# SUPERIOR REGION CONDO NEWS

Canadian Condominium Institute | CCI | Institut canadien des condominiums
Northwestern Ontario Chapter

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FALL
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2020 / 2021

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## Can Condo Corporations Charge Back Costs Without a Finding of Negligence?

*April 1, 2021*
*by Miller Thomson LLP*

In tort law, a finding of liability typically requires a finding of fault. The Divisional Court has recently confirmed that when it comes to a unit owner's liability under s. 105 of the Condominium Act, no finding of fault is required.

Many condominium corporations have large insurance deductibles for property damage claims. Section 105(1) and (2) of the Condominium Act allows a condominium corporation to pass the risk of amounts within the deductible on to unit owners. Section 105(3) of the Condominium Act further permits a condominium corporation to pass a by-law extending the circumstances whereby a unit owner may be liable.

In the recent decision of Lozano v. TSCC 1765, 2021 ONSC 983, a leak had emanated from the Lozanos' toilet, ultimately causing damage to the common elements. At the time, the Lozanos were on a several-month trip to the Philippines, and were having a friend check their unit every two weeks. The condominium corporation charged the damage back to the Lozanos under s. 105 of the Condominium Act and the by-law which had been passed by the corporation.

The by-laws of TSCC 1761 stated that owners would be responsible for damage to other units and the common elements in the event an owner or person residing in the owner's unit caused the damage through an act or omission. The Divisional Court confirmed that this "act or omission" does not require a finding of negligent behavior:

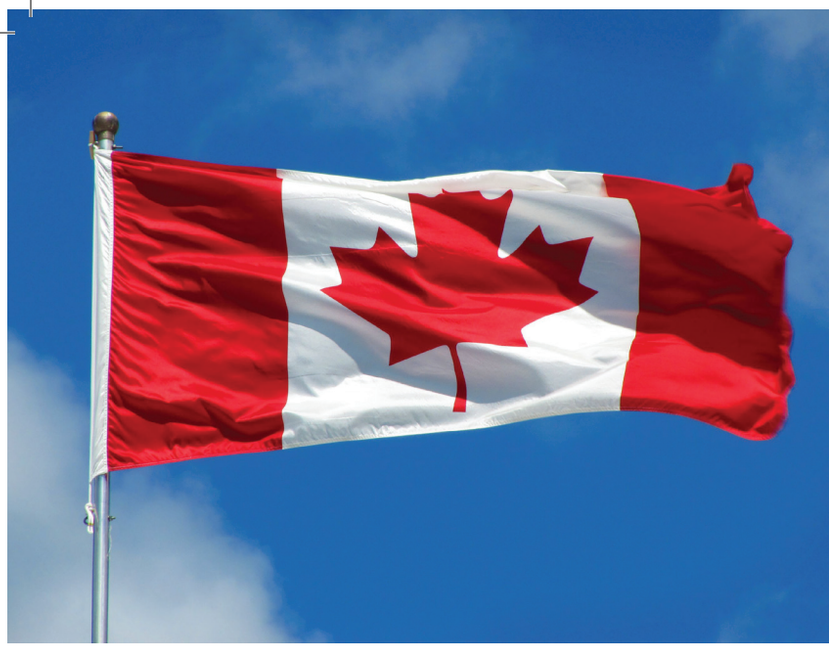
*s. 105 represents a policy decision made by the Legislature to place the burden of paying the insurance deductible on the person (unit owner) that caused the loss, without consideration of whether that unit owner's actions were negligent or otherwise.*

Despite no requirement of negligence, the Divisional Court still confirmed that there was a requirement for an "act or omission" which caused the loss both in fact and in law.

The original application judge was satisfied that the Lozanos' failure to hire a plumber to inspect the toilet would qualify as an "act or omission", as was the Lozanos' prolonged absence from their unit without shutting off their water. The Divisional Court only agreed in part. The Divisional Court expressed significant reservations as to whether the failure to hire a plumber would qualify as an "act or omission" in law, but was satisfied that the Lozanos' prolonged absence qualified.

