ABOUT CONDO

SELECTED TWEETS

During 2011, our law firm caught up with the social media revolution and started "Facebooking" and "tweeting" articles and cases that were of interest related to condominiums. It wasn't long before we were asked to include commentary from time to time as well. The following is a selection from our past years' commentary tweets and Facebook entries on various topics.

SAFETY

A number of the newsfeed items we receive have to do with death and damage in condominiums. Fires, attacks, murders. It's astounding. And, at a glance, it has nothing at all to do with condominium living, *per se*, or condominium law, so generally we don't include these stories. But they are a grim reminder of the importance of every member of a condominium corporation working together to make the condominium a safe place for all.

This, in fact, *is* law.

Section 117 of the Ontario *Condominium Act, 1998*, states: "No person [get that - nobody - not just the board - not just the owners - but no person whatsoever] shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition of the activity is likely to [not that it does or certainly will, but that it reasonably might] damage the property or cause injury to an individual."

Safety, as the slogans of so many fire, health and policing organizations say, is everybody's responsibility.

COMMUNICATION & COMMUNITY

We see a lot of condominium board attempting to make decisions via email. It is often convenient, but it is not valid.

Email should not be relied upon for anything other than discussion purposes, and that use should be strictly limited to discussions of matters that are not sensitive or otherwise confidential. A condominium board meeting held by remote means, such as a teleconference or web-conference, is only permitted if:

(a) the directors can participate concurrently;

(b) the by-laws authorize it; and

(c) all directors consent to the use of this means for the meeting. (See s. 34(5) of the Act.)

Email exchanges might, in a very complex way, satisfy the first requirement, but not in a way that facilitates the sort of direct, immediate interaction that the Act contemplates. Security of communication and confidence as to the identity of the communicating party are also not provided by email correspondence. For these reasons, and likely others, email correspondences should never be used to replace a formal meeting of the board.

Condominium boards also need to remember that decisions are not valid or authoritative decisions and do not bind the corporation if made (i) by an individual director or (ii) [unless the board is the declarant's appointed first board of the condominium] outside of a valid meeting of the board at which a quorum is present. (See s. 32 of the Act.)

One objective of condominium corporations that is not well stated in the law is the objective of building an effective and enjoyable community.

Condominium boards often need to be creative, sensible and sensitive in doing this. Contemporary social networking technology can help. Websites, web portals (there are service providers galore now offering these, and at least one manager who makes his own), email groups, Facebook pages and groups, Twitter profiles, Linked-In connections, and so forth. All can be used to good effect, along with more traditional paper and word-of-mouth based communication, to help a real sense of neighbourhood develop.

However, that can't be all that they do.

The condominium board that thinks a monthly newsletter distributed to the door, or by email, or posted on a website, or a portal with frequent updates, solves the community building problem, is likely to find things ultimately go awry.

Real community is built through real, interactive, interpersonal contact. Neighbours need to shake hands, look in one another's eyes and hear one another's voices to really get to know each other. Real community building happens in the hallways and parking lots of the condominium.

By all means, use technology; but be sure that the board is not simply hiding behind a wall of electronic media and never really meeting the people in its neighbourhood.

LIENS & COMMON EXPENSES

Something to keep in mind in regard to those by-laws so many lawyers make that require owners to pay the condo's insurance deductible when common elements are damaged: they can't, in and of themselves, create a common expense obligation.

Common expenses can only be defined in the Act or the declaration, and nowhere else.

Therefore, either:

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♦ there has to be suitable language in the declaration that allows a common expense to be defined in the condo's by-laws (this could still be "iffy" under the Act), or

♦ the requirement is mirrored in the declaration and defined as a common expense in that document (much better), or

♦ the condo has to take the matter to court (after mediation and arbitration) and if damages or costs are awarded, section 134(5) does the trick.

The key is not to assume that every obligation to pay creates a common expense obligation to which the condominium's lien rights attach. Sometimes it's not that simple.

Effective enforcement of a condominium unit owner's obligation to contribute to the common expenses involves a variety of factors. One important factor is the attentiveness of the person responsible for the collection (be it property manager or board member or officer of the condominium).

Although the *Condominium Act, 1998*, provides a space of time during which the condominium and the unit owner can try to work things out, it is not advisable that the condominium wait till the last minute to inform its legal counsel to commence lien proceedings.

