

Let's Talk Condo

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Ontario's
Condominium
Law Experts

Understanding Insurance Deductibles and Responsibilities



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Insurance coverage, responsibilities and deductibles in condominiums is one of the most complex issues to deal with, in large part because it may be counterintuitive to what people think it should be.

If your Corporation's By-laws provide that, where there is damage to a unit, the unit owner is responsible for the lesser of the cost of repairing the damage and the Corporation's insurance deductible, then this is important information for you. This article assumes that the corporation has a Standard Unit by-law or Schedule for standard units

turned over by the developer.

If there is damage to a unit, excluding personal possessions and betterments and/or improvements, which exceeds the amount of the insurance deductible, the Corporation's insurance policy would cover the costs in excess of the deductible. The personal possessions, betterments and/or improvements in the unit would be covered under the owner's insurance policy.

Consider the following examples, which are based on the assumptions that a Corporation's insurance deductible is \$5,000 and the damage is covered under the Corporation's insurance policy.

Example #1 – There is a leak from a pipe that forms part of the common elements of the building and as a result, damage occurs to a unit for which the cost of repair is \$2,000.

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ANNOUNCEMENT

Thank you to everyone that visited our booth at the annual ACMO/CCI-T Condominium Conference. Congratulations to **Kevin Middleton**, of ICC Property Management Ltd., and **Mike Mullen**, of Wilson Blanchard. Kevin and Mike won the draw to receive a free copy of Audrey Loeb's *The Condominium Act: A User's Manual* (3rd Edition). We look forward to seeing everyone again at next year's conference.

Our Mission

Our mission is to provide comprehensive, competitively priced, value-added, community oriented solutions throughout Ontario utilizing the range of knowledge and depth of expertise of a larger firm, while providing professional, friendly and timely service to our clients.

With offices in Toronto, Markham, Guelph, London and Kitchener-Waterloo, our Condominium Practice Group is part of a full service law firm which provides us with significant strengths in matching your legal needs to our resources. Our office systems and technology assist us in providing quick turnaround on a cost efficient basis.

The unit owner would be responsible for the \$2,000 (the lesser of the cost of repair and the deductible). The corporation will however be responsible for repairing the pipe and any damage caused to the unit by the necessity of gaining access to the broken pipe. However, the unit owner will be responsible for any damage to his/her personal possessions, betterments and/or upgrades (wallcovering, mirror, etc.).

Example #2 – There is a leak from a pipe that forms part of the common elements of the building and as a result, damage occurs to a unit for which the cost of repair to the standard unit (excluding personal property, betterment and/or improvements) is \$8,000.

The unit owner would be responsible for the \$5,000 deductible and the Corporation would be responsible for the balance, which in this example would be \$3,000.

Example #3 – There is damage to a unit caused by a faulty dishwasher located within the unit.

The resulting damage would again be the owner's responsibility, up to the amount of the Corporation's insurance deductible, as the unit owner is responsible for the lesser of the cost of repairing the damage and the Corporation's insurance deductible. This is exactly the same as Examples #1 and #2.

Example #4 – There is damage to the unit below as a result of a faulty dishwasher in the unit above.

In this case, the owner who is responsible for the damage caused, would be responsible for the lesser of the cost of repair to the unit below and the deductible. If the damage to the unit below exceeds the deductible under the Corporation's insurance, the owner who is responsible for the damage would be responsible for the deductible and the Corporation's insurance is responsible for restoring the standard unit. If there is damage

to the owner's personal property, betterments and/or improvements, then the unit owner below could either make a claim against the owner above or make a claim to his or her own insurance company.

Negligence – The only time the Corporation would be responsible for the lesser of the cost of repair and the deductible would be if the damage to a unit was caused as a result of the negligence of the Corporation. This would require the unit owner, to show that (a) the Corporation knew there was a problem, in the common elements of the building, which might result in damage, (b) the Corporation failed to correct the problem, and (c) as a result of the Corporation's failure to repair the defect, damaged occurred to the unit.

Deductible Insurance and Living Expense Coverage – As the above examples demonstrate, it is very important for unit owners to carry "deductible insurance coverage" as part of their policies. This would cover the owners for the lesser of the cost of the repair and the deductible under the Corporation's insurance policy. (This coverage is in addition to and should not be confused with the normal deductible portion of a unit owner's insurance coverage, which in many cases is between \$500 and \$1,000). Unit owners should be aware that we have heard that some insurers are limiting the circumstances in which the deductible will be payable.

Owners should also carry insurance for any living expenses they might incur if they have to move out of their units to have repairs carried out because of an insured loss.

Unit owners are well advised to consider obtaining coverage from the same company that insures the Condominium Corporation. This will reduce the likelihood of any gaps in coverage.



NEWSLETTER TIP

Condominium corporations that have Thyssen Krupp elevators and had to replace sheave jammers, the cost for which was not covered by the Ontario New Home Warranty Plan Act, major structural seven year warranty and compensated by Tarion, our partner in this process, the firm of Paliare Roland, has advised that a proposed settlement of the class proceeding has been reached. A copy of the proposed settlement can be obtained at:

<http://www.paliareroland.com/docs/class-actions/notice-of-the-settlement-approval-hearing>

The proposed settlement is a compromise of the disputed claims in the action and must be approved by the court before it will become effective.

