



IS YOUR ROOF GREEN?

By Lou Natale

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Although green roofs are not a new concept in the construction industry, for various reasons they have not been very popular in Canada. However, the City of Toronto is trying to change that. As part of its ongoing environmental initiatives and policies, in May 2009, the City of Toronto became the first City in North America to adopt a By-law requiring all new buildings of a certain size to be constructed with a green roof.

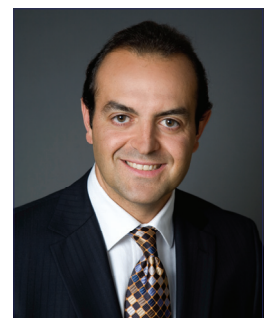
Under the new By-law, a green roof will be required for all new buildings having a gross floor area of more than 2,000 square meters or approximately 22,000 square feet. Depending on the size of the building, the area of the green roof must cover between 20% and 60% of the roof.

A "green roof" is commonly defined as a system where vegetated area becomes part of a building roof and includes vegetation (such as grass, shrubs and other plant life), a growing medium (soil materials), a filter and drainage layer, a root resistance layer and a water proof membrane. There are three main types of green roof systems:

- "complete systems" where all of the components, including the roof membrane form an integral part of the roof;
- "modular systems" which are essentially large flat trays of vegetation that are grown off-site and simply placed on the roof; and "pre-cultivated vegetation blankets" or interlocking green roof tiles which are placed directly on the roof.

In creating the By-law, the City relied on several studies and reports which considered the environmental and cost benefits of installing green roofs throughout the City.

Green roofs are said to reduce storm water runoff, improve air quality and reduce ambient heat around the City and therefore conserve energy and save costs. By creating more green space, these roofs are expected to contribute to the beautification of the City and perhaps even provide some opportunity for food production. Can you imagine growing tomatoes and lettuce on the roof of your condominium building?



Lou Natale, Partner
Commercial Real Estate
and Condominium Law

Green roofs can be designed to be very intensive, incorporating many varieties of plant life and be accessible to residents through pathways and seating areas. Green roofs can also be constructed to be passive, with low intensity layouts and no public access.

According to the City website, there are over 102 existing or planned green roofs in the City of Toronto, including the Sears Merchandise Lofts Building in downtown Toronto which was converted from a department store to a multi-residential condominium having a 10,000 square foot intensive green roof with accessible public pathways, decks and various garden beds. Ryerson and York University also have green roofs installed on some of their buildings.

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What are the possible negative impacts of having a green roof on your building and what does this all mean for condominium directors, owners and property managers?

Here is what you might expect:

Safety Issues – There is at least one international report that says green roofs could dry out and become a fire hazard if not properly maintained. There is also the possibility that poor maintenance or improper construction of the green roof can cause structural failure of the roof and water leakage resulting in significant damage and possible mould problems. Having a large amount of plant life and soil on a roof will make finding a water leak a much more difficult and expensive problem to correct. The City of Toronto is aware of the safety issues and has established guidelines and standards within the By-law in an attempt to address these concerns. As well, the By-law requires the Chief Building Official to establish a Technical Advisory Group whose mandate will include reviewing and making recommendations related to technical and safety standards for green roofs.

Repair and Maintenance – The Green Roof By-law requires that a "maintenance plan" be established in accordance with CSA Standards and must be submitted by the builder upon the issuance of a building permit. The maintenance plan must define programs of routine maintenance and inspections sufficient to ensure that the green roof components perform their required functions over the long-term. One would expect that after the condominium is turned over to the owner-controlled Board, that the maintenance plan approved by the City must be complied with and that any changes to the plan will have to first be reviewed and approved by the City. Managers and Boards will have to become familiar with the approved maintenance plan and ensure proper maintenance of the green roof in order to avoid problems in the future.

Operating Costs and Reserve Funds – It can be expected that a green roof will increase operating costs for a condominium. In addition to the day-to-day maintenance and watering requirements that will be needed, there will also be anticipated and unanticipated repairs and the replanting and replacing of plant life and the actual components of the green roof system (the drainage layer, membrane, etc.). The cost of replacing a green roof system will be more expensive and complicated than a typical roof membrane. Insurance premiums may also be affected as a result of having a green roof. All of this is expected to drive up operating budgets and reserve fund requirements, which in turn means higher monthly common expenses.



Making changes – As most managers and Boards know, making changes and upgrades to lobbies and recreational facilities can be an onerous task. Trying to balance budgetary constraints with owners' wishes and expectations and choosing the right designs, is not always easy. These same problems can be expected with green roofs. Some owners will have their own views and opinions regarding the type of plants and designs that they want for the green roof. Other owners may see the green roof as a cost burden, with little use for it and will expect the Board to spend as little money as possible to maintain or enhance the roof.

