Spring 2013

Fogler, Rubinoff LLP, Lawyers

CONDO COMMENTARY

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The Condominium Law Group at Fogler, Rubinoff LLP is pleased to welcome David Forgione to our team. David's practice includes advising developers, property managers and condominium corporations on the requirements of the Condominium Act, 1998, including dealing with shared facilities issues, easements and licensing issues, reserve fund and budgeting matters, general governance and meeting concerns, as well as, on a variety of other issues related to the enforcement of the declaration requirements, by-laws and rules. He also regularly assists clients with the purchase, sale and financing of real property as well as condominium and subdivision development matters. David frequently liaises with municipal officials and works with planners, surveyors, engineers and environmental consultants to assist clients with the cost effective and timely completion of their projects and transactions.

Older Condos: Be Careful What You Wish For?

by: Lou Natale B.A., LL.B.

Lou Natale, Partner
Condo Group

The old saying "be careful for what you wish for" is very applicable when it comes to condominium ownership and management. You may be disappointed when you realize the unintended results of what you "wished" for. A case in point with condominiums is the tunnel vision approach too often implemented by some board of directors (and managers) in trying to keep monthly common expenses as low a possible at the expense of proper maintenance and repairs, stable long term financial planning and enhanced property values. Of course, virtually every condominium unit owner and board member "wishes" to have low common expense fees or a zero budget increase year after year. But reality shows us that this is not possible and particularly with respect to older condominiums and their aging common element infrastructure.

It is estimated that there are over 6,700 residential condominium corporations in Ontario or about 500,000 units, with thousands more now under construction in the Greater Toronto Area. More and more people are calling condominiums their home. Although there have been many condominiums built in Ontario over the last decade, the first wave of "new" condominium buildings were constructed in the 1970's.

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Living in (and managing) an older condominium comes with some unique struggles and challenges. Too often, current boards of directors and managers come to realize that previous boards for many years neglected to properly maintain and repair the common elements (ie. roof, garage structure, building envelope, etc.) and have failed to properly set aside money in the reserve accounts because of their well-intended but short-sighted desire to keep common expense fees low and to avoid increases when possible. This type of decision making (or lack thereof) becomes extremely expensive when the current boards and managers receive news from the consultants that the long overdue repairs and replacements are now double or triple the cost today as compared to when the work should have been completed. This ultimately creates a financial dilemma and the need for strong leadership from both the board and management. Whether the repair costs are paid through a loan to the corporation or by way of a special assessment or large increases to the reserve fund, boards must inform and educate the unit owners regarding the situation and how they got into this position. It is sometimes easier for board members to procrastinate and continue to "kick the can along the road" when it comes to dealing with large, expensive repair work. But that is not leadership. The *Condominium Act, 1998* (the "Act") requires a condominium corporation to maintain and repair the common elements and it is the duty of the board of directors to ensure that this happens.

Recently, the Joint Legislative Committee for ACMO and CCI submitted a legislative brief (the "Brief") to the Provincial Government outlining a number of proposed changes to the Act. There are, in my view, several proposed changes which can directly impact and benefit aging condominiums to avoid situations where perpetual poor decisions of past boards have resulted in decaying infrastructure and financial mismanagement. Here are just a few examples:

1. Education is key to proper decision making. Without the proper knowledge or understanding of the requirements of the Act, there is a greater possibility of poor decision-making and lack of planning. The Brief proposes that directors' qualifications include a requirement that each newly-elected director attend an introductory directors' condominium course, within two years of being elected and at the cost of the condominium, which course will provide the basic knowledge of the directors' duties and responsibilities.

2. Boards spending reserve fund money on things that are not properly considered major repairs and replacement can, over time, severely deplete a reserve fund account. For instance, there are situations where boards choose to spend reserve fund money on "changes" made to the common elements even though such expenditures are not permitted to be paid through the reserve fund as per Section 93 of the Act. As well, boards sometimes spend reserve fund money on matters which are obviously minor, routine repairs and maintenance. To address these types of possible violations of the Act, the Brief proposes to add new sub-sections 93(8) and (9) to the Act which will clearly state that no reserve fund money can be spent on "changes" to the common elements unless those changes relate to a government ordered change or an energy conservation initiative (as will be further discussed below) or a "change" where the material being used is reasonably close in quality to the original as is appropriate in accordance with current technology and construction standards. As well, the Brief proposes that the phrase "major repair" be defined to include a monetary minimum to be considered "major" so as to avoid small routine expenses being paid through the reserve fund.

3. Boards of directors are sometimes faced with a situation where they have components in the building, such as the boiler, air intake system and lighting fixtures, which are not energy efficient and are costing the corporation large sums of money on higher energy costs. Currently, in order to change or replace these inefficient systems and equipment (before their useful lifespan has expired) the Act does not permit the Board to use the reserve fund which usually means that energy saving initiatives get delayed or shelved due to the lack of available money or the board's unwillingness to obtain a loan to finance the work. As indicated above, the Brief proposes that money in the reserve fund be permitted to be used for these types of energy conservation projects which in turn helps condominiums spend less money on utilities and perhaps more money on needed repairs and maintenance.

