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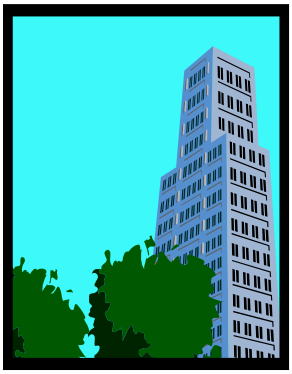
Fogler, Rubinoff LLP, Barristers & Solicitors

CONDO COMMENTARY

Fogler, Rubinoff LLP

Inside this issue:



TELECOMMUNICATIONS AGREEMENTS

By David Thiel, B.A., LL.B.

With the new market entrants in the telecommunications sector such as Mobilicity, Public Mobile and Wind Mobile, condominiums have seen a marked increase in the number of proposals for the installation of telecommunications equipment on the common elements. Primarily, this means that these new market entrants and established telecommunications providers seek leases to install equipment on rooftops of condominium high-rise buildings, although other scenarios are possible.

Rooftop leases provide a source of revenue for condominium corporations in the form of rental or licence fees. In some cases, any rental revenue can be nominal at best and the lease or licence agreement is entered into by the corporation, not for revenue purposes, but in order to make additional telecommunications services available to building residents.

Regardless of the range of purposes, such telecommunications agreements are almost invariably for very lengthy terms. An effective 20-year term is often 'hidden' in the form of the right for the telecommunications provider to renew for a series of shorter terms (eg. 5 years), multiple times.

The long duration of these agreements, the presumed value of the equipment installed and the potentially large financial interest of the telecommunication provider in the lease or licence make the stakes high if a condominium corporation were to ever seek to terminate such an agreement early.

Accordingly, telecommunications agreements can be among the most significant agreements entered into by a condominium corporation. In this article we will outline some of the legal considerations for condominium boards as they make decisions concerning such agreements. Of course, corporations should always seek legal advice with respect to the terms of any particular agreement.

David Thiel, Partner
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Non-Exclusivity

This is perhaps one of the more important aspects of such agreements. Often, we see agreements that are vaguely worded or worded in such a way that may provide the telecommunications provider with an exclusive lease over an entire rooftop or even the entirety of the common elements, potentially barring other market participants.

Typical condominium rooftops, depending of course upon the providers involved, the equipment which may be installed and the physical limitations of a particular site, could accommodate installations by multiple telecommunications providers. Exclusivity could be particularly problematic for a condominium building in a prime location which could easily attract interest from multiple service providers.

While there are some CRTC (Canada Radio-Television and Telecommunications Commission) regulations concerning sharing of sites, it is nonetheless important for condominiums to ensure maximum flexibility so as to not miss out on opportunities for multiple installations and potentially multiple streams of income.

(Continued from page 1)

Therefore, telecommunications agreements should be structured to be non-exclusive, with additional installations by other providers specifically permitted. Using the terminology of a "non-exclusive licence" as opposed to a "lease" can help to clarify that a particular agreement is non-exclusive in nature. At the very least, the scope of any exclusivity in a lease should be narrowed to that absolutely necessary for a particular provider's installations.

Equipment

While understandable that telecommunications providers will desire some degree of flexibility to change equipment over the years, the corporation should be mindful to place restrictions or have some reasonable approval process concerning the size and type of equipment which may be installed pursuant to a telecommunications agreement.

For example, while initially a small satellite dish may be contemplated, many agreements would not preclude a larger installation which may be aesthetically displeasing to a board and owners of a corporation or create other building issues. Consider the reaction of owners if for example a provider one day replaces its existing small satellite dish with a forty-foot antennae which can be seen for miles around.

Attempts should be made to provide some restriction on the type of equipment which may be installed. For example, a telecommunications agreement may include a provision that any material changes to the equipment be approved by the condominium board, acting reasonably, with the appearance of the building to be specifically mentioned as potential reasonable grounds for a Board to withhold consent.

Compliance with Government Regulation

It is important to ensure that the telecommunications provider, not the corporation, is responsible for compliance with all government regulations including Building Codes, Industry Canada requirements and/or CRTC regulations.

Non-Interference

As there may be other telecommunications providers using the rooftop space as discussed above, and undoubtedly residents of the buildings will also be using cell phones and other electronic equipment, provisions should be included in any telecommunications agreement, especially for second and subsequent rooftop installations, to require that the telecommunications provider not interfere with any existing telecommunications installations or in fact any existing signals to and from the property.

