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Condo Alert!

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When opposition becomes oppression: Director's duties

Christina Bell, paralegal student

Carleton Condominium Corporation 111 was created in 1977. Its declaration had a single family residence provision and prohibited rooming/boarding houses. This provision required a unit to "be occupied and used only as a single family residence and for no other purpose". The problem was that the condo's documents did not define what a "single family residence" was.

What should have been a simple clarification to the already existing restriction in the declaration was thrown into contention because a single director vied to subvert compliance while other owners fought for it. The board sought legal opinions, tried to incorporate a definition of "single family residence" into a rule. The vocal, opposing director set on a campaign against the recommended interpretation and its confirmation in a rule.

The opposing director's campaign began with a strongly worded memorandum to the board and quickly escalated. Newsletters were sent to owners by the opposing director (identifying himself as an owner *and* director) where he outlined his objections, accused the board of acting in bad faith and urged owners not to support the board. When he was denied access to records relating to individual owners, the opposing director accessed files via the manager's computer. He was asked to stop and refused to return his key to the manager's office.

Both the president and the opposing director sent out letters to the owners regarding an upcoming AGM where the single family definition rule was to be considered. The president explained why the rule was important. The opposing director urged owners to vote down the rule. Both, inappropriately, endorsed candidates who were running for the board who shared their views on the rule. The rule was voted down at the AGM.

A new board was elected at the AGM, including the opposing director. The new board sent out a newsletter that the wording in the declaration would be enforced. They also sought advice from counsel on whether they should refer to the single family restriction in the status certificate. The opposing director posted his position on the legal advice given to the board on his personal website and accused the board of acting in bad faith and going against what the majority of owners wanted. After two board members resigned, a new board was elected. The new board, now led by the opposing director, took no steps to enforce the single family restriction.

The unit owners (and former board members) went to court seeking compliance with the declaration, by-laws, and rules and an oppression remedy against the corporation and the new president (the opposing director) and a declaration that the opposing director breached his duties under the *Condominium Act, 1998*.

The court sided with the unit owners, finding that the opposing director made no effort to care for the legitimate interest of all unit owners as he single mindedly pursued his goal. He did not exercise the care, skill and diligence that a reasonably prudent director on a condominium board would display. He thought nothing of accusing fellow board members of dishonesty and bad faith. He thought of himself as more knowledgeable in the law than anyone at the corporation, including their lawyer. His emails to other board members were aggressive, highly critical, and, at times threatening. His letters and postings to his website showed the same level of disrespect to the board, and his disdain for the steps they were taking to deal with the single family residence restriction.

The court commented that a reasonably prudent director of a condominium would not threaten other board members, undermine board decisions, mislead owners as to the board's responsibilities and efforts to meet those responsibilities, encourage unit owners to distrust the board, undermine legal advice from counsel or provide his own legal advice to owners. He would also not put his own interests ahead of the interests of the owners.

Directors must avoid conflicts of interest and must not abuse their position in the corporation for their own personal motivations. Yes, directors can have their own opinion, but their opinion can't interfere with their duty to the corporation. Even if they disagree with their fellow board members, majority rules.

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Editor: Andrea Lusk

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Condo lien enforcement hits the highway

Christopher J. Jaglowitz, B.A., J.D., ACCI

Until now, mortgagees could bring enforcement lawsuits anywhere in Ontario they pleased, regardless of where the mortgaged property was located. That option is now gone. On March 31, 2015, the *Rules of Civil Procedure* changed to add a subrule requiring mortgage enforcement actions to be brought at one of the designated court locations in the judicial region where the property is located. The eight judicial regions of the Superior Court are illustrated on the map, below, along with the various court locations within each region. In some regions, all of the court locations are designated to deal with mortgage enforcement. In others, only one or two court locations are designated.