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Another initiative which will no doubt help condominiums generally in dealing with management issues is the requirement to license and regulate property managers in Ontario. Boards of directors made up of volunteers, who often know little about building infrastructure and reserve fund requirements, should expect to receive guidance and direction from property managers who have the proper knowledge and credentials. Managers are dealing with budgets worth thousands and even millions of dollars and their knowledge about building components, reserve funds and other requirements of the Act are essential in guiding corporations in the right direction as they age. Both ACMO and CCI, as well as other industry stakeholders, support the need to license and regulate property managers. How and when such licensing and regulations are implemented is now up to the Provincial Government. Stay tuned.

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Delayed Decision-Making – Don't Pay the Price

by Carol Dirks, B.A., LL.B.

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Recently, there have been a number of court cases which speak to situations where there has been delay on the part of the Corporation in either enforcing compliance with the condominium documents, or with respect to initiating an action in the Courts for damages. Delay in taking action can lead to serious consequences.

In Ontario, there is a general two (2) year limitation period for most causes of action. The limitation period commences when the party with the claim discovers the underlying material facts or, alternatively, when that party ought to have discovered those facts by the exercise of reasonable diligence.

Condominium corporations are in a particularly unique situation when it comes to the application of the two year limitation period. The typical changes each year in the composition of the Boards of Directors, and sometimes with management staff, make it challenging for the board members to be aware and apprised of the circumstances of a potential claim or the status of an enforcement issue. Even though a director might resign from the Board of Directors or not be re-elected, the other Board members and the Corporation can be imputed with that former directors' knowledge of a potential claim, subject to certain exceptions.

Given that Boards of Directors typically only meet once a month, it can be easy for decisions on various matters to become delayed or even forgotten about. It then becomes extremely important to keep detailed Board Meeting Minutes, to review the monthly Management Report, and to maintain re-occurring items on the agenda for each Board Meeting until those items have been determined or properly disposed of by a decision of the Board.

The effect of not making timely decisions was recently reiterated by the Superior Court of Justice in the case of *York Condominium Corporation No. 62 v. Superior Energy Management Gas*. The case involved an application by a Condominium Corporation to declare a fixed price gas supply contract with Superior Energy null and void. The fixed price contract had been purportedly entered into by a representative of property management on behalf of the Corporation in 2008. The Board of Directors claimed that the management representative was not authorized to bind the Corporation.

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The Board originally sought legal advice on the fixed price contract in September of 2009. No further action was taken with respect to that contract for a period of approximately one (1) year when a demand letter was sent to Superior Energy in 2010. There was additional correspondence exchanged between the parties thereafter. In 2012, the Corporation brought an application to the Superior Court of Justice seeking an Order declaring the fixed price gas contract to be void. The Court dismissed the Corporation's application on the basis that the two year limitations period had expired. The limitation period was found to have started to run "at the latest" when it received the legal advice from its legal counsel in 2009.

Similarly, in the case of Waterloo North Condominium Corporation No. 37 v. Silaschi (decided in 2012) confirmed the application of a two year limitation period to matters of enforcement and compliance brought by a Corporation as against a unit owner. In that case, an owner had enclosed his exclusive use common element balcony area without the approval of the Corporation. The Corporation brought an application under Section 134 of the Condominium Act, 1998 for an order permitting it to enter the owner's unit to remove the windows that had been installed by the owner in the balcony area.

Even though the Corporation had been aware of the balcony enclosure since 2006, the Court found that application was not statute barred because the owner's conduct was a "breach of the statute itself" – being the Condominium Act, 1998, as opposed to being a breach of the internal governance documents. Accordingly, if the compliance issue involves the enforcement of a provision of the Declaration or Rules of the Corporation, then it will be subject to a two year limitation period. However, if the proceeding is to enforce the Condominium Act, 1998, then it would appear that no such restriction will apply. There will inevitably be situations where the enforcement issues are blurred as to whether it is compliance with the Act, as opposed to the Declaration, or Rules of a Corporation.

The point to be taken from these cases is that board members and property management need to be aware of the statutory time limitations and when those time periods will be considered to have commenced. As part of that process, the Boards of Directors should impose their own internal deadlines for investigation and taking appropriate action, in consultation with legal counsel.

Police Inquiries: Considerations for Condominiums

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

David Thiel, Partner
Condo Group

It is not unusual for police to ask for assistance from condominiums and their managers. After all, condominiums have access to certain information relating to the units and residents, as well as various levels of control and access to the condominium property (often including the residential units). When confronted by the authority of the police and a request to assist, the first reaction may be to assist in good faith as requested. However, condominiums and their managers should consider when it is appropriate to assist, and under what circumstances it may not be so appropriate. Certain actions in response to a police request could, for instance, result in liability to the condominium or the manager. This article will review some scenarios involving police requests, presented below in the form of typical questions that may be posed by a manager or Board of Directors.

