WINTER 2016

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INSIDE

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A reflection of 2015

Let me begin by saying: Happy New Year! As we think about our new year's resolutions, and moving forward, many of us will also take this opportunity to look back, and reflect on our accomplishments of the previous year.

As I reflect on the activities of our local CCI Chapter for 2015, I am thrilled to summarize some of the key achievements and activities:

- **Changing our chapter name to CCI Eastern Ontario (CCIEO);**
- **Broadening the geographical area for delivery of educational services, including the introduction of the inaugural Directors Course in Kingston;**
- **Increasing educational, networking and social activities;**
- **Revamping our local newsletter CondoContact;**
- **Honouring John Peart, the recipient of the National CCI Hall of Fame Award.**

Clearly, our local chapter's efforts did not go unrecognized, as I am also thrilled to let our readers know that CCIEO was also awarded the National CCI Chapter of the Year.

With such a great year behind us, your Board is really excited to take our local Chapter even further this year. Many of your will recall the FREE seminar which was offered last February, which resulted in standing room only. Given the success of that seminar, upcoming changes to the condominium legislation, and the increasing need for educational opportunities, CCIEO will be offering several FREE seminars over the year. The first one for 2016 was "Lawyers, Guns & Money", which was an overwhelming success. I invite you to visit our website for a summary of upcoming events, and send us a note if you have ideas for future events or seminars.

We are also making a concerted effort to increase our communication, and I invite all of our readers to check us out on Twitter! And, while you are on our website, be sure to check out the Professional Directory for all of our members, which also includes direct links to websites, where provided!

Finally, as we move towards the implementation of the revisions to the *Condominium Act, 1998*, and potential changes in various service industries (such as insurance), rest assured that your Board will be actively involved in advocating for, or promoting, the interests of our Chapter!

Cheers to 2016!

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Rod Escayola

CCI Eastern Ontario has done it again.

We're pleased to present you with our Winter edition, the first edition of the year. This edition focuses on condominium risk and how to best manage them.

Risk outside of a condominium building is often related to the structure or construction of the complex. Justin Tudor of Keller Engineering presents an amazing piece on the risk (and annoyance) of efflorescence (the white power on masonry walls), while Jim Davidson and Christy Allen of Nelligan O'Brien Payne demystify complex concepts involved when facing construction defects.

We also have numerous pieces on risk inside the building. The first one deals with short-term rentals in multi-residential communities (can you say "Airbnb"?). Chuck Davies, a local director who regularly contributes to this magazine, shares his views on when to go to tender and when it may make more sense not to.

Finally, two pieces on what to do when/if risk turns into real and imminent danger. Pierre Sauvé of Maxium finance provides options to finance a cash shortfall and Marc Bhalla of Elia Associates discusses five examples where on-line mediation can be a good alternative to more traditional dispute resolution.

As always, I invite all of you to share your stories, whether they'd be successes or lesson learned you wish to spare others. Send them to me. I can even help you write them. Feel free to also send us your questions to be answered by our professionals.

Bundle up and happy reading!

Following our expansion to all of Eastern Ontario, we have updated our LinkedIn and Twitter pages!

We now invite you to follow us on LinkedIn (at CCI Eastern Ontario) and on Twitter (at @cciEastOntario).

We invite, once again, any comments or suggestions you may have about this newsletter and invite you to submit questions for our Q&A or stories for future publication.

Rod Escayola is a partner with the law firm Gowlings in Ottawa.

Contributing to CCI Condo Contact

Editor's Contact Information

A benefit of CCI membership is the opportunity to share perspectives with one another by contributing and reading articles in CCI-Eastern Ontario's quarterly newsletter *Condo Contact.*

If you are a condominium director, owner or manager, and have a unique tale to tell or advice to relay to other condominium boards, let us know! If you are a professional or represent a trade company offering services or products to condominiums and have a relevant article, let us know! The subject matter should be current, concise and helpful. Topics should relate to management and operation of condominiums and not be of a commercial nature.

ARTICLES MAY BE FORWARDED TO:

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By Justin Tudor, P.Eng

EFFLORESCENCE:
THAT ANNOYING WHITE POWDER ON MASONRY WALLS

You've seen it on a lot of buildings, perhaps even on your own property, efflorescence. That white powdery substance is a deposit of soluble salts which is most obvious during the winter, but may also be observed throughout the year following heavy rains and sudden drops in temperature.

What are the causes?

Efflorescence is caused by a combination of three factors:

1. Soluble salt in the masonry.
2. Presence of moisture to dissolve and transport the salt to the surface.
3. A force such as evaporation to move the solution.

Note that if any one of these factors is absent, efflorescence will not occur.

Where does the salt source originate?

The salt can originate from many different building materials including clay bricks, concrete blocks, mortar, cement admixtures and ground water.

Efflorescent producing salts are usually sulfates, carbonates, sodium bicarbonate or silicate. However, almost any soluble salt, such as chlorides, nitrates and others, may appear as efflorescence. Since chloride salts are highly soluble in water, rain will often wash them off the surface of the masonry wall.

On occasion, there is also something called "green stain", the result of certain vanadium and molydenum compounds present in some ceramic brick units. "Brown stain", on the other hand, is mostly the result of manganese deposits.

Studies have shown that even very small quantities of water-soluble salts in the masonry may lead to efflorescence. The amount and character of the deposits vary according to the nature of the soluble materials and the atmospheric conditions.

Efflorescence is particularly affected by temperature, wind and humidity. For example, during summer months, even after prolonged periods of rain, moisture evaporates so quickly that only small amounts of salt are transported to the surface. During winter months, slower rates of evaporation lead to the migration of salts to the surface. Normally, with the passage of time, efflorescence becomes less prominent unless there are external sources of salts.

