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Condo Alert!

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10 Reasons why condos should get legal advice about warranty claims

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Dealing with construction deficiencies is one of the largest and most critical tasks that the board of any new condominium must face in the first few years. It is therefore surprising to find that when it comes to dealing with construction deficiencies in the common elements of new condominiums, most condo boards simply start and follow the claims process under the Ontario New Home Warranty Plan ("Tarion"), a program that is notoriously ineffective, unresponsive and unsatisfactory when it comes to so many common issues faced by new condominiums.

Even more surprising is that condo boards often embark on the Tarion claims process without first asking the corporation's lawyer to outline the pros and cons of proceeding with a claim to Tarion rather than commencing a lawsuit in court to recover damages for construction deficiencies. In fact, many corporations pursue much of the Tarion warranty claims process without the help of a lawyer at all, simply because it is not mandatory to use a lawyer for such cases.

The decision to reduce or avoid using lawyers in pursuing claims for construction deficiencies is typically made in order to save money. This is often a poor choice and can lead to a host of unfortunate scenarios, including the following:

1. **Unsuccessfully pursuing claims clearly not covered by the Tarion warranty;**

2. **Pursuing claims of a value greater than the new monetary cap;**

3. **Missing the limitation period for commencing appeals of Tarion decisions;**

4. **Missing the new deadlines to request conciliation, resulting in the unintentional withdrawal of the warranty claim;**

5. **Missing the limitation period within which to commence an action in court;**

6. **Allowing the developer to divest itself of assets and fade away without making good on its financial obligations;**

7. **Being "outgunned" by the developer's legal team;**

8. **Settling for far too little money or pushing too far for too much;**

9. **Unknowingly releasing the developer from other viable claims without receiving adequate value;**

10. **Getting bogged down in procedural quagmires; and (as a bonus reason),**

Almost any combination of any of the above.

Any of these situations will likely cost the corporation many times more than the possible cost savings of embarking on the construction deficiencies claims process without the help of a suitably qualified lawyer. This is a classic example of condo boards being "penny wise, pound foolish."

Experienced property managers recommend that their condominium boards obtain legal advice about pursuing construction deficiencies claims at an early stage. In addition to having too little time to properly address the important issues that arise in a construction deficiency claim, property managers are neither trained nor insured to advise boards on the different legal ramifications of proceeding by way of Tarion rather than pursuing a claim

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A new defamation defence

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

Most managers and many directors can expect to receive defamatory attacks besmirching their reputations over a period of time. Despite their best efforts, it is inherent in the nature of their job descriptions that directors and managers have a duty to set budgets, enforce rules and comply with reserve fund and other statutory requirements in a manner which may cause grief to condo owners who may choose to respond in a spiteful manner.

Much to the chagrin of many directors, some disgruntled owners may feel directors are fair game for the same types of nasty attacks as are made against their municipal politicians. Condo directors and managers need to have a thick skin, because occasionally, they may have to shuck off hurtful trash talk. Sometimes, defamers deserve to slapped back, or at least educated.

In previous articles published in ***CM Magazine***, we explained the criteria applicable to publication of libelous and slanderous erroneous statements which harm a person's reputation, subject to the defences of justification, qualified privilege or fair comment.

Now professional journalists and perhaps some other defamers will have a new judge-made defence of "responsible communication on matters of public interest".

In the case of *Grant v. Torstar Corp.*, the Supreme Court of Canada assessed the applicable Charter Rights, rights to privacy and protections from defamation and decided to accord a greater scope of protection to a publisher based upon the freedom of expression concept, while purporting to offer adequate protection of a victim's reputation. In this recent case, freedom of expression was deemed to encompass more than just statements that can be proven to be substantially accurate in a court of law after the fact – a standard which had a libel-chilling effect on communications.

The usual defence of qualified privilege requires existence of an occasion where there is a compelling public duty or private interest which justifies the making of a communication which may turn out to be erroneous; moreover, the recipient of the communication must have a corresponding interest in receiving it. However in a media context, communications are made to the world at large rather than to a narrower audience with a particular stake in the communication.

This new defence was specifically made applicable to members of the press. It was uncertain when, if ever, the media could use the defence of qualified privilege, because it could often be questionable whether an "occasion" created a "compelling public duty" to communicate information to the public at large.

The new defence of "responsible communications on matters of public interest" is intended to capture a broader class of defendants than traditional professional media. That defence may become available to anyone who publishes material of public interest in any medium. The publisher must be diligent to attempt to verify the truth of the allegation, having regard to: (a) the seriousness of the allegation, (b) the public importance of the matter, (c) the urgency of the matter, (d) the status and reliability of the source, (e) whether the plaintiff's side of the story was sought and accurately reported, (f) whether the inclusion of the defamatory statement was justifiable, (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth, and (h) any other relevant circumstances. Some segment of the public must have a genuine stake in the matter. Mere curiosity or prurient interest is not enough to meet the "public interest" test. The "responsible communications" defence applies where there is a public interest in the communication and the speaker has been diligent to attempt to verify the allegations made.

Normally, repetition of another person's defamatory statement is no defence to defamation. However, in a "reportage" scenario, where the dominant public interest lies in the fact that a communication was made (rather than in the truth of its comments), the reportage exception can be expected to supersede the basic rule to protect a person's reputation.

