Volume 22

CONDOCONTACT

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THE CMRAO'S FIRST YEAR OF OPERATIONS: HANDLING COMPLAINTS

THE POETRY OF ROOF FAILURES

MEDIATION AND ARBITRATION: SIMILARITIES AND DIFFERENCES

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Volume 22

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Telephone: 613-755-5145

Fax: 613-755-4086

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Administrator: Angela Tracey
Email: atracey@cci-easternontario.ca
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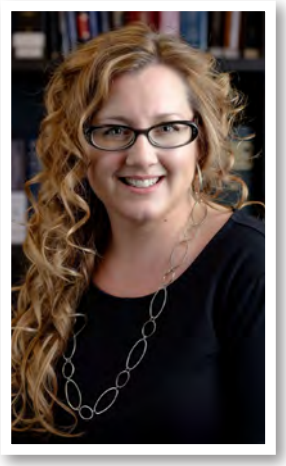
INSIDE



Nancy Houle, LLB
President-CCI-Eastern Ontario
Lawyer/Avocate
Davidson Houle Allen LLP

Although winter isn't here yet, it's already time to bundle up! As much as the chilly weather makes me want to cozy up with hot cocoa and a good book, there are many festivities throughout Eastern Ontario worth stepping outside for: tree lighting ceremonies, skating in Market Square or the Sens Rink of Dreams, parades, and of course, treating yourself to a warm BeaverTail.

With the end of the year approaching, it's also time to reflect on 2018 in preparation for the new year. At our Annual General Meeting (AGM) on October 24th, Stephanie Courneyea and Mike Lewicki were re-elected to the CCI Eastern Ontario Board of Directors. I'm also thrilled to announce that we have a new face on our Board of Directors, Lana Barnes from Hawkesbury, ON. Our first French Director's Course in Hawkesbury was a success, so we are excited to work with Lana to plan more events for our Hawkesbury members.

CCI Eastern Ontario also went to Kingston this fall. On November 23rd we held our joint CCI-EO/ACMO 2018 Kingston Condominium Conference at the Ambassador Hotel. It was fantastic to see so many engaged condo owners, managers, and professionals from Kingston's condominium community! If you missed your chance to attend, make sure you mark your calendar for May 11th, 2019 for the Ottawa Condominium Conference. [Online registration is open here].

Our weekend line-up of events continued in Ottawa with our two-day Director's Course held on November 24th and 25th. The CCI Eastern Ontario Director's Course goes beyond the basics of the online director training to ensure that directors are more confident and able to exercise their responsibilities. The course material is delivered by local experts in Ottawa, so our attendees can ask any questions they have during the course. Whether you're a new or experienced director, there will be another opportunity to expand your knowledge by attending our Director's Course in the spring.

To hear more details about our next Director's Course and upcoming seminars (like Lawyers, Guns, and Money!), contact our Administrator, Angela Tracey, and provide your e-mail to subscribe to our e-blasts if you haven't already done so.

Wishing you a warm and happy winter season!