Identifying the moisture source which is causing the efflorescence

Building-bloom: In most cases, efflorescence causing salts are from the building materials used during construction, namely the masonry units and the mortar. Sodium and potassium hydroxides are commonly present in cements. It is often apparent just after the structure is completed when the designers, builders and owners are most concerned with the appearance of the new structure. After the initial construction, as the masonry dries out, the exterior walls may display "building-bloom" for the first few months. Typically, rain will remove this efflorescence and after one or two seasons, the blooming effect will disappear.

Water Penetration: If your building is mature, past the "building-bloom" period and efflorescence persists, it is indicative of a continuous source of moisture which should be identified and controlled in order to preserve the infrastructure's integrity. The primary source of moisture is most likely rain water, and particularly driving rains which deposit substantial amounts of moisture in the masonry walls. Water is the solvent for the efflorescence-producing salts. It is the vehicle by which the salts are transported to the surface where they accumulate as the water evaporates. **Air Leakage:** Another major source of efflorescence in mature buildings is moist air leakage from the building interior. Such leaks are frequently possible due

> **"Efflorescence staining is a key indicator of distress in your veneer and is most visible in the winter; be sure to keep a keen eye on your building this season."**

to discontinuities in the air and vapour barriers which will allow the escape of moisture-laden air through the exterior wall components where they will condense on colder surfaces. Such moisture then migrates to the masonry surface by capillary action. Air leakage in buildings can occur at sills, headers and around rough openings cut to accommodate doors and windows, around plumbing stacks and openings for electrical outlets. It can also occur at the top of partitions, where the vapour barrier is frequently discontinuous.

Is it Harmful?

In general, efflorescence in the form of surface deposits is not harmful to the masonry walls, but the disfiguring staining is frustrating to owners and may affect property values. If efflorescence persists beyond the initial "building-bloom" period, the moisture sources must be investigated and identified. Where abnormal water accumulation occurs due to poorly located drains and scuppers, missing copings and drips or deteriorated caulking, these deficiencies can in most cases be easily and cost effectively rectified.

Where efflorescence is caused by air leakage, remedial repairs are frequently difficult to carry out and can be expensive since they entail repairing the air and vapour barriers and would also involve repairing a unit's interior finishes. Therefore, the advice of a professional engineer specializing in building science issues should be obtained for a careful assessment of the as-built conditions before remedial actions can be formulated.

What about applying a surface treatment to the masonry?

While a number of surface treatments are commercially available to help control efflorescence, they should be used with caution. Most surface treatments act as water repellents which reduce the formation of efflorescence. This is partly due to the fact that less moisture is able to enter the masonry and partly due to the evaporation of soluble salts occurring just behind the treated surface layer, and this is where serious problems can occur.

As the salts crystallize and accumulate behind the treated surface layer, pressures can build up which may lead to spalling of the masonry units. Therefore, surface treatments may be successful only if they are carried out in conjunction with other measures which will control the amount of moisture entering the masonry from the interior.

Removing Efflorescence

Once the cause of efflorescence is corrected, the removal of the deposit is relatively easy, since most efflorescing salts are water soluble. In general, efflorescence can be removed by dry-brushing followed by flushing with clean water. If this method does not provide the desired results, walls can be washed with a five to ten percent solution of muriatic acid. It is recommended that a small inconspicuous test area be tried first to determine whether etching or other discolouring will occur. After the acid treatment, the surface should be immediately and thoroughly flushed with clean water. Ensure that a qualified contractor is assigned to this work and you may wish to consult with your engineer prior to proceeding with this type of application. Acid treatments to masonry walls can do more harm than good if incorrectly applied.

Efflorescence staining is a key indicator of distress in your veneer and is most visible in the winter; be sure to keep a keen eye on your building this season. ■

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Hall of Fame

This fall, CCI Eastern Ontario was exceptionally proud to announce that John Peart was inducted into the CCI Hall of Fame.

John has been serving the condominium community since his call to the bar in 1974. As a result of his long-standing and active involvement with CCI, John is well known by condominium owners and managers throughout Ontario. He has devoted countless hours over the last 30 years writing and speaking on condominium law and issues of interest in the condominium community. At the local level, John served as President, Vice President, or Secretary of the Board for 16 years, and dedicated additional time as the Director of Education and Membership. During that time, he also acted as the Representative to the National Board for 16 years. At the National level, he has also acted as Chair, President, and Vice President, and served on the Constitution, Education and Membership Committees. John has also drafted the current National By-Laws, and continues to assist with revisions, as needed.

John was one of the initiators of the Directors Course in Ottawa. As many of our members will recall, alongside James Davidson, John introduced "Lawyers, Guns and Money", over 15 years ago! Since 1987, if CCI Ottawa or National needed anything, John didn't hesitate to offer or contribute.

As one of the lawyers paving the way in the condominium industry, John has been a pioneer in bringing the condo law practice to where it is today. As our members will know, meetings of owners can be challenging, at times. As any of our members who have been in attendance during a meeting chaired by John will know, John's conduct as Chair at these meetings exemplifies his personality. One of our long standing members, colleagues and friend of John's describes:

