

A SPECIAL REPORT: PART ONE

THE CONDOMINIUM BOOM!

Currently there are **130 condominium projects** on the go in Metropolitan Toronto. These units will be occupied by new buyers and their tenants in the next several years. Ontario now has the most condominiums in North America. **Are condominiums growing at the expense of consumer protection?**

Condominiums have been making plenty of headlines over the last year. In 2013, the provincial Liberal government made headlines when it commenced a review of the Condominium Act and, after various consultations, identified a series of recommendations for legislative reform. The proposed amendments to the Act were, however, put on hold when a provincial election was called this spring. Now that the provincial election is passed and a new majority Liberal government is in

place, the question remains as to what is going to happen to the Condominium Act. By all accounts, amending the Act is still a priority and is moving forward.

More headlines were made on April 28, 2014, when Maclean's magazine published a cover story titled "Why Condos are a living nightmare". The article focused on the "living hell of condo living". Condominiums were once again on the front pages of newspapers in August when it was dis-

covered that approximately \$15 million of pre-construction condominium deposits paid by purchasers of units in a proposed Toronto development were improperly released by the developer's solicitor to the developer, who subsequently absconded with the purchasers' money.

Finally, the just last week, at the final Toronto city council meeting prior to the election this fall, city council approved 755 storeys in new development in the

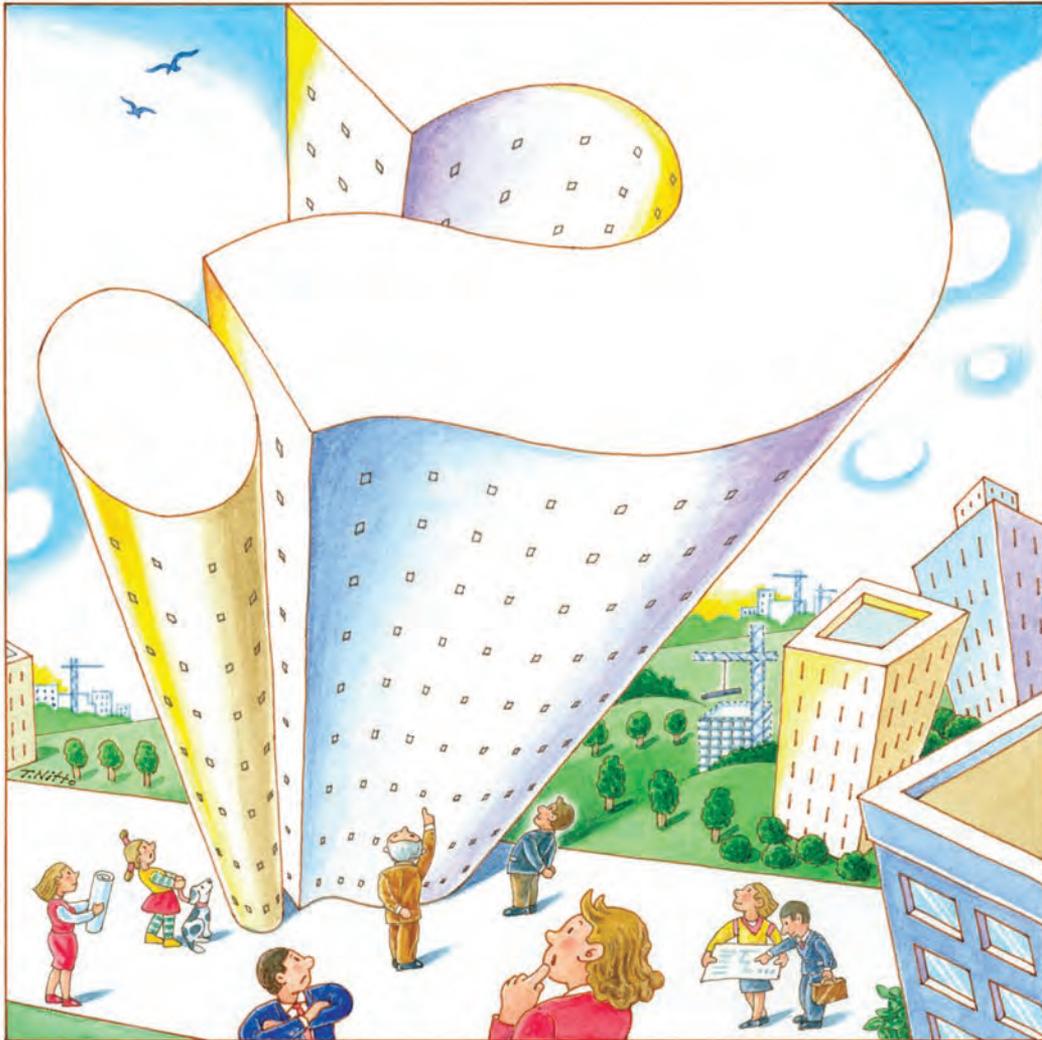


ILLUSTRATION BY TOMIO NITTO

city's downtown core. Currently there are approximately 260,000 condominium units in Toronto, 63,000 more under development and, with last week's decision another 7,000 units will be entering the Toronto market in the near future. The "Manhattanization" of Toronto's downtown core was on the front pages of most local newspapers, as Ontario now has the most condominiums in North America.

