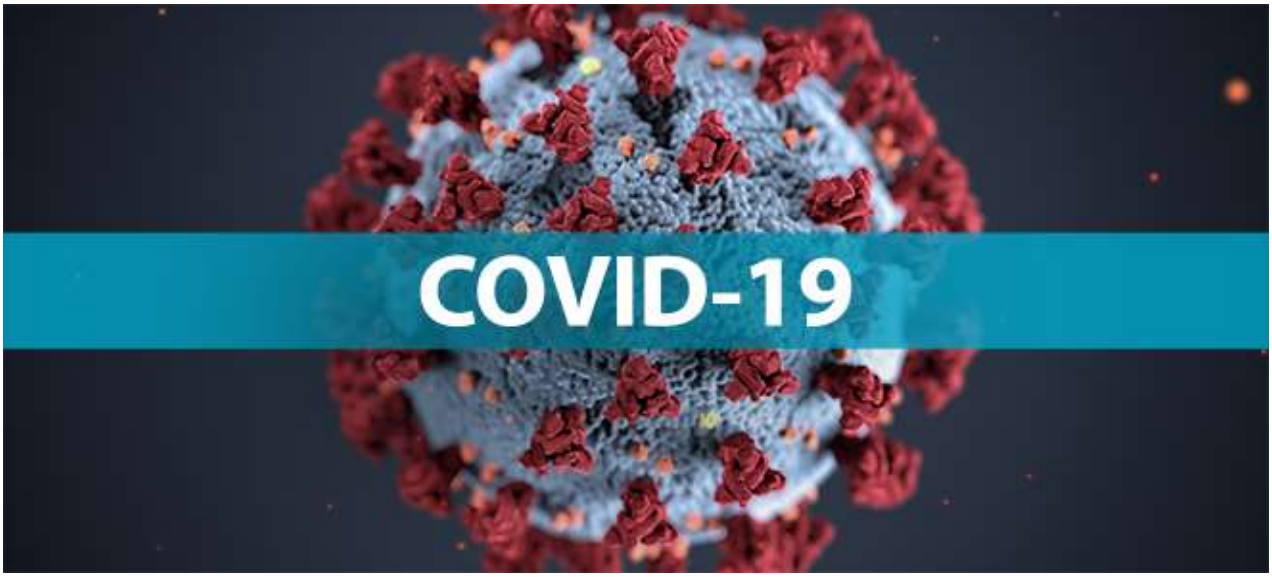
CCI HURONIA
SPRING 2020 NEWSLETTER

Canadian Condominium Institute | CCI | Institut canadien des condominiums
Huronia Chapter

COVID-19: ASK THE EXPERTS



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PRESIDENT'S MESSAGE

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Huronia Chapter

Debbie Dale
MCRS Property Management

First and foremost, we send positivity and our very best wishes to everyone. Life is invaluable and our time together is precious. United, we stand.

COVID-19 has taught some invaluable lessons about life, causing us each to re-evaluate, re-structure and ultimately re-deploy into a new way of living, being and behaving - both individually and as a society. Taking the lessons learned and struggles faced to craft a better future is an opportunity. Analyzing our learned lessons during a pandemic, or in the future, is a task that needs to be performed in order to realize some level of purpose in having journeyed through this time in history.

Some condominium dwellers dutifully abided the 'stay at home' guidelines, signs at their properties and health industry recommendations along with careful self-isolation. Others did not. For managers, trades performing essential work in common elements (such as Ontario Fire Code required processes), Boards and vulnerable residents who are entitled to even more care than usual, the deliberations as to how to preserve rights and life itself became complex, at best, giving rise to the need for analysis and quick decisions. Shake, rattle and roll – indeed.