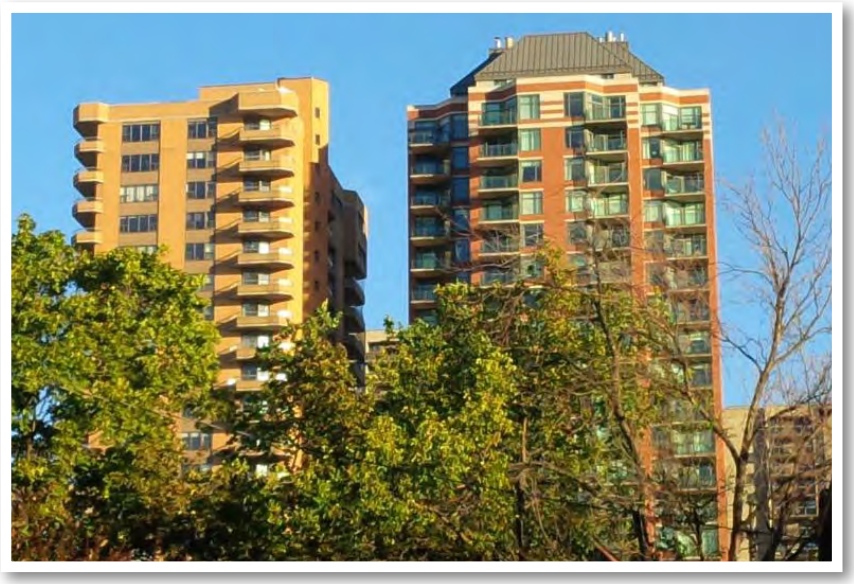
> He is always calm, even at the most contentious meetings… he does not lose his cool. He handles matters in such a way that everyone comes away feeling like they has their say – maybe did not get what they wanted, maybe did not agree – but they had their say. In Jewish, we have a word: Mench. This describes a person like John. Good and decent in every way.

What really shines through is that John truly cares about people. Not only does he serve our condominium community, he is also an active and effective advocate and leader for our aging community, and specifically issues related to health care and seniors. John is very proud to be Honorary Legal Counsel to the Community Foundation of Ottawa since 2007, as well as to the Canadian Hospice Palliative Care Association, an area of health about which he feels very strongly.

Our condominium community, both locally and nationally, would not be what it is today without the over 30 years of dedicated and diligent commitment John has made to this industry.

Purchasing and Contracting: To Compete or Not Compete?

By Charles (Chuck) Davies



It is widely believed that competitive tendering for goods and services always provides the best value outcome for organizations, and this belief is deeply ingrained in our collective conventional wisdom because it is an easy idea to understand and 'everyone knows it is true'. But is it?

Certainly governments greatly favour competitive tendering, but this is as much because other approaches can be politically unpalatable than because it provides best-value outcomes (and in fact it sometimes doesn't). In industry, more pragmatic, bottom-line driven considerations can lead to different conclusions in some circumstances. Certainly common items will often be competitively sourced, but in some cases preferred supplier relationships, in which a long-term stable partnership is cultivated, provide better outcomes. This may be because of the complexity of the services or technologies involved, a need for predictable quality, or a requirement for smooth integration of the elements each player contributes.

Condominium corporations need to operate more like private sector entities than governments if they are to keep their costs in line over the long term. This means setting aside the ingrained bias many of us may have towards competing every contract or purchase, and taking a more dispassionate, objective view of each requirement when deciding the procurement approach.

Here are a few cases where boards may decide not to openly compete a requirement:

Complex Requirements

Some condominiums have complex systems that may need a certain continuity of maintenance by people who fully understand their operation. In our building the hydronic heating and cooling system is uniquely constructed to match the building design, and it has a number of quirks that make it a challenge to maintain. It has taken the board, property manager and maintenance contractor several years and a lot of effort to fully understand how it works, fine tune its operation, and get control of maintenance and operating costs. The maintenance contract is a multi-year arrangement that comes up for renewal later this year and our board will need to carefully consider whether the risks associated with possibly changing service providers are worth it, and whether there are likely to be unpredictable costs incurred through the "learn-by-doing" process of educating a new contractor that exceed any nominal price advantage a new company might offer. I don't know which way this decision will go, but we will be giving it a lot of thought.

Some will argue that all you have to do is make sure that the contract requires the supplier to meet the specified performance standards, and shoulder the risks and costs involved

with doing so, but this is much easier said than done and may be short-sighted. In many building systems the impact of sub-optimal maintenance may not become apparent to the board or property manager for some time, possibly years. By the time it did the contract could have been renewed several times, perhaps with multiple service providers, none of whom could be pointed to as being legally responsible. It is therefore important for a board to take a long-term view of the costs and risks associated with the renewal of this kind of contract.

Service Predictability

Another circumstance where open competition may have unintended costs is when service reliability is important. To take a simple example, in some parts of the Province, such as Eastern Ontario, reliable snow clearing can be important. Many contractors offer snow clearing services, but not all consistently provide reliable service. Depending on how important a board considers reliability to be, sticking with a known and trusted service provider may make sense. This does not preclude the corporation and the property manager from keeping track of market pricing and using that knowledge in the negotiation to keep the cost in line with market norms.

Smooth Integration of Service

A third case where competitive sourcing may not be in the corporation's best interests is when it is important for different parts of a puzzle to fit together reliably and consistently. A good example of this is the working relationship between the corporation and the property manager. Others may include those between the board and the corporation's legal counsel, or with the engineering expert who did the building's performance audit. Changing any of these relationships may be a lot of work on both sides, given the sometimes tightly-woven connections that are needed. Re-tendering the arrangements every year or even every few years risks recurring major disruption and confusion, and can be a lot of work, so boards need to be sure they have the capacity and knowledge to do it properly – and a good reason to do so.

Factors to Consider

Here are a few questions boards may wish to think through when deciding whether or not to compete a requirement:

- Is this a common good or service that is readily available from multiple competent sources? If so, and if there is no tangible difference to the corporation whether it comes from supplier A or supplier B, then it clearly is a good candidate for competitive sourcing;
- Is this a good or service that is complex or relatively unique, requiring particular expertise or capacity from the supplier? If so, does long-term success materially depend upon continuity of knowledge or familiarity with your particular situation? If the answer to both of these questions is yes, then the requirement may be best met by a single preferred supplier; and
- Is the relationship between the corporation and the supplier one that depends upon mutual trust, comprehensive understanding of the corporation's situation and needs, and/or proven competence of the supplier? If so, then competitive tendering may not be the best approach unless the board has reason to reset the arrangement.

