MILLER THOMSON LLP
CANADA'S LEADING CONDOMINIUM LAW PRACTICE

Let's Talk Condo...

◆ALERT!!◆

ONHWP – Condominium Conversions

There is a possibility that condominium conversion projects may be entitled to ONHWP coverage for construction deficiency claims. Which projects may benefit from the extension in ONHWP coverage, if any, is still unknown.

However, we would recommend that all condominium conversion projects which are in the process of carrying out their initial Technical Audits, or are within the first year following registration of their Declaration and Description, should submit their claims jointly to ONHWP and their Declarant.

Those which are still within the first two years of registration, and are experiencing problems with the building envelope or mechanical and electrical systems, may wish to carry out an audit and submit it to ONHWP.

Notwithstanding ONHWP's current practice of denying coverage to conversions, coverage may become available. Failure to file your claim may preclude your condominium corporation from pursuing this avenue for recovery!

Please call us to discuss your options.

in this issue...

New Name —
Same Excellence in Legal Services

As many readers may already be aware, the law firm of Morris/Rose/Ledgett *LLP* has closed. However, we are both pleased, and excited to announce that, effective October 2, 2000, the Condominium Practice Group, being both lawyers and support staff, have joined the full service firm of MILLERTHOMSON *LLP*.

By keeping our Condominium Practice Group together, we have been able to deliver a virtually seamless transition from ***Morris/Ross/Ledgett LLP*** to ***MILLERTHOMSON LLP***. By maintaining the size of our practice group, we continue to be able to ensure that one of us is always available to assist you even when the "principal" lawyer is otherwise unavailable.

Today's condominium residents and Boards of Directors are becoming increasingly sophisticated and knowledgeable of their living environment, and, in turn, are demanding more from their legal counsel. By joining with another full service law firm, our Condominium Practice Group has maintained its ability to match the diverse legal needs of today's condominium corporation clients with the tremendous legal resources offered by MILLERTHOMSON's specialists in other areas of the law including: municipal and planning work, employment, labour and human relations, construction contracts and deficiencies, human rights matters, insurance matters, and civil litigation.

Individual lawyers can be reached at the following telephone numbers and e-mail addresses:

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Please contact any of us to discuss any of your particular condominium needs. Our address and general telephone and fax numbers are as follows:

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When is a Replacement Considered a Betterment or Improvement

by
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When is a replacement considered a betterment or improvement? I recently received a telephone call from a unit owner in a Condominium Corporation who is caught in the middle of a dispute as to which of two insurers is responsible for the damages, which occurred in a condominium unit as a result of flooding caused by a defective toilet.

The unit owner acknowledges that he is responsible for the defective toilet, which caused the flooding, the question however remains which of the two insurers involved are responsible for what portion of the repairs that are necessary to put the property into good repair. The damage that was caused was to flooring and carpeting.

The Condominium Corporation's insurance policy has a $1,000 deductible. The unit owner's insurance has a $250 deductible. The first matter which all condominium owners should realize is that this owner does not have, as part of his insurance coverage, what is known in the industry as "contingent insurance". This is insurance, which is intended to cover the amount of the deductible portion of the Condominium Corporation's insurance, i.e. the $1,000 where the unit owner is responsible for the damages caused.

The Condominium Corporation is approximately 20 years old and the unit owner had replaced the carpeting in his unit. He chose a similar carpet to what was originally installed but had replaced the original due to wear and tear.

The question, which has arisen, is whether the carpeting should be replaced at the cost of the insurer for the unit owner or the Condominium Corporation.

The Condominium Corporation's insurer argues that the carpeting is a betterment and therefore its policy need not respond. The unit owner's insurer argues that the carpeting is not a betterment but merely a replacement of the original carpeting and therefore the Condominium Corporation's insurance should be responsible for the cost thereof.

Assuming that the unit owner is responsible for the deductible in accordance with the documents, which govern the Condominium Corporation in which he resides, the question to be decided is which of the two insurers should bear the cost, in excess of the deductible, of replacing the carpeting.

This is a question, which I have not previously encountered. The practical way to avoid having to deal with this matter would be for the unit owner to ensure that his insurance carrier is the same one that the Condominium Corporation uses. By using a single insurer the unit owner should avoid the problem of falling between the cracks of two policies.