Expert condominium specialty lawyers, engineers, accountants and others were literally set upon by many seeking advice and ideas in without precedent circumstances. In a response to the info seeking quest, CCI Huronia quickly launched a Tuesday evening at 7 p.m. series of webinars dedicated specifically to the corona virus and condominium focused areas of concern/need. The webinar attendance continues to rapidly rise alongside the very apparent appeal of this info sharing format. Sonja Hodis of Hodis Law was at the helm of our new online platform working diligently on mastering Zoom, online host skills, agenda preparations and working with speakers in advance. Thanks for the high level of sharing, caring and dedication, Sonja. And a big thanks as well to Ashley Winberg of Elia Associates for diligently orchestrating this newsletter in fine form.

The webinars created an opportunity to bring together CCI Chapters from other parts of Ontario which expands the volume and level of expertise we can bring to members, and future members. With just a phone or any computer, laptop, Ipad or similar device, you can access these live webinars easily from the comfort of your own favourite chair at home. Invite your friends. No fees! Registration is simple and easy through our modern website under the Events tab or you are invited to call or email our Administrator, Geri, and she will guide you along in her usual supportive style. https://ccihuronia.com/events/upcoming-events.

We have linked the exciting, recently launched, national Resource Center to our website, as well. https://cci.ca/resource-centre/overview.

CCI - all the way across Canada - continues to expand the resource platform to ensure that CCI maintains our vision in providing education, information, awareness and access to expertise. Coast to Coast, we are and will remain your condo connection. Membership is easy, affordable and will provide more benefit than you may now realize. Join us today! Now is the time for change and forward action. https://cci.ca/membership/why-join-cci.

Q&A
WITH THE LEGAL EXPERTS

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Huronia Chapter

Patricia Elia
B. Comm., LL.B., A.T.C.
Associate, Elia Associates

Sonja Hodis
Solicitor, Barrister & Notary Public

Ashley Winberg
B.A. (High Honours), J.D
Associate, Elia Associates

Q: Should we hold our annual general meeting scheduled to take place in June? If we do not hold our annual general meeting before the end of June, we will be in violation of the Condominium Act, 1998.

Ashley Winberg: Pursuant to Section 117 of the Condominium Act, 1998, (the "**Act**"), condominium corporations have an obligation to prevent dangerous conditions and activities from occurring within the units and on the common elements, and pursuant to Section 26 of the Act, are the occupiers of the common elements for liability purposes. Pursuant to the *Occupier's Liability Act*, condominium corporations have an obligation to take reasonable steps to protect persons on the common element from foreseeable harm.

Based upon the information released by the World Health Organization and public health officials, COVID-19 is highly contagious and as such, if a condominium corporations were to hold its annual general meeting on its common elements during the COVID-19 pandemic, it would be reasonably foreseeable that an owner could contract COVID-19 at said meeting. Accordingly, pursuant to the *Occupier's Liability Act*, a condominium corporation must take reasonable steps to protect owners from the risk of the foreseeable harm. Accordingly, it is advised that your condominium corporation hold off on holding its annual general meeting at this time.

It is also important to note that pursuant to the emergency order issued by the Ontario government under the *Emergency Management and Civil Protection Act* on March 28, 2020, organized public events and social gatherings of five or more people are currently prohibited in the Province of Ontario. Arguably, this emergency order would apply to owners' meetings and as such, under the *Emergency Management and*

Civil Protection Act, condominium corporations are arguably currently prohibited from holding any in person meetings of five or more people at this time. Pursuant to Section 7.0.11(1) of the *Emergency Management and Civil Protection Act*, it is an offence to violate any order issued under the *Emergency Management and Civil Protection Act*.

For all of the foregoing reasons, it is advised that all condominium corporations hold off on holding their annual general meetings at this time, and that same be held when the state of emergency in the Province of Ontario has been lifted and when public health officials no longer recommend social distancing.