In connection with this issue, the corporation must also ensure that any new telecommunications agreement does not conflict with the terms of previous existing telecommunications agreements or other leases, licences or other contracts affecting the condominium property. This review should be undertaken in conjunction with review of the subject telecommunications agreement itself.

Condominium Act, 1998 Compliance

Since a telecommunications agreement would typically grant a licence or lease over parts of the common elements, the condominium corporation needs to consider the requirements of Sections 21 and 22 of the *Condominium Act, 1998* (the "*Act*"). Section 21 of the *Act* would normally require a By-law to be registered in order to authorize a licence or lease of the common elements.

Fortunately, in the case of a wide variety of telecommunications agreements, Section 22 of the *Act* permits the corporation to comply with the *Act* by sending a notice (often called a "Section 97 Notice") to the owners instead of obtaining By-law approval, in certain situations. The Section 97 Notice permits the owners 30 days to submit a requisition for a meeting of the owners to vote upon the agreement, otherwise it is automatically approved.

Section 22 of the *Act* was not worded in the clearest of language. However, in most typical situations Section 22 will usually permit the corporation to avoid having to go through with By-law approval, which especially in larger condominiums can be onerous and impractical. Without Section 22 of the *Act*, many condominium corporations may be deprived of an additional revenue source to defray common expenses or of the opportunity to provide additional telecommunications services to residents.

Where possible, the condominium corporation should attempt to negotiate for the telecommunications provider to pay for the cost of having to send the owners a Section 97 Notice and even for the legal costs of review of the subject telecommunications agreement.

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(Continued from page 2)

Other Matters

Of course, other legal matters which are common to many types of contracts entered into by a corporation should be addressed such as whether or not there are renewals (preferably not automatic), termination provisions, indemnification, payment for utilities (electricity usage), maintenance and repair, building security requirements and insurance.

Condominium corporations should also consult with their accountant, auditor and/or lawyer as to any taxation issues such as the collection of HST and obtaining an HST account.

The foregoing is merely a taste of the degree of review required of such agreements. Again, these issues should be reviewed by the corporation's lawyers prior to any contract, licence or lease being executed by the Board.

While some of the foregoing is specifically related to rooftop agreements, these comments can be of general application to other licence agreements with telecommunications providers; for example, access by the local cable company in a non high-rise setting.

COURT APPOINTED ADMINISTRATOR—WHY?

By Carol Dirks, B.A., LL.B.

Carol Dirks, Partner
Condo Group

Why is it that some condominium corporations are simply unable to govern themselves? When should the democratic rights of the owners to run their corporation be overridden by an Order of the Superior Court of Justice?

Section 131 of the *Condominium Act, 1998* enables a corporation, owner or mortgagee to apply to the Superior Court of Justice for an order appointing an administrator for a corporation. The Court has the authority to make the order if "*it would be just or convenient, having a regard to the scheme and intent of the Act, and the best interests of the owners*".

On its face, there is a relatively low threshold for making such an Order. In deciding whether the appointment of an administrator would be in the best interests of the owners, the Courts have considered a number of factors, including:

- If there has been established an inability to manage the corporation;
- If there has been demonstrated substantial misconduct or mismanagement of the corporation's affairs;
- If the appointment is necessary to bring order to the affairs of the corporation or has a reasonable prospect of bringing such order; and
- If there has been a struggle within the condominium community between competing groups, which has prevented or interrupted the proper governance of the corporation.

The financial and political state of affairs of a condominium corporation often typically goes hand in hand. From a financial side, there may be large operating deficits, lack of or insufficient reserve fund planning, or the postponement of major repair and replacement projects such that the building components have reached or are reaching the end of their life cycle at the same time. From a political side, there typically is one or a series of requisition meetings, often with the intention of removing the existing board members and/or property management.

The condominium community then shifts into a "crisis management" situation with some owners seeking to avoid expenditures and maintain unrealistically low common expenses, and while other owners (usually the minority) struggle to make the hard decisions in the face of opposition. A toxic level of distrust emerges between the board of directors, property management and the unit owners which only an independent non-interested party can break through.

Many times, the board members who contributed to, or are responsible for, the "crisis" situation have sold their units and have moved on.

Once a condominium reaches this level of calamity, the appointment of a court ordered administrator is for the most part inevitable. That administrator is able to function without the political consequences of having to make tough decisions in the interests of all owners, which almost certainly will not be popular ones. Further, in many cases, the independent nature of the administrator restores a level of trust within the condominium community such that the information presented by the administrator to the owners is accepted as being an accurate report of the corporation's state of affairs.