Please keep in mind that each fact situation will be different and the condominium should seek legal advice as to how to respond if there is any doubt, particularly if the situation is of a non-emergent nature and there is time to make such inquiries of legal counsel. In particular, where appropriate as discussed below, requiring that the police make a written request rather than a verbal request should provide the condominium with the opportunity to seek legal advice.

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A. The police are at the management office, asking for information as to where a particular individual resides in connection with a criminal investigation. The police do not suggest that there is any imminent danger or emergency to locate the individual in question. The condominium has the requested information in its record of unit owners. Should I provide the unit number and the name of all of the occupants?

If the police have a warrant or production order to search the condominium records, then of course, the condominium should cooperate. The manager should ask to see the warrant and also write down the names and badge numbers of the officers in attendance.

In general, without a warrant or order, the condominium would not be required to provide the requested information. The safest approach would be to request a warrant.

That being said, there is an exception to the restriction on the disclosure of personal information under the Personal Information Protection and Electronic Documents Act ("PIPEDA"), whereby disclosure is permitted where disclosure is to a government institution and "the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law".

Therefore, we suggest that a disclosure could be made if the condominium is reasonably satisfied that the disclosure meets the criteria quoted above. We recommend if this approach is considered that at the very least a written request be received outlining the purpose of the request and the authority upon which the police is relying in making the request.

Failure to comply with the foregoing could result in a complaint or claim for breach of privacy from the resident in question if the condominium was to provide the information.

The recommended response to the police inquiry may be different if the police expressed a concern of immediate danger and threat posed by the individual in question, in which case immediate disclosure of the requested information is appropriate.

B. The police have arrived and are asking for a copy of the condominium's security video footage from a particular date in connection with an investigation. Should I provide this?

The security video is potentially personal information of a resident or residents and therefore the principles described in response to question A above apply. The Corporation should at the very least require written confirmation of the request as discussed above.

As well, the condominium should review the footage in question to ensure that the request is reasonable in its scope. For example, if only a few minutes of video are reasonably necessary, the condominium should not provide several weeks worth of video. The disclosure should be limited to that which is reasonably necessary to comply with the request. The disclosure should also be limited to video footage relating to the individual in question and not any other person.

The condominium should consider relaxing the requirement of a written request if the incident which is subject of the request relates to an illegal activity occurring onsite. If for example the police are seeking to determine the whereabouts of an individual at a certain time relating to an investigation of an incident occurring elsewhere, the condominium may wish to be more strict with the request. However, if the inquiry turns out to relate to a security incident onsite (eg. break and enter, car theft etc.) which the condominium would have reported to police in any event,

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C. The police just arrived at the building and are asking the concierge for access to a specific unit for the purpose of arresting an individual. The Declaration provides that the condominium shall retain keys to the unit. Do I provide the key, or open the unit door for police?

The starting point for the condominium is to consider the purpose for having the keys in the first place. Although a Declaration would not normally state the purpose explicitly, the purpose would essentially be for access to the unit in the case of emergency access for repairs as well as access on reasonable notice to perform the condominium's objects and duties under the Condominium Act, 1998.

Therefore, as the request of the police noted above does not relate to the condominium's objects and duties, there is a potential question as to whether or not the condominium should provide a key or access to the unit, even if the police have a warrant.

Perhaps in the vast majority of cases there would be no adverse consequence of providing a key. If however there was a problem with the warrant for example and it happened that entry by the police was not legal, then it is possible that the condominium and/or manager could be held liable for providing access.

Out of an abundance of caution, the condominium should in our view not provide a key or access to the unit for the purpose of arresting an individual. Also, keep in mind that the police could have a general arrest warrant and may in fact need a special arrest warrant permitting entry to a specific residence if entry is to be lawful. The condominium should not have to make such a determination on the spot. Access over the common elements (eg. hallways, elevator) can be provided in this scenario however.

For example, if the police request access to the common element hallways and elevators to attend at a unit to make an arrest or question an individual, our view is that the condominium should cooperate in providing such access.

D. The police have arrived at the building, in 'hot pursuit' of an individual? Should I cooperate in access to the building and if necessary to the unit?

As per the above discussion, the condominium should he hesitant to provide a key or open the door to a unit even if the police have an arrest warrant. If the police so choose, they would have the right to break down a door if thought reasonably necessary in certain circumstances.

Police have arrest powers without a warrant in a variety of circumstances and generally speaking the condominium should provide access to the police of the common elements if the police explain the grounds for not requiring a warrant or it is obvious from the situation. Police for example can arrest without warrant in various circumstances which can include: (a) a fresh pursuit by a police officer or if (b) the police officer finds the person committing an offence. Circumstances in which a police officer may enter a residence without a warrant can include reasonable grounds that entry is necessary to prevent imminent bodily harm or imminent destruction of evidence of an indictable offence.

Managers cannot be expected to know and assess all of such situations and we suggest that asking the purpose of entry to the common elements and obtaining a response should be sufficient. Simply put, if the police represent that a warrant is not necessary and explain the circumstances, the condominium should cooperate with access to the common areas of the building.

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