

# About Condo

## THE ONTARIO CLOTHESLINE REGULATION AND CHANGES TO THE COMMON ELEMENTS

At the outset it is helpful to acknowledge that this memorandum does not define the law on this topic. In fact, the views set out in this memorandum could be considered controversial (to the extent condominium law can ever be considered “controversial”).

In a previous **About Condo** memorandum, there is an introductory analysis of the Ontario government’s new regulation, Ontario Regulation 97/08, dubbed the “Clothesline Regulation”. In this memorandum we address a more specific question: Does or should the Clothesline Regulation have any impact on decisions made by a condominium corporation pursuant to sections 97 or 98 of the *Condominium Act, 1998*, (the “Act”) with respect to the proposed installation of clotheslines or other similar items and related equipment (“clotheslines”)?

In our view, the Clothesline Regulation should not affect any decisions validly made pursuant to sections 97 and 98 of the Act.

### LEGISLATIVE REVIEW

Following is a summary of the relevant legislation discussed in this article.

#### ***Clothesline Regulation***

The Clothesline Regulation purports to lift most legal restrictions prohibiting the use of clotheslines on residential property.

However, condominium unit owners and boards should *not* rush into allowing installation of clotheslines on the condominium property that are currently prohibited by the condominium documents without first reviewing both the physical circumstances of the condominium and its documentation. It is suggested this review be conducted with the assistance of legal counsel.

Where the specific criteria set out in the regulation are met, the Clothesline Regulation renders inoperative:

*any restriction imposed at law that would otherwise prevent or restrict [the installation or use of any clothesline], including a restriction established by a municipal by-law, a condominium by-law, an encumbrance on real*

*property or an agreement.*<sup>1</sup>

This definition appears to easily cover condominium declarations and rules as well as condominium by-laws and other legal restrictions. However, there are some limits to the effect of the Clothesline Regulation; specifically, it does not apply “*with respect to a restriction imposed by an Act or regulation.*”<sup>2</sup>

### **Section 97**

Section 97 of the Act deals with circumstances in which the condominium board elects to make a change to the common elements (amongst other things). Pursuant to that section:

- a. some changes by the board require no unit owner approval or even notice to the unit owners;
- b. other changes require notice to the owners, but will not require their approval unless the owners of 15% or more of the units requisition a meeting within thirty days of the notice; and
- c. other changes require notice to and approval by the owners.

Changes that are minor or required by law or for safety will usually not require any notice to or approval by unit owners.

### **Section 98**

Section 98 deals with those situations where a unit owner desires to make a change to the common elements, including those parts of the common elements that are designated for the exclusive use of the owner. This section requires that the proposed change must be:

- a. approved by the board of directors of the condominium;
- b. consistent with the provisions of the Act and the declaration of the condominium; and
- c. the subject of an agreement entered into by the condominium corporation and the unit owner and the agreement must be registered on title to the owner’s unit.

Where the change is not a change to the unit owner’s exclusive use portions of the common elements, the provisions of section 97 must also be followed if the proposed change would have triggered any notice or vote under that section if it had been proposed by the condominium corporation and not the unit owner.

Sections 97 and 98 of the Act are mandatory; failure to comply with these sections renders the corporation’s or a unit owner’s change to the common elements illegal.

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<sup>1</sup> Per sub-section 3(2) of the *Energy Conservation Leadership Act* (ECLA) – the statute which gives the government the authority to enact the Clothesline Regulation.

<sup>2</sup> Sub-section 3(3), ECLA.

## COMMENTARY

### ***Application of the Clothesline Regulation to Condominiums***

In the first place, we should be clear that there is nothing in the Act that interferes in principle with the application of the Clothesline Regulation to condominiums. The Act contains no restrictions against clotheslines, and therefore does not give rise to any express exemptions from the Clothesline Regulation.

Secondly, we should be clear that in our view the Clothesline Regulation renders ineffective any restrictions against the use of clotheslines within the confines of a condominium unit subject to compliance with the criteria of the regulation. That is, subject to the unit meeting the criteria set out in the Clothesline Regulation itself, no prohibition against clotheslines that is set out in any condominium declaration, by-law or rules<sup>3</sup> can be relied upon to prevent an owner who wishes to install a clothesline within his or her unit boundaries from doing so.

Where we believe the effectiveness of the Clothesline Regulation is limited is in circumstances where a condominium corporation validly decides against allowing the proposed installation of clotheslines in or on any part of the common elements, including any exclusive use areas.

### ***The Crucial Issue of Common Element Ownership***

Our conclusions about the Clothesline Regulation not being able to supercede a valid section 97 or 98 decision against clothesline installation in the common elements is not set out within the Clothesline Regulation itself: It is based instead on what the Clothesline Regulation does *not* say and on the nature of common element ownership.

1. *The Clothesline Regulation does not require anybody to install a clothesline*

It is a fundamental starting point for this discussion that a homeowner *wants* to install a clothesline. Until that decision is made by the homeowner there is no issue to deal with. Certainly until an owner wants to install a clothes line there is nothing for the Clothesline Regulation to deal with. Clotheslines certainly are not mandatory, and the Clothesline Regulation does not make them so.

