

Canadian Condominium Institute (Toronto)
&
Association of Condominium Managers of Ontario

LEGISLATIVE BRIEF

The Condominium Act, 1998 (the “Act”)

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EXECUTIVE SUMMARY

In conjunction with the Legislative Brief (the “Brief”) the Legislative Committee is pleased to provide an Executive Summary highlighting some of the more important and substantive suggested amendments.

Although the 1998 Act represented a very significant improvement over its predecessor, it has now been over 13 years since it was drafted; during that time, there has been explosive growth of residential condominiums in Ontario. With this growth, comes an increased number of increasingly complex problems. Accordingly, we believe it is time to revisit the Act, determine its strengths and weaknesses – what worked and what did not – and update the legislation.

The Brief is extensive and includes an analysis of the Act’s Regulations; we also note that further amendments may suggest themselves. In the meantime, it is hoped that the government and all political parties will recognize the need for immediate changes to the Act.

It is difficult to provide a short summary of our suggested changes, but for ease of reference, the Committee has grouped them into five loosely defined categories: (1) Owners’ issues, particularly relating to disputes with condominium corporations; (2) Governance; (3) Financial; (4) Repair & Maintenance; and (5) Reserve Fund and Reserve Fund Study.

1. OWNERS – CORPORATION RELATIONSHIP ISSUES

(a) Better Mechanism for dealing with disputes (sections 132, 134 and 135):

Although the mediation and arbitration provisions that were added to the Act were beneficial to some degree, they have not resolved the problem of finding an efficient, effective and inexpensive way to deal with many smaller owner/corporation disputes. Consideration must be given to finding an innovative mechanism to deal with this, balancing the needs of individual owners with the needs of the community; this may be by way of a Tribunal, ombudsman or otherwise.

To avoid a duplication of actions and legal proceedings, the oppression remedy should not be made available to persons where the problem complained of, or a problem of substantially the same nature, has already been determined pursuant to section 132 or section 134; rather, we see the legal doctrine of *res judicata* as applying.

(b) Examination of Records (section 55)

This provision is posing a very real issue in the relationship between corporations and owners. Keeping in mind that the Act is consumer protection legislation, it would be useful to provide guidance on when the requests for documents by an owner for documents are unreasonable (e.g., an owner honing a grudge against the Board for past actions) versus when a Board is being unreasonable in its refusal to produce certain records even though reasonably requested (trying to protect Board members' positions). This is a difficult balancing act, but section 55 needs to be improved to reduce these conflicts. Also, clarification of exactly when labour fees can be charged should be provided.

(c) Corporation to be able to collect all reasonable costs for compliance (sections 17, 98 and 134)

A corporation should be allowed to collect all its reasonable legal costs incurred in enforcing the Act, declaration and rules, even if a court order is ultimately not obtained. For example, an owner may be in breach of the quiet enjoyment provision of the declaration but may voluntarily comply after the corporation has made an application to the court but before the court has considered that application. Even though the application was necessary and properly commenced, since no court order was obtained, arguably the corporation cannot collect all its reasonable costs. Thus, the innocent owners have to pay for actions to correct the wrongful acts of the defaulting owner. This is not fair to these innocent owners

Additional costs are often incurred by the corporation to enforce an order once it has been obtained. These should, therefore, be recoverable by the corporation and not borne by the innocent owners. There have been many cases where the defaulting owner argued that enforcement or collection costs were not covered by these sections.

(d) Corporation's Insurance Deductible – Damage to other units & common elements (section 105)

This is a major gap in the Act. Currently, the corporation's right to collect the deductible from an owner who caused an incident relates only to damages to that owner's unit and not damages to the common elements or to other units. Therefore, we recommend that, if the damage is caused by an act or omission by an owner (as opposed to an Act of God), the corporation should be allowed to collect the deductible relating to the common elements and other owners' units from the responsible owner. In addition, it should be clarified that the repair costs up to the limit of the deductible be a common expense payable by the responsible owner, and that the repairs are to be carried out by the corporation.