As a result of the Green Roof By-law, it is expected that other municipalities in the GTA and other parts of Canada will follow Toronto's lead. If that occurs, we can expect a lot more to be written about green roofs and their potential impact on the condominium industry (pros and cons). I should point out that the By-law permits a builder to seek a full or partial exemption of the requirement to install a green roof in return for a "cash in lieu" payment. This means that in some cases, the City will accept money from the builder in return for not installing the green roof. The "cash in lieu" amount is \$200 per square meter which is the City's current estimate of the cost to install a green roof.

One thing is for certain, condominium owners can expect higher costs associated with buying and living in a condominium building which has a green roof. Done correctly, however, green roofs can contribute to a more healthy and eco-friendly environment with some or all the added benefits associated with "going green".

This Article was previously published in the Winter 2009 Edition of the CM Condo Magazine

DO SOLAR PANELS “FIT” YOUR CONDOMINIUM?

By David E. Thiel



David Thiel, Partner
Condo Group

As one of the Ontario government's initiatives to promote renewable and green energy, the Ontario government has authorized the Ontario Power Authority (the "OPA") to implement the Feed-in-Tariff Program, commonly known as the "FiT" Program.

The FiT Program permits Ontario property owners to receive monetary compensation at a fixed rate for electricity which

the owner may generate on his/her property by means of certain renewable sources such as solar power, water power and biomass. The FiT Program was first authorized by law in May of 2009 upon the enactment of the *Green Energy and Green Economy Act, 2009* with the first applications being accepted by the OPA at the end of 2009 and the first projects being connected to the electricity grid in the Spring of 2010.

Under the FiT Program, the property owner would enter into an agreement with the OPA for a term of 20 years, or 40 years in the case of water power, and be paid a fixed rate for the electricity generated and fed back into the electricity grid. These fixed rates (or tariffs) are generally higher than current market rates for electricity.

In these times where condominium boards are struggling to minimize increases to common expense budgets, the potential monetary benefits of the FiT Program may be widely considered by condominium boards as a way to offset common expenses by adding a revenue stream for the condominium corporation.

The most likely, but by no means the only, manner of participation in the FiT Program by condominiums would be by way of installation of solar panels for the generation of electricity. In fact, we are aware of several condominiums considering such possibilities. The idea is that the fixed rate received for the electricity generated by the solar panels installed on the common elements would pay for the initial cost of the solar panels and thereafter become a revenue stream for the condominium corporation.

Condominium boards should be cautioned however that participation in the FiT Program raises several legal issues

which should be considered.

The first consideration is the very nature of condominiums and their ability to raise revenue from alternate sources other than from the unit owners. We should keep in mind that the stated objects of a condominium corporation under Section 17 of the *Condominium Act, 1998* (the "Act") are to manage the condominium property and the assets, if any, of the corporation on behalf of the owners.

There is, for example, no explicit statement in the *Act* that a condominium may undertake potential 'profit-making' activities such as participation in the FiT Program. While a large number of condominiums already have alternate revenue streams such as rooftop antennae leases or commercial area leases, these activities are for the most part quite limited and are incidental or very minor when compared to the overall operations of the condominium. It is expected, however, that in many cases participation in the FiT Program will see considerable initial expenditure of money as well as corresponding substantial revenue streams.



Corporations will also have to consider taxation issues. The revenues from participation in the FiT Program might be treated as business income and taxable as such. Also, it is possible that realty taxes could be assessed against the Corporation or its owners relating to the portion of the condominium property being used for energy generation.

The Corporation should receive tax advice from a qualified tax advisor or lawyer prior to participating in the FiT Program. We are not aware of any stated position or rulings made by the Canada Revenue Agency with respect to revenue generated by condominiums under the FiT Program.

Of course, condominiums will also have to comply with the *Condominium Act, 1998* itself with respect to participation in the FiT Program. Section 97 of the *Act* is the primary provision to consider, which provides for various requirements where the corporation makes an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in service.

For example, where the cost of an improvement to the common elements (such as solar panel equipment) is in excess of 10 percent of the corporation's annual budgeted common expenses, the improvement would have to be approved by the affirmative votes of at least two-thirds of all of the unit owners.

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For example, where the cost of an improvement to the common elements (such as solar panel equipment) is in excess of 10 percent of the corporation's annual budgeted common expenses, the improvement would have to be approved by the affirmative votes of at least two-thirds of all of the unit owners.

Due to what we understand to be the significant costs of some of these renewable energy projects, corporations may also seek financing by way of a condominium loan which would trigger additional requirements under the *Act*.