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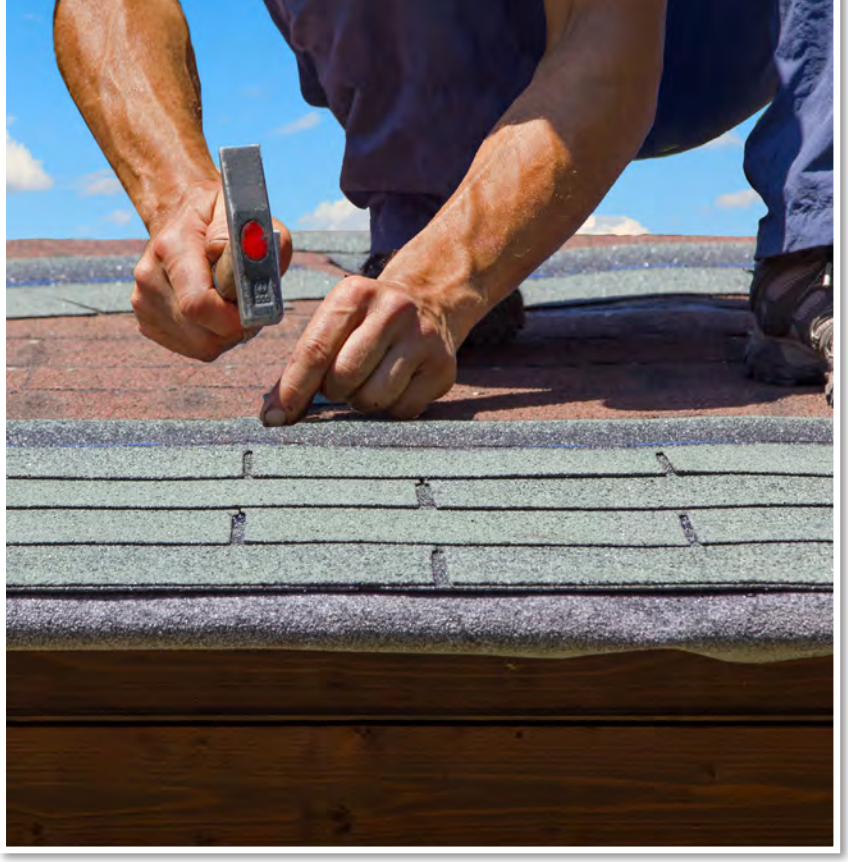
The Poetry of Roof Failures

Rachel Smith, P. Eng.
WSP Canada Inc.



What do engineers do for fun? I can't speak for them all, but this one occasionally reads poetry about roofing. Carl G. Cash, a well-respected roofing consultant who practiced in the Boston area, wrote a snappy little book simply titled, *Roofing Failures*. Now out of print, the book describes nearly 40 case studies Cash encountered over his career of 1500 roof failure investigations. It is part technical paper and part professional memoir with homework questions at the end of each chapter. The most charming part of the book are the interspersed haiku poems that Cash wrote to distill his lifetime of roofing observations to a mere 17 syllables each. He begins:

Roofing is joyous
Always remember: it is
On top of us all!

With that level of enthusiasm in mind, understanding your roof and its construction, expected life span, and maintenance requirements will reduce the chances that your roof becomes a future case study. In Carl's own words:

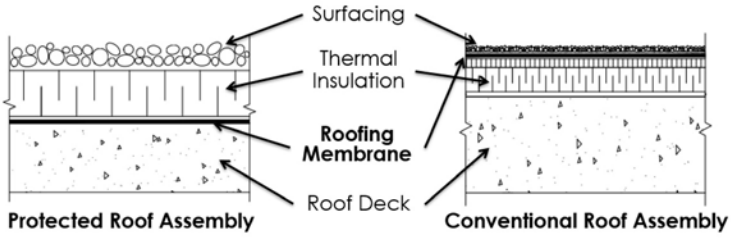
Roofing is simple
Slope all surfaces to drains
Or they will leak.

There are two broad categories of roofing: steep slope and low slope. Steep slope roofs have slopes of 25% (3 in 12) or greater. The exposed surface of these roofs may not be completely watertight, but rely on gravity and multiple layers to promote water shedding and drainage. They may be clad in asphalt or wood shingles, metal, slate, or tiles made of concrete or clay. These materials can have life spans from 15 years (asphalt shingles) to 60 years or more (slate). If roof leaks occur during the roof's service life, it is generally due to flaws in the flashings at penetrations like vent pipes and chimneys, and at slope transitions like valleys and dormers. Rain runoff must be managed with properly designed eavestroughs and downspouts.

Low slope roofs are sometimes called flat roofs, but in fact, they should have at least a 2% slope towards roof drains to prevent accumulation of water or "ponding". Low slope roofs contain continuous membranes that must be welded, glued or taped at seams to keep them watertight. Think of the membrane as being in a bathtub configuration with roof drains at the lowest points on the roof. Life spans of membrane-type roofs are in the 15-20 year range, but can be longer if using enhanced materials and detailing or shorter due to weathering, abuse and neglect.

Holes and gravity
Are the primary sources
Of all roofing leaks.