Your condominium corporation were to hold off on holding your annual general meeting as recommended, your condominium corporation may end up breaching Section 45(2) of the Act, which provides that a condominium corporation is required to hold its annual general meeting within six months of the end of its fiscal year. However, I am of the opinion that given the global pandemic created by COVID-19 and the state of emergency in the Province of Ontario, if your condominium corporation were to be in breach of Section 45(2) of the Act, same would be insignificant and that a court would not punish your condominium corporation if your condominium corporation were to do so.

Q: If a resident notifies our corporation that they have tested positive for COVID19, is our corporation permitted to then notify other residents is that a resistant has tested positive for COVID-19?

Patricia Elia: A condominium corporation should notify residents of a positive COVID-19 test so that residents can take any additional steps to protect themselves. With this said, a condominium corporation cannot release any personal information about the person who tested positive. Speak to your lawyer about an creating in Information Management and Privacy Policy and Section 55 of the *Condominium Act, 1998.*

Q: During the COVID-19 crisis, should condominium corporations provide any sort of relief to unit owners who cannot afford to pay their common expense fees ("CEF") and/or refund CEF paid if amenities have been closed?

Sonja Hodis: The short answer is NO. Why?

As an owner, you are not paying rent to a landlord who assumes risks in exchange for profits. Your CEF is a share of the expenses the condominium corporation incurs. Condominium corporations do not make profits. Every owner shares in the ownership and expenses of the condominium corporation. If one owner does not pay CEF, the other owners will have to make up the shortfall. If no one pays their CEF where is the condominium corporation going to get the money to pay the expenses it incurs on behalf of all owners? Whether the condominium corporation borrows the money or uses its contingency fund to cover common expenses in the short term, at the end of the day the only people that will be paying are the owners. As such, asking the condominium corporation to defer or refund your monthly CEF is like asking yourself for a loan or a refund.

Condominium corporations are not banks, social agencies or government. The condominium corporation's duties do not include lending money which is in essence what a condominium corporation is doing when it defers CEF payments. Owners have other sources to turn to get relief to pay their expenses. They do not need to nor should they turn to the condominium corporation. The condominium corporation will continue to have on going expenses during this crisis and thereafter and will need money flowing into the condominium corporation to be able to continue to provide necessary services to residents. Someone has to pay the condo's expenses. In condo land, the "someone" is always the owners. There is no one else. In addition, delaying payments now does not mean you are forgiving them. As such, are you really helping those in a financial crisis now by allowing them to accumulate a larger amount to be paid down the road?

We must remember that the *Condominium Act, 1998* creates a super priority on CEF and the fact that these fees have been given this super priority also signals the importance that has been placed on making sure CEF gets paid on time.

If you are still thinking about providing owners some sort of relief from CEF or a refund, here are a few more things to think about before you consider taking this action:

1. Can you actually do it? Does your operating account have enough funds to waive or reduce fees for all owners? Can you do this for several months? If you decide to do this you will need to make this is available to all owners. From my experience, most condominium corporation do not have any or large enough surpluses in their operating accounts to even allow them to defer CEF payments and still meet their expense obligations.

2. The *Condominium Act, 1998* does not allow you to use your reserve fund account to cover operating expenses. As such, if you are thinking of this option you must solely rely on your operating account balance to cover ongoing expenses.

3. It is likely that you have not budgeted for the extra costs that will be incurred in light of the COVID-19 crisis. If you are fortunate to have a surplus in your operating account, you may want to save that extra money for expenses related to COVID-19 that you have not planned for in your budget in order to avoid or minimize a special assessment down the road.

4. There is no authority to refund CEF when amenities are not being used or closed during the COVID crisis.

In terms of collecting unpaid CEF, condominium corporations should be following the established statutory procedures for liens that existed prior to COVID-19. There is no reason to change the established process and liens should be registered for any CEF not paid prior to the expiry of the 3 month period despite any interim suspension of limitation periods which have been legislated by the Ontario government. It is not "reasonable" to not register a lien within 3 months of default. By not doing so, you are in essence giving up the condominium corporation's super priority over mortgages and other creditors and creating a huge risk for the corporation as it may not be paid the money it is owed if a lien is not registered in time. Depending on the condominium corporation's financial status, a condominium corporation may consider a payment plan after the lien is registered and its priority is protected. However, it is highly recommended you speak to your legal adviser prior to agreeing to any payment plan.