Unfortunately this is not the case here. There are no court decisions on this question and so we are left with trying to provide the best advice possible to the parties involved. It is our view that if a unit owner replaces something that was original to the unit with something comparable, because the original has worn out, then this replacement would not constitute a betterment or improvement and the Condominium Corporation's insurance policy should be responsible for the cost of replacing the carpeting, less the deductible. This assumes that the appropriate provisions to make the unit owner responsible for the deductible, are contained in the Condominium Corporation's documents.

If the unit owner installs carpeting that is upgraded from the original installation, it is our view that the unit owner's insurer should be responsible for that portion of the costs, which are considered the "upgrade" value. The Condominium Corporation's insurer should bear the cost of the original installation carpeting.

Miller Thomson LLP

Condominium Seminar 2000

The first draft of the Regulations to the Condominium Act, 1998 have been released for consultation. We now expect the Act to be proclaimed early in 2001.

In order to better coincide with proclamation of the new Act, the Condominium Practice Group will be inviting you to attend its Seminar on the Condominium Act 1998 and its Regulations early in the new year. Enrolment in the Seminar will include a complimentary copy of *The Condominium Act: A User's Guide,* by Audrey M. Loeb.

If you attended our last seminar and are entitled to a copy of the Guide, kindly advise us of your change of address if it is different from when you attended in order that we may update our records.

Chimney Safety

by
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The fairly recent case of the City of Toronto v. York Condominium Corporation No. 60 involving the installation of smoke detectors, now has condominium corporations developing rules and enforcing the installation and on-going maintenance of smoke detectors.

As a result of this court decision, condominium corporations are now expected to ensure that smoke detectors are installed in every dwelling unit and to exercise "due diligence". This may also extend to a condominium corporation's responsibility to install carbon monoxide detectors in condominium units.

At the recent Golden Horseshoe Canadian Condominium Institute's "Condominium 2000" Conference, the Chief Fire Prevention Officer of the City of Burlington, Dave Cioruch, spoke about the fire hazards and risks associated with factory built insulated metal chimneys serving fireplace inserts and woodstoves in both highrise and townhouse condominium complexes. He advised that the problem is wide spread throughout the Province.

The Ontario Fire Marshal's Office, has been aware of the fire hazards associated with premature corrosion of these chimneys since 1991 and has issued a number of Advisory's and Communiqués to the Fire Service in an effort to increase public awareness of the issue. Accelerated corrosion is the result of moisture that penetrates the casing of the chimney whereby it reacts with the chlorine molecules in the insulation thus creating an acid that attacks the stainless steel inner and outer shell of the chimney.

Dave Cioruch cautioned that condominium corporations must be aware of this safety concern and ensure that thorough annual inspections of these installations are conducted by qualified technicians to reduce the risk to occupants. These risks are two fold. *Firstly*, perforation of the exterior casing can create a fire risk to any combustible materials in close proximity to these chimneys which is designed and intended for reduced clearances to combustibles. *Secondly*, interior casing perforation as well as saturation of the insulation which could freeze in winter could result in interior collapse of the chimney thus creating a carbon monoxide concern within the dwelling unit that places residents at risk.

Mr. Cioruch also advised that boards of directors and property managers should be taking whatever steps are necessary to comply with the Ontario Fire Code when corrosion of these installations is encountered. He suggested four options when rectifying the problem:

- Have the chimney certified as safe for continuing use by a qualified contractor such as a WETT Certified Technician (Wood Energy Technical Transfer Technician)
- If unsafe, remove the fireplace so that it is rendered totally inoperable
- Restore all components of the same manufacture to a safe condition
- Replace the wood-burning appliance and chimney with an approved gas installation

In light of the York Condominium Corporation No.60, where both the condominium corporation and the unit owner were charged and found guilty under the Fire Marshall's Act for failure to install a smoke detector in the unit, condominium corporations and property managers should now be taking proactive steps to prevent the risk of fire or injury.

Federal Election 2000

by
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We are all generally familiar with section 30 of the *Condominium Act* which provides that access to condominium property cannot be unreasonably restricted to candidates or their representatives for election to the House of Commons.

However, just in time for the upcoming Federal Election, the new Canada Elections Act came into force on September 1, 2000, with certain implications for condominium corporations including:

- Access is not to be restricted between the hours of 9 a.m. and 9 p.m.;
- A unit owner may display an election advertising poster in his/her unit (eg. through the window) subject to reasonable size limitations; and
- The condominium corporation may prohibit election advertising posters from being displayed on any portion of the general common element areas.

