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Fogler, Rubinoff LLP, Barristers & Solicitors

CONDO COMMENTARY

Fogler, Rubinoff LLP

Inside this issue:

The Time is Ripe for Change to the *Condominium Act, 1998*

by David Thiel

It's difficult to believe but the eighth anniversary of the coming into force of the Condominium Act, 1998 (the "Act") just passed on May 5. In those eight years, I think that it is fair to say that all of those in the condominium industry have experienced their share of frustrations and growing pains with the 'new' Act. The Act brought about many improvements, however, there are undeniable problems and other areas of concern which ought to be addressed.

Although to our knowledge there is no specific timetable or firm plan by the Ontario government to implement changes to the Act at the current time, it is worthwhile for all those with an interest in the condominium industry (owners, directors, property managers and other industry professionals) to consider how they might get involved in pressing for change to the Act.

Some ways in which you can get involved include writing to the Ministry of Small Business and Consumer Services or communicating with one of the industry groups who intend to make submissions to the provincial government. For example, the Canadian Condominium Institute ("CCI"), of which this firm is a member, has established a Legislative Committee for the purpose of recommending various legislative changes to the Ontario government.

Our condominium law group intends to provide its input to the government, through CCI and/or directly, concerning possible changes to the Act. We would be happy to hear from our condominium contacts with your experiences and views as to any suggested improvements and changes to the Act.

In this regard, we would start the discussion by noting some areas for improvement, amendment and/or clarification below:

David Thiel, Partner
Condo Group

1. Mediation/ Arbitration

Now that mediation and arbitration are required for a wide variety of condominium disputes, it is quite unfortunate that the Act itself contains very little detail as to how mediation and arbitration are to proceed. A mediation/arbitration procedures by-law can be very helpful in filling in the gaps however the Act itself could be improved.

For example, the Act provides very little assistance in cases where owners are non-responsive to a condominium corporation in rules (and Declaration and By-laws) enforcement situations.

Overall, the mediation/arbitration procedures of the Act, while presumably enacted for the purpose of resolving certain disputes in amore cost and time effective manner, actually in our experience usually result in more expense and greater delay than court proceedings. Any update to the Act should take these issues into account and aim to reduce cost and delay while still ensuring a fair process for the participants.

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2. Owner-occupied' Position

Subject to certain exceptions, all residential condominium corporations now require that one position on the Board of Directors be reserved for voting by owner-occupants only.

The reasoning behind the provision is to ensure that in cases where a person or company owns a controlling number of units in a condominium corporation, at least the resident owners can be assured that their interests can be represented by one person on the Board.

Unfortunately, in practice, the 'owner-occupied' position is largely irrelevant for what we would estimate to be a vast majority of condominiums. Instead, setting up the position and drafting proper notices and proxies for Annual General Meetings, not to mention the additional time consumed at owners' meetings across the province on a daily basis is extraordinary.

The 'owner-occupant' position is quite simply a major annoyance for owners, directors, managers and others and ought to be eliminated and other options considered for the protection of resident owners where appropriate.

3. Shared Facilities

As we have noted in a previous issue of this newsletter, the Act has extremely limited reference to shared facilities or shared facilities agreements, notwithstanding that shared facilities are widespread and form a critical part of hundreds, if not thousands, of condominium corporations in Ontario.

"Act has extremely limited reference to shared facilities".

For example, there is no requirement or guidance concerning how to deal with joint reserve funds established for shared facilities. There is a similar lack of guidance concerning almost all aspects of the operation, maintenance and repair of shared facilities.

Clearly, shared facilities are of great importance and any update to the Act should consider adding provisions to deal with the various aspects of shared facilities and shared facilities agreements.

4. Occupancy Standards

Subject to various considerations, a condominium corporation can enact an occupancy standards by-law restricting the number of residents in each unit on the basis of the 'maximum occupancy for which the building in which the units are located is designed.'

