

# Liability Considerations for Condominiums & Unit Owners

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Occupiers of premises (whether speaking of the condominium or the unit owners) have a duty of care to ensure people are reasonably safe on their property. Under the *Condominium Act*, the condominium is liable for the common elements. Unit owners are liable for their units. This article highlights examples of this shared duty of care between condominium and unit owner and how sometimes the line separating this shared duty gets blurred. Take note of the lessons to be learned here and the steps to be taken to protect the condominium.

## Dogs & Condominiums

Most condominiums have rules for pets in the condominiums, but are they good enough? Many rules place restrictions on dog ownership and have adopted rules addressing how dogs will be handled in units and on the common elements. Many breaches deal with nuisance issues such as barking, but what about the dangerous situations? A recent court decision concluded that a dog attack may expose liability to both the dog owner and the condominium.

A condominium's liability may be triggered by the **Occupier's Liability Act**, when a dog attacks while on the common elements and the condominium is found to have failed to take reasonable steps to ensure the safety of individuals on the property.

This was recently confirmed in the court case of **Elbaum v. York Condominium Corporation No. 67**. In this case, a unit owner was seriously injured while walking on the common elements of the condominium when an unleashed dog allegedly attacked her causing her to fall. The unit owner was entitled to sue both the dog owner and the condominium.

**The Lesson:** *Condominiums should adopt and enforce rules with respect to dog ownership and the safe handling of dogs on the common elements by the unit owner.*

## Pools and Recreation Facilities in Condominiums

Pools and recreational facilities can be fun, until an accident occurs. In the instance where a unit owner who is under the influence of drugs or alcohol seriously injures himself, the condominium may still be liable, if the condominium did not adequately warn of risks when using the recreational facilities.

Proper notices must be conspicuously displayed to ensure the risks are known to the users. No fee should be taken for entry or use of the recreational facility, unless the condominium is prepared to provide the appropriate supervision.

**The Lesson:** You can even owe a duty of care to trespassers using your recreational facilities, so ensure that all users are adequately warned of risks with clearly marked signage and properly maintained facilities.

## **Maintenance and Repairs in Condominiums**

On-going maintenance and repairs in condominiums is necessary but can be fraught with liability. When a condominium hires an individual or business to work at the condominium, workplace safety legislation applies. In Ontario, the **Occupational Health and Safety Act (OHS)** governs the workplace.

Failure to meet the requirements of OHS can lead to fines and penalties against condominiums, as well as against its directors and/or agents and even condominium managers.

### **Criminal Code Liability**

In 2004, the *Criminal Code* was amended to impose a duty on directors and officers to take reasonable steps to ensure the safety of employees, workers and other persons while work is undertaken on the condominium's property.

An individual director could face criminal charges if he was aware of a danger and did nothing to correct it, which resulted in injury or death to the worker, which includes independent contractors. There could also be monetary damages from a civil claim from the injured person.

**The Lesson:** Condominiums should be sure that they are well informed of their obligations before undertaking any major work on common elements. It is important that appropriate advice be sought in advance of work from an engineer, architect, insurer and lawyer. A Workplace Health and Safety Policy should also be implemented and properly reviewed annually.

## **Condominium Fire Safety and Prevention**

Fire safety and prevention is often misunderstood in condominiums and so the Courts have provided guidance on who is responsible for fire safety in the unit: the condominium or the unit owner?

In the case of **City of Toronto v. York Condominium Corporation No. 60**, a fire started in a condominium unit which did not have a smoke alarm. Both the unit owner and the condominium were charged by the Fire Marshall for failure to have a smoke alarm, an offence under the *Fire Code*.

The provisions of the **Fire Code** stated that an "owner" is defined as any person or corporation "having control over any portion of the building or property." Now the *Condominium Act, 1998* clearly states that the unit owner owns the individual unit; however, the Court based its decision on the definitions in the *Fire Code* and stated:

***“This case being about smoke alarms is about fire. Fire does not respect the division of control in condominium law. The purpose of the smoke alarm regulation is to carry out the intent and purpose of the Fire Marshall’s Act.”***

Even though York Condominium Corporation No. 60 had encouraged and even obtained smoke alarms for unit owners to purchase at a low price, compliance was not confirmed for all units, which resulted in the condominium being cited for an offence. This was so, even though the condominium is not the owner of the unit by definition under the *Condominium Act*.

**The Lesson:** *Consult with the appropriate Fire Safety professionals. Most local Fire Departments will gladly assist the condominium with a fire safety and prevention plan.*

### **Nuisances, Human Rights and the Condominium’s Responsibility**

Most condominiums have rules that prohibit owners from creating or permitting any nuisance that disturbs the comfort or quiet enjoyment of other residents. In Ontario, the **Smoke-Free Ontario Act** provides, in part, that “no person shall smoke or hold lighted tobacco in...any common area in a condominium, apartment building or university or college residence, including, without being limited to, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas.” However, smoking in uncovered outdoor common areas is apparently not illegal.

A “nuisance” arises in law when one person uses his condominium unit in such a way that it unreasonably interferes with another unit owner or occupant’s right to use his or her respective unit.

In a recent case, **McKay v. Metropolitan Toronto Condominium Corporation No. 985\***, unit owners fell victim to an intense smell of cigar smoke in their unit and promptly reported the “nuisance” to the concierge. The owners alleged that the smell of cigar smoke continued to infiltrate their unit and since the condominium did nothing in their opinion, they called their insurance company. The insurance adjuster concluded that the unit was uninhabitable and arrangements were made for the owners to move into a hotel at the insurer’s expense. The owners sued the condominium alleging that the condominium breached its duty to maintain the common elements and to repair common elements after damage. The owners also sought a declaration that the failure to address the issues constituted discrimination against owners on the basis of a disability citing the **Ontario Human Rights Code**.

The question of whether the condominium is in breach of its maintenance and repair obligations engages a necessary dialogue between the condominium and the unit owners involved. If the smoke is not caused by a common element deficiency, then the condominium may look to the offending owner of the unit where the smoke is originating to take steps to eliminate the problem at that owner’s cost. One way would be to seal off any air leaks in the units, however, sealing techniques may only reduce, and not eliminate, the transmission problem.

**The Lesson:** *When responding to smoke complaints or other human rights issues, condominiums should immediately investigate and rule out the possibility of a common element deficiency. If a deficiency is discovered, then it should be rectified promptly. The responsibility of who pays to rectify a common element deficiency will typically depend on the maintenance and repair obligations set out in the condominium's Declaration. Exceptions may result if the condominium has a duty to accommodate under the Human Rights Code.*

### **Insurance – Protecting the Condominium from Risk**

The *Condominium Act* provides at Sections 99 and 102 that the condominium is required to maintain property and liability insurance. This insurance will provide the condominium with coverage for many risks; however, preventative measures go a long way to assist the condominium with their legal obligations.

Condominium directors, officers and managers should also ensure that they have appropriate insurance in place to address their own liability exposure for potential risks.

*Most importantly, be vigilant! If you think there may be a liability issue, there probably is.*

End Note: \* See further details of *McKay v. Metropolitan Toronto Condominium Corporation No. 985* in article by Erica Gerstheimer in this CCI Newsletter.

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