There are two main types of low slope roof assemblies: conventional and protected. The diagram below shows the two types of low slope roofing assemblies:



The membrane of a conventional roof assembly is visible when you stand on the roof. You may see a white, grey, black or coloured granulated surface which likely means you have a modified bitumen-based membrane of two or more layers. A roof covered with dime-sized gravel embedded into a black asphalt-based membrane is likely a built-up roof (known as a BUR) consisting of multiple layers of asphalt and felt. Or you may see a black, rubbery surface, which is likely a single-ply EPDM membrane. There are many other membrane possibilities, but these systems are a few of the most common assemblies we see in the Eastern Ontario market.

On conventional low slope roofs, it is common to see puddles of water collecting in unintentional depressions on the roof surface. The rule of thumb is that if the water evaporates within 48 hours, it is of no concern. If the water lingers and keeps the roofing membrane saturated, the membrane can experience premature aging and failure. Owners can perform preventative maintenance by ensuring roof drains are regularly checked and cleaned to reduce ponding.

If you can't see the roofing membrane because it is covered in a layer of rocks or concrete pavers, you likely have a protected assembly, sometimes called an inverted roof. The membrane is applied directly to the structural roof deck (concrete, fluted steel, or in some cases wood sheathing) and then covered with insulation boards (usually extruded polystyrene foam) held in place with rocks or paving stones to anchor them against movement from wind uplift.

As the name implies, the membrane is protected by the insulation and ballast which can extend its lifespan if it is well-designed, installed and maintained.

All insulation
Requires firm adhesion
Or it will go bye.

The September tornados in the National Capital Region resulted in a number of roofing failures across the city. Though most systems are unable to withstand a direct hit from a storm of this magnitude, several failures in areas outlying the storms' centres brought to light the importance of detailed design and quality control to resist increasingly severe weather events. Even if damages are covered under insurance policies (not all are), upgrades that improve performance or energy efficiency are not covered. The re-roofing phase is a good time to look closely at the design and function of the roof and see if it is worthwhile to pay a little more to increase the lifespan of the roof with higher quality membranes or to reduce heating and cooling costs with higher insulation levels. Roofing consultants can help determine which is the best option for your project.

To sum up the book and one of Carl's best observations regarding roofing failures and how to avoid them:

Materials don't fail
They obey physical laws
We don't use them right.

Rachel Smith, P. Eng. is a Project Manager in Building Sciences with WSP Canada Inc., based in Dartmouth, Nova Scotia. She is a board member of CCI-NS and President of the East Coast Building Enclosure Council. This article was first published in the CCI-NS newsletter. All haiku in this article are reprinted from Roofing Failures, by Carl G. Cash, Taylor & Francis, New York, 2003. ■

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The CMRAO's First Year of Operations: Handling Complaints

Sandy Vizely, Deputy Registrar
CMRAO

The Condominium Management Regulatory Authority of Ontario (CMRAO) was designated through provincial legislation, the *Condominium Management Services Act, 2015* (CMSA), to license and regulate the condo management profession in the interest of the public. Regulation by the CMRAO means condo management professionals are licensed, meet minimum education and experience requirements, and comply with a code of ethics.

The complaints process is an important interface between the CMRAO, the condominium community and the condominium management sector. It gives people a place to take their concerns about the conduct of CMRAO licensees.

Though the CMRAO has only been in operation for one year, we have received over 350 complaints so far. From the beginning, two particular areas have stood out: records management and the use of proxies. To help licensees understand their legal obligations and to ensure that we are delivering on our consumer protection mandate, the CMRAO has developed resources (available on the CMRAO website) to ensure that licensees understand their role, as well as the legislative and ethical requirements in these specific areas.

What the CMRAO is Hearing About Records Management

We have received complaints about managers and management companies that are:

a. not keeping adequate business records; and/or

b. not turning over a client's records upon termination of a contract.

Condo corporations should clearly articulate records management functions in the management agreement. That said, all managers and management companies have an ethical obligation to make and keep all records that would reasonably be required for the purposes of providing management services.

The CMSA and General Regulation require that licensees transfer all documents and records to the client no later than 15 days after the management contract has been terminated. If a document does not exist at the time that the contract is terminated, then the licensee has 30 days to create that record and transfer it to the client. This requirement pertains to "all documents and records relating to the client."