The problem is that there is no guidance in the Act for interpreting this 'maximum designed occupancy'. Does this mean a simple standard of two persons per bedroom, or something more complicated such as using a standard from the Ontario Building Code? Can the Corporation perform a study to determine the 'maximum design occupancy'?

In our experience, this less-than-ideal wording may be discouraging many condominium corporations who may otherwise wish to enact an occupancy standards by-law and thereby take advantage of what could be a very valuable tool in dealing with occupancy problems.

5. Reserve Fund Adequacy

One of the most important new requirements of the Act is the requirement for condominium corporations to conduct periodic reserve fund studies and to establish a plan to ensure "adequate" future funding.

Here, the problem is that the Act does not define "adequate". This issue is of fundamental importance because depending upon how one interprets "adequate", vastly different funding plans could apply.

One interpretation has been that "adequate" future funding means that owners should pay a stable amount towards the reserve fund in each year, with only an inflationary increase to be applied year after year.

At the other end of the spectrum, one could interpret "adequate" to mean that when repairs are expected to be performed, sufficient funds are in the corporation's reserve fund. Using this interpretation, any plan where the reserve fund balance is always positive, would be adequate.

"Adequate" is a very ambiguous term and the Act should be updated to clarify this extremely important issue.

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These are only a few of the many issues which should be considered in any update to the Act. We endeavour in future issues of our newsletter to keep you informed of any news relating to such legislative changes.

"SMELL THY NEIGHBOUR": Cooking Odours in Condominiums

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

Lou Natale, Partner
Commercial Real Estate
and Condominium Law

Living in a condominium requires people to understand and respect the basic legal rights and reasonable expectations of their fellow neighbours. You don't have to be a lawyer or read legal textbooks to understand what it takes to be a good neighbour. You simply have to use common sense and follow basic common courtesy. This is particularly true if you live in a typical condominium where people reside next to each other sharing common walls, floors, hallways and other common areas.

One of the most common problems arising between condominium residents, and perhaps the most difficult to resolve, is the "nuisance" issue created by the conduct of one resident who interferes with and disturbs the reasonable use and enjoyment of the units and common elements by other residents. The most common kinds of nuisances in a condominium are loud noises (music, parties) and obnoxious smells (cooking odours, cigar fumes and smoke from barbeques). This article will examine how Boards of Directors and managers should deal with the problems arising from strong and obnoxious odours in common areas created by cooking food.

The following is typical wording which can be found in Declarations and Rules of standard freehold condominiums:

> "No condition shall be permitted to exist, and no activity shall be carried on in any unit or on the common elements that will unreasonably interfere with the use and enjoyment by other owners of their units and or common elements"
>
> - and -
>
> "Owners and their families, guest, visitors or tenants shall not create nor permit the creation or continuation of any noise or nuisance which, in the opinion of the Board or Manager, may or does disturb the comfort or quiet enjoyment of the units or common elements by other residents."

There are both legal and non-legal (not to be confused with "illegal") means of solving odour problems in condominiums. In fulfilling their duties and responsibilities, Boards have an obligation to investigate odour complaints and to take reasonable steps to address a problem if one actually exists. Boards and managers can not simply ignore a smell complaint. What should a Board and manager do?

The first problem in dealing with a complaint about strong cooking odours is that there is wide diversity of people having different ethnic backgrounds living in the GTA and it is inevitable that the cooking odours of one ethnic group may be considered to be too strong and overpowering for the smell senses of other people. What one person considers to be a strong, obnoxious cooking odour may in fact smell delicious and customary to another person. While this may true, Boards must still use their judgment in determining what is considered to be "reasonable" cooking odours emanating from a unit, keeping in mind that the air in hallways and other common areas should have a fairly "neutral" smell. To be considered a "nuisance" the cooking odours must be such that they unreasonably interfere with and disturb other owners. The odours must be very strong, noticeable and prolonged and be beyond what is considered acceptable. While the odours may not be a problem if they are confined within the condominium unit in which the food is being cooked, it can certainly cause a problem if the smells penetrate and escape into the common areas and other units.