### Closing Thoughts

If a by-law has been passed which makes owners responsible for damage to other units and the common elements resulting from an "act or omission", then a condominium corporation must show that the loss was caused by an "act or omission". The question of what will qualify as an act or omission remains open to interpretation and debate. What is clear is that no finding of negligence on the part of the unit owner is required, and it is no defence for a unit owner to say that they took all reasonable care to prevent the damage.



## Can Condos Prohibit Displaying of the Canadian Flag?

*June 23, 2021*
*by Rod Escayola*

With Canada Day just around the corner, Canadian flags will start popping up everywhere, including in Condo Land. Inevitably, this will lead to a yearly question: can condos prohibit owners from displaying their maple leaf pride? We tackle this question in this post.

*"May the land over which this new flag flies remain united in freedom and justice; a land of decent God fearing people; fair and generous in all its dealings; sensitive, tolerant and compassionate towards all men: industrious, energetic, resolute; wise, and just in the giving of security and pportunity equally to all its cultures: and strong in its adherence to those moral principles which are the only sure guide to greatness."*
- Lester 8. Pearson, Feb. 15, 1965 (on the first raising of the Flag)

Many corporations have rules preventing the display of, or hanging of, anything from balconies or the erection of any structure in the exclusive-use yard. Many corporations also have rules limiting the colour of draperies or blinds visible from the outside.

At this time of the year, these rules can confiict with the wave of red-and-white patriotism that comes with Canada Day festivities. Sometimes, this leads to all-out conflicts. We've written about one of these cases, earlier this year, when a Canadian Soldier planted his flag on his common element garage.

So, what are the rules applicable to these situations?

**The National Flag of Canada Act**

The National Flag of Canada Act provides that:
Every person who is in control of an apartment building, a condominium building or building in divided co-ownership or another multiple-residence building or a gated community is encouraged to allow the National Flag of Canada to be displayed in accordance with flag protocol.

**What rules can be adopted?**

The best way for condo corporations to deal with this question is to adopt a rule governing the display of our national flag. A rule completely prohibiting the display of the flag may not only be found to be unreasonable under section 58 of the Condominium Act, but could also be contrary to the intent of the federal legislation.

A rule providing some guidelines such as the timeframe during which the flag can be displayed (as an example only, for some 10 days around Canada Day] as well as the size and location allowed would be more appropriate. The rule could also provide that any such display not damage common elements.

**Flag protocol**

The National Flag of Canada Act already provides some guidance by encouraging the display of the flag in accordance with flag protocol. Adopting a rule which incorporates some elements of the protocol could provide corporations with the required tools to ensure that our flag is displayed with pride but, more importantly, with taste.

As importantly for owners, remember to take your flag down at the end of the celebration. This may avoid turning a patriotic celebration into a compliance matter when August rolls around.

## Can the CAT Evict Your Dog?

*June 1, 2021*
*by Graeme Macpherson*

As many of our readers know, on October 1, 2020 the Condominium Authority Tribunal (also known as the CAT), expanded its jurisdiction beyond records requests. The CAT now handles disputes relating to pets, parking, storage and lockers (and chargebacks related to these).

This is a relatively new change, and, as such, many of us were waiting to see how the CAT would approach these cases and the scope of what it could order. In a recent case, the CAT ruled on whether it had the power to evicted pets.

**The facts of the case**

In PCC No 96 v Psofimis, the CAT had to consider whether Mr. Psofimis was breaching the corporation's rules by keeping a dog in excess of the Corporation's 40-pound weight limit. The CAT found that Mr. Psofimis's German Shepherd was in excess of this threshold (based on the American Kennel Club's website indicating that German Shepherds weigh between 50-70 pounds). Accordingly, the question for the CAT was, what it could do about this.

**Can the CAT evict your dog?**

The CAT began its deliberations by noting that the corporation had a duty under section 17 of the Act to enforce its rules. Likewise, Mr. Psofimis has a duty under section 119 of the Act to abide by the rules. These independent responsibilities, the CAT stated, are "crucial to maintaining a harmonious condominium community."

