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CANADA'S LEADING CONDOMINIUM LAW PRACTICE

Let's Talk Condo...

Spring 2003
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ANNOUNCEMENT

Condominium corporations qualify to benefit from the hydro rate freeze at 4.3 ¢ per kilowatt hour as a designated customer under Ontario Regulation 339/02 made under the Ontario Energy Board Act, 1998. Each condominium corporation should write to it's local utility supplier and confirm that it is a "property" as defined in the Condominium Act, 1998 and as a result is a designated customer to ensure that it gets the benefit of the rate freeze. The letter should also include a specific request to be billed at the rate of 4.3 ¢ per kilowatt hour. In Toronto, letters should be forwarded by fax to:

Att: Joe Novosel
Toronto Hydro
5800 Yonge Street, Toronto,
Ontario, M3M 3T3
Fax: (416) 542-3412

We can now be reached, toll free, at
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in this issue...

RESERVE FUNDS-COMMONLY ASKED QUESTIONS:

by
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There are many new rules that govern reserve funds for condominium corporations. This article will not deal with those matters, but rather with questions which are frequently asked of us as solicitors to condominium corporations as result of the new rules.

When a reserve fund study is carried out, all the "components" of the building(s) must be listed. This includes such items as the windows, roofs, garage membranes, mechanical and electrical systems, as well as anything else which may be on the property and for which monies must be set aside to meet the cost of repair and replacement in to the future. Each component will be considered separately and a calculation will be made to determine how much money should be set aside each year so that at the projected date for replacement of that item, there will be monies available to pay for it. This gives rise to three questions.

The first is, if the study shows an expenditure of an amount in a particular year for a component, such as the garage membrane replacement in 2006, does the corporation have to carry out the replacement in that year? It is our view that the reserve fund study is a guide. It is intended to assist condominium corporations in their planning for long range saving and spending. It is not however intended to be an exact blueprint, which must be followed without consideration of the actual physical condition of the building(s). If the garage membrane is in satisfactory condition, perhaps because the condominium corporation has done more maintenance of it in the last several years, the replacement need not be done until the membrane requires it, even though the plan indicates that it should be replaced in 2006.

The second question is whether monies, that have been allocated in the reserve fund, must be used only for the purpose indicated? For example, if the garage membrane replacement showed that the condominium corporation was to have $375,000 for that purpose in 2004 but an emergency occurred in 2003 for which there was not adequate funding, could money earmarked for the garage membrane replacement be used for another purpose? In our view it could. The reserve fund study is not intended to

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RESERVE FUNDS-COMMONLY ASKED QUESTIONS.

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tie the condominium corporation's hands in terms of how and when it can spend monies that are in the reserve fund. It is a guide to assist corporations in determining what is a reasonable amount for them to set aside on an annual basis to avoid the crisis management approach of special assessments.

My next article will outline the third question: whether the board of directors has the authority to improve and update the common areas in accordance with the reserve fund plan, even though they may not be in disrepair.

If your board is uncertain about issues relating to reserve fund expenditures you should contact your legal counsel for an opinion. Once this is obtained the board will have met the standard of care that the Condominium Act, 1998 imposes on board members who wish to avoid the risk of personal liability.

ATTORNMENT OF RENTS : A FORMIDABLE REMEDY

by
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The scope of an Ontario condominium corporation's power to collect common expenses from the tenants of defaulting owners has recently been explained in a decision of the Superior Court. The Court dealt primarily with the issues of attornment and liens. A unit owner argued that the attornment remedy was an adjunct of the lien remedy, so that only arrears that would be recoverable by lien could be collected from the tenant (i.e. the previous 3 months' arrears). Justice Lane, after a thoughtful analysis of Part VI of the Condominium Act, 1998 disagreed and found that attornment rights and lien rights are two separate and distinct collection rights given to the condominium corporation.

The decision of Justice Lane also clarifies various aspects of lien practice. This recent decision deals inferentially with a corporation's ability to place one lien against multiple units of the same owner and which "costs and expenses" may be covered by a lien.

If your corporation wants to recover monies owing, whether by a tenant or an owner, make sure to speak to your corporation's solicitor to be sure that the corporation takes the appropriate steps to recover as much of the money that is owing and related costs and expenses as possible.

The unit owner has applied to the Divisional Court for leave to appeal the decision. The leave application is scheduled to be heard at the beginning of April.

QUICK TIP NO. 1

Consider getting directors to sign a Directors' Code of Ethics.