No later than as soon as the third month of arrears commences, legal counsel should be informed and involved. This will allow legal counsel to provide advice and assistance to help ensure the condominium does not lose its priority and power to collect the outstanding fees.

We asked before, how quickly do you lien; now we ask, how quickly should lien work be done by your lawyer?

Underlying this inquiry is the question of whether the quality of *any* legal service should be based on the speed at which it gets done.

We know some law firms advertise that their process or program promises a particular "turn-around" time. One ad we saw recently said that their firm could turn around a lien file in 48 hours. Others might say more or less time than this, a day perhaps, or a week. Whatever they say, it's all spin, and begs the questions: what does it mean, and what's the point?

First, what does "turn-around" time mean in relation to liens? Does it mean the firm will send the notice, register the certificate of lien and get the arrears collected within the advertised time frame? Of course not. The whole condominium lien process cannot possibly be done within 24 or 48 hours or even a week. It would not be legal to do so.

Once the notice goes out, the law mandates a waiting time of 10 days (plus 2 if counted properly) before the certificate of lien can be registered. If the instructions come from the client too late in the month, a properly handled lien process might even require that the firm to delay any action until the next month. What's that going to do to the promised "turn-around" time? It ruins it; but, in some cases it will be the right thing to do to help ensure the client's enforceable rights are protected.

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Of course, it is possible that arrears could, in some circumstances, be collected within 24-48 hours of instructions being given to the lawyers, but that requires very specific and unusual circumstances. No one can promise it will happen that way.

The fact is that any promise as to the timing for collection of the arrears is obviously false, since no one can actually guarantee when either the defaulting owner or the owner's mortgagee will pay (unless the law firm is promising to pay the condominium the amount outstanding right away and then have the arrears assigned to itself as its own debt to be collected, which is not an advisable or profitable mode of practice).

So, most likely any advertised "turn-around" time could only reasonably refer to the time it should take to get a notice of lien out the door.

In regard to that part of the process, however, *any* experienced law firm with dedicated condominium lien experts should be able "turn-around" a lien file in a matter of hours (i.e. within one working day), provided the information given to the firm is accurate and complete.

If the information provided to the firm is inaccurate or incomplete, then the time it will take to get it done really depends on what is wrong or missing and how available the correct and complete information might be. It could take little more than an extra half-hour, or up to any other amount of time.

In the final analysis, from the perspective of what best serves the client's interest, the point is not how fast the work gets done, but how well it is done. Is it accurate? Is it complete? And is the lien going to be enforceable?

Failure to carry out the lien process properly can end up undermining the client's ability to collect the arrears and/or its costs. Therefore, what ultimately makes one law firm's condominium lien process better than another's is not the promise of a 24- or 48-hour "turn-around", but a promise that knowledgeable and experienced lawyers and clerks will process the lien accurately, in the manner and within the time-frame necessary to ensure the lien is enforceable and collectible.

RENTALS & STUDENTS

Restrictions affecting rental to students are important to many condominium communities, not just in Ottawa but in Waterloo, Guelph and other cities where condo owners seek to make an easy buck by renovating and renting units without regard to the interests or intentions of their neighbours to reside in a primarily single-family dwelling neighbourhood.

Do such rules discriminate against students? Of course they do. Is that bad? Not necessarily.

It's not the kind of discrimination that ought to be considered a human rights violation anyway. (And, technically, at this time clearly *isn't* considered as such in Ontario anyway.)

Discrimination, in and of itself, is not bad. It is essential. It is discrimination to choose any one thing over another. When we shop, we discriminate, selecting the brands and fashions we prefer. Even something as simple as selecting a meal at a restaurant is a matter of

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discrimination. What? You've got something against veal!? Is that why you ordered the prime rib instead?!

We also can reasonably discriminate in regard to people. When we choose our friends, our spouses or our business partners, for example, we discriminate, selecting people we trust over people we don't, people we consider polite over those who are rude, and people we can rely on over people who have let us down. None of these kinds of discrimination are human rights violations or otherwise illegal or unfair.

That people living in a community designed for single family residences might be opposed to student rental housing being placed next door will not be surprising to anyone who has ever lived in that situation.

Frankly, when I was a student, I hated living next door to other students. Noise, disruption, disregard for privacy and property, run rampant. Sure, it's a stereotype, but it is a stereotype that all too many students prove to be all too true, all too often. Perhaps if they would collectively shape up, then attitudes toward them would generally shift.