To conclude, open tendering is a good purchasing approach in many circumstances, but there will be times when it may not provide the best outcome. Governments face considerable public pressure to compete all requirements no matter what, but condominium corporations have much more latitude to take advantage of private sector best practices in procurement and they should do so when it is in the long-term interest of the corporation. Boards and property managers need to take an objective, reasoned view of each case when deciding whether to compete a requirement or go to a known source. ■

Chuck is the president of OCSCC 882, a Charlesfort development consisting of 94 high-rise units and 3 townhomes in the McKellar Park area.

We are pleased to present the latest issue of the CCI National News (Winter Edition) for you to enjoy. The edition can be found in both print and web editions in PDF HERE.

RISKY BUSINESS

Short-term rentals pose threat to multi-residential communities

By Clare Tattersall

Short-term rental is not a new concept but it has gained traction in recent years thanks to room-letting websites like Airbnb, which connects people who have space to spare with those looking for a place to stay. For many, space-sharing has turned a tidy profit; however, there have been instances when hosts have paid a heavy price for renting out their home to total strangers. And they're not the only ones. Apartment landlords and condo corporations have been on the hook for damages caused by transient renters.

"Many insurance policies don't provide coverage (for damage) if the home is used for commercial purposes," says Steve Kee of the Insurance Bureau of Canada. "If a bathtub overflows while a renter is subletting their apartment and the water infiltrates the unit below, for instance, the landlord will have to foot the bill for the damages if (the lessee) doesn't have insurance."

At least that was the case up until Oct. 22, when Airbnb announced it was rolling out its Host Protection Insurance program in Canada (and 14 other countries), effective immediately. Launched earlier this year in the U.S., the program affords some protection against temporary tenants. The coverage provides compensation if a guest is injured at a property listed on Airbnb and brings a claim against the landlord or condo corporation. This would apply to a situation where, for example, a guest is injured during a treadmill workout in the apartment building's gym when the exercise equipment broke. It may also cover damages a guest causes to the building, such as accidental water damage from toilet overflow to the neighbouring apartment below. Liability protection tops out at $1 million per occurrence. The coverage is also subject to a $1 million cap per listing location.

"We (worked) hard to expand this groundbreaking collaboration between Airbnb and insurance companies to other countries around the world," says Peter Huntingford, a spokesperson for the online accommodation provider.

In Canada, the program is provided through a partnership with a Lloyd's of London participating insurer.

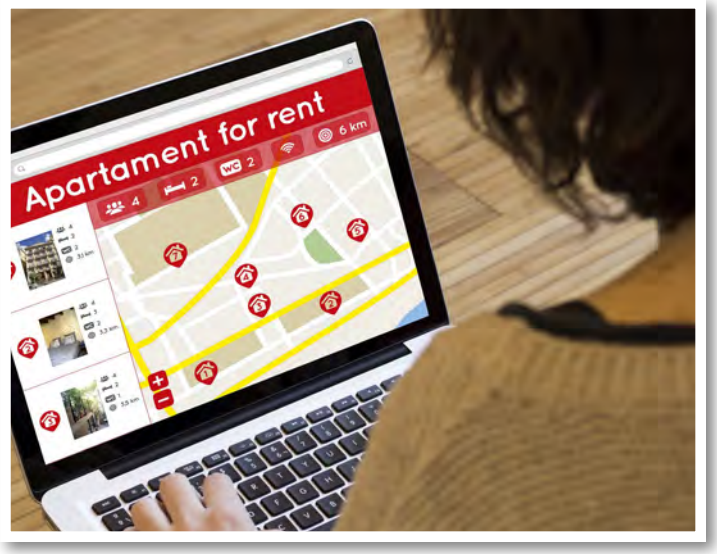
What the liability insurance doesn't cover, however, is personal injury to a building resident, caused by a guest.

"The (head) tenant allows a complete stranger to occupy a unit in the building, (providing it) the opportunity to interact with other residents. The potential for fraud, theft and assault is foreseeable," says Joe Hoffer, a partner and specialist in residential tenancy law with Cohen.

Highley LLP. "Where that occurs, the landlord is the easiest target for litigation by tenants who are victims of the (short-term) renter, especially if the landlord is aware of, or has failed to take measures to address, the Airbnb operation being run in the building."

Commercial subletting operations also impose a burden on the building community. They result in increased traffic, with "guests" coming and going at all hours of the day and night,

which impedes other residents' "quiet enjoyment" of the property, says Hoffer. More people using common elements, such as the pool and gym, may also quicken their wear and tear, resulting in an earlier than expected repair or replacement cost to the landlord or condo corporation.



WALKING PAPERS

Short-term rentals are illegal in most apartment buildings (due to well-drafted industry leases) so landlords have recourse if they discover this type of activity.

A landlord can serve a notice to terminate tenancy early, or a N5, to the head tenant for breaching the permitted use restrictions in the lease, and exposing the landlord and other building residents to legal liability, says Hoffer. The tenant is given seven days to correct the situation, otherwise the landlord can file an application with the Landlord and Tenant Board to go to a hearing and seek termination of the tenancy.

"If the tenant complies during the seven-day period, then (the N5) is void," explains Hoffer. "However, if the tenant starts the operation up again within six months, the landlord can serve a second notice on the same grounds and proceed with an application to evict."

Alternatively, says Hoffer, the landlord can look to Sec. 234 of the *Residential Tenancies Act* (RTA), which prohibits tenants from subletting a rental unit for an amount that is greater than the lawful rent.

"Bed and breakfast arrangements are often priced per day or per week so it is likely that the sum charged by the tenant exceeds the lawful rent, in which case a tenant's breach of this section is also a 'serious' offence under the RTA."

WEIGHING THE OPTIONS

Unlike apartment landlords, condo corporations in Ontario can't outright ban homeowners from leasing their unit. They can, however, hinder short-term rentals from operating in their building or, at a minimum, control this type of leasing.

