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CANADA'S LEADING CONDOMINIUM LAW PRACTICE

Let's Talk Condo...

Summer 2004
Pages 203-206

ANNOUNCEMENTS

Doubletree International Plaza Hotel
ACMO/CCI Joint Condominium Conference
November 5 and 6, 2004

Human Rights – Be Prepared!
Moderator: Denise Lash
Speakers: Patricia Conway and Probhu Rajan, Legal Counsel for the Ontario Human Rights Commission

Be prepared to deal with human rights complaints. Hear it from the experts. Issues will cover age restrictions, religious beliefs, sexual harassment and provisions for individuals with disabilities. Learn how to deal with human rights issues in your condominium.

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ALWAYS NOTIFY OWNERS OF ACTION AGAINST THEIR TENANTS

by
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There has been a recent decision in Ottawa concerning a condominium corporation's ability to recover its costs on a substantial indemnity basis from a unit owner where the condominium corporation commenced proceedings to enforce provisions of the condominium documents against a tenant.

In the case of Carleton Condominium Corporation No. 555 v. Guy Lagace et. al., when problems first arose with the tenant, the unit owners were notified by the condominium corporation. Upon receiving notification of the first infractions relating to parking problems, the unit owners immediately contacted management and their tenant in an effort to ensure his compliance.

The unit owners then hired a Property Management firm (the unit's manager) to manage their unit. Unfortunately numerous problems continued to arise with the tenant and on at least two occasions letters setting out the infractions and the need for compliance were sent by the corporation's manager to the unit's manager. These letters, however, were never delivered to the unit owners.

A year after the last letter was issued by the condominium corporation, it commenced an action against the tenant to enforce the condominium documents. The tenant abandoned the property and the condominium corporation sought to recover the costs it had incurred from the unit owners in accordance with the indemnification clause in the corporation's declaration.

The unit owners objected to paying these costs on the grounds that had they been advised of the problems with their tenant they would have dealt with them and the condominium corporation would not have had to commence these legal proceedings.

The unit owners maintain that they never received any correspondence from the corporation although their agent did admit that he received the correspondence and failed to forward it to them.

There is no requirement in either the *Condominium Act, 1998* or any of the condominium documents requiring notification to owners when there are problems with their tenants. Her honour stated: "Nevertheless, I find that implied in the Declaration, By-laws and Rules of CCC 555 is a duty on the condominium corporation to provide an owner with notice of a tenant's contraventions before the corporation seeks legal costs against the owner for litigation against the tenant brought to enforce compliance with the condominium's governing documents.

The condominium corporation looks to the owner to live up to the terms of the condominium declaration, by-laws, rules and regulations. The owner requires the tenant in the tenancy agree-

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ALWAYS NOTIFY OWNERS OF ACTION AGAINST THEIR TENANTS

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ment to agree to comply with those condominium documents. In the case of a breach, the corporation demands compliance from the owner, who in turn, demands compliance from the tenant.

The Condominium Act, 1998 does not establish the strict liability of unit owners for all infractions of tenants, even if they have had notice of the infractions. The wording of s.119(2) to the effect that an owner shall take "all reasonable steps" to ensure that an occupier of the owner's unit complies with the Act, the declaration, the by-laws and the rules, implies that the owner has to know what is going on at the unit so that he or she can take whatever steps would be reasonable to deal with any problems."

Aitken J. found that the condominium corporation took adequate steps to bring these enforcement matters to the attention of the unit owners from March 2000 until May 2002 by notifying their agent. The court found that the condominium corporation should not be financially penalized because the unit owners' agent failed to make them aware of the continuing enforcement problems the corporation was encountering with their tenant.

However between May 2002 and May 2003 when the condominium corporation commenced the litigation, notification was not given to the unit owners. The unit owners argued that had they been advised they could have taken steps to terminate the tenancy at much less cost than the costs now being sought by the corporation.

Aitken J. accepted the unit owners' argument. She therefore found that the corporation should not be entitled to the full legal costs charged by its solicitors as they "were not costs incurred by the Corporation by reason of a breach of any rules and regulations in force from time to time by any owner,… or occupants of the unit…"

The total costs claimed by the corporation for legal fees amounted to over $7,800 of which the Corporation was only entitled to recover half.

QUICK TIP

All bank accounts must be kept in the name of the corporation, not in trust for the corporation. Management should not have exclusive signing authority. Any signing authority should at least be shared with the corporation.

NEW RESIDENTIAL CONDOMINIUMS – THE FIRST YEAR

by
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The board of directors of a new condominium has to deal with certain matters that must be addressed within the first year after the condominium is registered.

Most purchasers of new condominiums take occupancy of their units before the property has been registered as a condominium corporation. During this occupancy period, the developer has control of the project and purchasers pay an occupancy fee (much like rent) to the developer. Shortly after the property is registered as a condominium, the developer can start to transfer ownership of the units to the purchasers.

At the initial stages after registration of the condominium, the developer retains control of the condominium. The first board of directors of a corporation is made up of developer appointees. A declarant is required to call a "turn-over" meeting within 21 days after a majority of the units have completed their final closings. The turn-over meeting is where the unit owners elect their first board of directors and the developer is required to turn various documents over to the condominium corporation.

QUICK TIP

As a way to welcome new members to the corporation, at each AGM consider having the president welcome all new owners and give each one the opportunity to stand up and introduce themselves.

