

# Let's Talk Condo...

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## ONTARIO'S CONDOMINIUM LAW EXPERTS

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## THE GUTTING OF S. 97 AND THE ABANDONMENT OF CERTAINTY



by  
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Sometimes decisions are rendered by the Courts that have a significant impact on the entire condominium community. One such recent decision of the Ontario Court of Appeal will require that all condominium corporations consider how they control what owners do on exclusive use common elements, whether they are parking and storage spaces, back or front yards, or patios and balconies.

S. 98 of the *Condominium Act* allows owners, with the permission of the board of directors, to make additions, alterations or improvements to the exclusive use common elements. Condominium corporations have relied on this section to provide them with a vehicle for controlling what unit owners put on exclusive use common elements.

In the case before the courts, the unit owner had installed a hot tub on his exclusive use common elements, without the approval of the board of directors. The corporation did not have a rule prohibiting owners from installing hot tubs. The board assumed that the installation of a hot tub was an addition, alteration or improvement to the common elements and therefore fell within the scope of S.98.

Because this was considered a breach of the Act, the corporation commenced a proceeding in Superior Court for an order that the hot tub be removed.

At trial the judge found that the placement of a hot tub on the exclusive use common elements did not constitute an addition, alteration or improvement to the common elements.

The trial judge found "that "an addition" means something that is joined or connected to a structure and the word "alteration" means something that changes the structure.

... the word "improvement" means the betterment of the property or enhancement of the value of the property. I also accept that an "an improvement" refers to an improvement or betterment of the property."

Unfortunately this conclusion was upheld at the Court of Appeal.

In our opinion, the court "got it wrong". The purpose of S.98 was to ensure that owners did not have the right to put anything they want on the exclusive use common elements without ensuring that the board approves of the placement, and where appropriate, an agreement is entered into between the owner and the corporation to protect the corporation and the interests of other owners.

We believe that in this case, the board of directors was unwilling to allow the installation under any circumstances. In our opinion, the board has this right. Just because an owner wishes to install or place something on the common element, does not mean that a board of directors has to approve it, if acting reasonably, the board believes it is not good for the community.

The consequence of this decision is that condominium corporations can no longer rely on S.98 to control what owners can put on the common elements.

Boards will need to pass rules prohibiting owners from putting anything on the exclusive use common elements without the board's permission and/or check what is in the corporation's declaration to determine if there is a provision which will protect the corporation from the impact of this decision.

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# HOME RENOVATION TAX CREDIT UPDATE



by  
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## Overview

As you are aware, in December 2009, the Federal Government introduced a Home Renovation Tax Credit ("HRTC") that can be claimed by an individual on eligible expenditures incurred on an individual's eligible dwelling which includes condominium units.

There have been many concerns expressed by both condominium boards and property managers in relation to the application of this legislation and the corresponding requirements that the Canada Revenue Agency expects unit owners/taxpayers to meet.

The Association of Condominium Managers of Ontario, in conjunction with CCI Toronto & Area Chapter, retained David Chodikoff of Miller Thomson LLP, who specializes in tax law, to coordinate a meeting with Canada Revenue Agency ("CRA") representatives in order to address the many concerns of members regarding the legal interpretation of the HRTC rules and how they impact condominium corporations. Michael Gwynne of Miller Thomson LLP, who is a member of our condominium practice group, also attended and participated in these discussions.

Although the information provided by CRA representatives is not binding, it does provide all stakeholders with some valuable direction from the Taxman's perspective as to the obligations of condominium corporations. Here is their position:

- There is no legal requirement for either a condominium corporation or a property management company to provide an HRTC receipt summarizing the eligible expenses incurred by a condominium corporation on behalf of all owners.
- If a receipt is issued, it should indicate the supplier/contractor name, the GST number of the supplier/contractor, the type of work/service performed, and the dollar amount of the expenditure incurred during the eligible period. This receipt should also show the unit owner's proportionate share of expenditures that may be claimed, calculated in accordance with Schedule D of the corporation's declaration. Receipts do not need to be provided by February 28, 2010 although it is recommended that owners receive their receipt in sufficient time to meet the April 30th filing deadline for the 2009 taxation year. If a receipt is issued after February 28, 2010, CRA has advised that taxpayers have the right to file and request an adjustment. Taxpayers have 10 years to file a claim for the HRTC credit.
- Condominium corporations may not be justified in taking

the position that a receipt will only be issued to the owner of record on January 31, 2010. The credit belongs to the owner of record at the time the expense was incurred. Where there is a transfer of ownership of a unit during the year, more than one receipt may be required. ACO and CCI are attempting to address this issue with the CRA.