Accordingly, the CAT found that when Mr. Psofimis purchased a unit at PCC 96, he agreed to abide by the rules of the community, which included restricting pets to those below a certain weight limit. The CAT also found it significant that the corporation took several steps to ensure that Mr. Psofimis was aware of the rule, including asking him to sign an agreement, sending reminders to all owners, and sending him a written notice. Mr. Psofimis was also given two opportunities to re-home his dog voluntarily, but he refused to do so. On this basis, the CAT ordered that the dog be evicted within 30 days.

**The costs award**

The CAT's next question was what amount, if any, the Corporation was entitled to charge the owner as a result of having been successful in this application.
The CAT noted its jurisdiction to award damages up to the amount of $25,000 when considering the Corporation's request that its legal fees (in the amount of approximately $5,000) be reimbursed.
The Tribunal noted that it is not fair that all other owners should have to pay the legal fees incurred due to one owner's unwarranted conduct. Mr. Psofimis broke the rules and left the Corporation with no choice but to start a CAT hearing. Accordingly, the CAT awarded the Corporation its fees for preparing a demand letter, the filing fee for the Tribunal, and

all of the legal fees incurred throughout the hearing. The CAT noted that this was an exceptional case where the owner deliberately and repeatedly ignored the Corporation's attempts to resolve the matter on a voluntary basis.

**Lessons Learned**

There are a few takeaways from this.

For owners, it is absolutely vital that you carefully review a condo's governing documents before you move in, especially if you want to have a bigger pet. You don't want to end up in a situation like this one.

For corporations, this case sets a good example of what you should do when faced with an owner's refusal to comply with rules. The Corporation made an honest and real attempt to resolve the matter amicably before bringing it to the next level. This is always the preferable method, and indeed, it is what lead to the CAT to award legal fees to the corporation.

## Can You Enforce a Policy the Same Way as a Rule?

*April 29, 2021*
*by Graeme Macpherson*

The CAT recently released a very interesting case with a lot of useful information packed into it, including some guidance on when a board policy really ought to have been a rule. Let's dive right in!

**Facts of this case**

The owner in this matter lived in her unit for ten years. She had several visitors, but one in particular who apparently visited very frequently, always driving the same Honda. The visitor often parked in the condo's visitor parking spot.

Based on how frequently this was taking place, the condo took the position that the driver of the Honda was not a visitor, but was actually a resident. This meant that they couldn't park in the visitor's parking, according to the Declaration.

This resulted in a series of parking tickets being issued by the condo (on the basis of what the condo labeled a "policy"), and the unit's owner commencing a CAT application, wherein she sought compensation.

**Questions before the CAT**

Accordingly, the CAT had to determine 3 issues:

1. Did the condo have the ability to determine whether the Honda driver was a resident rather than a guest?
2. Was the condo's visitor parking "policy" valid and enforceable?
3. Was the owner entitled to costs/compensation from the condo?

**Guest vs. Resident**

While the condo initially indicated that it had overwhelming evidence that the Honda driver was a resident, by the end of the hearing, this turned out not to be the case. The condo relied on a principle called the "business judgement rule" which means that the decisions of the board of directors should be given a lot of weight, and should not be called into question, unless it is evident that the board has acted unreasonably or unfairly.

The CAT did not agree with the board and concluded that there simply wasn't any evidence suggesting that the condo had thought out or defined how the terms of its declaration would be applied. Instead, it appeared that it inconsistently applied criteria that seemed to have been designed to specifically target the Honda driver.

In the end, the CAT was not able to define whether the driver was a guest or a resident without more evidence.

**Rules vs. Policies**

The next issue for the CAT was to decide whether the Corporation's "policy" was really a "rule". This is important, because what each of these can do and the process to adopt them differ. Ultimately, in this case, the CAT concluded that the Corporation's "parking policy" was really just a rule, which had not been properly enacted. As such, it was unenforceable.

**Rules**

Rules are meant to do one of two things:

- promote the safety, security or welfare of owners or
- prevent unreasonable interference with the use and enjoyment of the units, common elements or assets of the corporation.

To be valid and enforceable, rules must be reasonable and must be adopted following the formal process set out in section 58 of the Condominium Act. This process includes circulating the proposed rule to the owners for period of at least 30 days. During this period (and later) owners can requisition a meeting to vote on the rule.