"The first thing to do is look at the condo's declaration," advises Rodrigue Escayola, a partner in the Ottawa office of law firm, Gowlings. "Some declarations contain language limiting the use of units to 'private single families' or 'residential purposes,' while others prohibit rooming, boarding and transient or hotel-like occupancy."

If the declaration already contains language that restricts the use and type of occupancy of the unit, then the corporation may be able to deal with short-term rentals through normal compliance, says Escayola. If not, the corporation can amend its declaration, though he warns this is not an easy process.

"An amendment requires a very high level of approval by the owners – at least 80 or 90 per cent of the units," says the condo law specialist who is also a condo owner and board member.

A far easier alternative is for the condo board to adopt a "reasonable" rule – one that complies with the Condominium Act, declaration and bylaws – to regulate the leasing of units, says Escayola. For instance, the rule could prohibit leases of less than three months.

He also suggests condo corporations look into whether their municipality has a bylaw that prohibits, or requires a licence to operate, short-term rentals, and find out if this type of leasing puts their corporation's insurance at risk. Either case is grounds to prevent short-term rentals.

SECRET OF SUCCESS

Success in preventing short-term rentals is dependent on consistent enforcement and compliance of building policies. In the case of condominiums, corporations can often cite Sec. 83 of the *Condominium Act* to cull the practice in their buildings.

"Section 83 provides that an owner must advise the corporation every time it enters into, renews or terminates a lease of the unit. The owner must also provide the corporation with the lessee's name, and a copy or summary of the lease," explains Escayola.

"When there is a new tenant every week, for example, the owner isn't doing this and it is therefore not complying with the act."

As with any enforcement and compliance matter, Escayola stresses it is important to properly document the transgression and gather as much evidence as possible before turning it over to the corporation's lawyer or, in the case of an apartment landlord, approaching the Landlord and Tenant Board. Proactively monitoring short-term rental websites like Airbnb is the most effective way to obtain evidence.

"This is where hosts advertise their units. An added bonus is the guests often rate or comment on their stay, indicating how long they leased the unit," he says, adding this type of proof is essential.

"It's going to cost a lot of money to the corporation (or landlord), especially if it goes to court, so it's important to make sure the process is worthwhile and costs can be recovered." ■

This article originally appeared in the October 2015 issue of Canadian Property Management: GTA & Beyond.

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Financing a Cash Shortfall: An Attractive Option!

By Pierre Sauvé, MBA
Maxium Finance Group

Condominium Boards are continually faced with the competing objectives of keeping common expense fees low and properly maintaining and repairing common elements. This dilemma invariably leads to situations where there is shortfall between the reserve fund and the cost of repairs and replacements. These deficiencies may occur for a number of reasons that are often beyond the control of the Board and in many cases, the Board inherits a shortfall that has compounded over time and needs to be addressed sooner than later.

Reserve Fund studies are valuable tools to plan for substantial future common expenditures but they do have limitations that may contribute to shortfalls. The accuracy of the forecast is based largely on the reasonableness of the assumptions made and the expertise of the company engaged to do the study and the cost of replacing a certain common elements may be higher and/or the life expectancy may be shorter than originally assumed. Also, unexpected damage may be found when undertaking certain common element projects as costs are often unpredictable until the work is assessed.

Faced with a cash shortfall, there are realistically three options available; namely, defer, assess or borrow. Deferral is effectively delaying dealing with the issue until the common element absolutely has to be replaced. The delay will not avoid having to deal with the cash shortfall at some point. It may in fact increase the risk of further damage and expose the condominium corporation to escalating costs. In addition, buildings with unaddressed common element issues will be less desirable in the marketplace.

A second option is a one-time special assessment. In this case, current owners are paying the full cost of repairs with future owners benefitting from the new components. Owners may have been faced with this situation for a previous shortfall hence increasing the anger and resentment of facing another assessment. This is also a difficult situation for owners with small savings or weaker credit. If they are able to secure the financing it may be at a high cost and the additional debt may affect their ability to borrow in the future for other personal requirements. Owners who cannot pay on time or at all are faced with expensive lien claims against them and the real possibility of losing their home. The special assessment presents a real risk of dividing the owners and affecting the spirit and cohesiveness of the community.

The third option is to borrow to cover the cash shortfall and make payments over time. The condominium corporation borrows the funds via a loan agreement as opposed to the individual unit owners forced to come up with the funds under

the previously described special assessment option. Funds are available immediately or in the case of a longer term project, funds are drawn to pay for work as it is performed, incurring interest only as funds are extended. Loan financing can also be a viable option for Boards when considering substantial additions/improvements to enhance quality of life and market value yet are restricted from using the reserve fund by the *Condominium Act.*

Loan payments are included in the annual budget forming a part of regular monthly maintenance fees. Amortizations periods from 5 to 20 years are available and typically match the estimated useful life of the repair or replacement. Payments are fixed for the term of the loan (typically 3 to 10 years) and, with interest rates at historically low levels, it is a great opportunity to lock in long-term financing at very attractive rates. Condominium Boards can obtain non-binding term sheets from lenders that outline interest rates and financing terms.

Another situation where financing should be considered is in the area of energy retrofits where projected energy savings combined with government rebates can offset some or all of the costs of borrowing. With energy prices continuing to increase, looking at saving energy through higher efficiency boilers, building automation, and efficient lighting and paying for the capital investment over time by way of a loan may be a sound strategy for a Condominium Board to consider.