Given all these headlines, this may be a

good time for some retrospective. Specifically, the goal in this two part article, which will be continued in the winter edition of this publication, is to explain some of what is happening, why it has happened, and why some condominium owners have experienced, or are currently experiencing, the "living hell of condo living". The first part will focus on the political decisions, at the municipal and provincial levels, that have impacted the current state of the condominium industry. The second

part will deal with how condominiums are marketed and sold in Ontario. The goal is to provide the condominium community with an explanation as to what has happened in the Ontario condominium market and more specifically with the explosive Greater Toronto market.

At the outset, it should be noted that this article is not intended as an attack against the development industry. Developers have the right to structure and

market their projects in a manner that is favourable to their interests, provided that it is compliant with the statutory and regulatory framework. Some developers specifically target the loopholes in the regulations and the lack of enforcement. Why shouldn't they? Developers should not be seen as the scapegoats for all of the industry's faults – although some developers are fairer than others. The real problem is that the condominium development industry has outpaced government action. The consumer in Ontario is not, and has not been, adequately protected in this marketplace. The blame must rest on the shoulders of the municipal and provincial governments.

The Role of Municipal and Provincial Governments

What we see in Toronto is uncontrolled, and increasingly complex, condominium development; a condominium market that is relying heavily on foreign investors; and an inflated residential real estate market that has made condominiums the only practical option for most first time home buyers, notwithstanding that the day to day costs of living in a condominium are likely equal to or greater than single family dwellings.

(a) Unwillingness to Control Development

A primary contributor to the current state of Ontario's condominium development and living is the Places to Grow Act of Ontario and the role of the Ontario Municipal Board. The Places to Grow Act was intended to stop urban sprawl and concentrate growth in the areas where it made the most sense, i.e. near subways, transit routes, and on main arteries. The result, however, has been increased density in smaller spaces without the appropriate services for a residential community. Essential services that should have gone with this increased development, such as transit, schools, libraries and parks, have not kept pace at all and, in some cases, have been woefully underestimated. Toronto has thousands of condominium units which are, in the minds of many, not adequately "serviced". Even where the City's Planning Division recommends that a proposed development not proceed as submitted by the developer, the developer is likely to appeal the decision to the Ontario Municipal Board (OMB) and,

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more often than not, the OMB will override the City's decision. As a result, the City's planning authorities have very little practical powers to control the rate and form of development. In other jurisdictions, there is no authority to which developers can appeal to override the planning department of the municipality.

The amount of relatively uncontrolled development is one problem. Another source of the problems currently faced by the condominium market is the complexity of modern condominium developments.

(b) Government's Reactionary Approach to Legislating

From 1967 until 1990's most condominiums were single purpose residential buildings – i.e. just condominium corporations. These buildings had little if any retail incorporated into them. If there was any, the retail components were units in the condominium corporation, and subject to the Act and the corporation's governing documents. There were some shared facilities agreements with other condominium corporations but that was about it. Condominiums may have been hi-rise/low rise or townhouse but they were "stand alone buildings or projects" and our system of disclosure on sales from developers, while not ideal, worked fairly well. The documents were fairly simple and straight forward. There were some issues regarding the sale of superintendent and guest suites to condominiums and problematic agreements between two or more condominium corporations but that was about it.

The first Condominium Act in Ontario was 24 sections long. There have now

been three versions of the Act and we are going to be dealing with a new one in the not too distant future. Although there are currently 188 section, plus 2 sets of regulations, the legislation has simply failed to keep up with the ever evolving nature of condominium development.

Today's condominium industry is dynamic and complex. The types of condominium projects that we have seen in the last ten years simply did not exist thirty years ago. Our laws including the Ontario Building Code have failed to address the evolution of condominium development and the issues arising in a condominium community. The issues that one normally associates with a high density residential community, such as noise and odour transference and services such as, schools, transit, and parks, have not been properly addressed by the various government authorities. Legislators have been unable to accurately foresee the development of the condominium industry and the issues that arise in a condominium community, with legislation often being enacted after the fact and in response to industry practices or new loopholes discovered by developers.