Once properly adopted, and assuming the rule is reasonable, the rule is enforceable. It can therefore prevent a certain conduct or impose certain obligations aimed at promoting the safety, security or welfare of owners, etc...

**Policies**

What is interesting is that the Condominium Act does not actually include any mention or description of "policies". As a result of this, the legislation does not provide any guidance on what policies can do and on the process to be followed to adopt them.

Still, both the CAT and courts across Ontario have recognized the validity of condominium policies (in the right circumstances). In fact, in two recent cases dealing with the current pandemic, courts have recognized that the enactment of health-related policies during the COVID-19 pandemic is an appropriate exercise of the corporation's authority.

By their nature, policies can be adopted without the requirement of being circulated to or approved by owners. As such, they are easier to adopt. What is important to keep in mind however is that policies cannot replace rules.

Generally speaking, policies are not meant to impose new obligations on owners where none existed. Policies are meant to provide a "consistent and reliable framework" to guide the corporation's decision-making process. They can, for instance, guide the corporation on how it will enforce a rule or on how it will respond to recurrent requests it gets from owners. It helps apply consistency to the corporation's decision making process.

So while a policy can likely not impose new obligations on owners where none existed, it can define or provide clarification on an existing obligation or on how a corporation will enforce this existing obligation. The mask policies adopted by many corporations is the perfect example.

Condo corporations already have a duty to control, manage and administer the common elements. And owners already have an obligation not to carry on an activity that is likely to cause injury to an individual. Add to this the provincial and municipal regulations imposing the obligation to wear masks on interior common elements.

On the basis of the above existing obligations, a condo corporation can (and in fact in some municipality must adopt a policy) explaining and defining how the corporation is interpreting these obligations and how it will enforce it.

**Compensation**

The Applicant was awarded $200 for her costs. While she had sought to receive $25,000 in damages, the CAT denied her this relief as there was no evidence that she had suffered actual, genuine damages (beyond frustration). The CAT noted that it does not have the jurisdiction to impose "fines" in circumstances like this one.

**Lessons Learned**

There was a lot packed into this case! I would encourage managers, directors and owners to review it!

In our view, the lessons that can be taken from this are:

- If a corporation is going to ask an owner to comply with the governing documents, it is vital, that the board have a clear understanding of what "compliance" would mean and require. This standard must be clearly defined and applied equally to all owners. Compliance with the governing documents should not mean different things for different owners, and it should not be used in such a way that targets any owners in particular. This is not to say that all compliance matters are the exact same. Of course every case is different and has its own nuances. The lesson here, is that it is important to clearly define what the governing documents require to obtain compliance, and make sure that this is applied uniformly.
- While this next lesson flows from the one above, it is worth giving it its own bullet here. While the business judgement rule will lend some deference to boards of directors, it is not a be-all-end-all shield. Accordingly, it is very important to make sure that you fully understand your governing documents and what authority they give to the Corporation. When in doubt, you should turn this question to your favourite condominium's lawyer.
- This case is a good reminder to make sure that any rule your corporation seeks to enforce has been enacted properly and in accordance with section 58 of the Act. Otherwise, they may just get invalidated! Again, when in doubt, we recommend asking your friendly neighborhood condo lawyer.


## EV Charging stations: Condos must be ready to accommodate all-electric vehicles by 2035

*June 30, 2021*
*by Rod Escayola*

The federal Minister of transport announced yesterday that Canada is setting a mandatory target for all new vehicles to be zero-emission by 2035. This is accelerating Canada's previous goal, which was set for 2040.

To meet this objective, Canada had previously set the following targets:

- 10% of all new vehicles to be zero emission vehicles (ZEVs) by 2025;
- 30% by 2030; and,
- 100% by 2040.

Naturally, we expect these interim targets to change.

What's clear is that ZEVs are coming and are here to stay. Condos must actively turn their minds to setting up the required infrastructure to accommodate this.

**Process to install EV charging stations in condos**

New regulation was adopted in 2018 to facilitate the installation of EV charging stations in condos. It provided for 2 distincts scenarios:

- When the corporation wishes to install charging stations;
- When an owner proposes to install a station for themselves.