In summary, using the financing option to overcome a cash shortage provides a number of benefits. Owners have the ability to pay for capital expenditures over the useful life of the asset with a fairer distribution of costs over time. Owners are not required to individually seek financing on their own and will benefit from the condominium corporation's ability to secure financing at attractive long-term market rates. In addition, the financing does not affect the owners' access to future credit or result in a charge against their condo unit. Financing may also be a great solution to facilitate taking advantage of energy saving initiatives that provide relatively short payback periods but require a substantial up front investment. Finally, the timing for considering a loan financing alternative has never been better as interest rates are currently at historically low levels. ■

Pierre Sauvé is the Director of Originations at Maxium Condo Finance group. He has 25 years of experience in the financing industry offering structured loan solutions to clients across Canada.

By Jim Davidson & Christy Allen

Construction Defects: Considerations for your Board of Directors

It's the bad news dreaded by every condominium Board of Directors: A construction defect has been identified at your condominium. What, as a Board, do you do?

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Here's our list of some of the more important considerations:

1 Tarion vs. Court Claims

Condominiums may have the right to advance two types of building deficiency claims simultaneously: (a) claims to Tarion under the statutory warranties contained in the *Ontario New Home Warranties Plan Act*; and (b) ordinary court claims. There is no requirement that a condominium opt for one claim over the other, nor is there any need to exhaust one process before the other can be commenced.

Generally speaking, we think it is always a good idea to preserve both claims. Claims to Tarion can be preserved by making the claim within the statutory warranty period (or, where you are outside of the statutory warranty period, checking to see if claims were in fact made during the warranty period); ordinary court claims are preserved by filing a Statement of Claim (or Notice of Action).

There are a variety of reasons why preserving both claims can be important, including the fact that not all claims, damages and costs may be recoverable through the Tarion process (whereas they may be recoverable through the Court process). But in many cases the Tarion process may offer a faster and cheaper process than the court process.

Once preserved, the next question will be how best to manage and pursue the two types of claims. This decision will depend in part on the specific facts of your case, and is a decision to be made by each condominium Board, in consultation with its legal counsel.

2 Applicable Limitation Periods

It is important to keep in mind that strict timing requirements must be observed with respect to all claims (whether to Tarion or the Courts). Generally, these timing requirements are referred to as "limitation periods". The Tarion process and ordinary court claims each have different applicable limitation periods (which may have an impact on the decision to proceed with the Tarion claim, the court claim, or both).

Claims to Tarion must be made within the applicable one, two and seven year statutory warranty periods. Each warranty offers specific coverage, and, in the case of condominium common elements, each warranty period runs from the date of registration of the declaration. Claims to Tarion must be made by completing the applicable Tarion forms, and submitting those forms to Tarion within the applicable warranty period.

With respect to ordinary Court claims against a builder or others involved in the original construction of the condominium, a general two year limitation period normally applies. Generally speaking, the two year limitation period requires that a claim be filed in Court within two years of the date of discovery of the defect, or within two years from the date on which the condominium corporation ought to have discovered the defect.

3 Common Element Warranties

Condominium corporations should be aware they are entitled to the benefit of all warranties (express or implied) given with respect to the common elements (see section 96(3) of the *Condominium Act*).

This means that condominiums receive the benefit of any warranties in relation to the common elements that may have been given by or to a builder or developer of a condominium (which can include warranties from any contractors, subcontractors or consultants involved in the construction).

Ultimately, this means that condominium corporations can seek to enforce any such warranties directly against the party providing the warranty. This also means that for the purposes of a court claim, condominium corporations will want to consider adding as a defendant any party who fails to fulfill a warranty given with respect to the original construction.

4 Claims on Behalf of Owners

When asserting court claims, a condominium corporation can assert claims on its own behalf, as well as on behalf of owners (see section 23 of the *Condominium Act*). This effectively permits condominium corporations to assert claims that owners may have in relation to unit defects (for example).

This said, before asserting a claim on behalf of unit owners, the Board will want to consider how that aspect of the claim is to be funded, and how any settlements or awards of damages will be managed. In addition, owners will need to understand that they will not be permitted to assert the same claim on their own behalf and owners will not have absolute control as to how their individual claims will be managed as part of the collective claim. In some circumstances, it may make most sense to leave unit owner claims to be asserted by the owners themselves.

5 Status Certificates

Condominiums must of course be mindful of any potential impact an identified building defect may have on common expenses. If there is ***any real chance*** the defect could increase the common expenses (or result in a special assessment), this must be mentioned in the status certificates (even if you don't yet know for sure that the defect will have an impact on the common expenses and/or what that impact will be).

If a claim may ultimately be asserted, this too should be noted in the status certificates. In particular, the status certificates should identify that a claim may be, or has been asserted (and provide a snapshot of the status of the claim) and, where applicable, should also identify the fact that the legal costs associated with the claim are unbudgeted expenditures (which may or may not be recovered).

Any time there is a significant change to the wording in the status certificates, we feel it generally makes good sense to let owners know about such changes. Generally speaking, owners should also be kept informed any time a condominium corporation is facing significant building deficiencies – so that they are aware the problem exists and the potential impact on each of them.

6 Insurance

Finally, your Board should consider whether or not it should be involving its insurer. There are two reasons why you may want to involve your insurer:

(a) Some damage could be covered by insurance. In particular, while most condominium insurance policies contain an exclusion with respect to the costs of repairing construction defects, most policies do provide coverage for damage resulting from such deficiencies. Section 99 (3) of the *Condominium Act* also says that an exclusion in the corporation's insurance policy **"is not effective with respect to damage resulting from faulty or improper material, workmanship or design that would be insured, but for the exclusion".** (For example, while a policy may not cover defects in the installation of pipes, the policy may cover the water damage that results from a pipe failure.)

(b) If the identified defect presents a risk of harm to persons or property, your insurer must also be put on notice of this increased risk.