In a condo context, a besmircher may be expected to try to utilize this new defamation defence (for instance, where a libelous statement appears in a homeowner's association newsletter attacking a director or manager). Any such defamer had better stand ready to prove she was diligent in attempting to verify the truth of the allegations made. She had better make sure she had satisfied the various rigorous criteria applicable to the tests set out above, if she intends to rely upon the defence of "responsible communications on matters of public interest". We can expect to see a condo case on this topic before long. A defamer using this new defence risks substantial legal costs.

Now that internet defamation has become ubiquitous, a new English Court of Appeal case makes it clear that on-line news publishers who wish to cloak themselves with the protection of "responsible journalism" must promptly update and rectify defamatory news pieces which have been shown to be false, because on-line publications can easily be corrected. A defamer should expect to be held liable (even if he would have been protected by the responsible communication in the public interest defence) if he failed to promptly remove and correct the newly-ascertained false version, to make it clear that the false allegation had no factual basis. Known false information "cannot possibly be described as responsible journalism" and there is no "public interest" in continuing to record incorrect information – instead, it is obviously unfair to the defamed person.

Warranty Claims, continued from page 1...

in court. As a result, property managers are generally not in a position to give proper advice on these important issues and they typically recognize the limits of their ability when it comes to these complex legal areas. A lawyer with expertise in condominium and construction law can provide the necessary advice and help devise an effective plan to guide boards and their managers through the construction deficiency maze.

This is not to say that the property manager does not play a pivotal role in the entire process. The manager is key in supporting the entire effort and coordinating between the board, the engineers and counsel and in helping to move the claim forward. Perhaps even more important is the fact that the manager will help the board budget for a legal battle with the developer and rejuggle the financial plan where necessary so that the war chest doesn't run dry at a critical juncture.

Whether through the Tarion procedure or a lawsuit in court, pursuing claims for construction deficiencies is a process in which the condo directors, managers and owners invest substantial time, effort and money. The outcome of the process will play a large role in the condominium's finances and its esthetic appearance and practical function for years to come. Embarking on the journey without the help of the corporation's lawyer can put that investment at risk, cause delay and extra cost, and reduce the likelihood of a successful outcome. This, in turn, reflects poorly on the building and impacts the financial status and standing of the community. It may also demoralize the board, the manager and the owners alike and increase the chance of a dispute or conflict between those players. An unfavourable outcome of a long and hard-fought claim over construction deficiencies often gives rise to additional issues that distract everyone from the other important business that needs to be addressed in the condo's early years.

With so much at stake, responsible condo boards and property managers get their corporation's lawyer involved before starting any warranty claim process.

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Your condo's Workplace Violence Risk Assessment

Andrea C. Krywonis, B.Sc. (Hons), LL.B.

The new Workplace Violence and Harassment provisions of the *Ontario Health and Safety Act* (OHSA) have been in force for just over 3 months now. Here are some considerations for getting started on your Workplace Violence Risk Assessment, which the condo, as an employer, must perform under the new provisions, regardless of the number of employees.

The OHSA prescribes that a Workplace Violence Risk Assessment must assess the risk of workplace violence given the nature of the workplace, type of work or conditions of the work. The Risk Assessment must also consider circumstances common to similar workplaces and specific to the workplace. The Corporation is not required to assess the risk of harassment, only violence. However, under the OHSA, the results of the Workplace Violence Risk Assessment as well as workplace harassment in general must be addressed in a Workplace Violence and Harassment Program.

Common condo risk factors include:

- Having direct contact with owners;
- Working alone or in small numbers;
- Working with unstable or volatile people; and
- Working in a community based setting.

The potential risk of violence which could generally stem from any of the above factors should be considered in your condo's Risk Assessment.

A non-exhaustive list of *specific* condo circumstances that the Corporation can assess in light of its particulars are:

- Safety of the neighbourhood;
- Whether past measures have been introduced to protect the workers from violence;
- Lighting;
- Security checks or protocols (identification checks, sign in sheets, guest/visitor passes);
- Restrictions on public access to the workplace (i.e. secured elevators, stairways, entrances);
- Security in areas used to store personal belongings (i.e. management office, break room);
- Presence of security staff/concierge;
- Security of any public restrooms on the property (i.e. rec facilities, on common elements);
- Security of parking lots;
- Communication procedures (when and how to call for help);
- Layout of the workplace (visual obstructions, unsecured objects and furniture, etc.);
- Security devices (surveillance equipment, silent or sounding alarms, panic buttons, personal alarms, telephones, cell phones, etc.);
- Live in superintendent/superintendent couple;
- Any resident or individual who is regularly on the property who may have a medical condition which could – intentionally or unintentionally – result in violence to a worker;

There are many more factors to consider. If your condo wants help in implementing its Workplace Violence and Harassment Policy, Risk Assessment and Program do not hesitate to contact us.

The CondoLawyers™

Professional News and Notes

Bob Gardiner and **Andrea Krywonis** will be speaking at the September 17, 2010 ACMO Luncheon on Legislation Governing Violence at Your Condo.

Chris Jaglowitz has the following speaking engagements in Fall 2010:

- "Ask the Experts" panel at ACMO's London Conference on October 1
- "Building Digital Communities" at the ACMO/CCI Condo Conference on November 5
- "What's new in condos" at PM Expo on December 1

This newsletter is provided as an information service to our clients and colleagues. The information contained herein is not meant to replace a legal opinion and readers are cautioned not to act upon the information provided without first seeking legal advice with respect to the unique facts and circumstances of their situation.

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