

The First Crucial Year of a Condo Following Registration: Acting on Deficiencies Versus Tarion



By Ray Mikkola



IN ENACTING the first *Condominium Act* in the late 1960s, the Ontario Legislature showed remarkable faith in the ability of a lay, volunteer board of directors to manage the affairs of condominium corporations, many of which now have multi-million dollar budgets.

It's not an easy job. Not surprisingly, boards over the last 40 years or so have come to rely on experts such as lawyers, property managers, engineers and accountants to navigate the choppy waters of an increasingly complex world of condominium governance.

Ironically, it is the first year following registration (during which the directors are new and coming to grips with their new responsibilities) that the board generally plays its most important role.

For the most part, the board is focused in particular on the following:

1. Dealing with Tarion (formerly, the Ontario New Home Warranties

photo: Dianne Werbicki

Program) in respect of those deficiency claims that must be reported to Tarion in writing prior to the one year anniversary of registration of the condominium. Not all deficiencies are obviously exclusively common element-related. For example, noise complaints, condensation on windows, and heating and cooling issues sometimes involve both unit and common elements based-defects.

2. Dealing with the performance audit engineer. The Corporation is mandated to retain an engineering firm to prepare the performance audit (the engineering review of the building's common areas that identifies deficiencies and upon which the obligation of the developer to rectify these issues will be based) not earlier than six months and not later than ten months following registration of the condominium, and to submit it to Tarion before the one-year anniversary of registration.

This will involve reviewing the report with the engineer and legal counsel, collating deficiency survey results from unit owners, and dealing with the difficult issue of whether

or not to remediate deficiencies using the corporation's money which just can't wait for the developer to fix them or for the ultimate outcome of Tarion's sometimes very lengthy conciliation process.

3. Conducting a reserve fund study. This study, conducted by an expert, is intended to ensure that monies set aside for major capital repair and replacements of the common elements will be sufficient for their intended purpose.

The board is also required to put in place a plan for ensuring that the reserve fund is properly funded. Prior versions of the Act did not mandate such studies, although in my experience, few responsible boards were prepared to proceed in any event without some significant technical assistance before being satisfied that they have sufficient monies in the fund.

Unlike the performance audit, which is designed as a "one shot" report on which, very often, the ability of the corporation to recover from a developer will be based, the reserve fund study is a dynamic document

that will be revisited (at least once every three years) to ensure that its recommendations and funding plans are still relevant.

To be sure, these "nuts and bolts" activities relating to the physical condition of the building and its future condition should of course occupy a large portion of the board's time during the Corporation's first year of existence. The failure to submit the performance audit within the required timeframe, for example, is likely to have deleterious consequences for the corporation.

But there are several less apparent duties of the board, which, due to the focus on the physical structure of the building, directors often overlook, with sometimes serious results for the Corporation and for the owners, both present and future. For example:

1. The *Condominium Act* requires developers to pay for a shortfall in the budget during the first year following registration. This provision is intended to discourage developers from understating the expected common expenses to be incurred,



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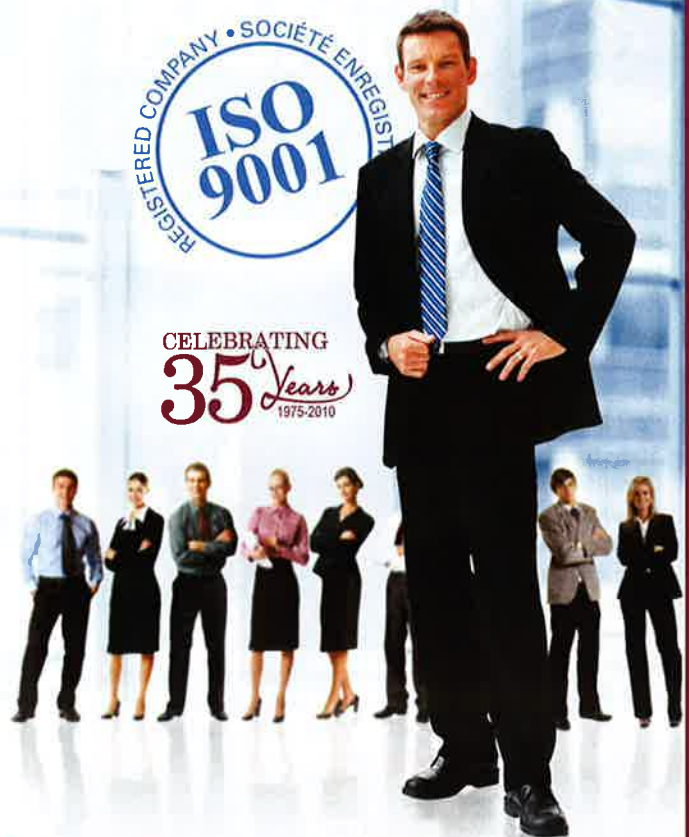
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thereby acting as an incentive during the marketing phase, and obviously before any purchaser can gauge the appropriateness of the level of common expenses.

However, the board is required to notify a developer within 30 days of the delivery of the audited financial statements of such shortfall. Boards that miss this deadline may be out of luck. In my experience, the shortfall claim is best advanced when the board has the developer's undivided attention during the deficiency negotiation process.

2. Although Tarion is the corporation's best vehicle to obtain satisfaction in respect of a building deficiency claim (Tarion holds security from the developer, but Tarion is independently able and required to rectify deficiencies where the developer will or cannot do so), boards often overlook the warranties available to it in respect of equipment, fixtures and chattels.

Tarion won't help a corporation with a claim for faulty exercise equipment in the exercise room, or for any fixture or equipment particularly if

the deficiency is brought to its attention beyond the Tarion warranty period, but a condominium corporation that has a warranty from the manufacturer is entitled, thanks to the Act, to enforce such warranties even though it was not even in existence when the warranty was first issued.

In my experience, no developer is prepared to pay for the cost of fixing or replacing equipment when a claim under a warranty could have been made, but wasn't, by the condominium corporation.

3. The former *Condominium Act* required a turnover board to ratify certain contracts that had been executed by the pre-turnover board (these were, you will recall, developer appointments) during the first year following the turnover meeting, or they simply were deemed to terminate on such date.

The current Act is significantly different.

A turnover board has 12 months to terminate these contracts, or the condominium corporation is bound by their terms. These include management agreements and certain

leases of the common elements. The turnover board also has 12 months in which to bring an application to court to terminate so-called mutual use agreements, or the corporation will be bound by their terms.

Unhappily, on occasion, a board that has missed this deadline finds itself attempting to negotiate itself out of a bad agreement, thereby spending time, money and energy on a matter that could have been resolved by a termination notice if the board had reviewed the turnover documents.

Happily, the legislature does not expect board members to be experts. But directors are expected to obtain advice to ensure that all of the owners are protected, their rights are enforced, and they are not put to needless expense. ■

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