2. GOVERNANCE

(a) Elimination of Owner-Occupied Elected Board position (section 28 and 51(6))

The requirement to have one director elected by owners who occupy their units no longer serves any purpose; instead, it adds an unnecessary complication to general meetings. It would be extremely rare that a board of directors would not have at least one resident owner as a director. This provision is causing unnecessary practical complexity during elections, confusion for owners, and additional administrative work and cost to create the applicable entries on the corporation's record and to prepare two different ballot forms. Although well intended in 1998, it has turned out to be unnecessary, and this provision has opened the door to other situations where conflicts between resident owners, non-resident owners and tenants occur.

(b) Condominium Director Education should be mandatory as qualification (section 29)

Given the significant responsibility borne by directors (often dealing with assets worth many millions of dollars) and that most often they are volunteers without specific skills in condominium governance, we recommend that there be a statutory provision included under subsection 29(3), requiring all new directors, regardless of their educational and professional background, to attend an introductory condominium directors' course to ensure at least basic knowledge of the expectations and responsibilities of their positions.

(c) Notices to Owners can be sent to municipal address of unit (section 47):

The contents and correctness of the corporation's records, including addresses for service, are entirely dependent on owners submitting this information; the corporation is not permitted to rely on or use a record of owners and mortgagees received from other sources. This is a significant problem caused by the wording in subsections 47(1) and (2). Despite efforts by the corporation and property management, many owners don't bother to provide the corporation with particulars of their names and addresses. In our view, the corporation should, in the absence of a notice from the owner, be entitled to provide notice to owners at the unit they own and to the persons that the Registry Office records show to be the owner.

(d) Proxies should be able to vote for candidates nominated from the floor (section 52)

This section was included in the Act to solve the problem of boards re-electing themselves through collection of proxy instruments, by requiring those instruments to specify the candidates for whom the proxy is to vote. The effect of the wording is that the proxies cannot be used to vote for any person who was nominated from the floor at a meeting because they were not named in the form of proxy; candidates so nominated will be at a disadvantage because the proxy holder cannot vote for them regardless of their qualifications.

3. FINANCIAL

(a) Units owned by corporation to be exempt from municipal taxation (section 15)

Units owned and used by the corporation should be free of municipal taxation in the same manner as common elements. For example, a recreational unit, on-site management office, gatehouse, superintendent's unit, guest unit or mechanical unit owned by the corporation are common amenities for the benefit of all owners of the property. The value of this common property is already proportionately included in the assessed value of individual owners' units, which are already municipally taxed. We recommend adding a new subsection, 15(5), to deal with this.

(b) New property tax assessment classes for residential condominium units (section 15)

We recommend establishing two new residential condominium property classes/ classifications for municipal assessment and taxation purposes: one each for high-rises and townhouses. This would recognize the unequal delivery of municipal services to corporations and condominium units compared to non-condominium freehold residences. Examples include facilities and services provided by condominiums to their owners which otherwise would have to be provided by the municipality (e.g. street lighting, road maintenance, sidewalk maintenance, sewer maintenance and garbage pick-up). For instance, a condominium consisting of 200 homes would only require one garbage pickup, yet if these 200 residences were houses on a street, the municipality would have to make 200 stops. Numerous municipalities refuse to pick up garbage at townhouse condominiums due to narrow streets/access ways, when the municipalities themselves have allowed such restricted access. Despite this inequity, the municipality assesses the units property taxes as if they were receiving individual services. This is neither fair nor equitable to condominium owners.

(c) Ontario New Home Warranty Plan (Tarion) to apply to Conversions

Although the Act is broadly-based consumer protection legislation, Tarion does not cover conversions (a substantial concern for many condo owners); thus there is no warranty protection (a fact many purchasers do not understand). Therefore, we recommend the Ontario New Home Warranty Plan Act be amended to include warranty coverage for conversions. Alternatively, developers should be obligated to obtain insurance coverage for condominium conversions in the event of major claims regarding construction deficiencies, and a statement stating so should be given to all purchasers.

(d) More disclosure by developers on key financial matters and better first year budgets (sections 72 and 112)

Unfortunately, some declarants often artificially depress first year common expenses by absorbing costs such as extra security or elevator and mechanical maintenance contracts, or by deferring payment of mortgages on guest suites until after the first year. They also include provisions in the small print of the purchase agreement that effectively cause the corporation to

assume leases or other liabilities for such things as heating and air conditioning equipment in the units, or mechanical equipment and building automation systems.