The second problem in dealing with a cooking odour problem is that, to the best of my information, the *Building Code* and health regulations do not have specific measurable smell and odour criteria. Unlike noise complaints where a Board can commission a sound test by an engineer to determine whether the wall and floor assemblies meet the sound transmission requirements found in the *Building Code*, there is no similar type of formal "smell test". Of course, there are air quality tests for detecting mould spores or carbon dioxide and other gases but those tests would not be applicable to cooking odours. As such, members of the Board and managers should conduct their own inspections to determine whether they can smell a cooking odour and if so, is the odour "too strong" and "obnoxious" that it could "unreasonably" interfere with the use and enjoyment of the units and common elements of other owners.

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If it is determined that cooking odours are escaping into the common areas, the Board should retain an engineering firm and/or an HVAC contractor to review the mechanical and ventilation systems in the building to investigate whether the systems are operating properly as designed. In most cases, ventilation and mechanical systems in residential condominium buildings are designed to constantly pump fresh air from the outside of the building into the common areas thereby forcing fresh air through the common hallways into the units where the air then escapes out the ventilation systems, ducts and fans located within the units. Correcting problems and making adjustments to the common element ventilation systems will sometimes alleviate the problem with cooking odours escaping into the common areas.

Sometimes it may be necessary for Boards and managers to identify which unit or units are creating the strong cooking odour and arrange inspections into those units with an engineer or HVAC contractor to determine whether all of the ventilation equipment and fans located in the unit are working properly. Section 19 of the *Condominium Act* allows persons authorized by the Corporation to enter a unit on reasonable notice to permit the Corporation to perform its duties. If repairs are required to the ventilation equipment servicing a unit, the Board should first check the Declaration to determine who is responsible to pay for those repair costs.

When all of the foregoing "non-legal" steps have been taken by the Board in an attempt to address a cooking odour complaint, and yet the problem continues, the Board must then move to enforce the "nuisance" provisions contained within the condominium's Declaration and Rules. If the cooking odour problem is being caused by a tenant, the Corporation can commence a Court Application pursuant to Section 134 of the *Condominium Act* requiring the tenant to cease and desist and if the smells continue even after obtaining the Court Order, the Corporation can ask the Court to terminate the lease and evict the tenant. However, if the smell complaints relate to an owner (and not a tenant) then the Corporation must proceed to mediation and arbitration pursuant to Section 132 of the *Act*. The Corporation will seek to have the owner who is causing the strong cooking odours to change their cooking habits and/or implement some form of air freshening system within their unit in order to alleviate the problem. To increase the chance of success with the enforcement of the "nuisance" provisions, the Corporation and the complaining owners should keep detailed notes containing information on how often the odour problems occurred and what type of smells were encountered.

Keep in mind that in coming to a decision, an arbitrator or judge will likely consider and try and balance the rights of the complaining owner(s) who expect to live in an environment without strong cooking odours versus the rights of a resident to cook foods that appeal to him or her within certain norms. Although there is a balance between these rights, more and more courts and arbitrators are recognizing that it is acceptable to place reasonable limits on the conduct and rights of condominium residents who live in such close proximity with each other.

Service Contracts – Don't Forget to Keep Track

By Carol Dirks,

Carol Dirks, Partner
Condo Group

Have you ever attempted to terminate a service contract, only to find out that the condominium corporation became automatically "locked in" for a further five (5) year term?

Condominiums will typically have various building service contracts, for such services as elevator maintenance, landscaping and snow removal, cable television, and utilities. Unless there is an explicit authorization contained within the management contract, all of these building service contracts are subject to the specific authorization and approval of the Board of Directors in order to bind the condominium corporation.

While a lot of focus should go into these contracts at the time of initial approval (and rightly so), it is surprising how quickly these weighty contracts are forgotten, and become absorbed as part of the expected day to day operations of a condominium corporation. When dealing with elevator maintenance or gas / hydro agreements, these often contracts commit condominium corporations to thousands of dollars over a number of years.

