Real Estate News

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Top 10 Proposed Changes to the Condominium Act, 1998

I sit on the Hamilton Law Association Real Estate Subcommittee. During one of our meetings I mentioned that the *Condominium Act, 1998* (the "*Act*") was being amended. The first comment around the table was "again?" which comment was shortly followed by "are the changes good or bad?" My answer – "it depends"; surely they weren't expecting a clear answer from a lawyer, after all. All joking aside, in the summer of 2012 the government of Ontario announced a review of the *Act*, the last comprehensive review was completed 16 years ago. A review of the proposed changes reveals that some are good as they clarify uncertainties whereas others are not as they muddy the waters even further. As with everything, whether the change is good or bad also depends on your viewpoint.

The proposed changes to the *Act* are being made by way of the *Protecting Condominium Owners Act*, which legislation also amends the *Ontario New Home Warranties Plan Act*, enacts the *Condominium Management Services Act* and makes minor changes to other legislation. This article summarizes the top 10 proposed changes which will likely have the largest impact on your clients, including developers, property managers, boards of directors and owners.

No. 1 – Creation of a Condo Office & the Condo Authority

There exists a perception in the condo industry that there is a power and resource imbalance between condo boards and owners. In order to eliminate or at the very least alleviate this imbalance, the government is creating a Condo Office to oversee education, dispute resolution, condo manager licensing and to maintain a registry of all condos in the province. These functions would be delegated to 2 authorities – an Administrative Authority and a Condo Authority.

Property managers are currently not required to be licensed and they are not subject to oversight by a regulatory body. The primary function of the Administrative Authority will be to require and provide licensing for property managers.

The Condo Authority will provide owner education and establish a Condo Authority Tribunal which will offer dispute resolution through self-help tools, case management, mediation and adjudication. The initial start-up would be funded by the province and would then be a "pay per play" system that would also receive funding from a fee levied on condos. The initial fee amount is expected to be in the range of $1 per unit per month and will be based on the unit's common element proportion.

The Condo Authority Tribunal will likely deal the following types of disputes: requisitioned owners' meetings, access to records, enforcement of condo declarations, by-laws and rules and procurement processes. It is expected that the following types of disputes will not be heard by the Condo Authority Tribunal: issues dealing with liens, determinations relating to title to real property and amalgamation and termination of condos.

The Condo Authority will also create a condo guide, which will provide information to buyers on how condos are governed, owners' rights and re-

sponsibilities, maintenance and repair of common elements and owners' meetings. Developers will be required to provide a copy of this guide to all buyers of new condos at the time of sale, and receipt of this guide will be included in the 10-day cooling off period. Meaning, the 10-day cooling off period does not begin until the buyer receives a copy of the disclosure statement, agreement of purchase and sale and the condo guide.

No. 2 – Off Budget Spending by Condo

Condos currently prepare yearly budgets which include the operating costs and reserve fund contribution. The budget is then distributed to owners, typically by including a copy in the notice sent for the Condo's upcoming annual general meeting. There is no requirement to obtain approval of the budget or to provide notice to owners if there is a change in the budget.

The proposed changes require condos to notify owners if there is a change in the budget within a specified period of time.

No. 3 – Owners' Liability for Damage to Units, Common Elements and Assets of the Condo

The *Act* currently vests a condo with the power to pass a by-law to extend the circumstances under which an amount may be added to the common expenses payable by an owner for damage to their unit so long as the damage was not caused by an act or omission of the condo, its directors, officers, agents or employees. Many condos have passed these types of by-laws, which permit the condo to chargeback the lesser of the cost of repair and the condo's insurance deductible.

The proposed changes will now require the condo's declaration to include this type of provision, a by-law to that effect will be insufficient.

This means that those condos that had previously passed the abovementioned by-law will now be required to amend the condo's declaration in order to extend the circumstances. Such amendment will likely require 80% approval of all of the owners at the condo.

The failure of a condo to amend its declaration may have detrimental financial effects on owners and condos and their ability to obtain adequate insurance. This is because, unless the condo can prove the damage caused to the units, common elements and/or assets was caused through the owner's act or omission, the condo will be unable to require the owner to pay the lesser of the cost to repair the damage and the condo's insurance deductible. As a result, the condo will be responsible for the cost to prove the owner's act or omission and if unsuccessful, for the cost of the condo's insurance deductible. This cost will trickle down to owners and will likely result in the condo's insurance deductible amount increasing as well.

No. 4 – Shared Facility Agreements

A very common issue condos regularly deal with is the cost sharing of services. There are generally two scenarios with respect to shared facility agreements.