In Toronto, arguably, this all started with the City deciding that all new buildings in the core had to have retail on the main floor. From a planning perspective it made sense – you want to encourage social activities, entertainment, and "life" on the boulevards. At first we started with retail components on the ground floor, most of which were initially units in the condominium. This may not have been ideal for residents of the condominium, but it was a fair way of proceeding as the condominium corporation had some control

over the retail and could therefore, subject to the applicable zoning, protect the condominium owners' interests. In addition, the retail was subject to the Act and the governing documents. Well drafted condominium documents would limit the activities which could be carried out in the retail units and balance the interests of residential owners and retail owners. Some developers, however, quickly figured out that the more restrictions on retail, the harder to sell the retail units, and accordingly adapted their precedent condominium documents to permit retail units to be used for any purpose except as prohibited by the applicable zoning by-law. The interests of the residential owners were not considered, as it was much easier to sell residential units. As a result, totally dissonant uses are being permitted in the same structures and the boards of directors and unit owners are faced with the consequences, without realizing what the problems are until they have moved into their units and the different entities are fully operational. It is one thing to have a restaurant next door with an outdoor patio, it is another when it is downstairs, under your window and it is 11 pm on a weekend.

It was not long before this concept was taken a step further. Developers, as they are entitled to, under the Condominium Act, began doing horizontal severances and carving out parts of the complex into separate ownership; these spaces did not form part of the condominium corporation. In most recent developments in the Toronto downtown core, this has resulted in separate ownership of:

- i. Main floor retail (not forming part of the residential condominium);
- ii. Hotel, if any (again, not forming part of the residential condominium);
- iii. Residential condominium corporation on upper levels; and/or
- iv. Below grade commercial parking lots (as well as any combination of the above).

It not uncommon for there to be 3 or 4 different ownership interests within one building – aside from the residential condominium corporation, with the relationships between the entities being governed by multiple agreements,

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including reciprocal agreements, hotel management agreements, and agreements relating to the naming rights of the building. On top of this, the City has now required the addition of other ownership components within the condominium structure, which are not part of the condominium corporation. Specifically, the City of Toronto has recently required that there be separately owned rental apartments within newly constructed Toronto condominium buildings. In one downtown condominium a subsidized co-op has been mandated to be built as part of the condominium structure. The rental apartments and the co-op, however, are not units in the condominium. They are held in separate freehold ownership. The rental apartments may be spread randomly throughout the condominium building but they do not form part of the condominium corporation. The owners of these rental apartments are bound only contractually to the condominium corporation. The obligations of the owner of the rental apartments to the condominium corporations and vice versa are as set out in the agreements between the owner and the condominium. These agreements are normally prepared by the developers, who may either retain these components to generate profit or sell them to a third party. In one case, the developer wanted the apartments to be condominium units with restrictions imposed to insure that they are used for affordable housing tenancies but the City refused this approach. The City insisted that such an approach was inadequate to protect the tenancies. The result of dispersing rental components within a condominium corporation (in addition to retail commercial spaces,

etc.) is that it is one more thing for homeowner boards to get their “heads around”. For example, if a resident is in breach of the Act or the governing documents of the condominium, the first question that will have to be asked is whether the unit is part of the condominium and whether the corporation can use the enforcement provisions of the Condominium Act. If not, the corporation will have to go after the Landlord of the apartment who will then have to take action against its tenant. While the Condominium Act has some good enforcement provisions to assist corporations, the Residential Tenancies Act is an entirely different creature, which may have a very negative impact on the condominium. There will be no lien rights for non-payment. If the rental component is sold to a third party, who does not sign an assumption agreement, the positive obligations contained in the original agreement between the parties will likely not apply to the third party purchaser and we can only imagine what will happen then.

In addition, the City of Toronto has imposed “beautification” requirements on developers, such as creating public areas and/or contributing public art on condominium lands. These public areas are open to the public, not just condominium residents, but are not maintained or repaired by the city. These costs are the responsibility of the condominium owners. While public areas and art are necessary for people living in the City, the costs of maintaining them should either be borne by the City or the condominium owners in the corporation responsible for the maintenance and repair should receive some property tax relief. Such govern-

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If such legislation is implemented it will result in almost all condominium rentals in the province becoming subject to rent control

ment imposed obligations impact the condominium owners financially and add to the increasing costs of living in condominiums. Ultimately, a discussion will need to take place on whether such obligations are necessary and/or equitable.

Like it or not developers are in this business to make money. That is fine – they take on great risk in building an entire community out of a mere vision, they employ thousands of Ontarians and, especially over the last ten years, have been the primary source for the development of community centres and parks (although such costs are often passed on to the purchasers). At the same time, they seek opportunities to maximize the return on their investments, including deficiencies or loopholes in the municipal or provincial regulation. Where such loopholes have been discovered, the courts have repeatedly interpreted the law very literally without taking into account the consumer protection aspect of the Condominium Act. As will be discussed in part two of this article, the courts have regularly decided that as long as there is disclosure to prospective purchasers in “some brief narrative form” condominium owners have no recourse.