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(Continued from page 3)

The appointment of an administrator is not without real and very harsh consequences to the unit owners. The existing owners are often required to pay for the mistakes of past owners, and past directors by means of large special assessment(s). Faced with a real risk of the direction their condominium corporation could be heading in, most owners would be in agreement that proactive action be taken to avoid having an administrator appointed. Why is it that intervening events did not occur earlier? What if anything can property management or the Board of Directors do on a proactive basis to avoid a "crisis" situation? Here are some suggestions:

1. **Work to Dispel Distrust** – Owners have indicated they feel more secure with the appointment of an administrator because it brings a level of independence into the management of the affairs of the corporation. Distrust of the Board of Directors, and management, typically arises from a reluctance on the part of the Board to be candid about the affairs of the corporation for fear of repercussion. Corporations should not wait to bring in a level of independence to the owners through professionals, or other persons. The auditor is the one person appointed by all of the unit owners and whose legal duty it is to report to the owners. Do not hesitate to involve the auditor, and other professionals such as the Corporation's engineer or legal counsel.

2. **Improve Communication** – In many cases, the fact that the corporation is in a "crisis" situation comes as a surprise to owners. Owners may question why information was not brought to their attention earlier. Improved communication in the form of newsletters, information meetings, and a yearly report at the Annual General Meeting can have a positive impact. In most cases, owners who are faced with the cold hard facts about the physical and financial state of affairs of their corporation will recognize and agree that appropriate action needs to be taken in response. Owners should also be made aware of the likelihood of an administrator being appointed to manage the Corporation if that action is not taken.

3. **Directors need to be Accountable** – Directors (and their successors) need to understand their legal responsibilities and obligations to comply with the *Condominium Act, 1998*. Compliance with the Reserve Fund requirements of the *Act* is not optional, and neither is making sure that the funds collected from the unit owners each month are sufficient to meet the operating budget requirements of the Corporation. This may be accomplished by having directors acknowledge their legal obligations by signing a Directors' Code of Ethics, or requesting a legal opinion from the Corporation's solicitor as to what their requirements are in the circumstances. In addition, owners need to be made aware that no matter who they elect to be a director on the Board of Directors, that person is also mandated to comply with the requirements of the *Act*.

The writer has been involved in situations where an administrator was required to be appointed by the Superior Court, and situations where the appointment was avoided by taking proper action. The circumstances at one corporation will differ significantly from another. However, with pre-emptive action, a crisis situation may be able to be averted, in the interests of all owners.

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BED BUGS AND CONDOMINIUMS: A LEGAL PERSPECTIVE

By Lou Natale, B.A., LL.B.

Lou Natale, Partner
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and Real Estate

Bed bugs are a serious issue and should not be ignored by residents, boards of directors or property managers of condominiums. As the media has recently reported, cities across North America have experienced a sudden increase in infestations. Some government officials and representatives of the pest control industry have even called for legislation to deal with this growing dilemma. The situation with condominiums is particularly problematic because of the high risk associated with the potential rapid spread of infestation from unit-to-unit and into the common areas. This Article will review and consider some of the potential legal implications for condominium corporations when dealing with bed bugs. I suspect that as you read through this article you may get the urge to itch and scratch yourself. It's normal!

What are Bed Bugs?

Bed bugs are small parasitic insects that feed on blood, preferably human but may also feed off animals such as dogs and cats. They are brown in colour and can measure up to half a centimeter. They are nocturnal and can apparently travel 15 to 20 feet nightly to feed. Bed bugs lay eggs and multiply quickly into an infestation unless detected and treated. Their bites can leave itchy red welts, however, some people experience little or no signs of bites. These critters do not discriminate their victims by age, gender, income level or cultural background. The good news is that bed bugs are apparently not known to transmit diseases.

Bed bugs are commonly found in mattresses, furniture, personal belongings and in crevices throughout a room like baseboards and power outlets. They enter into homes on or in luggage, clothing and personal belongings. There are various types of treatments and procedures to follow once bed bugs are detected in a home. You should contact a qualified pest control company for details.

Legal Issues to Consider:

What happens once a bed bug situation is reported to or detected by management? Who pays for the treatments to deal with the problem? Do you contact your insurer? Do you notify all owners in the building if only one unit is found to have bed bugs or do you notify just those owners who directly neighbour the infested unit? What if the infestation spreads to the lobby couch or the recreational amenities? What do you have to disclose in a status certificate regarding bed bugs? These and other questions should be seriously considered by boards and managers in advance of a potential bed bug situation. Knowing the answers, or who to ask, is critical to avoiding or minimizing problems for the corporation.