The first scenario is one where a shared facility agreement is in place but the agreement is poorly drafted. The terms may be vague, contradictory, undefined, the agreement favors one party over another, fails to address specific issues, the agreement does not accurately reflect how the condos actually use and maintain, repair and replace the services, or worst of all – the agreement requires the unanimous approval of a shared facility committee, which committee is typically comprised of representatives from each of the parties, to make any change to the agreement, which approval is rarely if ever achievable.

The second scenario is one where there is no shared facility agreement. However, despite there being no agreement, services are located on one of the condo's properties (i.e. street lighting, underground parking, swimming pool), and the adjacent condo, whose owners have a right to use the services, is not required to share the cost of maintaining, repairing and replacing the services.

The proposed changes require written shared facility agreements between condos, developers and any other parties who share services, land or other property. These agreements will also be required to contain specific minimum provisions.

No. 5 – Condo Insurance

The *Act* currently provides that a condo is required to obtain and maintain insurance on behalf of itself and owners for damage to units and common elements that is caused by major perils and any other perils as defined in the condo's declaration and/or by-laws. The *Act* also defines major perils and further provides that the condo's obligation to insure does not include insurance for damage to improvements made to a unit. Meaning, the condo is only required to insure a unit up to a standard unit definition. Such definition is usually contained in a by-law or in a schedule provided by the developer. Unfortunately, many condos do not have such by-law or schedule, and those condos often find themselves paying for improvements to a unit, which cost ultimately trickles down to owners.

The proposed changes include a default definition for a standard unit for insurance purposes.

No. 6 – Disclosure of Costs beyond Condo's 1st Year

There is currently no requirement for developers to include all of a condo's operating costs in the condo's first-year operating budget which is included in the disclosure statement and reviewed by the buyer. Such exclusion may be for a variety of reasons, including the fact that the cost is unknown at the time the first-year budget is disclosed or the developer is subsidizing that cost in year one. Unfortunately, since not all of the operating costs are included, common expenses initially disclosed to buyers are not always a clear indication of what an owner will be required to pay in their second year of condo ownership.

The proposed changes require developers to disclose any circumstances that they know of, or ought to know of, which may lead to an increase in common expenses within a set period of time after the condo's first-year.

No. 7 – Material Change

Buyers currently have the option of terminating an agreement of purchase and sale if there is a material change to the information initially provided to them, or information which should have been provided and was not provided, to a buyer in the disclosure statement.

The proposed changes now further define what a material change excludes.

Specifically, an increase of less than 10% or such other amount which may be prescribed, is not a material change. The changes also enable a buyer, or past buyer, to make an application to court to seek compensation for any losses pertaining to a material change.

No. 8 – Sale or Leaseback of Units and Common Elements

There is a growing trend in condo development where developers are retaining ownership of items which should arguably form part of the condo property, as a common element or as an asset. For example, developers are retaining ownership of recreation rooms, superintendent suites and even elevators and hallways, by creating them as standalone units. These items are then either leased or sold to the condo on terms which may not be favorable to the condo. As a result, the condo is then responsible for financing the lease or purchase of these items, which cost may be in addition to owners' common element fees.

The proposed changes specify items that must form part of a condo's units, common elements or assets and prohibit developers from retaining ownership of certain items unless the Condo's turnover board elects to do. Developers will also be unable to circumvent this prohibition by way of the agreement of purchase and sale. There will likely be some exceptions to this prohibition.

No. 9 – Procurement Process

The proposed changes require condos to follow specific procedures and fulfill certain requirements before concluding procurement contracts. At this point in time the specific procedures are unknown.

No. 10 – Proxies

The *Act* provides that an owner, mortgagee or proxy on behalf of an owner may participate at owners' meetings. The *Act* does not require a specific form of proxy to be used. Technically, this means that a proxy may be written on a napkin so long as it meets the minimum requirements – it is in writing under the hand of the appointer or their power of attorney and is given for a particular meeting of owners. As a result, proxies are often tampered with, which causes many issues, which is why proxy wars are one of the most litigated areas in condo law.

The proposed changes include a standardized form of proxy with the hopes to eliminate proxy-tampering and provide greater clarity in this area.

There are very few certainties in life and the odds that the *Act* will not be amended again in the future is certainly not one of them. I hope you enjoy reading the amended *Act* and discovering how, although the changes are being made with very good intentions, some may not necessarily have the effect originally intended by its drafters; for example the change pertaining to insurance deductibles, while others will be worth their weight in gold; for example the change pertaining to shared facility agreements.

The *Act* and all of the proposed changes may be viewed at: https://ontario.ca/laws/statute/98c19#BK222 . ■

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