We summarize these two processes below, but you can read more about this in a prior blog of ours.

Due to the cost and complexity of installing the required infrastructure, most corporation will proceed with an hybrid approach, with the corporation overseeing the installation of the infrastructure and owners assuming the responsibility/cost of the installation of their actual EV station and connection to the infrastructure.

**Installation by the corporation**

Corporations can "unilaterally" install an electric charging station or the infrastructure on 60-day notice to owners if the following 2 conditions are met:

- The cost of installation is not greater than 1% of the annual budgeted common expenses for the current fiscal year; AND,
- In the reasonable opinion of the board, owners would not regard the installation of the charging station as causing a material reduction or elimination of the use or enjoyment of units or of common elements or assets of the corporation.

If both these conditions are met, the board can proceed to install the charging station 60 days after having given proper notice to owners. Owners do not get to vote on this. If either one of these conditions is not met, the corporation must give notice to the owner of its intention to install charging stations and must specifically advise them of their right to requisition a meeting of owner to vote on the issue.

The corporation can proceed with this installation if:

- a meeting is not requisitioned;
- quorum is not met at a meeting if one is called; OR
- the majority of the owners at the meeting don't vote against the proposed installation.

**Installation by owners**

The 2018 regulation also provided for a process by which individual owners could apply to have an EV charging station installed for their use. This process can be summarized as follows:

- Owners must apply for such an installation in writing.
- The owner is responsible to provide, at their cost, the

required drawing, specifications or information pertaining to the installation but the corporation must cooperate and provide, as soon as possible, any required information, permission or authorization required by the owner to put together the application.

- The corporation has 60 days to respond to the request (which time frame can be extended on consent). There are very few reasons to reject such a request.
- The owner and the corporation have 90 days to enter into a Section 98 agreement specifying who is responsible to install, maintain, insure and repair the installation as well as who owns it and who can use it.

**Emission Vehicle Infrastructure Program**

Natural Resources Canada had deployed a program aimed at supporting/subsidizing the implementation of EV charging infrastructures in multi-residential buildings. Regrettably, this program closed on June 22 this year. Let's hope it will be renewed.



## Canada: Understanding Board Member Duties: When Condo Boards Fail

*March 2, 2021*
*by Erin Berney*
*Field LLP*

Boards of directors for condominium corporations are typically comprised of volunteers. Depending on the eligibility requirements in the corporation's bylaws, these are more often than not members of the corporation, that is, unit owners. For residential condominiums, this means that the directors are also often lay people, with no particular specialized skills or professional knowledge. Most board members I've met are certainly not well-versed in the nuances and intricacies of condominium law, and many have little to no appreciable background in building maintenance, or even accounting. As a result, many condo boards tend to rely on experts, such as property managers and engineers, to provide them with advice and guidance when problems arise.

As the board of directors is the directing mind of the condo corporation, endowed with all the corporation's legal powers and duties and tasked with making all its decisions, the board is also legally responsible for all the actions it takes, including those of its employees and volunteers. Because of this ability to control the affairs of the corporation and affect its interests, board members are also fiduciaries to the corporations they serve.

The duties of a fiduciary to a beneficiary (the condo corporation, and by extension, the individual members or unit owners thereof) are broad. In Alberta, these duties are codified by the Condominium Property Act. The Act provides that board members shall act honestly and in good faith, with a view to the best interests of the condominium corporation, while exercising the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (see section 28). Generally, so long as the members of the board act in accordance with this statutory standard, they will generally not attract any personal liability for their conduct even where it may have an adverse effect on an interested party such as an individual unit owner. However, a recent decision by the Alberta Court of Queen's Bench confirms that acting honestly and in good faith is not a complete answer when a claim of improper conduct is brought against the condominium corporation itself.

In Lauder v The Owners: Condominium Plan No. 932 1565, 2021 ABQB 145, a ground-floor unit owner in an apartment-style condominium had been living with severely leaky windows for several years. Initially, the board was responsive to the owner's concerns and attempted to perform some minimal repairs. Thereafter, unfortunately, communications broke down, and the board, operating under the (in my view, unreasonable) belief that its repairs were effective, declined further investigation despite continued complaints received from the unit owner that the leaking windows had not yet been fixed.