Costs of Treatment – The cost to treat a typical unit (which also includes inspecting the surrounding units – up, down and side-to-side) can be expensive and range from $450 to $2,000 or more depending on the nature and extent of the treatment. Owners are required to maintain and repair their units and as such, the owner of an infested unit must pay for the full cost of the bed bug treatment. Depending on the extent of the problem, the resident of the impacted unit will also incur costs to bag, remove and dry-clean all clothes in the unit and they may have to find alternative accommodation for a day or so to allow for proper treatment of the unit. Treatments may also have to be repeated.

With respect to the common elements, corporations generally budget for regular pest control services (ie. rodents, roaches and insects). However, in the event of an unexpected outbreak of bed bugs in the common areas and amenities, corporations will have to find the money in their budgets to deal with the situation. Also keep in mind that it is very unlikely that the cost of remediating a bed bug infestation will be covered by a standard policy of insurance for condominiums and unit owners.

Disclosure Obligations – In light of the potential negative impact on a building's reputation, and in order to deal with the legitimate concerns of owners and to stop the spread of misinformation, it is critical, in my view, to immediately inform all owners of a reported incident of bed bugs in the building. All owners should be asked to be vigilant to check for and report to management any suspected sightings of bed bugs. Information and education is key to avoiding a bed bug infestation. Remember to communicate with tenants as well as off-site owners. With respect to what should, or should not be said, about bed bugs in a status certificate, is a little "itchy" – sorry, meant to say "tricky". Each situation must be considered on their own facts. For instance, if a request for a status certificate is made for a unit and the manager knows that a bed bug problem has just been reported or treated in that unit or if the manager is aware of a larger problem in the building, then a properly worded cautionary statement should be inserted into the status certificate. You should have the corporation's lawyer review the situation and advise on the specific wording to be included in the certificate. It is interesting to note that a private member's bill has been presented for consideration in the Ontario legislature, which would require landlords to reveal to potential renters whether a unit has been infected by bed bugs.

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(Continued from page 5)

Uncooperative Resident - A resident is not entitled to refuse a corporation's request to allow a pest control company to conduct an inspection or treatment of the unit. The general right of entry into a unit is stated in the Condominium Act and in most Declarations. The Board also has the right to pass Rules dealing with procedures for detecting, treating, controlling and preventing the spread of bed bugs in the building and units. A resident known to have a bed bug infestation and whose unit has not yet been treated, may in certain circumstances be asked by management not to use the amenities for fear that the bed bugs have latched to the resident's clothes and could potentially spread. Although some precautions are a good idea, you must be careful not to overreact and create a sense of paranoia throughout the building. Again, consult with the corporation's lawyer for specific advice in these circumstances.

Remember, if a resident refuses to deal with a suspected bed bug problem, the corporation is entitled under Sections 19 and 92 of the Act to enter the unit on reasonable notice and arrange to carry out the necessary inspection and treatment. All costs associated with the inspection and treatment can then be charged back to the owner of the unit and liened. One would hope and expect that all residents would cooperate and properly deal with a bed bug situation for their own sake and for the sake of their fellow residents.

Information and Education – As previously indicated in this article, the key to avoiding an outbreak of bed bugs in a condominium and to reduce the associated legal risks, is to proactively inform and educate residents, superintendents and building staff. Consider sending a written notice to all residents and owners with pertinent information and asking them to conduct their own simple inspections for bed bugs. Prevention, detection and proper treatment is important to stop this real and growing problem.

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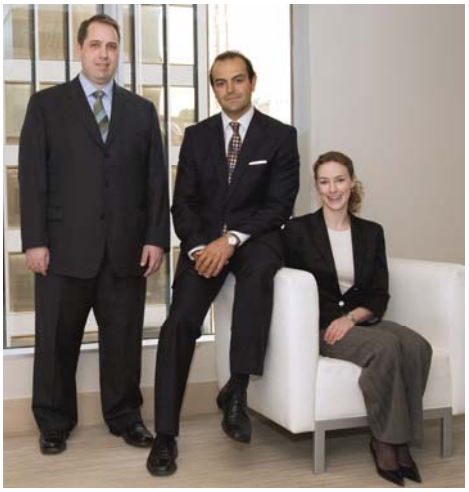

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News & Notes

- **2010 Annual ACMO/CCI Conference** is being held in Markham on November 5th & 6th. Watch for Carol and Lou who are participating as speakers.
- Ask Lou about his involvement with the Health Indoor Partnership (HIP) which is a trade and education association offering seminars to property managers on Indoor Air Quality issues.