CHANGING FINANCIAL YEAR ENDS

by
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The Condominium Act now requires that AGM's be held within six-months of the fiscal year-end. Many corporations have December 31st year-ends and are now considering changing their year-end to ensure that the auditor and legal counsel are available to attend the AGM during this extremely busy period of time. The winter months are also the time when many owners may go south for the winter and may not be able to attend an AGM held during the months of January, February or March. There are also other reasons why a corporation may choose to change its year-end.

To do so, corporations should be reviewing their by-laws to determine whether the year-end can be changed simply by a Board resolution. The corporation's auditor should also be advising and obtaining the consent of Revenue Canada before proceeding to change the year-end. Information as to why the corporation is changing it's year-end must be provided to Revenue Canada.

In addition, changing the year-end may involve producing two financial statements. Any changes of this nature should be discussed with the corporation's auditor.

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IN-SUITE ALTERATION AGREEMENTS

by
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There are two types of Alteration Agreements that are entered into between owners and condominium corporations:

1. Section 98 Alteration Agreements that the Condominium Act, 1998 requires be entered into between owners and a condominium corporation where an owner wants to make an addition, alteration or improvement to the common elements that has been approved by resolution of the Board; and

2. In-Suite Renovation Agreements that are entered into between an owner and a condominium corporation where an owner wants to make changes to his/her unit that, pursuant to the corporation's declaration or rules, requires prior approval from the board of directors.

Both agreements are intended to protect the interests of the condominium corporation and other owners from the potential problems that may arise from an owner making a change to his/her unit or the common elements. The agreements allow corporations to regulate the changes made by owners to the common elements and the units.

In most instances where an owner wants to makes changes to his/her unit, the changes often include changes made to the common elements. In these circumstances, one agreement that combines both the Section 98 Alteration Agreement and the In-Suite Renovation Agreement should be entered into between the corporation and the unit owner.

Many declarations contain a restriction on making any structural changes or alterations in or to a unit without the consent of the board. In our view, "structural changes" refers to changes with respect to the walls, concrete floors and ceilings, whether load bearing or not.

Some non structural alterations, for example, those that are strictly decorative in nature, are alterations with which the Board is likely not concerned. Only those alterations, which may in any way impact upon the common elements or other units, in our view, ought to be alterations, which require prior written approval of the Board. These include, but are not limited to, changes to the flooring and changes that affect plumbing, electrical or other services or systems throughout the building.

It should be noted that, although items listed below may physically be within the unit, many corporations' Declarations provide that units do not include:

1. concrete, masonry or block portions of loading bearing walls that are within the boundaries of the unit;

2. the concrete floor slabs within the boundaries of the unit; and

3. pipes, wires, cables, conduits, ducts, flues, shafts, public utility lines and all horizontal or vertical service facilities, which are used for the distribution of power, water, drainage or other services with the building and are within the boundaries of the unit.

In these circumstances, in-suite renovations which include alterations to the foregoing, are in fact alterations to the common elements for which owners are required to enter into Alteration Agreements prepared in accordance with Section 98 of the *Condominium Act, 1998.*

QUICK TIP NO. 2

When making a written demand for payment of monies owed to the corporation, be sure to set a date for payment for purposes of future legal action.

QUICK TIP NO. 3

The Ontario Government has recently proclaimed into force the *Limitations Act, 2002* which imposes a basic limitation period of 2 years for making claims. The limitation period previously was 6 years. In most cases, a condominium corporation now has two years from the date a claim was discovered or ought to have been discovered to sue a party, including a developer.

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QUICK TIP NO. 4

A condominium corporation must register and charge G.S.T. on commercial activities, including party room rentals, laundry facilities, and guest suite rentals where the activities generate over $30,000.00, but not where the activities generate less than $30,000.00.

Let's Talk Condo is published quarterly by the full service law firm of MILLER THOMSON LLP. By practising within a full service firm, we are able to match the diverse legal needs of today's condominium corporations with the tremendous depth of legal resources offered by MILLER THOMSON LLP's lawyers 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.

To obtain copies of earlier issues, or to have yourself added to our mailing list, please contact Betty Dworatschek at 416.595.2968.

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We have offices in Toronto, Markham and the Waterloo Region to better serve your needs.

In addition to our condominium expertise, our firm has experts in all legal areas including employment, construction, planning, insurance and environmental law, all of whom are available to support our clients' needs in an informative, timely and cost-effective manner.

We welcome your questions, comments and suggestions.
Please contact any of the Members of our Practice Group at 416.595.8500

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