The bottom line is that condominium corporations are entitled to self-determination in regard to the kind of community they contain. Having regard to genuine issues of human rights (such as ensuring there is no discrimination on the basis of race, creed, colour, gender, ability, and so forth), condominium corporations should be entitled to decide whether they will allow the conditions and community "vibe" that is required to accommodate student housing.

CONDO TRIBUNAL

Why would a specialized condo tribunal or ombudsman's office be a good idea? Some believe there simply has to be a better way than requiring owners to deal with stubbourn and recalcitrant boards and condominium developers, over certain issues at least, without going to court.

Of course, mediation sometimes helps, but it doesn't apply to all situations. A tribunal or ombudsman might be given suitable powers to assess and adjudicate situation in a way that accommodates the benefits of mediation and avoids the costs and lengthy processes of typical condominium enforcement.

Some cite cost as a factor. I've never thought that to be a prohibitive issue. Frankly, if every condominium was assessed $1 per unit per month, the fact is that millions of dollars could be raised annually to fund the system. (If there are around 9000 condominiums in Ontario -- in 2007 there was over 8600 -- and if they had on average 20 units each -- and the average might be higher -- over $2 million would be able to be raised annually, at a cost per unit of only $12 per year.)

DO YOU KNOW…?

Condo Types

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Know what you own: Do you know your condominium types? Here is a brief summary:

Leasehold Condominium - a condominium built on leased land. The condominium developer (declarant) is the "tenant". Each "unit owner" is really purchasing a right to occupy the lands as a sub-tenant for the duration of the lease.

Freehold Condominium - any type of condominium that is not a Leasehold Condominium. There are four types of Freehold Condominium:

(1) Standard Condominium - the traditional type of condominium, with units and common elements. The units are individually owned portions of the property, the primary types having been constructed up to at least the defined unit boundaries. Common elements are owned by all unit owners as tenants in common in proportions defined in the condominium declaration. All condominiums in Ontario that were registered (completed) prior to May, 2001, are Standard Condominiums.

(2) Phased Condominium - a Standard Condominium that is registered in stages (phases). It is one condominium that keeps growing (for up to 10 years). This allows the developer to stage marketing as well, often providing the cash flow needed to complete the project.

(3) Vacant Land Condominium - a condominium in which at least one unit has nothing constructed on it, and where (upon registration) no buildings straddle the units, and no units are placed on top of (or below, of course) others. Generally used to create projects that mimic regular plans of subdivision, or where the developer does not intend to build the homes or wants to provide for custom build homes. Has been used usefully for shopping centres too.

(4) Common Elements Condominium - a condominium in which there are no units. This is the ideal method for a group of owners of various properties to collectively own some other piece of land (i.e., road, parking lot, rec. centre, pool, etc.). Each owner's property which is outside of the condominium is designated in the declaration as a "parcel of tied land" and is granted a proportion of the common interest in the condominium (common element) property.

Now you know.

Unit Boundaries

Know Your Condo #2: Boundaries? Which boundaries?

The common assumption about standard condominiums is that the unit boundary is somewhere around the drywall on the interior of the dwelling space, and that everything else is common element; but this is not always true. In fact, the Ontario *Condominium Act, 1998*, permits a great deal of flexibility as to where unit boundaries lie, and in some cases owners are surprised to discover that they own (and are responsible for) much more than they thought.

To determine what your unit boundaries actually are, you need to review:

1. the condominium description (survey) plans, which define the boundaries in visual form, and

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2. the schedule in the declaration (Schedule C in most cases) that explains the boundaries in words.

Sometimes there will also be qualifications placed on the unit boundaries set out elsewhere in the declaration. Once again, the key to knowing your condominium is to know its documentation.

In general, there are three broad categories of unit boundary: traditional; whole building; and whole lot. But don't be deceived: these are only general categories, and each is subject to significant variation.

Unit boundaries that are defined by the drywall (or studs, or concrete walls) located on the interior of the dwelling building are what we typically call "traditional" boundaries. In condominiums that have these types of boundary, the owner essentially owns the air-space within a box, and often a bit of the box as well. The owner of this type of unit typically does not own any of the exterior components of the building in which the dwelling is located, nor the windows, doors, foundation or roof structure of the building. All of those are typically common elements.