These practices can mislead or misinform purchasers as to the true cost of condominium living and often result in large increases in common expenses (typically a minimum of 25%) in the second year, causing financial stress and discontent for owners. Given that the Act is consumer protection legislation, these practices can be manipulative and unfair, and should be clearly prohibited or restricted to protect purchasers from those declarants following them. Alternatively, there should be greater financial disclosure, including disclosure of these obligations, in both the disclosure statement and the proposed first year budget (all of which are prepared by the developer) and additionally in the agreements mentioned in sections 111, 112, 113. Therefore, we recommend significant amendments to sections 72, 111, 112 and 113 of the Act.

(e) Accountability of developers for payment of first year budget shortfall

Under section 72, developers are responsible for a shortfall in the first year's budget. However, this obligation has been watered down by developers substituting new first year budgets long after the agreement of purchase and sale has been signed. In addition, some developers stipulate that budgeted amounts will be increased by a stipulated percentage if occupancy occurs after a certain date. Developers should not be entitled to produce a budget showing an artificially low monthly common expense for each unit at the time of marketing, and then to use various devices to increase it without incurring the refund obligation specified in subsection 75(2), unless the delays were due to causes outside their reasonable control (e.g. strikes, government authorities, etc.). An alternative would be to allow increases after a designated time, for example if occupancy is delayed more than three or four years.

Another serious issue for some new corporations (which are always cash strapped) is that, even when the developer accepts that there was a shortfall, they do not make the corporations financially whole for a long time (sometimes years) after the amount becomes due, causing corporations to chase them for it. Often they then try to roll this obligation into an overall settlement of matters, including all construction deficiencies, and use the shortfall as a bargaining chip. There should be a mechanism for corporations to be able quickly to collect on a validly owing shortfall.

(f) Change in monetary threshold for Alterations & Improvements to Common elements (section 97)

Subsection 97(2)(c) allows the board to make minor changes arising in the normal course of its maintenance and repair obligations. A corporation should not have to give notice to owners when it is buying, for example, office equipment costing \$10,000 for its administrative purposes. It is more realistic to allow the board to make expenditures up to a prescribed percentage of the corporation's annual budget, or up to a fixed amount such as \$15,000 per year. Also, clarification is required because "in any given month" has been used to avoid notice to and/or votes of the owners by breaking expenditures greater than 1 per cent of the annual budget into a series of payments that are less than that amount in any given month, or by having the addition,

alteration, improvement or change made so they straddle more than one fiscal year.

Although closing a pool does not have a cost, and actually may result in a significant savings to the corporation, it will have a major impact on the lifestyle of the owners and residents. Therefore, the test or calculation should be on the “net change” to the budget cost. This could incorporate both expenses and savings. This subsection also should indicate what would happen if a meeting was requisitioned but there was no quorum. Would the change be allowed? Was the requisition nullified? As presently written it arguably could mean that a small minority could indefinitely block an otherwise acceptable change by ensuring that no quorum is achieved at a meeting they requisitioned and thus no vote held.

The meaning of “substantial change” is not appropriate (subsection 97(6)), and the definition should be deleted altogether; the determination of whether the addition, alteration, improvement or change is “substantial” should be made by a vote of a majority of the owners (50% +1).

4. **REPAIR & MAINTENANCE (section 90)**

Sections 90 and 93 are provisions that may constitute the most serious deficiencies in the Act.

(a) Repair & Maintenance (section 90)

Subsection 90(1) states that the obligation to maintain includes the obligation to repair after normal wear and tear. A declaration may provide that the corporation will repair balconies but that they will be maintained by the unit owners. When the balconies deteriorate as the result of normal wear and tear then repairs, such as concrete work and even rebar (steel) replacement, will now be the obligation of the unit owner and not the corporation. In addition, the reserve fund, although it includes amounts collected in contemplation of such repairs, will not be available.