- Owners are entitled to claim their share of qualifying expenditures as part of their HRTC credits and are therefore entitled to review copies of the invoices relating to work which they believe is eligible.
- Reserve fund expenditures generally qualify if the monies are used for an enduring improvement to the building, including the land that forms part of the building (and not an annual or recurring renovation). It is important to make a determination of what is an eligible expenditure, regardless of whether it was paid from the reserve or operating fund. As a general rule, if the item purchased does not become a permanent part of an eligible dwelling/building, it is not eligible.
- Ancillary expenditures related to eligible expenses (professional engineer fees, security costs related to eligible work etc.) qualify as eligible expenditures. Ancillary costs associated with the completion of a project that is an eligible expenditure are eligible.
- Condominium corporations and/or property management companies are generally not liable in the event that an expenditure is deemed to be ineligible by CRA, provided that the condominium makes an **honest** error in judgment in determining whether an expenditure is eligible.
- Condominium corporations do not need to supply copies of the invoices being claimed as eligible expenditures by an owner or a copy of Schedule D of the declaration for that condominium corporation. If the condominium corporation provides a receipt for eligible expenses incurred on behalf of all owners, the unit owner can rely on that receipt. The condominium corporation is responsible to maintain the records and proof of expenses to support the receipt which it provided to owners. Condominium corporations should maintain those records to assist a taxpayer in the event that the unit owner is assessed.
- Receipts that are issued should be based on the total expenditures incurred during the qualifying period. There is no minimum amount required in order to issue a receipt.
- Condominium corporations are not obliged to advise unit owners in the event that there are no qualifying expenditures. However, it is recommended that a notice be sent to owners indicating that the Corporation has not incurred any eligible expenditures.
- If it is determined after issuing receipts that an error was made, owners should be notified as soon as possible and advised that they should forward the information on the correction to the CRA in order to have their personal income tax return re-assessed.
- Condominium corporations should include a disclaimer on any receipts issued.

## Summary

As a service to owners, it is highly recommended that condominium corporations and/or their property managers provide owners with receipts summarizing the qualifying eligible expenditures. It is further recommended that boards of directors and property managers seek the advice of tax counsel to assist in the determination of the eligibility of expenditures for purposes of the HRTC.

For further information on the rules and guidelines relating to the HRTC please visit <http://www.cra-arc.gc.ca/hrtc>.

**Our readers are advised that tax legislation is subject to interpretation. Moreover, interpretation of legislation by Canada Revenue Agency officials is not binding on the Canada Revenue Agency and is subject to determination by the Courts.**

## GOOD NIGHT. SLEEP TIGHT DON'T LET THE BED'S BUGS BITE



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You may all remember this nursery rhyme from your childhood.

However, no longer is this just a nursery rhyme. Toronto is experiencing a dramatic spread of bed bugs to homes and offices.

You have no doubt seen recent news reports indicating that bed bugs have become a major infestation problem in Toronto, and accordingly, condominium boards should consider instigating a program of preventative measures to protect residents from an infestation and to eliminate and/or control any problems which may arise.

The Boards of directors should deal with this problem by addressing three (3) key elements. These are education, observation and communication.

The boards of directors and property management should issue a general notice to owners indicating that if they find evidence of bed bugs in their units they should report the problem immediately to property management. Moreover, residents should be advised that a program is in place to deal with the problem quickly and effectively.

In addition, the notice given to owners should provide information pertaining to the following:

- What are they?
- Where are they?
- Why are they spreading?
- Are they harmful?

Each of these points should be addressed.

### What Are They?

Bed bugs are blood sucking insects that attack humans and other mammals. They are oval shaped, wingless insects. Bed bugs are maternal and have a life span of about one year (1) during which time an adult female can lay 200 to 400 eggs.

### Where Are They?

Bed bugs latch on to warm blooded animals or humans. They feed on blood and after feeding, "fall off" until such time as they are hungry again. As these bed bugs "fall off" they tend to be found in upholstered furniture, clothing, bed clothes and mattresses and other places where they are likely to come into contact with their human meals.

It is important to note that bed bugs are not attracted by dirt, or poor hygiene, they are attracted by blood. It is not uncommon to find bed bugs in private homes and high end hotels. Few places are exempt from the threat of bed bugs.

### Why are they Spreading?

The spread is believed to be as a result of increased international travel, the more restrictive use of pesticides, their resistance to pesticides, and increasing urban population density and mobility.

### Are They Harmful?

Although most individuals bitten do not experience anything more than sometimes undetectable reddish bites which disappear within 24 hours, bed bugs can of course cause physical and psychological discomfort. There are cases in which allergic reactions may develop resulting in inflammation and itching. Secondary infection may also result from scratching the bites. Repeated exposure to bed bugs may result in agitation, sleeplessness and nervousness. Although bed bugs are not related to hygiene, properties infested with bed bugs may be subject to a social stigma.

### Summary

The key to a successful bed bug strategy is observation and reporting. Residents should be advised to look for bed bugs by checking for bite marks on skin and looking for tiny specks or speers of blood on bed clothes or mattresses. Owners can also check for live bed bugs or shells in creases, folds of mattresses, box springs, cracks in head boards and bed frames, cracks in plaster, etc. Owners should also be advised that bed bugs may attach to clothes while they are in public places such as the subway, elevators, restaurants, etc. As a result, owners if they suspect a problem, should check their clothes and in particular, outdoor clothes.

Boards should advise owners that if they find evidence of bed bugs they should immediately report it to management. Owners should not try to deal with the problem themselves as they may direct the bed bugs into neighbouring units. The board should also tell owners that arrangements are in place to deal with the problem quickly and effectively, and boards should ensure that such arrangements are in place and that

remedial action is carried out quickly and effectively. This will reduce and hopefully eliminate the spread of bed bugs in a complex.

In short, timely reporting and quick action ensures that the infestation is identified, controlled, and eliminated.

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