



Ten Top Tips

By Bob Gardiner, BA, LLB, FCCI, ACCI

During the case law update session held at the Toronto Congress Centre on September 15, 2017, Bob Gardiner, Tim Duggan, Antoni Castlinuovo and Bradley Chaplick analyzed the key points arising from 16 of the most informative legal cases of 2017 to date. They also discussed each of their Top Tips, further explained below.



1. New Condos – Limitations Deadlines

Managers and volunteer directors at new condos have to overcome many challenges during the first year, so it is not surprising that they often wait until the last minute to address some complex deadline-driven issues confronting them. Boards should instruct their lawyer, within eight months after the turnover meeting, to renegotiate any improvident s. 112 contracts for goods and services on a

continuing basis, or for the provision of paid facilities, or a lease of part of the common elements for business purposes. That allows adequate time to negotiate satisfactory solutions or to issue a notice of termination, before the end of the 12th month.

Similarly, s. 113 shared facilities agreements should carefully be reviewed by the corporation's manager and lawyer no later than eight months after turnover, to determine whether any aspect which was not clearly disclosed is oppressive or unconscionably prejudicial to the corporation or any of its owners. The same 12-month deadline leaves little opportunity for the lawyer, declarant and other shared facilities participants to negotiate revisions before the deadline to issue an application to the Superior Court of Justice.

Moreover, new condos often overlook their superior litigation rights and miss the various limitation periods applicable to construction

litigation, erroneously presuming that the Tarion process will adequately resolve their building deficiencies. Boards should involve the corporation's lawyer by the 18th month after registration to negotiate solutions and finalize the corporation's construction claims, failing which the corporation's Statement of Claim should be issued prior to the end of the applicable limitation period, regardless of the Tarion process.

2. Mandatory and Optional Policies

Every condominium board was obligated by January 1, 2017 to adopt the mandatory AODA - Integrated Accessibility Standard Policy and Program. Every condo also had to adopt its Workplace Violence & Harassment Policy, Risk Assessment and Program which can protect workers and occupants; a Harassment Rule should also govern owners, residents and the Corporation's representatives. Condos

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also had to adopt an Occupational Health and Safety Policy, and specific Programs applicable to certain potential hazardous workplace scenarios. Your condo may already have a Human Rights Rule governing owners, but has the board committed to a Human Rights Policy as might provide some comfort when the Human Rights Tribunal comes knocking? It is arguable whether condos need a Privacy Policy or to otherwise comply with the PIPEDA requirements, but such a policy can also solve several other troublesome issues.

3. Update Bylaws & Rules

Recent amendments to the *Condominium Act*, 1998 may invalidate some of your existing General Bylaw provisions, while many of the new amendments to the Act will also be missing from your existing bylaws. Consider updating your general bylaw by adopting many new improvements. Moreover, a number of new rules concepts have invaded condo-world (not to mention an average of 30 new condo court cases each year). Rules are becoming more sophisticated and extensive, but boards should consider their lawyer's standard set of General Rules to be a menu from which the board should carefully select reasonable and appropriate rules customized to suit the circumstances at their condos.

Timothy Duggan, BA, LLB
Horlick Levitt Di Lella LLP

4. Pursuing Litigation

When faced with the prospect of pursuing litigation for a compliance matter, two questions will arise as to whether the corporation should proceed. Firstly, consider the nature of the dispute: issues regarding compliance with the Act or the corporation's governing documents will be of concern to the corporation, given its statutory obligation to take reasonable steps to enforce compliance. The corporation has an obligation

to protect a board member, property manager or employee, if the individual is experiencing adverse conduct from another person because of his or her role with the corporation, as was recently affirmed in the Robinson and Yahoo cases. That may

include pursuing litigation if necessary. Secondly, the availability of evidence may be a crucial factor in the decision as to whether to proceed with litigation. If the nature of the dispute is "he said/she said", the corporation will need to be careful to ensure that it has enough evidence of its version

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of events to satisfy the court. In the case of complaints by unit residents, the corporation should work with the residents to keep them involved in the process, so that they will be available to give evidence, if need be, to support the corporation's position.

Antoni Castlinuovo, Hons. BA, LLB
Elia Associates

5. Status Certificates Review

Status Certificates, although a mere snap shot of a condominium's affairs, impose substantial liability, because the corporation is held accountable for the information contained in it. Help mitigate the risk of issuing an inaccurate Status Certificate by asking the corporation's lawyer to review your status certificate periodically. Provide background about any suspected upcoming expense not revealed in the current budget or reserve fund study, as well as upcoming maintenance or repair projects or general problems. Better disclosure can alleviate costly litigation with a new unit owner. Generally speaking, it's better to include more information than less.

6. Shared Facilities – Pay Up

Cutting off contractual payments to the shared facilities is not a good idea – even though that may seem like the best method of conveying a condominium's frustration/dissatisfaction in the manner the shared facilities are being run. Most shared facilities agreements contain penalty clauses, lien

rights and interest on arrears. Judges don't look favourably on a party who unilaterally stops paying, because that could compromise the level or quality of service provided by the shared facilities and leave the other condominiums with the obligation to pick up the slack. If you think your condominium

is overpaying, ask for an accounting of all fees collected or review the monthly financial statements with your auditors if expenses appear unusual. If a project seems to have resulted in cost over-runs, ask the manager and the consulting engineer to provide information and clarification.

7. Meeting Notes

You never know when a simple meeting might be a critical event in the determination of a legal proceeding. Since property managers deal with many issues and people on a daily basis, try to document all calls and meetings with residents, owners and contractors, including dates, times, locations, individuals involved and a summary of the key points. Details regarding what was discussed will also greatly assist to refresh a manager's memory when asked to recall something several years down the road. It also lends credibility to any evidence a manager may be required to give because: i) the document or note was created close to the event when one's memory was fresh; and ii) shows how professional and diligent the manager is!

Bradley Chaplick, B.Comm., J.D.
Fine & Deo

8. Embrace Electronic Communication

Condominium corporations should consider replacing hard copy notices to owners with electronic notices. The "new" *Condominium Act* amendments will allow for electronic voting,



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and will update the existing notice provisions in the *Condominium Act*, with the consent of the unit owner. Many condominiums have not taken advantage of the cost savings of sending electronic notices. In addition, it is easier to verify that an electronic notice was actually sent (and received) at a particular date and time, as compared to a hard copy notice in the event of a dispute at a later date.

9. Simplify Proxy Forms and Ballots

Unless required by your corporation's bylaws, remove extraneous content from proxy forms and ballots. Examples include requiring that owners both write in and then "initial" next to a director candidate's name in order for the vote to be counted, or stating that candidate names filled in by third parties will not be counted. Despite good intentions, the inadvertent effect is to create uncertainty as to the validity of individual votes, as well as the overall outcome of the vote. The "new" *Condominium Act* amendments will seek to rectify the problem of ambigu-

ous proxies by requiring that proxies comply with a standardized form.

10. Ensure Clarity When Amending Rules

Avoid confusion when amending your corporation's rules and bylaws by clearly distinguishing proposed amendments from the existing provisions. Underline additions and "strike through" deletions. In one recent situation, a condominium faced a requisition opposing an ostensibly "new" rule which had actually been in place for more than 25 years. The requisitionist unit owners, in fairness, could not easily determine which of the rules in the package that they had received were new or amended rules, as the proposed amendments had not been distinguished. The condominium was then forced to call and hold the meeting of owners (an avoidable expense of several thousand dollars), where the proposed amendments to the rules were shown to be relatively minor, and were approved.

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