Beyond what is explicitly identified in the CMSA and General Regulation, licensees have an obligation to promote and protect the best interests of their clients. For this reason, and as a professional courtesy to fellow managers, the process of transferring records should generally begin before the contract is officially terminated. Ideally, there should be a smooth transition from the outgoing management company to the incoming management company.

The Use of Proxies

When it comes to proxies, the CMRAO's role is to ensure that managers are following processes that align with the CMSA and its regulations.

Section 53 of the CMSA states:

A licensee, or any person acting on behalf of a licensee, shall not solicit an instrument appointing a proxy for a meeting of owners where the subject matter of the meeting includes,

a any matter directly related to the licensee;

b the removal or the election of one or more of the directors of the client; or

c any other prescribed matter.

The key word here is "solicit." To solicit **does not** include collecting or holding proxy forms, notifying or reminding owners to submit forms, making information available on how to submit forms, putting forms in meeting packages, or providing a form upon request. All of these activities are acceptable and do not contravene any legal requirements for handling proxies. Managers can also solicit proxy forms, as long as the proxy cannot vote at the meeting—meaning, the only purpose is to establish quorum.

Condo managers should be neutral administrators in the use of proxies and should treat owners equally and equitably. If a board member directs a manager to contradict the CMSA, the manager should refuse and advise the board member accordingly. Failing to do so could lead to disciplinary action or action against the manager's licence. If you are a manager and have questions regarding the use of proxies, please contact the CMRAO.

Protecting Consumers through a Complaints Process

The CMRAO's complaints process provides an impartial assessment of concerns regarding condominium management services provided by licensed managers and management companies. Complaints can be submitted using a simple form on the CMRAO's website.

Condo managers and management companies have an obligation to protect the interest of their clients. Complainants should also understand that the CMRAO treats their complaints seriously and gives licensees every opportunity to respond fairly to any allegations against them. This includes telling the licensee what was submitted, and by whom.

Through effective regulation, the CMRAO is strengthening the condo management profession while helping to protect consumers in Ontario's complex and rapidly growing condominium sector.

Sandy Vizely is the Deputy Registrar for the CMRAO and oversees the organization's day-to-day operations, which includes managing the licensing and compliance team. www.cmrao.ca ■

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Mediation and Arbitration: Similarities & Differences

Marc Bhalla, Hons.B.A., C.Med, Q.Arb, MCIArb
Elia Associates

Mediation and arbitration are processes that share similarities, yet have very distinct differences.

In mediation, those involved in a conflict control the outcome. The mediator's role is to help guide the conversation and the exploration of different options in an attempt to find one that may be agreeable to address the dispute.

The mediator's role is not to offer any opinions or impose any outcomes on disputants. Mediation is safe, as nothing can be forced upon those participating in it. Yet, with this safety comes no guarantees of resolution. It is possible for a mediation to conclude without settlement.

Arbitration, on the other hand, guarantees the resolution of the dispute. It does this by taking control of the conflict out of the hands of those directly involved in it and empowering an impartial third party to make a binding decision for them.

Yet, with this guaranteed outcome comes a degree of uncertainty. Similar to court, participants in the arbitration process will have a decision made for them and are not sure of exactly what that will be. However, in contrast to court, there may be some added comfort to be had in the fact that you can often have a say in the selection of your arbitrator. This can provide an opportunity to ensure that your arbitrator can relate to your situation and understand the nuances applicable to it – something that can be important when addressing condominium conflict, in view of the unique factors at play by way of the law and how condos operate.

What mediation and arbitration have in common includes:

- **They are both confidential.** Unlike the public nature of court proceedings, what happens in both processes is private and can be kept that way. Exceptions are generally limited to the appeal of an arbitration award or enforcement proceedings (should one fail to fulfill their settlement commitments or abide by the terms of an arbitrator's award). Confidentiality tends to be valued, as many do not want their business being broadcast publicly, and is often reflected as a term of a mediated settlement as a result.

- **They are both unregulated.** Members of Ontario's condominium community can appreciate the difference between regulated and unregulated professions with the recent introduction of regulation and licencing of condominium property management. One now needs a licence to practice property management in Ontario. With mediation and arbitration, this is not the case.