The first elected board must ensure that a performance audit is conducted within the time prescribed under the Condominium Act (no earlier than 6 months and no later than 10 months following registration). This audit identifies all of the building's deficiencies that may give rise to a claim under the *Ontario New Home Warranties Plan Act* (or would give rise to a claim if the property was covered under the *Act*, i.e. conversions). Sometimes monetary settlements are paid to the corporation and the corporation carries out the work required to complete the deficiencies and/or the developer may complete the deficiencies or rectify certain deficiencies.

The board must also make sure that the reserve fund study is done in the first year after registration. The study projects how much money will have to be put into the corporation's reserve fund to meet the corporation's needs for the major repair and replacement of the common elements and assets of the corporation. The study's financial projections cover a thirty year period. The board will have to prepare a plan for the future funding of the reserve fund based on the study. The plan will determine how much money unit owners will contribute to the fund as part of their maintenance fees.

The board will also have to review the budget for the first year. The developer sets the first year budget when marketing of a project begins. A copy of the budget is given to prospective

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RESERVE FUND OBLIGATIONS

by
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One of the important responsibilities of the board of directors in 2004 is to start putting into place plans for funding the reserve fund.

May 5, 2004 was the deadline for corporations to complete their reserve fund studies. However, there are some corporations that have not completed that process yet.

If your corporation has not completed the study, focus your efforts on finalizing the study as quickly as possible.

Once the study is completed, the board will then have to make sure that the fund is "adequate."

The *Condominium Act* provides that the board must ensure that the reserve fund is adequate within a 10 year period from the date of the completion of the reserve fund study, unless the Corporation was registered on or after May 5, 2001, in which case the fund must be adequate within one year from the date of the study.

The key to having an adequate reserve fund is to come up with a plan for funding. The *Condominium Act* provides that the board is required to propose a funding plan within 120 days from **receiving** the completed reserve fund study.

Within 15 days of proposing a plan, the board is required to send out notice to the owners. This notice is "Form 15" which is the form set out in regulation 48/01 to the *Condominium Act*.

Form 15 contains the following:

- the summary of the study
- the summary of the proposed plan
- if applicable, the statement indicating the areas in which the proposed plan differs from the study

In addition to the owners, the board must also notify the auditor and provide the auditor with the following:

- a copy of the full reserve fund study, not just the summary
- a copy of the full proposed plan, not just the summary
- a copy of the notice sent to the owners, ie. Form 15 (the summaries)

Once all those steps are carried out, the plan must be implemented following the expiration of 30 days after sending the notices (Form 15).

The obligations do not stop after the first study is completed. The Act requires that corporations carry out updates to the reserve fund study every three years.

Directors should also be aware that section 32 of regulation 48/01 sets out which individuals can conduct reserve fund studies and also provides a list of those individuals who are not permitted to do reserve fund studies. This would include directors, officers or property managers for the corporation, owners, residents or spouses, partners, or children of directors or officers of the corporation.

Also, it is important to check that the person conducting the reserve fund study has the appropriate insurance coverage. These requirements are also set out in the regulations. For example, there is a requirement for liability insurance coverage and such coverage must be valid for three years from the date of the study.

Lastly, directors should also be particularly careful with those expenditures made from the reserve fund. Although the board has the authority to decide when funds should be used from the reserve fund, there are situations in which it may not be clear as to whether certain expenditures should be made from the operating fund or the reserve fund. When in doubt, board members should obtain a professional opinion.

We have been involved with corporations who have improperly used reserve funds to cover shortfalls in operating budgets, upgrades to the common elements and purchasing of new assets and now are taking steps to put the money back into the reserve fund. Remember that reserve funds are to be used **solely** for the purpose of **major repair and replacement of common elements and assets** of the corporation.

It is important that directors always keep in mind that as a board member, they may be personally liable for failure to carry out their duties and a director may not be covered under the corporation's directors and officers liability insurance policy if such director knowingly fails to comply with the provisions in the *Condominium Act.*

QUICK TIP

The names of individuals who have notified the corporation of their intention to be a candidate for the board of directors in accordance with the Act must be included in the Notice of Meeting to elect directors. Those candidates do not have to be nominated at the meeting

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NEW RESIDENTIAL CONDOMINIUMS – THE FIRST YEAR

purchasers along with the disclosure statement. The developer is responsible for the accuracy of the first year budget and is responsible for any deficiency as long as the newly elected board did not add additional services or increase the level of services provided in the first year. After the first year, the developer is no longer responsible for any shortfall or deficit in the budget. Many condominiums see moderate to substantial increases in maintenance fees in the second year after registration.

Many of the contracts entered into by a developer on behalf of a corporation for goods and services on a continuing basis can be terminated by the corporation within 12 months of the turn-over meeting and should be reviewed by the first elected board of directors.

All of the information in *Let's Talk Condo* is of a general nature for information purposes only, and is not intended to represent a definitive opinion of MILLER THOMSON LLP on any particular matter. Although we make every effort to ensure that the information contained in our newsletter is accurate and up-to-date, the reader should not act upon it without obtaining appropriate professional advice and assistance.

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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Miller Thomson LLP actively supports The Weekend to End Breast Cancer benefiting the Princess Margaret Hospital which will take place on September 10 to 12, 2004. One weekend. 60 KM. Visit **www.endcancer.ca** for more details.

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For information on this independent, non-profit organization, contact:

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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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