The complex condominium developments that we have seen in the last ten years have created additional burdens for managers and board members. The managers and condominium boards are faced not only with dealing with day to day condominium issues but also with trying to understand and implement a series of agreements with other entities such as commercial, retail, commercial parking, hotels and then just to make it really com-

plicated separate rental apartments.

(c) Government’s View of Condominiums as the Solution to Affordable Housing

Another factor affecting condominium development in Ontario was the government’s push to use condominiums as a means of providing affordable housing. When the Condominium Act was first introduced in the late 1960’s, it was seen by government as a way of providing home ownership for low income individuals. For example, the government had programs where for \$99 down, a purchaser could get Canada Mortgage and Housing (CMHC) insurance and own his/her own home. When the Ontario real estate market crashed in the seventies, many of those home owners either never paid or stopped paying. They packed up the appliances that came with the unit and walked out having put down only \$99. CMHC took possession of the units and resold them for even less than their original market price.

As a result of the above initiative, a group of condominiums have been created where the people living in them cannot afford the costs of maintaining/repairing the facilities or of having the daily services provided by third parties. The boards have little or no knowledge of their obligations regarding raising common expenses to keep the buildings in good repair and when they do try, as some do, there is usually a group that seeks the removal of that newly motivated board because they cannot afford and do not want to pay any more in common expenses. These buildings are in disrepair and the boards have little or no un-

derstanding of governance or their statutory obligations. In some instances, there are board members who cannot read or write English but have taken on the task of administering budgets in the millions of dollars, often with less than reputable management companies at the helm.

Possible solutions to address this reality, some of which may be implemented in the coming new Act, include:

- i Greater regulation and oversight of board members, including a requirement for education for first time directors;
- ii Expansion of the appointments of administrators to run the condominiums, which will likely add another layer of expense to those who can least afford it;
- iii A workable mechanism for terminating some of these condominium corporations, many of which are built on large parcels of land, with a view to the possible redevelopment of the sites.

(d) Unanticipated Consequences of Government’s Rent Control Provisions

A further contributing factor is the rent control provisions enacted in the early 1990’s by the provincial government. For the longest time, Toronto enjoyed a vibrant and robust “pure” rental market – entire neighbourhoods of apartment buildings purpose-built to be leased for residential uses. While there remain quite a number of these pure rental apartment buildings in the City, they are almost all “mature stock” – most of these apartment buildings were constructed in the sixties, seventies, and eighties. Since the enactment of rent control, very few such purpose-built rental apartment buildings have been constructed. Instead, the province’s rental stock has gradually been replaced by rental condominium units, which are not subject to rent control and, as a result, are much more attractive to investors relative to rental buildings with statutorily capped revenues. For example, new condominium developments in downtown Toronto routinely have 70-80% of the units sold to investors/landlords who are purchasing the units with the intention of using them for rental purposes. We even have condominium

buildings where the documents specifically allow for short term rentals. How can running a hotel in a condominium be consistent with community living?

This is totally contrary to the intention of condominium living. Condominiums were intended to be communities of like-minded people who get to share ownership and administration of their homes with people volunteering to be board members because they care about their community and people who can afford to pay others to do all those pesky household chores like window washing, snow removal, elevator maintenance and repair, garage cleaning and all the major maintenance and repair associated with home ownership. The influx of investors has created a new set of problems, including:

- i. Absentee landlords;
- ii. Tenants who have not “bought into the building”; and
- iii. An imbalance between owner-occupiers and tenants, with 20% of the owners taking responsibility for the administration of the building.

No other jurisdiction has this imbalance. No one knows how this will affect our condominiums. For example, what will be the consequences if the provincial government enacts legislation to cancel the exemption from rent control currently available for most condominium units (this may not be that far-fetched as Toronto’s city council recently adopted a resolution requesting that the province enact such legislation)? If such legislation is implemented it will result in almost all condominium rentals in the province becoming subject to rent control, levelling the playing field between rental apartment buildings and rental condominium units, and essentially preventing condominium landlords from passing on annual maintenance fees increases to their tenants (unless such increases are within the annual rent increase cap).

The provincial government is also likely to address the phenomenon of absentee condominium landlords in the anticipated amendments to the Condominium Act, including lowering voting thresholds so that corporations can make changes to condominium by-laws and create quicker

and more efficient enforcement solutions against landlords.

Ultimately, we need communication between the provincial and municipal governments to make sure each recognizes its responsibilities for condominiums and establishing what these should be. Municipally imposed obligations that require parking to be available and/or parkettes or community centres must not be left as

the responsibility of the condominium corporation while the developer’s obligations remain unfulfilled. A more equitable approach needs to be developed.

In the second part of this article, to be published in the winter edition, the focus will be on how condominiums are marketed in Ontario and the failures of the “disclosure” system adopted by legislators, the scope of which has been expanded by the courts. **CV**



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