

Let's Talk Condo...

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ONTARIO'S CONDOMINIUM LAW EXPERTS

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INSURANCE ADVICE FOR OWNERS AND BOARD



by
Audrey M. Loeb
416.595.8196
aloeb@millerthomson.com

In my experience, the best advice you can give a condominium unit owner that is easy for him or her to follow has to do with insurance. The advice is two-fold. First, unit owners must carry insurance and, second, it should be with the same company that insures the condominium corporation.

I want to illustrate my point by telling you about a meeting I recently attended between a unit owner, the board of directors and its management team. At this meeting, there were numerous issues relating to repairs which needed to be done to the owner's unit, and questions relating to the insurance coverage and the parties' respective responsibilities. The unit owner and the corporation each had their own insurance adjuster with them at the meeting.

The unit owner had not been living in her unit for some time due to repairs that needed to be done to the unit. Her insurer had been paying her costs of living in a hotel. The repairs were taking longer than anyone was happy about and the end was just coming into view.

There were disputes regarding whether the owner or the corporation's insurer should bear responsibility for some of the items which needed repair as the Standard Unit By-law was not perfect. The unit owner's relocation coverage was about to end since the dollar value of that coverage was limited and the owner had been out of her unit for quite some time.

As we sat at this meeting and tried to work out a time frame for completion of the work and who would do what in what order, I realized how easy it is when there are two different insurance companies for each of them to take

the position that the other should cover the loss.

The unit owner's adjuster turned to me as counsel for the condominium corporation at the end of the meeting and said, "our insured's relocation coverage is almost finished. If the corporation does not complete the repairs quickly, we may look to your client for the costs". I turned to the corporation's adjuster and was able to say the following, "Since the corporation and the unit owner are insured by the same company, it does not matter to me which adjuster agrees to bear the expense because the same insurer is going to pay for it". The adjusters knew immediately that there was no further reason to continue the discussion.

In other words, if both the corporation and the unit owner have the same insurer, there are no holes in coverage and it does not really matter whether the condominium corporation is acting as quickly as the owner would like, as there is no one to whom the insurer can look for coverage except itself. So many disputes can be avoided if both the unit owner and the corporation are insured by the same company.

I have been advised, although I cannot verify it, that only about 25% of all condominium unit owners actually carry insurance on their units and their personal possessions. This is a mistake.

All unit owners should carry insurance for the following reasons:

- Many condominium corporations are increasing the amounts of the insurance deductibles which apply under their policies. The unit owner can insure his or her responsibility for the deductible, which the corporation may claim from him or her;
- Many condominium corporations are enacting by-laws, in addition to the provisions in the *Condominium Act*, that make unit owners responsible for the deductibles in all circumstances except

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when the corporation has negligently caused the loss, even if the owner/resident may not have actually acted wilfully or negligently in causing a loss;

- Insurance can protect an owner for living costs if he or she has to relocate from his or her unit because of repairs which need to be carried out as a result of an insured loss;
- Special assessment coverage can be secured so that if a condominium corporation does not have adequate insurance for an insured loss it has suffered, and needs to levy a special assessment to make the necessary repairs, the owner can recover that special assessment under his or her insurance policy;
- If a unit is tenanted and the tenant cannot live in the unit because of repairs that need to be carried out due to an insured loss, the owner can insure the continuation of the rental income;
- A unit owner who negligently causes damage to another unit owner or that owner's possessions may be liable for damages and the insurer will represent that owner, if legal action is commenced, and be responsible for the value of the losses that person may have suffered; and
- Every homeowner has personal possessions which can

be damaged and/or destroyed. Many unit owners have made extensive improvements to their units. These things can be protected with insurance if an insured loss occurs.

In my experience, the best advice you can give a condominium corporation on insurance matters is that it have a good standard unit schedule or by-law. Unfortunately for those condominium corporations who received these as part of their turnover documents, we are starting to see that these schedules are not practical and do not provide the protection condominium corporations need. These developer-prepared standard unit schedules are usually the list of suite features that the developer offered to purchasers as part of their agreements of purchase and sale. They are often not compliant with the *Condominium Act* and include items which most condominium corporations do not want to insure, such as flooring, countertops and appliances. All condominium corporations that received a standard unit schedule from the developer after May 5, 2001, should review the schedule to see if it is suitable for the corporation. I recently reviewed one where the exterior features of a townhouse unit, including the deck, etc., were included in the standard unit definition.