The above-noted considerations are only some of the considerations that a condominium Board will be required to balance when a building deficiency is identified at the condominium. However, this list, which contains what we believe are some of the more important considerations for a Board, will hopefully provide you with a basic roadmap for the initial navigation of a building deficiency claim. ■

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5 Examples of How Online Mediation Can Work

Marc Bhalla

The convenience and cost savings that can be realized through embracing technology to address conflict is getting attention. This year, British Columbia is launching an online Civil Resolution Tribunal (CRT) to help address condominium and small claims disputes. The CRT represents Canada's first online tribunal and is being structured to provide a great deal of flexibility and convenience for those who choose to make use of it to address a conflict. While optional at first, the aim is for the CRT to become mandatory for certain disputes as early as 2017.

Here in Ontario, the provincial government has identified technologically-assisted processes as efficient and cost effective ways to deliver on the promise of lower cost dispute resolution with legislative change and the forthcoming introduction of the Condominium Authority and Tribunal. While we await further details to be released, it is widely anticipated that some form of online component will be included to streamline the delivery of information and the management of conflict.

It is one thing to use the term "Online Dispute Resolution" and explain that it simply means injecting technology, in some fashion, to an Alternative Dispute Resolution process and another entirely to explain, practically, how this can help condominiums. The concept of online mediation has been around for some time; however, those who have yet to take part in an online mediation session often offer questions about how it works and to which situations it can apply.

Consider video conferencing and how it allows for real time interaction that enables people to see and hear one another without having to physically be in the same location. This could allow a non-resident unit owner to more easily participate in mediation or add a layer of comfort/security to empower someone hesitant to take part in a face to face meeting with a means to take that first step toward addressing a concern.

What follows are 5 benefits with additional examples of how online mediation could help address condominium conflict:

1. Greater Flexibility. Traditional, in person mediation takes place in the course of a meeting scheduled for a particular duration of time – usually half a day (3-4 hours) or a full day (6-8 hours). This can often pose challenges in respect of scheduling as it can be difficult for all participants to attend at a particular location at the same time, for so long. Online mediation overcomes these challenges and allows for greater scheduling flexibility. Participants need not all travel to the same physical location which also makes it easier to divide the mediation into multiple sessions, when desired.

Example: A busy condominium resident is not available during the business day to take part in a mediation session. She appreciates having her weekends to herself and would prefer not to give up an entire evening for a 3 hour mediation after a long day of work. By mediating online, a "half day" mediation is broken up into three, 1 hour long sessions. This makes it much easier for the busy condominium resident to address her conflict without impacting her work life or placing too much of a burden upon her personal time.

2. Greater Access. It is often the case that discussions in the course of a mediation turn to considerations that had not previously been anticipated or for which further information is required. Parties will often tentatively agree to an outcome

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subject to their assumptions about unavailable information proving accurate or to re-connect once they have obtained the information desired. When mediating online, particularly, in the comfort of your own home or office, additional information is more readily accessible. Also, the "Greater Flexibility" example above could be applied to more easily allow parties to reconvene once the additional information needed has been collected (i.e. such could be obtained in between mediation sessions).

Example: In the course of negotiations, participants in an online mediation find themselves disagreeing as to the current state of a damaged carpet for which some repair work had already been carried out. As one of the participants is taking part from the comfort of her own unit, she is able to use her tablet to take and share pictures of the current state of the carpet during the mediation. This would not have been possible had the mediation taken place in person at the lawyer's office.

3. Greater Control. While there is much good that can come about with real time, in person interaction, including the cues which are not as detectable via computer, tablet or smart phone, the injection of technology into the dispute resolution process, in turn, provides advantages that cannot be as easily realized in person. Particularly as people increasingly participate in other elements of their lives online – from shopping to dating to keeping in touch with friends – online mediation can capture what is convenient and apply it to the dispute resolution process.

Example: An unrepresented unit owner is concerned about being able to keep his emotions in check at the outset of mediation as the conflict pertains to something he holds near and dear to his heart. Despite rehearsing what he would like to say in his opening statement, he is concerned that he will lose focus on what he is hoping to accomplish and "shoot himself in the foot" by letting his feelings get the better of him as the process gets underway. By mediating online, the owner is able to pre-record his opening statement and have the recording played at the beginning of the mediation when it is his turn to speak. The difference in presentation as between a live and pre-recorded delivery is marginal with the online platform and does little to impact the process for all participating in it.

4. Greater Comfort. When people get together in person, there is certain etiquette expected to promote collective comfort. For example, it is increasingly becoming less socially acceptable to smoke in front of non-smokers, particularly indoors. Food allergies and odour sensitivities are among other considerations that can significantly influence someone's comfort level based upon who they are. Online mediation minimizes the degree of collective comfort needed to get together, allowing each individual participant greater freedom to ensure that they are comfortable taking part in the process.

Example: A smoker smokes during his online mediation session without having to worry about disturbing other participants as they are not impacted by the smoke in the course of interacting via computer screens. No break in the mediation session is needed and the momentum being built through the course of discussions continues uninterrupted.

[Note: This example assumes that the conflict does not pertain to concerns about the smoker smoking!]

5. Greater Participation. When mediating in person, consideration is usually given to the number of bodies that will be on each "side" of the table. For example, when a condominium Board of Directors is directly involved in a dispute, it is often encouraged to select only one or two representatives to take part in the process, to ease scheduling challenges and to prevent others participating in the process from feeling outnumbered in the room. This can present difficulties for the Board members who miss out on directly participating in the process, including when it comes to any post-mediation Board ratification requirements, as the road to resolution can be lost on those who were not along for the ride. Online mediation can allow more people to participate while managing the concerns that discourage increased participation when mediating in person and offer plenty of flexibility surrounding how such can be structured to allow for greatest comfort amongst participants.

Example: A Board of Directors gathers in their Board Room with a computer to participate in online mediation with a unit owner to address a conflict between them. The unit owner, participating elsewhere through the comfort of his own computer, contributes equally to the discussion as the Board, avoiding the discomfort that would have emerged if he was sitting across from many people in person, intimidated by their collective presence.[1]

Online mediation has its limitations and does not apply well to every condominium conflict. However, it can offer a convenient, cost effective and comfortable way for those involved in condominium disputes to more easily and efficiently address them. Like in British Columbia, there is no need to wait until online processes become mandatory to realize the advantages that they offer. We can – and should - consider online opportunities today. It is 2016, after all.