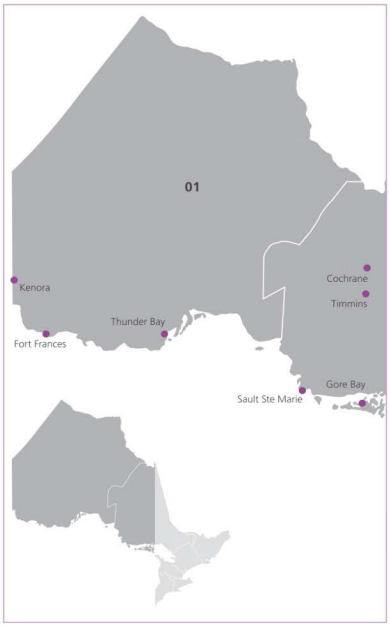
Condo liens are likely captured by this new subrule because s.85(6) of the *Condominium Act, 1998* provides that a condominium lien "may be enforced in the same manner as a mortgage." Our lawsuits to enforce condo liens include a claim for possession of the liened unit and where the unit owners or their mortgagees refuse to pay the debt after we obtain judgment, we often require a sheriff's eviction to remove the occupants and take physical custody of the unit to prepare and sell it. Our office always started these actions in Toronto because it's convenient and early hearing dates are available as backlog clears. We must now take our show on the road, to the region where the property is located.

The only potential benefit this change brings to defaulting unit owners or mortgagors is that they can now count on lawsuits enforcing their mortgage or condo lien being brought in the judicial region where their property is located. While seemingly helpful, this requirement is of no benefit to someone who owns a Muskoka recreational condo unit but lives in Toronto, for example. Further, the subrule does not require these actions to be commenced at the court location nearest to the subject property. This bodes poorly for the owner of property in the East judicial region but outside the City of Ottawa (which is the sole designated court location in that region), or where the plaintiff sues in Woodstock in respect of a property in Windsor. The proximity of the court location to the property at issue is now of slightly greater importance but still not paramount importance, and the added benefit to the defendant is small.

The change is likely intended to benefit the court administration. But will there actually be a net benefit? The impact of the new subrule on the workload and wait times of the various designated court locations remains to be seen but is potentially massive. Lawyers for many major lenders traditionally file their lawsuits at one or two select court offices outside Toronto. Now there will be a flood of new cases at other courts, most notably in Toronto, that have processed relatively low volumes of mortgage cases.

The tremendous progress in reducing court delays in Toronto may be wiped away in short order and we may be on the cusp of a bureaucratic boondoggle of epic proportion. Time will tell. Meanwhile, our firm's condo lien enforcement road-show is about to kick off and may soon visit a town near you.

REGIONS AND COURT LOCATIONS OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO



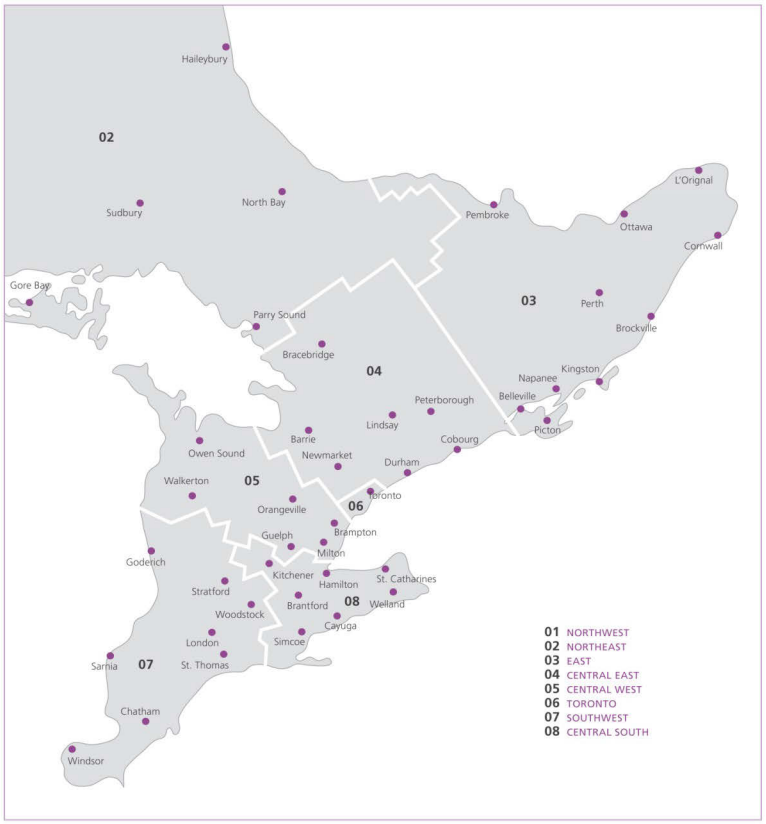


Image from Ministry of the Attorney General