Just as the Association of Condominium Managers of Ontario (ACMO) offered the Registered Condominium Manager (RCM) designation to help condominium communities identify qualified property managers when the industry was unregulated, the Alternative Dispute Resolution (ADR) Institute of Canada helps those in search of mediators and arbitrators by offering designations that can vouch for an ADR practitioner's training, experience and skill. These designations include confirmation of appropriate insurance coverage and a commitment to abide by a Code of Ethics.

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- **They are both flexible.** Unlike the stringent court system, both mediation and arbitration allow for customization. While this can go so far as to include hybrid processes, it can add conveniences such as by utilizing technology to overcome scheduling hurdles and introducing degrees of informality should such offer comfort to participants. It would be a mistake to think of either mediation or arbitration as taking place in the same way in every instance, as there is opportunity to leverage their flexible nature to cater the process to best suit the particulars of any given dispute.

While many ADR practitioners offer both mediation and arbitration services, it is not uncommon for the two processes to be confused – particularly in terms of the role your mediator or arbitrator plays. One can be both a capable mediator and arbitrator; however, not at the same time.

When a mediation is conducted by someone who also offers arbitration services, it can be tempting to inquire how they would decide the case if they were arbitrating instead of mediating. The problem with this mindset is that someone conducting a mediation is not in a position to consider what needs to be taken into account to make an arbitration award.

Mediation focuses on the interests of the participants. The focus is not on the mediator, but rather on the parties developing a better understanding of one another and exploring potential settlement. While much information can surface about the conflict, the aim is to find an outcome that is mutually agreeable in satisfying the interests of the participants. The focus is not on determining who is right and who is wrong.

Arbitration, on the other hand, is like private court. Think Judge Judy without the cameras. Participants are not focused on one another, but instead on making successful submissions to the arbitrator. They introduce evidence, witnesses, case law and otherwise make their best arguments in support of their position. The arbitrator weighs evidence, considers submissions and makes a decision to bind the parties and end the dispute.

In the course of mediating, a mediator does not receive evidence to weigh or testimony. The focus is instead on the underlying interests of the participants and what may work for each of them in terms of resolving the dispute. While they may speak with the mediator about the strengths and weaknesses of their case, legal arguments are not put to the mediator for a decision as that is not the focus of the mediator's involvement in the matter.

The Hannah Montana Analogy

To further explain the differing roles as between a mediator and arbitrator, and also to highlight how one person can capably play both

roles, I share an analogy to Hannah Montana. This was a highly successful television show featuring Miley Cyrus which ran from 2006 – 2011 and included a series of related merchandise, albums and even a feature film. The show was about a teenager who lived a secret double life. During the day, she was an average student but at night she was a rock star. No one at school knew of her fame and she was able to enjoy "the best of both worlds" in experiencing both stardom and a typical childhood at the same time by keeping the roles apart.

The role of a mediator in mediation can be viewed like that of the ordinary student in the show. Their focus is very different to that of a rock star. The types of skills utilized in each role differ significantly. There truly are different "hats" being worn in participating in one role as opposed to the other.

Time and time again, we have seen the value of both mediation and arbitration in addressing condominium conflict. They both offer efficiencies of process and privacy which allow members of condominium communities to navigate through difficult situations much more comfortably than the costly, uncertain and time consuming court process. The *Condominium Act, 1998* directs certain types of disputes to mediation and arbitration, though increasingly we are finding that condominium conflict is turning to ADR for resolution because it simply makes sense to do so. Understanding the role of your mediator and your arbitrator can help you make the most of the opportunities that ADR processes offer.

Marc Bhalla is a mediator and arbitrator who focuses his practice on condominium conflict management. He holds the Chartered Mediator and Qualified Arbitrator designations of the ADR Institute of Canada and the MCIArb designation of the Chartered Institute of Arbitrators. Marc believes in customizing dispute resolution processes to best suit the unique circumstances of each individual case and offers an expedited electronic documents-only arbitration process explained at www.arbitrate.online. He has been with Elia Associates for over 16 years and leads the firm's CondoMediators.ca and CondoArbitrators.ca practice groups.

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