It is also possible that individual unit owners, for example in a 'townhouse-style' condominium, may wish to install solar panels on the roof to the unit in order to participate in the "microFiT" Program. The microFiT Program is an extension of the FiT Program, for smaller electricity producers such as homeowners and small businesses. In typical cases where the townhouse roof forms part of the common elements, Section 98 of the *Act* would apply to require unit owners to obtain the approval of the Board and also require an agreement to be entered into with the corporation and registered on title to the unit.

The foregoing discussion illustrates some of the main legal concerns which may arise in relation to participation in the FiT Program. Corporations should seek appropriate tax and legal advice prior to making any final decisions with respect to such matters.

NEW LAW - WORKPLACE VIOLENCE AND HARASSMENT (BILL 168)

By Carol Dirks



Carol Dirks, Partner
Condo Group

In December of 2009, the provincial government passed Bill 168, which amends the *Occupational Health and Safety Act*. **Effective June 15, 2010, all employers in Ontario must protect its employees from violence and harassment in the workplace.**

What does this mean for a condominium corporation?

If your condominium corporation directly employs staff such as a superintendent (or superintendent couple), cleaning persons, security or concierge persons, or office personnel, then it is required to comply with this new law. Failure of a condominium corporation to comply with Bill 168 could expose it to civil liability and to potential fines under the *Occupational Health and Safety Act*.

What conduct is covered by Bill 168: "Workplace violence" is defined as:

- (i) the exercise of physical force by a person against a work, in a workplace, that causes or could cause physical injury to the worker;
- (ii) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker.

- (iii) a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

"Workplace harassment" is defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to the unwelcome". Workplace harassment could include conduct such as bullying, intimidation or the making of offensive jokes or innuendos towards an employee.

What is an employer required to do to protect an employee?

If the condominium corporation is an employer, it must:

1. Do a risk assessment of workplace violence that may arise due to the nature of the workplace, the type of work, and/or the conditions of work;
2. Develop a policy dealing with both workplace violence and harassment. The policy must be written and posted in a spot visible to all employees if the number of employees regularly employed is six or more. If the condominium corporation employs five or fewer employees, it will not be required to do a written policy unless an inspector orders otherwise. If a written policy is required, condominium corporations will want to make sure that the policy fulfills the provincial requirements.

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3. Develop a program to implement those policies and in response to a report of workplace harassment or violence. The program must include procedures for an employee to report an incident of workplace violence and/or harassment, and how the employer will investigate and respond to incidents or complaints of violence and/or harassment.
4. Provide information and training to employees on the contents of the workplace violence and harassment policy and the Implementation program .

In particular, the employer is required to do an assessment and identify risks that are likely to expose each employee to physical injury or harassment in the workplace. The risk assessment for each condominium corporation will be different. It includes a duty to tell an employee about a potential or actual danger to his/her health and safety from a person with a history of violent behaviour if that employee could be expected to encounter the person during the course of his/her work and the risk is likely to expose the employee to physical injury.



For example, if there is a resident in a condominium building with a history of violent behaviour, and the corporation's employee could be expected to encounter that person during the course of that employee's work, then the condominium corporation likely would have a duty to tell that employee about this person. Limited personal information about this person is permitted to be disclosed to the employee (such as the person's name and the unit where the person lives), but only to the extent that the disclosure is reasonably necessary to protect the employee from physical injury.

If there is an incident of workplace violence requiring medical attention of an employee, the employer has an obligation to report that incident to the Ministry of Labour. Employees also have a right to refuse to work if they have a reason to believe that they are in danger of workplace violence.

To a large degree, this new law codifies what would be good workplace practice in any event. Corporations should review the requirements of Bill 168 and take proper steps to comply and seek legal advice, if thought necessary or appropriate.



Fogler, Rubinoff LLP
Barristers & Solicitors
95 Wellington Street West
Suite 1200
Toronto-Dominion Centre
Toronto, ON M5J 2Z9

Contact the Condominium Law Group

Lou Natale
Direct Line: 416.941.8804
Fax: 416.941.8852
lnatale@foglers.com

David E. Thiel
Direct Line: 416.941.8815
Fax: 416.941.8852
dthiel@foglers.com

Carol A. Dirks
Direct Line: 416.941.8820
Fax: 416.941.8852
cdirks@foglers.com

Anne Teixeira (Lien Clerk)
Tel: 416.864.9700 ext.114
Fax: 416.941.8852
ateixeira@foglers.com

Fay Colt (Lien Assistant)
Tel: 416.864.9700 ext. 113
Fax: 416.941.8852
fcolt@foglers.com



Your Condominium Law Group
David Thiel, Lou Natale, Carol Dirks

News & Notes

- **2010 Annual ACMO/CCI Conference** is being held in Markham on November 5th & 6th . Watch for Carol and Lou who are participating as speakers.