Beware! Many building service contracts typically will have an initial term for providing their services (sometimes as long as 5 years or more), coupled with an automatic renewal provision.

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"Beware! Many building service contracts typically will have an initial term for providing their services".

Unless a Corporation takes active steps to terminate or renegotiate the provisions of the contract before the end of the term and follows the stipulated notice periods, the service contract may automatically renew for another 5 year period. This unintended result can cause serious problems for Corporations and take Boards and managers by surprise.

Unfortunately, as legal counsel to hundreds of condominium corporations, we typically will be asked for advice just shortly after the deadline for the corporation to give notice of termination. In those cases, there is very limited action that can be taken, in the absence of persistent non-performance or a fundamental breach of the contract terms. Similar to employment law, in order for a condominium corporation to establish grounds for termination based on non-performance, there usually will need to be a paper trail documenting the non-performance and giving the service provider an opportunity to correct the issue. The "break fee" or payouts for a corporation to get out of these contracts (in the absence of non-performance) can work out to be many thousands of dollars.

With constantly changing board members, and sometimes management personnel, it is easy to appreciate how this can happen. Frequently, the board of directors at the time of the building service contract approval will not be the same board five years later.

Corporations and management companies should ensure that a list of the ongoing contractual obligations of the corporations is maintained, including the applicable termination dates. We strongly recommend having such a list – which is there not only to benefit both the Corporation and its directors, but also property management. A copy of the list should be kept in the management office and reviewed and updated regularly. Even in the event of a change in the management company, it is in the interest of the departing management company to protect itself and the Corporation by ensuring that such a contracts list, and the accompanying contracts, are provided to the new management company and documented as such.

In the event of an automatic renewal, by having a list of contracts there should be no reason for the Board of Directors or the new management company to allege that it was not aware of a contract, or its provisions.

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Fogler, Rubinoff LLP

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

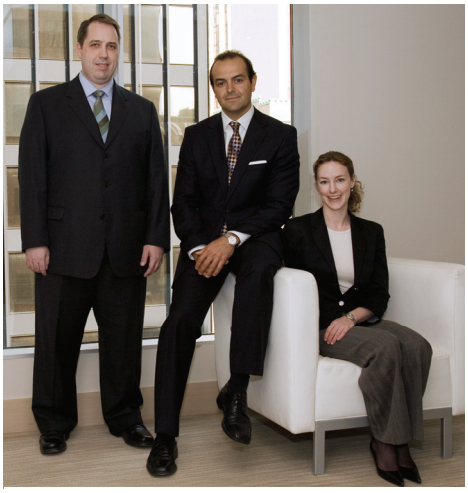
Contact the Condominium Law Group

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

Fay Colt (Lien Clerk)
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

1. **13th Annual Condominium Conference (Nov. 6- 7 2009)**: Look for Lou Natale and Carol Dirks who will be guest speakers at this year's Annual Condo Conference being held at the Hilton Suites, Toronto/ Markham Conference Centre and Spa, 8500 Warden Ave, Markham, Ontario.

2. **Home Renovation Tax Credit**: The Credit may be available to condominium homeowners for their individual share of certain eligible expenditures made by the Condominium Corporation during the period January 27, 2009 through February 1, 2010. Corporations should obtain advice on this issue from the Corporation's auditors and/or solicitors with a view to providing homeowners with documentation to support individual homeowners claims for the Credit, if applicable.

3. **Harmonized Sales Tax**: The Ontario government has proposed that, effective July 1, 2010, there will be a single value-added tax in Ontario of 13%. Condominium Corporations should take the harmonized sales tax into consideration when preparing new budgets.

4. **Increase to Small Claims Court Monetary Jurisdiction**: As of January 1, 2010, the maximum claim in Small Claims Court in Ontario will be increased from $10,000 to $25,000. This 250% increase in the limit will certainly change the approach of Corporations to Small Claims Court claims, both in defence of a claim and in pursuing a claim.

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