Mediation Under the Condominium Act 1998

by
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Although a number of legal advisors and managers have expressed scepticism respecting the utility of 'mandatory' mediation to resolve a dispute between a recalcitrant unit owner and the Board arising from non-compliance by the unit owner/occupant with the declaration or the rules, I forecast that 80% of these and other condominium-related disputes will, in time, be settled directly by the parties with the assistance of a skilled mediator, and that only 20% of these cases will remain unresolved and progress (or redress) to arbitration proceedings.

Why? Because in many of these disputes, the party feeling aggrieved simply needs to be heard and understood by someone who is considered to be completely neutral and independent of the process of enforcement. Secondly, mediation, while being far less expensive than arbitration, still costs money, and the mediator has authority under section 132 of the *Condominium Act* to award the costs of his/her fees against one of the parties, i.e., likely the party who attempts to avoid responding at all to the mediation procedure (to be) set forth in the condominium corporation's by-laws, or who enters the mediation session with a clearly stated mandate that they do not wish to participate in the mediation themselves and give the other side an opportunity to settle the dispute.

Mediation is a confidential settlement process that is quick, private and informal, and generally allows the parties, with the assistance of the mediator, to explore options in resolving their dispute that may not come immediately to mind without the assistance of a skilled mediator who brings experience, insight and, perhaps, a fresh approach to resolving the problem in a manner that does not create, for example, an impediment in the future for the Board to generally enforce the declaration or the rules as the context of the dispute may require.

For example, the classic confrontation between the Board, bound by requirements of the *Condominium Act* to enforce the rules, and the recalcitrant unit owner often arises from one of several impressions by the unit owner that the pet rule is unenforceable (having read a newspaper article to that effect), that the provision in the declaration is being enforced discriminately against the owner and not others, or that soundproofing between the demising walls of the two adjoining suites is inadequate, or that the directors are acting in a harsh, arrogant manner, i.e., why cannot we all simply act as good neighbours, which involves a certain amount of 'give and take'?

The current method of dealing with these disputes involves letters of compliance, respectively, from the property manager and from the Corporation's solicitor, followed by correspondence in reply from the recalcitrant unit owner's solicitor, followed thereafter by an application to enforce compliance with the declaration in accordance with section 49 of the *Condominium Act*. Generally speaking, this process is not concluded for a period of from three to six months.

Mediation as an alternative

In most cases, with the possible exception of the condominium solicitor advising the Board how to prepare for mediation, the mediation session will not involve lawyers. The parties will select a mediator from a roster of skilled condominium mediators from the Condominium Dispute Resolution Centre or from the Arbitration and Mediation Institute. There will be a pre-mediation conference call by the parties with the mediator, and the mediator will determine the issues in dispute and which matters, if any, have been agreed upon, and where the mediation should be held, either on-site or in a neutral place off-site. The mediator briefly facilitates an exchange of documents, correspondence, etc. and each party is asked to summarize in writing their understanding of the nature of the dispute.

The mediator schedules the date, time and location for a mediation conference, and the parties agree (in advance) that the mediation session is a settlement negotiation and that disclosures made at the mediation are inadmissible in any further proceedings so that the parties are free to exchange, candidly, what they hope to achieve through the mediation.

While the mediation session cannot assure the binding resolution of the dispute unless the parties come to an agreement, if the mediation succeeds, a settlement report will be drawn by the mediator which can form the basis for the agreement between the parties on the course of action to be followed.

The mediation process, unlike the standard enforcement procedure currently employed under section 49 of the *Condominium Act* (described above), can be carried out, effectively, within two to four weeks from the outset. Each party is immediately placed on a level playing field and made to feel comfortable about the process by the mediator.

A skilled mediator enhances the conduct, civility and respectful nature of the session, and allows each party to tell his or her version of the 'story'. The mediator listens and searches for common interests that may bring the parties closer together, and helps the parties describe the real issues that separate them. A skilled mediator employs different techniques, including active listening, probing questions, allowing parties to ask questions about the process, caucusing separately with each of the parties, and encouraging the parties to use objective criteria to assist them in choosing and creating options to resolve their dispute.