2. *Unit ownership includes the right to decide whether or not to install a clothesline*

In the situation of a unit owner wanting to install a clothesline within the confines of his or her unit, the owner is free to make the decision. Once that decision is made the Clothesline Regulation will “kick in” and in most cases the unit owner will be entitled to a clothesline of some description. This will be permitted regardless of any restriction in the condominium’s governing documents.

3. *Common element ownership includes the same right, but this right is shared by all of the unit owners collectively*

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<sup>3</sup> See our earlier memorandum on the Clothesline Regulation for comments on the appropriate documents in which such restrictions ordinarily would or should be found.

The situation is not the same situation when the clothesline is to be installed on the common elements. This is true even if the common elements are allocated to the exclusive use of the unit owner.

Common elements, unlike units, are not owned by any individual unit owner. All of the common elements – including any designated as “exclusive use” common elements – are owned by *all* of the unit owners collectively. Therefore, using the same reasoning as under point number 2 above, it should not be possible for any one unit owner to insist upon the installation of a clothesline (or any other thing) in the common elements, if the other owners (or, more accurately, the owners of a majority of the common interest) do not agree. In such situation, there should be no change to the common elements regardless of the Clothesline Regulation.

In short, in our opinion the Clothesline Regulation does not become operative until the owner(s) of the property in question has (have) made the decision that those owners want a clothes line. When property is owned by multiple owners, that decision cannot and should not be made by any one of the owners contrary to the wishes of the other owners.

#### ***A Decision Under Section 97 or 98 is Not a “Restriction Imposed at Law”***

In our view, owners’ rights with respect to the common elements should be treated no differently than with any other residential property that is subject to shared ownership.

In dealing with any other residential property where there are multiple owners, if only one of them wanted to install a clothesline, the will of the majority should prevail to determine whether it could be done. A decision not to install the clothesline would not amount to a “*restriction imposed at law*” but merely the decision of the majority of the owners of the property that they don’t want a clothesline.

We take the position that a decision made pursuant to sections 97 and 98 of the Act to prohibit the proposed installation of clotheslines in the common elements is also not a “*restriction imposed at law*” but merely a decision by the owners of the property arrived at by a sensible mechanism imposed by the Act.

If this view is correct – and we believe it is – then decisions made pursuant to sections 97 and 98 of the Act fall outside of the purview of the Clothesline Regulation and cannot be affected by it since they deal with the mechanism of deciding if the owners of the property want a clothesline. Again, until a decision is made by the owners of the property to install a clothesline it is our view that the Clothesline Regulation is not applicable.

#### ***How do By-laws, Rules and Declaration Provisions Differ from Such Decisions?***

We do not believe that provisions in the condominium’s governing documents are to be treated in the same manner as decisions made under sections 97 and 98. In our view, a restriction against clotheslines that is set out in any one of the condominium’s declaration, by-laws or rules *is* a restriction imposed at law and *does* fall within the range of the Clothesline Regulation.

The argument might be made that such provisions are like decisions under section 97 and 98, in that they are determinations made by a majority of the owners of the common elements. While this can be (but is not always) true, one crucial difference is that a prohibition set out in the condominium rules or other documentation is not a specific response to a particular proposed installation. Instead, it is intended to be a blanket prohibition preventing installation at any time, even if the owners desire it. In our view this is exactly the kind of situation that the Clothesline Regulation is intended to address and to rectify. We do not believe such a prohibition could withstand judicial scrutiny if challenged.

Having said this, we do not believe the Clothesline Regulation prevents a condominium from imposing reasonable rules regulating such things as the appearance, size, type, colour, location, material, times of use, etc., of permitted clotheslines, whether in or on units or the common elements. In fact, we would (and hereafter do) recommend that this be done in most cases, and that such criteria be what are ultimately referred to when making a determination under sections 97 and 98, as well as being complied with in regard to installations being made in or on the units.

### **CONCLUDING RECOMMENDATIONS**

Accordingly, notwithstanding our opinion that a condominium should be entitled to refuse to allow a clothesline to be installed in the common elements pursuant to section 97 or 98 of the Act, we do not recommend that any condominium adopt a policy of refusing any and all applications for such installations.

Although the legislature has not made the installation of clotheslines mandatory, it is clearly one purpose of the Clothesline Regulation to encourage, as well as facilitate, the same. It is therefore, in our view, unlikely that a policy of absolute refusal to allow clotheslines would find favour with any court.

We also are not of the view that the Clothesline Regulation is a bad thing. To the contrary, although the legislation itself is not perfectly well drafted (for example, failing to directly address the procedures of sections 97 or 98 of the Act), there would appear to be several laudable benefits for individuals as well as for the environment to be derived from the sensible use of clotheslines, and we do not believe that this should be discouraged.

However, this does not mean that such installation and use should not be regulated. As stated above, it is in our view reasonable for a condominium to impose appropriate guidelines as to how, where, when and what type of clothesline may be installed on the units or the common elements. We do not believe that reasonable regulations that address matters of safety as well as the decent appearance of the property are contrary to the fundamental purposes of the new law.

Michael H. Clifton and Craig Robson<sup>\*</sup> (May 2008)

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<sup>\*</sup> Partner, Robson Carpenter LLP.