



# About Condo

## WHAT TO DO WHEN DAMAGE OCCURS

Several years ago, Craig Robson (now of Robson Carpenter LLP) and I prepared a reasonably detailed article and checklist for the Canadian Condominium Institute titled "What to do when damage occurs" (available at <http://www.ghccci.org/Insurance.htm>). That was prepared in part in response to incidents we were seeing wherein property managers or boards of directors were mishandling various repair issues resulting in added costs, confusion and conflict within the condominium. We still see such issues arise from time to time. This memorandum reiterates in summary form some of the key and most fundamental issues covered in that article in a new format and with some new commentary.

Note that the matters set out in this memorandum are to be considered *prior to taking action to repair any damage*. This is essential. Too often, property managers, boards and unit owners rush headlong into repairs without ever considering who is actually responsible for the repairs, who will pay (who has to insure), and what permissions might be needed to get the work done. Other than in genuine emergencies, such a rush is likely never appropriate. Even in emergency situations, if the property manager or others taking charge in such matters have learned to consider first the issues discussed in this memo before any action is taken they will likely be better able to help ensure that the repairs are done by and for the person who is actually responsible for them.

### FIRST THINGS FIRST

When damage occurs, you first need to determine: *Is the damaged item part of the unit or common elements?* To determine this, look at the unit boundaries description (usually Schedule C) in the declaration and the description (survey) plans of the condominium. If there is any uncertainty, consult the surveyor or condominium solicitor.

### COMMON ELEMENTS

If the damaged item is part of the common elements, its repair is subject of condominium insurance. However, you will need to distinguish whether it is a regular common element or a common element that is designated for the exclusive use of a particular unit in order to confirm who has the obligation to repair it.

Note that designation for exclusive use is based on what is specifically written in the declaration (Schedule F in declarations made under the Act<sup>1</sup>) and shown on the description plans (usually on a separate sheet). It is not based on any other factor, such as actual location or use of the item. For example, it is typical for entrance doors to

<sup>1</sup> In this memo, "Act" refers to the *Condominium Act, 1998* and its regulations.

residential condominium units to be common elements. However, it is uncommon for them to be designated for exclusive use of the unit, even though on account of their location and actual use they are used exclusively by that unit's owners and occupants.

If the damaged item is a regular common element (non exclusive use) then it is the condominium corporation's responsibility to repair it. The Act does not permit any variation to this obligation.

However, if the damaged item is an exclusive use common element, it is possible that the declaration to the condominium will allocate responsibility for repair to the unit owner for whom the common element is designated for exclusive use. The repair and maintenance provisions of the declaration would need to be carefully read to determine if this is the case. If it is not, then the condominium corporation would remain responsible for its repair. As noted above, in either case the condominium must insure the damaged item (regardless of who must actually perform the repair).

## UNITS

If you determine that the damaged item is part of a unit and not common element, there are two issues to consider: repair obligations and insurance obligations. In both cases it is necessary to refer, amongst other things, to the "standard unit definition" of the condominium (usually, but not always, found in the by-laws of the corporation).<sup>2</sup>

With respect to repair of the units after damage, this is, by default under the Act, the responsibility of the condominium corporation unless the declaration assigns responsibility to the unit owners. Most declarations do assign responsibility to the unit owners. However, no decision should be made on the basis of the "usual case" or by guessing: the declaration needs to be checked.

Whoever has the obligation to repair the unit after damage is only responsible to repair the "standard unit" components of the unit. All other components of the unit are considered "improvements" and are the responsibility of the unit owner to repair. Therefore, it is necessary to determine whether the damaged item is part of the "standard unit" or an "improvement".

If there is no standard unit definition, then all components of the unit are "standard" and subject of the obligation to be repaired. If there is a standard unit definition it will define which parts of the unit are "standard" and which are "improvements". Only the standard components are required to be repaired. (The unit owner may, but under the Act is not required to, repair the improvements to his/her/its unit. Occasionally there are provisions in declarations requiring repair of damaged improvements. It could be argued these are not enforceable as being contrary to the Act, but it is not clear whether this argument would succeed in any or all cases.)