The standard unit schedule can be corrected with a Standard Unit By-law and I recommend that if your corporation needs one, it be done as soon as possible.

NEWSLETTER TIPS

- ♦ Many homeowners have reported major water damage to their homes as the result of cracked plastic nuts at the back of their toilets, and splits in the woven metal or polymer covering of the modern flexible hoses routinely installed today for the water supply to toilets. Check your toilets and ensure your hoses are marked with the CSA standard certification. If they are not, contact us for guidance on how to deal with this.
- ♦ The Condominium Act regulations provide that the maximum fee a corporation can charge for a status certificate is \$100, inclusive of all applicable taxes. Miller Thomson LLP has contacted the government and asked it to consider whether this maximum amount will be changed now that the 13% Ontario HST must be applied when issuing status certificates.

NEW CASE LAW ON AMENDING THE DECLARATION



by
Patricia M. Conway
416.595.8507
pconway@millerthomson.com

Trying to amend the declaration of your condominium corporation using the "consent" route offered by Section 107 of the *Condominium Act, 1998* is notoriously difficult. Obtaining the written consent of 80% or 90% of the unit owners (depending on the nature of the amendment) presents an almost insurmountable obstacle for a large corporation.

Section 109 of the *Condominium Act* provides for a court order amending the declaration, where it is "necessary or desirable" to correct an error or inconsistency that appears in the declaration or description, or that arises out of the carrying out of the intent and purpose of the declaration or description.

Until recently, this Section was believed to be limited to correcting errors made by the declarant of the condominium corporation at the time of registration of the condominium corporation. The evidence in support of the application to the court had to state that a provision in the declaration was always intended to say something else; a mistake was made in the original drafting; the corrections were confined to clerical errors, or unintended

ambiguities or inconsistencies.

A recent decision of the Superior Court brought by our office expands the scope for bringing such an application. In *MTCC 675*, the Court ruled that it had jurisdiction under Section 109 of the *Condominium Act* to amend the declaration to take into account changes which the corporation had decided to make, long after the registration of the condominium corporation.

MTCC 675 was registered in the early '80s. As was common then, one of the amenities offered by the developer was a live-in superintendent's suite. About 6 years after registration, the corporation decided that it did not want a live-in superintendent. A by-law was passed, allowing the corporation to lease the unit to third parties, with the rent being used to defray common expenses.

Fast forward to 2008; the condominium corporation's aging infrastructure required major repairs and annual contributions to the reserve fund were now burdensome. The Board determined that the superintendent's suite would be of more benefit to the corporation if it was sold as a residential unit to a third party, with the proceeds being contributed to the reserve fund. The problem was the suite was a common element, not a unit. To convert the suite into a unit so that it could be sold by the corporation required an amendment to the declaration and the description. To amend using the consent route under Section 107 of the *Condominium Act* required getting the written

consent of 90% of the owners. It could not be done.

The alternative was a court application. But, was there an error or inconsistency which the Court had jurisdiction to correct? The developer made no error; he intended the super's suite to be a common element. One of the unit owners hired counsel to object to the amendment.

On behalf of the corporation it was argued that Section 109 should be given a liberal interpretation in order to carry out the purpose and intent of the *Condominium Act*, which was to make possible, and regulate, a community's ability to manage and operate its common elements. Where the corporation had decided to make a change, for the benefit of all, with the result that its constating

documents were now inconsistent with the objectives of the corporation, the Court should use Section 107 to assist the community to achieve its objectives.

The corporation was successful. The common element suite was converted into a unit and its sale would enrich the corporation's reserve fund.

Undoubtedly, as condominium corporations age, a community may wish to make some fundamental changes to aspects of the physical structure or its governance. Now the obstacle of having to amend the declaration and description should be overcome more easily with the assistance of the Court.

NEWSLETTER TIPS

- ◆ There are dogs specially trained to sniff out bed bugs! For more information on using one of these trained canines to avoid a potential disaster in your building, please contact us.
- ◆ Ontario launched a new online condo survey at www.ontario.ca/condos to capture a snapshot of Ontarians' experiences with condo ownership. We urge boards to make this information available to owners as the survey also educates condo owners about their rights.