Q&A
WITH THE PROPERTY MANAGEMENT EXPERTS

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Jeff Struewing
Property Manager/VP Operations
Shore to Slope Management Services Inc.

Debbie Dale
President
MCRS Property Management

Joanna Tomaszewski
GM of Condominium Operations
Bayshore Property Management Inc.

Q: Can the Corporation restrict non-residents from entering the building?

Debbie Dale: Yes, a restriction is permitted but complete denial of any entry by any person other than a bona fide owner/resident is not only problematic but would also not be enforceable in my opinion, nor would it be practical. Section 117 of the *Condominium Act, 1998*, does prohibit a person from allowing a condition to exist, or to carry on any activity, in either a unit or in the common elements of the corporation, if it is likely to damage either the property or to cause injury to someone. Drawing from this a determination can certainly be made that the corona virus is injurious to people given the classification of COVID-19 as a pandemic which has led to massive death counts and perhaps long-term respiratory injury to those that survive. A reasonable approach to protect people is to limit entry by non-residents thereby reducing the number of potential transmissions of the virus through the common elements. Restriction of access to/through common elements has been widely applied across the condominium sector to protect people and, indeed, such policy supports the physical and mental wellbeing of the community. Section 117 is to be enhanced in the future to prohibit noise, disruption, nuisance and annoyance which will lead to a broader ability to address, for example, even noise from an air conditioner. As always, Boards are reminded that having legal counsel on whom they may rely for legal advice is recommended and I suggest that this is even more important than ever before given the ramifications of COVID-19 in shared living spaces.

Q: What should a Corporation do when a resident has refused to self-isolate for 14 days after returning from travel?

Joanna Tomaszewski: Contact the resident via phone to review their situation, see if they need assistance with self-isolating. If the resident refuses to co-operate and follow the government's guidelines report to the Health Unit or the police as the management and corporation have no authority to enforce it.

Q: Can a Corporation ask non-residents, prior to same entering the building, if they have traveled in the past 14 days and/or if they have any exhibited any symptoms indicative of COVID-19?

Jeff Struewing: In these unprecedented times and in order to protect the residents of the condominium corporation, I believe the corporation not only has the right but it would be prudent to ask non-residents/guests to the building if they have travelled outside of Canada in past 14 days or have exhibited any symptoms of COVID-19 in buildings with common entrance (lobby).

Q&A
WITH THE ENGINEERING EXPERT

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Mina Tesseris, P. Eng., LEEP AP
Senior Forensic Engineer
Arbitech Inc.

Q: How could COVID-19 impact construction projects and how has it already impacted existing construction projects?

Mina Tesseris: How quickly life changes. Only one short month ago we were carrying on with our daily routines which for many meant juggling busy school schedules, attending classes at the gym, socializing with friends and colleagues and enjoying the occasional night out on the town. Fast forward to today and we are isolating in our homes, spending more time online than we ever have and mastering the practice of physical distancing and compulsive handwashing. It feels like we are living an episode of Rod Serling's Twilight Zone, having transitioned overnight into the new era of COVID-19.

Condominium Directors and Property Managers are discovering a multitude of new issues that probably never crossed their minds prior to the COVID-19 pandemic. Sanitization and limiting access to common areas, wrestling with how to hold an AGM, and logistics of Board meetings when groups are limited to 5 persons (for the time being) are a few examples of new issues that are on the minds of many these days. Many of the planned tasks in the routine operation of the Condominium are being deferred in order to focus on other tasks that have taken priority as a result of the pandemic. But when it comes to maintaining buildings, time may not be on your side and deferral may not be a feasible option. Some Condominiums may face the situation that a major repair or replacement project is required now to protect their building from damage and/or to resolve a health and safety issue. If that is the case for your Condominium, your contract will need to set out the Contractor's obligations in performing the work in accordance with the guidelines of various authorities with respect to COVID-19. In some cases, compliance will require additional time and effort by the Contractor which may translate to greater tender prices to complete the work than allocated or even available in the Reserve Fund Plan.