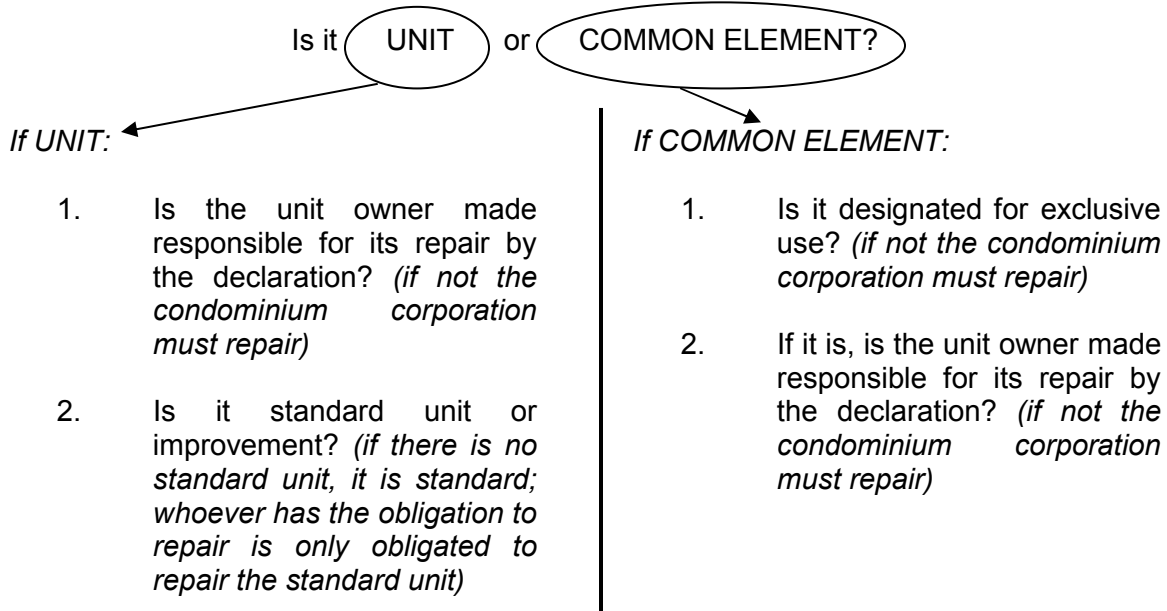
As noted above, determination of insurance obligations with respect to damaged unit components also requires reference to the standard unit definition. Under the Act, the

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<sup>2</sup> If your condominium does not have a standard unit definition, you should get one prepared immediately. It is a very important feature under the Act for coordinating and controlling obligations relating to the repair and, particularly, insurance of units in the condominium. Your condominium solicitor should be able to assist in the drafting and approval process of a standard unit definition, which must be created as a by-law of the corporation.

condominium corporation must insure the units against most damage. However, this obligation only extends to the standard unit. Any components of the unit that are not standard but are considered improvements under the standard unit definition are not insured by the condominium (but may be insured by the unit owner).

**IN SUMMARY:** *If a part of the condominium property is damaged, ask:*



In any of the foregoing cases, the condominium must insure the damaged item, except for improvements to the unit.

## OTHER ISSUES

In addition to the foregoing essential questions, the following points are important:

1. Where the condominium is responsible to insure the damaged item, the condominium must pay for the insurable repair even if no insurance claim is made.
2. The costs of such repairs, or the deductible under the insurance policy, are common expenses of the condominium.
3. The condominium corporation's deductible, or the costs of repairs up to the deductible amount, may be recoverable from the unit owner pursuant to section 105 of the Act with respect to damage to that owner's unit.
4. Regardless of the application of section 105 of the Act, other damages or additional repair costs might be able to be claimed from the unit owner if appropriate circumstances exist and/or there are provisions in the declaration of the condominium whereby the unit owner must indemnify the corporation. A claim might be made in court on the advice and direction of the condominium's insurer and/or the corporation's legal counsel.

Michael H. Clifton (June 2007)