"Whole building" unit boundaries are - just as it appears from the name - unit boundaries that include all or most of the building in which the dwelling is located. I.e., the building envelope. In this case, the owner usually owns (amongst other things) the exterior brick and cladding, doors, windows, and, except in some cases, the roof and eaves. This style of unit boundary is, of course, more common in townhome and detached home condominium developments, as well as in commercial condominium properties where owners may want to have more control over the building exterior.

"Whole lot" (or, sometimes, "lot line") unit boundaries are a further extension of the "whole building" concept, but in this case the unit boundary extends away from the building, often including front, side and rear yard areas, detached garages, walkways, driveways, etc. While not quite identical, this is (in concept) not unlike vacant land condominiums.

Understanding that such flexibility in the definition of unit boundaries exists under the *Condominium Act,1998*, ought to send condominium owners, directors and managers (who are not already certain of the boundaries applicable to their properties) rushing to check their documents and determine their condominiums' circumstances. The issue isn't a minor one. Errors in relation to unit boundary definition can affect insurance obligations, repair and maintenance work and reserve fund studies and funding plans. Once again, it is good to get to know your condo.

Condo Documents

Do you have your docs? And do you read them?

When you bought your condominium unit or parcel of tied land), did you receive copies of the declaration, by-laws and rules? Without these key documents to review (and actually reading them) you can't possibly know all your rights and responsibilities as condominium owners.

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The declaration is your condominium's "constitution". Second only to the *Condominium Act, 1998*, it is the key statement of the condominium's policies. It tells you what you own and what your proportion of the common costs is. It also usually sets out rights, responsibilities and restrictions relating to the use, care and enjoyment of the property, including anything from who cleans what and who fixes what, to the basic rules about pets and parking. Without this information, you are more likely than not to make mistakes and end up running into conflict with your community.

The by-laws can cover a multitude of matters, but mostly provide guidelines relating to condominium procedures. Of key importance in most types of condominium is the "standard unit definition" (not always in the by-laws, but ideally always should be) which clarifies the respective obligations of the corporation and the unit owner with respect to unit property insurance and the limitations of the obligation to repair the unit.

Finally, the rules inform you of your day-to-day obligations. Can you barbecue? How much noise is too much? Where can my pet (if permitted) be kept? Almost anything relating to the enjoyment and safe use of the property can be dealt with in the rules.

These documents do not constitute everything you can or should know about your community, but they are absolutely vital to understanding what you've bought and what you can do with it.

GOALS

A New Year's Resolution for Every Condominium?

Philippine journalist, Michael Tan, makes several sound statements in his analysis of the challenges facing his society as condominiums become more and more common modes of residence, "Condominium, Pandemonium" in the December 21st Inquirer, posted earlier this morning by us.

Some of his statements make us shudder. Especially when he describes the "nightmares" encountered by some Manila condo dwellers, such as "karaokes blaring away, garbage in corridors, nasty neighbors breathing down one’s neck."

But wise counsel follows. He suggests that we think of condos as "ecosystems". Well, that might not be an entirely perfect analogy, but it is comparable to the suggestion we have often made that condos can be like ancient "city-states" - small, self-governing communities, in which people must learn to live together, sharing space, sovereignty and resources to the effective betterment of all.

Implicit in Tan's remarks is sensible indictment of those developers and urban planners who do not think of the impact imposition of a condo community - particularly a high-rise - might have on neighbouring subdivisions. Condominium properties that do not include adequate facilities - particularly parking - or that take away from favourite feature of a neighbourhood, are generally not welcome additions and will cause social stress.

And Tan also means to emphasize environmental responsibility. This is something developers and condo communities here are also learning to deal with. Greening our condos, reducing the

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impact of the added concrete, piping and people in a condensed space, is not just a trendy idea, but a responsible, ethical choice.

Overall, Tan's comments are balanced. Not an anti-condo rant, but a pro-community commentary. He ends with very a sound recommendation that resonates here as well: "Our fears of condos and pandemonium should challenge us to think harder not just about the “sins” of others, but also our own deficiencies in the collective responsibilities for the common good."

"Collective responsibilities for the common good." Something every condominium developer, planner, architect, owner, board member and manager, should reflect on. Perhaps it could even be your condominium's new year's resolution - to do less about correcting others' errors and more about effecting the common good.

You can find us on Facebook at **http://www.facebook.com/CKLegal** and on Twitter by following **@CliftonKokLLP**.

Michael H. Clifton
(December, 2011)

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