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[1] The actual structure of participation by multiple participants, such as a Board of Directors, in online mediation can vary based upon the preferences of those involved in the process. When there are concerns about the number of screens participating on behalf of each party, people can get together and collectively participate through a single screen. In the example provided, a representative of the Board could be appointed as the primary speaker on behalf of the condominium corporation, with other directors participating by contributing their thoughts during caucus and taking in what the owner says first hand. Alternatively, the person speaking on behalf of the Board could alternate through the course of the mediation, with only one director speaking at a time in front of the camera and microphone. Conversely, online mediation can easily allow multiple people to participate in the process from a variety of locations. The key is flexibility in structure and process through the removal of the challenges posed in coordinating in person gatherings with multiple people. ■

Marc Bhalla, Hons. B.A., Q. Med. is a mediator who specializes in condominium conflict management. As the leader of CONDOMEDIATORS.ca, he provides a full range of in person and online mediation services to condominium communities throughout Ontario. Marc encourages anyone involved in a condominium dispute to seize the mediation opportunity to improve the situation and can be reached at mbhalla@elia.org.

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FEBRUARY	Free Seminar – The ABC's of Tarion, **February 24th**
MARCH	Free Seminar – Insurance: Covering Your Assets, **March 30th**
APRIL	Spring Directors Course, **April 30-May 1st**
APRIL	Free Seminar – Lunch and Learn; Self-Managed Boards
MAY	ACMO/CCI, Conference / trade show, **May 27th**
JUNE	Social – Still a Mystery
SEPTEMBER	Free Seminar – A Night with the Experts, **Sept 28th**
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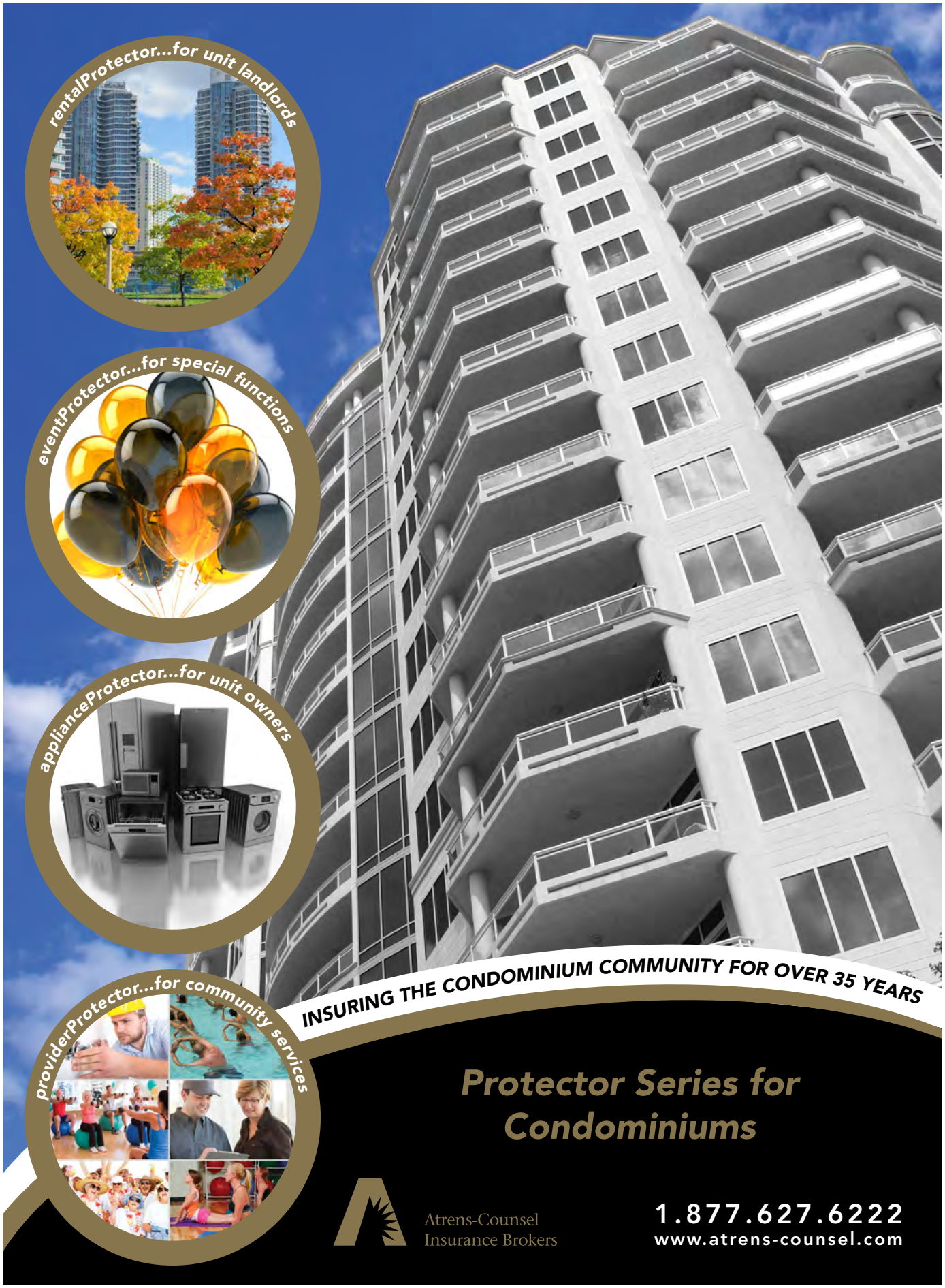
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