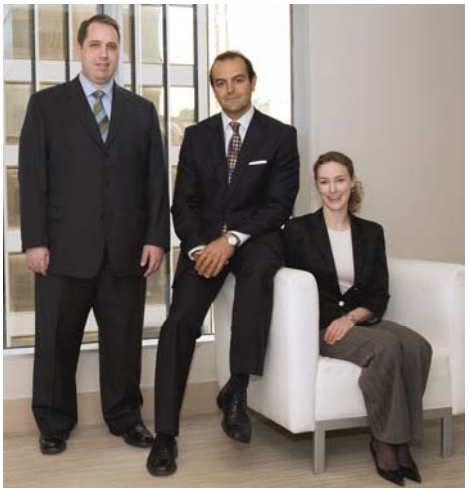
David E. Thiel
Direct Line: 416.941.8815
dthiel@foglers.com

Carol A. Dirks
Direct Line: 416.941.8820
cdirks@foglers.com

Anne Teixeira (Lien Clerk)
Tel: 416.864.9700 ext.114
ateixeira@foglers.com

Fay Colt (Lien Assistant)
Tel: 416.864.9700 ext. 113
fcolt@foglers.com

Mary Vercillo (Lien Assistant)
Tel: 416.864.9700 ext. 147
mvercillo@foglers.com



Your Condominium Law Group

News & Notes

- Lou Natale will be speaking at the 15th Annual Condominium Conference (November 4th and 5th) being held this year at the Toronto Congress Centre, 650 Dixon Road, Toronto.