

Real Property

FOCUS

Future may be web-based

Teraview

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Superior Court will realize just how good we have it in the Registry Offices. Where else do you have your registered documents reviewed by a government employee who will contact you to point out your mistakes and allow you to retroactively correct those mistakes without losing the priority of your registered document? Hopefully this favourable treatment will also be incorporated into the next generation of Teraview.

Teranet has sent out a survey to the users of the Teraview software seeking their input on suggestions for the design of the

next generation of Teraview and it is initially anticipated that this survey will be conducted annually in order to elicit additional input.

If you did not receive the survey but still wish to submit feedback for this next generation of Teraview, the following are the two contact points: Janet Brown, email: janet.brown@ontario.ca and John Ozturk, email: john.ozturk@teranet.ca. ■

Steven Pearlstein is a partner at Minden Gross LLP in Toronto and a certified specialist in Real Estate Law.

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Why the *Condo Act* needs some tinkering



RAY
MIKKOLA

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Ten years on, the new Act is in need of revisiting — not the significant upgrade that took place on May 5, 2001, but some tinkering is definitely in order.

Just over 10 years ago the Ontario *Condominium Act* was significantly amended. The number of sections tripled. Many of the problematic aspects of the Act were addressed: note that only seasoned condominium junkies remember “phantom mortgages” which were necessitated by some unfortunate and no doubt unintended wording of the previous Act. The new Act took a simplified and fresh approach to a number of matters that had bedeviled its predecessor.

Ten years on, the new Act is in need of revisiting — not the significant upgrade that took place on May 5, 2001, but some tinkering is definitely in order.

The Legislative Committee of the Canadian Condominium Institute (Toronto) and the Association of Condominium Managers of Ontario has, for this purpose, submitted what the committee refers to as a legislative brief, highlighting numerous proposed amendments to the Act, including, in some cases, providing the actual wording of the changes it recommends to the Act. A thoughtful and well-written brief, it proposes amendments to provisions dealing with owner-corporation issues, corporate governance, financial matters (including exempting corporation owned units from property taxes and creating a new property tax class for residential condominium units) and a host of repair, maintenance and reserve fund amendments.

One of the proposed amendments caught my eye in particular. Under the current Act, a condominium corporation, for example, cannot obtain an order for compliance against a unit owner unless the dispute has first been subject to mediation and arbitration, which every declaration is deemed to require as a means of resolving disputes. The dearth of direction on the process of such mediation and arbitration in the Act could be addressed by the enactment of a bylaw setting out all such details. These mandatory provisions have resulted in much hand wringing and consternation at the board level, where a unit

owner is in plain breach of a rule, the declaration or the Act, but nevertheless an expensive and lengthy mediation and arbitration process is required before the condominium corporation can stop the offensive behaviour.

The committee is determined to retain the mandatory mediation and arbitration provisions, but to remove them as prerequisites to obtaining a compliance order from the court. This will either not resolve the issue or will result in parties ignoring the mediation and arbitration provisions in any event.

In my view, the mandatory mediation and arbitration provisions of the Act have been resoundingly unsuccessful. They have not saved costs, because mediators and arbitrators (unlike judges) are expensive and their fees must be paid by the parties.

Some disputes currently get to court without resorting first to mediation and arbitration, based on such matters as whether the dispute pertains to a tenant or an owner and whether the breach relates to a provision of the Act as opposed to the provision of a rule or the declaration, for example. Why is the tenure of a person relevant to the enforcement process? Any disagreement, including,

apparently, the fees charged for the registration of a condominium lien, may be sufficient to trigger the duty to mediate and arbitrate. Did the legislature so intend?


Some court decisions do not set out clearly the basis on which the owner and the corporation overcame the requirement to mediate and arbitrate. Arguments pertaining to enforcement orders, and why they should or should not issue, are and would no doubt continue to be made in respect of enforcement proceedings, and those arguments (particularly in respect of uneven enforcement, interpretation of the rule or the declaration, and bad faith) would not be out of place in mediation and arbitration proceedings.

A board needs to know with certainty whether it can get to court directly or not. The appointment of an ombudsman (as suggested by the committee’s executive summary) is not the answer as this would merely impose another level of dispute resolution mechanism with its attendant costs and delays.

The creation of a specialized tribunal (also as suggested in the committee’s executive summary) would be a mistake. The previous Act created such a tribunal, but those sections were never proclaimed in force for complicated reasons as I understand it, including the costs of such a tribunal and the concern that for constitutional reasons, only high court judges should determine matters pertaining to property rights.

I applaud the committee’s work. But I also think it is time to go back to court directly for condominium compliance orders as authorized by the prior Act, without the constraints of mandatory mediation or arbitration, for reasons that have to do with costs, clarity and consistency. ■

Ray Mikkola is the head of the Commercial Real Estate Practice at Pallett Valo LLP, Mississauga’s largest business law firm. He specializes in condominium law.

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