Another example arises when unit owners are, in the declaration, assigned the obligation to maintain windows. When the window seals deteriorate and the windows must be replaced, it will be the unit owner’s obligation, even though the windows are common elements and the reserve fund contains amounts collected for such repairs. In addition, the reserve fund is only available for major repairs and replacements. If the exterior wall of a high-rise building must be re-caulked due to the caulking deteriorating over a period of time (i.e. normal deterioration), subsection 90(2) appears to prevent the corporation from using the reserve fund for that purpose.

The term “maintenance” must be defined. For instance, does “maintenance” include “replacement”? At what point does it become “repair after damage”? Maintenance should not mean or include “repair” and particularly repair after normal wear and tear. It is recommended that the Act allow corporations to clarify the obligations in a by-law with respect to certain listed items (e.g. balconies, equipment, etc.) so that it would be clear that “maintenance” does not include any form of repair and that the obligation is truly that of “repair after damage”.

In addition, a specific provision should be included in section 90 which clarifies that a requirement for a unit owner to maintain a portion of the common elements refers only to

maintenance of the surface thereof, and not any below-surface components.

5. **RESERVE FUND and RESERVE FUND STUDY (sections 93 and 94)**

(a) Reserve Fund: The term “Major” should only relate to repair and not include replacement. If **any** common element or asset must be replaced for any reason, e.g. it becomes worn out due to wear and tear, etc, the cost of that replacement should come from the reserve fund; indeed, the reserve fund should cover all replacements of common elements and assets regardless of how small. However, reserve fund “repairs” should be restricted to “major” repairs in order to distinguish them from the normal, ongoing maintenance and repair obligations of a corporation covered by their operating budget.

(b) Amount of Contribution to Reserve Fund (subsection 93(5)) – Reserve Fund Study and Future Funding (section 94)

This is one of the most serious deficiencies in the Act. Declarants interpret this provision to mean that only 10% of the corporation’s annual operating budget is required to be contributed to the reserve fund in the first year; it is clear that this is never sufficient and falsely represents the cost of condominium living. This practice puts undue financial stress on new purchasers and engenders discontent in the condominium community when fees do rise in subsequent years to properly fund the reserve fund. In order to plan for possible change in this percentage in the future, consideration should be given to stating the percentage in the Regulation, which can be amended more easily than can the legislation, or mandating that a reserve fund study based on the drawings be carried out by the builder. The Committee has recommend that the minimum contribution in the first year budget be 20% and not 10%.

(c) What is “adequate” or “sufficient” funding to Reserve Fund: As presently worded, subsection 93(6) does not provide guidance for the calculation of the amount of contributions to be made to the reserve fund following the completion of the first reserve fund study. This section says “sufficient” funds and section 94 says “adequate”, and thus there is confusion as to whether these two terms have the same meaning (and neither are defined in the Act or its regulations).

Due to this vagueness, three different approaches currently exist in the industry on the calculation of reserve fund contributions: (a) Inflation-matched; (b) No deficit; and (c) Balanced. The Act should clearly define the meaning of “adequacy” so that it is uniformly applied to all corporations, and should allow a defined “phase-in” period. Care must be taken not to create a definition that is rigid or unrealistic. The Committee has recommended moving to inflation-matched contributions within 3 years. Also, part of the definition of “adequate” should allow for non-standard changes in costs. In lieu of changing the wording in this section, a definition of “adequate funding” could be added to the definition section and italics added as appropriate to this section; section 29 of Ontario Regulation 48/01 must also be amended to define “adequate”.

(d) Environmental and Energy Conservation Expenditures to be allowed from Reserve Fund (sections 92 & 97)

The Act currently lacks clarity as to whether or not legislated or government ordered changes or those that are of an environmental or energy consumption/conservation nature fall within the definition of “major repair or replacement” and can be paid from the reserve fund. The owners should not be out of pocket for the entire costs of these government ordered changes in one year (which would happen if they could not be paid out of the reserve fund). Clarity is needed.

In addition, it is important that corporations be able to take steps to reduce the environmental impact and energy consumption of their buildings and be able to work to current technology and health and safety standards. As presently worded, the Act makes it difficult for Boards to take these steps without triggering section 97 obligations and also arguably prohibits use of reserve funds for these purposes. So long as these are the primary reasons for the repair or replacement, then the Board should be able to pay for such changes from the reserve fund and complete them without notice to the owners.

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