HAVE YOU DEVELOPED A WORKPLACE VIOLENCE AND HARASSMENT PREVENTION POLICY YET?



by
Tiffany K. Koch
519.931.3512
tkoch@millerthomson.com

On June 15, 2010 changes to Ontario's *Occupational Health and Safety Act* (the "OHS") with respect to violence and harassment in the workplace came into effect. These new amendments to the OHS strengthen protections for workers from violence and harassment in the workplace by placing new obligations on employers, including condominium corporations.

Under this new legislation, condominium corporations, as employers, are required to:

- develop and post workplace violence and harassment policies, and to review these policies at least annually
- assess the risks of workplace violence and report the results of the assessment to the condominium corporation's health and safety committee, an appointed representative or directly to the workers
- develop and maintain programs to implement their workplace violence and harassment policies, including procedures for workers to report incidents of workplace violence/harassment and the steps management and the corporation will take to investigate and deal with reported incidents
- allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence

A condominium corporation's workplace violence and harassment policy should state that violent behaviour and harassment of any kind is not acceptable and will not be tolerated from any person in the workplace. The definition of "workplace" for a condominium corporation includes anywhere work is performed for the corporation. This includes all common areas inside and outside

the building, the corporation's offices, off-site locations where work related to the corporation is conducted, as well as the units. It is important for a condominium corporation's workplace violence and harassment policy to state that the policy applies to all persons in the condominium corporation's "workplace", including employees of the corporation, employees of outside service providers, owners/residents, occupiers and visitors.

The new legislation does not simply require condominium corporations to prepare a workplace violence and harassment policy. Similar to all employers, they must also develop procedures and methods to implement and maintain their workplace violence and harassment policies. Part of this process is assessing the condominium corporation's risks of workplace violence. Workplace violence is defined in the new amendments to the OHS as:

- the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- a statement or behaviour that it 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.

When assessing a condominium corporation's risks of workplace violence, special attention must be given to the unique environment of a condominium corporation's "workplace". Management, security personnel and outside service providers are routinely required to attend to matters unaccompanied in remote areas of the property, as well as inside the units. Condominium corporations with 24-hour concierge or security service must consider the increased risk to workers who work during the night.

Further, under the new amendments to the OHS, employers are required to take every reasonable precaution to protect workers from injury in the workplace that may result from domestic violence.

Employers are required to provide workers with information and instruction on both its workplace violence and workplace harassment policies and procedures. The new legislation defines “workplace harassment” 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 be unwelcome. This definition encompasses a much broader range of conduct than just discriminatory conduct which is prohibited under the *Human Rights Code*. Workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating phone calls.

Once procedures to address workplace violence and harassment are put into place by a condominium corporation, it is crucial that

the board and management strictly adhere to these procedures and maintain a zero tolerance policy for violence and harassment in the workplace. Ministry of Labour health and safety inspectors will enforce the new OHS provisions regarding workplace violence and harassment and determine if employers are complying with their new duties.

The new amendments send a strong message to employers – “Don’t wait until it’s too late.” We suggest condominium corporations heed this message and contact their management companies and/or solicitors to prepare workplace violence and harassment policies, and develop procedures in support of these policies, as soon as possible.

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LOOKING AT LAW FROM YOUR PERSPECTIVE



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FOR PRACTICAL SOLUTIONS

Tel: 416.595.8500

Fax: 416.595.8695

Toll Free: 1.888.762.5559

WWW.MILLERTHOMSON.COM

OUR CONDOMINIUM PRACTICE GROUP

Toronto

Audrey M. Loeb
General
aloeb@millerthomson.com
416.595.8196

Warren D. Kleiner
General
wkleiner@millerthomson.com
416.595.8515

Michael Gwynne
General
mgwynne@millerthomson.com
416.595.2997

Patricia M. Conway
Litigation
pconway@millerthomson.com
416.595.8507

Dražen Bulat
Construction
dbulat@millerthomson.com
416.595.8613

André Nowakowski
Employment
anowakowski@millerthomson.com
416.595.2986

Alexandra White
Litigation
awhite@millerthomson.com
416.595.8667

Megan Mackey
Litigation
mmackey@millerthomson.com
416.595.8623

London

Tiffany Koch
General
tkoch@millerthomson.com
519.931.3512
416.595.8500 x43512

Lien Department

Dana Zhang
Lien Clerk
condoliens@millerthomson.com
416.595.2959

Lizann McInnes
Lien Clerk
condoliens@millerthomson.com
416.597.4370

**ONTARIO'S
CONDOMINIUM
LAW EXPERTS**

**MILLER
THOMSON** LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

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