One issue that some Condominiums may be facing is Contractor delay in performance of a construction contract that was entered into before COVID-19 became a health concern. An unforeseen event like this can have an impact on scheduling of work for restoration or replacement of common elements such as roofs, windows, parking garages and the like. Procurement of materials may be delayed due to supply chain disruptions and maintaining an adequate labour force may become an issue. New COVID-19 protocols adopted by Contractors will require workers to maintain physical distancing from one another in settings where they never had to before, such as in floor areas partitioned by polyethylene zip walls during a window replacement project, work that was planned to be done from a two-person boom lift, or work to install balcony guards. The schedule may also be affected by the fact that in a Condominium setting, work is almost always performed while the building is occupied which may raise health concerns for both unit owners and workers and lead to delay in accessing units and common areas to complete the work.

Where a written contract between an Owner and Contractor exists, the rights and obligations of both parties with respect to construction delays are usually set out in their construction contract. In Canada, the CCDC 2 Stipulated Price Contract is a common form of construction contract used by Consultants and contract administrators on Condominium construction projects. The CCDC 2 contract contains "General Conditions" which provide rights and remedies to the Contractor if their ability to perform the work is delayed due to causes beyond their control including:

1. Delay due to an action or omission of the Owner, Consultant or anyone employed or engaged by them directly or indirectly. In this case, the Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as a result of such delay. Also, the contract time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor.

2. Delay due to a stop work order issued by a court or other public authority provided the order was not issued as a result of an act or fault of the Contractor or any person employed or engaged directly or indirectly by the Contractor. In this case, the Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as a result of such delay. Also, the contract time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor.

3. Delay due to: labour disputes, strikes, lock-outs; fire, unusual delay by common carriers or unavoidable casualties; abnormally adverse weather conditions,; or any cause beyond the Contractor's control other than one resulting from a default or breach of contract by the Contractor.

In this case, the contract time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. However, the Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly.

When a delay occurs for any of these reasons, the Contractor is entitled to an extension of the contract time as determined by the Consultant. The Contractor is also entitled to payment of costs under the CCDC 2 contract but only for some types of delays. It is important to note that when a delay does occur, the new Construction Act that came into effect in 2018 contains provisions that establish a relationship between the contract price and a delay in supply of labour and materials that is outside the control of the Contractor. In some cases, this new provision could take precedence over the Contractor's entitlement (or lack of entitlement) to costs in the CCDC 2 contract.

It is important to note that these remedies for delay apply to the CCDC 2 standard form of contract and may vary if a different form of contract is used. Also note that CCDC 2 contracts sometimes contain supplementary general conditions which, if not contrary to a governing statute or regulation, take precedence over the standard general conditions. It is crucial to review your contract as a first step in determining your

rights and obligations with respect to a potential delay claim because the conditions will often vary from one contract to another.

Two questions with respect to construction contracts that will likely arise as a result of COVID-19 are:

1. How is an unprecedented event like COVID-19 viewed in the context of a delay claim under a CCDC 2 contract?

2. Does COVID-19 constitute a force majeure event that prevents one or both of the parties from fulfilling their obligations under the Contract?

Regarding the first question, COVID-19 has been declared a pandemic by the World Health Organization and has resulted in a declaration of a State of Emergency by the Province of Ontario on April 3, 2020. The Emergency Order requires certain establishments and businesses considered as non-essential services to be closed. Furthermore, the Province has deemed construction work and services in the residential sector to be an "essential workplace", meaning that the Order to stop work does not apply to residential condominium construction projects that commenced on or before April 4, 2020. Therefore, there are currently no Stop Work Orders in effect that would give rise to a delay claim under a CCDC 2 contract in Ontario.