In enforcing and administering the *Income Tax Act*, the Canada Revenue Agency may request information from a condominium corporation, including information relating to leasing of units by owners. The *Personal Information Protection and Electronic Documents Act* permits the disclosure of personal information without an individual's consent where the body seeking the information has identified its lawful authority for such a request and the request relates to the administration of law in Canada. The *Income Tax Act* gives the CRA the power to administer and enforce Canadian tax law. If requested by the CRA, condominium corporations should disclose information in their records relating to leasing of units by owners. The only instance where a condominium corporation does not have to comply with a request by the CRA is where the request relates to a criminal investigation.

Be Aware of Limitation Periods



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One of the ways a condominium corporation can lose the right to bring a claim against the declarant for construction deficiencies, or an application against an owner for non-compliance, is by waiting too long. In the eight years since the *Limitations Act* was introduced, Ontario courts have made it very clear, failure to commence an action or application within the applicable limitation period will result in dismissal of the proceedings.

The *Limitations Act* provides that for most causes of action there is a two year limitation period running from the day that the claim is discovered. A claim is discovered on the earlier of:

- (i) the date when the injury, loss or damage occurred; or
- (ii) the date on which a reasonable person, in similar circumstance, would have known of the injury, loss or damage.

The Act presumes that a claim is discovered on the date when the injury, loss or damage occurred. It is up to the party commencing the claim to prove otherwise.

Recent Developments

In the condominium context, the recent decision in *Toronto Standard Condominium Corp. No. 1789 v. Tip Top Lofts Development Inc. (2011) (ONSC 7181)* (“**Tip Top Lofts**”) supports the general rule that the limitation period for deficiencies discovered through a performance audit begins to run on the date that the performance audit is issued to the condominium's board. As a result, a condominium corporation has two years from the date the performance audit is received to commence

a claim for construction deficiencies. If the claim is not commenced within this period, the right to bring a claim is lost.

There are strategies to “suspend” the running of the two year limitation period for commencing a claim for constructions deficiencies. Section 11 of the *Limitations Act* permits parties to enter into an agreement to have a third party assist in resolving a claim. This gives the parties additional time to negotiate and/or mediate towards a resolution, while preserving the ability to bring an action if a settlement is not reached. Where the parties have entered into a written agreement, the limitation period is suspended from the date of the agreement until the earlier of the date that the claim is resolved, or the resolution process is terminated, or a party withdraws from the agreement, at which point the limitation period begins to run again.

An agreement pursuant to section 11 of the Act was proposed by the declarant in *Tip Top Lofts* but the condominium corporation declined to enter into the agreement. The court held that settlement discussions, without a formal written agreement between the parties, pursuant to section 11 of the Act, does not suspend the running of the two year limitation period. Similarly, the court held that the process of conciliation found in section 17 of the *Ontario New Homes Warranties Plan Act* does not suspend the running of the two year limitation period.

Enforcement and compliance related matters are also subject to a two year limitation period. Extensive case law supports the position that if a condominium corporation fails to seek compliance with its Declaration, By-laws, or Rules, within two years of the date that it becomes aware of the violation, it may be prevented from commencing an application for compliance. However, as was recently reinforced in *Waterloo North Condominium Corp. No. 37 v. Silaschi (2012) (ONSC 5403)* (“**Silaschi**”), the two year limitation period does not apply to a breach of the *Condominium Act, 1998*.

In *Silaschi*, the unit owner carried out alterations to common element windows appurtenant to the unit. The condominium

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It is important to review the registered address for service of the condominium corporation. If the managers are or have been the authority for service, when management changes the registered address for service may be incorrect.

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corporation became aware of the unauthorized alterations in 2006. In 2012, the condominium corporation commenced an application for an order deeming the owner in breach of section 98 of the *Condominium Act, 1998*. The unit owner argued that the condominium corporation is prevented from commencing the application by virtue of the two year limitation period. The court held that the two year limitation period applies only to internal governance documents, such as the Declaration, By-laws and Rules. Where there is a breach of a provision of the *Condominium Act, 1998*, such as section 98 in this case, the two year limitation period has no application. There may however be other arguments that a unit owner can rely upon to defeat a condominium corporation's proceeding for enforcement.

Courts have also been liberal with the two year limitation period where the breach is continuous. If a condominium corporation can demonstrate that the unit owner's breaches are continuing, the court will often deem the two year limitation period to commence on the date of the most recent breach, as opposed

to the date that the breach first occurred.

Lessons Learned

Whether dealing with construction deficiencies, breach of contract, negligence, collection of arrears, or enforcement matters, the two year limitation period must be taken into account.

For new condominiums, it is especially important to engage legal counsel at an early stage to address deficiencies in construction. If proceedings are not commenced within two years of discovery, or the parties have not entered into an agreement pursuant to section 11 of the *Limitations Act*, the condominium corporation may lose the right to bring a claim against the developer for construction deficiencies. An agreement pursuant to section 11 of the *Limitations Act* should always be reviewed by legal counsel to ensure that proper assurances are in place to protect the condominium corporation's ability to commence an action in the event that a resolution is not reached.



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