The second question raises interpretation issues. "Force majeure" is a term used in contract law to describe an unforeseen event that is outside the reasonable control of the contracting parties and which impacts the ability of an affected party to fulfil its contractual obligations. It seems reasonable that delays resulting from a pandemic such as COVID-19 would qualify as a force majeure event. The CCDC 2 contract does not use the term "force majeure" but, rather, it contains a catch-all clause that reads as follows: "any cause beyond the Contractor's control other than one resulting from a default or breach of contract by the Contractor". This catch-all clause could be interpreted as providing the same delay remedy that a force majeure clause would typically provide. Consultants are designated as the first interpreter of a CCDC 2 contract. Thus, the Consultant may determine that there is delay that is excusable but there are no costs added, or a delay in which costs could be added for additional required time to complete work and/or for additional materials. Those delays may be imposed by conditions added to the contract by the condominium or self-imposed by the contractor to achieve compliance with the prevailing emergency orders by government.

It is important to note that the occurrence of COVID-19 (or any other unforeseen event) on its own does not substantiate a delay claim. There must be a consequence arising from the event that impacts the ability of the Contractor to perform the work within the allotted timeframe in the contract. It is also important to note that both parties to the contract have a duty to mitigate the impact of the event on the performance of the work. Assessment of any claim for delay and/or added cost would therefore require a rather rigorous assessment of adjustments to the schedule and the associated costs.

Finally, when an event like COVID-19 results in circumstances that make it impossible for the Contractor to perform the work, the contract may be deemed to have been "frustrated". This would relieve the Contractor of their obligations under the contract. The legal test to have a contract deemed as having been "frustrated" has a very high bar. Performance of the contract must be impossible due to a supervening event that causes performance to become something radically different from that which was undertaken by the contract. Unanticipated difficulty that doesn't amount to impossibility to complete the contract hasn't met that test in the past. An increase in cost to perform the contract is not sufficient reason to say a contract has been "frustrated". An example of frustration could involve a contract for repair to small areas of shingled roofs at a fixed cost per roof where replacement becomes necessary after an extended delay caused by an unforeseen event. The original contract could be viewed as having been frustrated by the need to replace the entire area of the roof rather than repair small areas. The very nature of the work would have changed. On the other hand, if the area of repair were to remain the same but the Contractor is unable to mobilize the crew that was originally planned to perform the roof repairs as a result of the delay, it is very unlikely that this would be a valid reason for the contract to be deemed to have been frustrated because it would still be possible to complete the work with another crew. Ultimately, it is up to the

judge to decide whether frustration has occurred based on the facts.

As of the end of March 2020, the response activities to the COVID-19 pandemic did not appear to have prevented the construction industry in Ontario from working. This could change if the event continues for a long duration and causes government imposed additional measures such as Stop Work Orders, lockdowns, construction material supply chain disruptions and/or labour shortages. The situation is evolving rapidly which could change the appropriate actions to be taken by Contractors and Condominium Corporations.
In the meantime, Condominium Corporations that currently have construction projects in progress can do a few simple things in concert with the trades to help prevent or at least prepare for claims for added costs.

1. Keep a daily record of all on-site activity as well as any governmental actions that may have an impact on performance of the work.
2. Have all trades working in or at your buildings provide written documentation of the response measure that they are taking and make those added instructions to your contract.
3. Have enforcement provisions for persons that fail to comply with those agreed instructions.
4. As always, maintain open communication with the Contractor to update all health, safety, access, and schedule impacts to manage and mitigate the impact of COVID-19 on your project.
5. When in doubt regarding the rights and remedies of the contracting parties, seek legal advice.

In March 2020, the construction and capital repair situation changed for all of us. It is now our duty to change the way we work to meet these new demands.