There is a section of the Act ( section 67) known as sort of an "all-terrain" vehicle that provides relief for interested parties such as unit owners. This section may apply to various situations involving different conduct by a variety of listed actors, and because of this, I often refer to it as simply "the improper conduct section", as that is the catch-all phrase used in the Act. in particular, section 67 may apply when a board of directors has exercised its powers and duties in a manner that is oppressive, or unfairly prejudicial to or that unfairly disregards the interests of a unit owner. This is the specific subsection was relied upon by the owner in the Lauder decision.

The Court concluded that while the board of directors had not been deliberately prejudicial in its dealings with the unit owner, the conduct of the board nonetheless had the effect of being oppressive to that owner. The board's failure to respond to or properly investigate the unit owner's concerns in a timely fashion (which turned out to be legitimate), coupled with a failure to take seriously the owner's complaints of a potentially dangerous problem involving the building envelope (which turned out to be a rather large construction deficiency in the common property), constituted conduct that unfairly disregarded the owner's reasonable, legitimately-held interests.

There was evidence that the board may have misunderstood the corporation's legal obligations, perhaps as a result of being misinformed by its agents, including the property manager. The Court acknowledged that it is possible to misunderstand one's duties without acting in bad faith and while still acting honestly with a view to the best interests of the corporation. But the fact that the board members were acting in good faith, and had been relying on advice from purported experts, such as the property manager (which advice was incorrect), is not a complete answer. Ultimately, this did not shield the corporation from being found liable to the unit owner.

The Court ordered the corporation to complete the final window replacement in the owner's unit (recommended by the corporation's engineer three years earlier), and perform all necessary repairs and/or replacements of any other windows that continued to leak. The corporation was also directed to repair all interior damage to the unit caused by the leaking windows. The entirety of these repairs are to be completed within a fixed period of time. This direction by the Court was not surprising, as it is in line with the general duty of condominium corporations to maintain and keep the common property in a state of good and serviceable repair.

The Court further points out that this duty necessitates more than simply preserving a state that could be deficient or maintaining the status quo, especially if it might pose a danger to the health and safety of occupants. The corporation's duty to maintain the common property actually extends to an obligation to correct deficiencies, or at the very least, to investigate and bring the conclusions to a meeting of the owners. In the Lauder case, not only did the board fail to investigate until the owner engaged legal counsel, 3 to 5 years after first reporting the leaks, but it actually prohibited the unit owner from raising the issue of the leaking windows at an Annual General Meeting where it could be discussed by all the members of the corporation.

The real surprise in this case was that the Court also ordered the condominium corporation to pay general damages to the unit owner, in the amount of $5,000. This was determined to be appropriate compensation for the inconvenience and stress that the owner had suffered as a result of the extreme delays by the board in effecting the necessary investigation and repairs to her unit, among other things (such as entering the unit without permission, and improperly suggesting the owner was responsible for interior repairs to the unit for damage caused by the leaking windows, etc.)

All of this highlights the importance of board members informing themselves as to their own legal powers and duties as well as the obligations of the corporation as a whole. Condo boards are tasked with making all kinds of decisions on behalf of the corporation and this necessarily involves having some understanding the content and limits of their duties and authority. Effective decision-making must be informed, and decisions must at all times be made in accordance with the policies and bylaws of

the corporation, and within the scope of the law. Board members need to familiarize themselves with the Act and the bylaws, and cannot simply rely on a manager who may or may not be providing them with accurate information and advice.

Serving on a board means embracing a philosophy of proactive involvement. The following are some tips for board members and condo unit owners who may be considering a position on the board of their condominium corporation:

- Regularly review and familiarize yourself with and the Act and Regulations, as well as the corporation's foundational documents, such as the plans, bylaws, and any rules or policies approved by the board.
- Develop and implement proper policies and practices for board members, including codes of conduct, confidentiality, human rights, occupational health and safety, and privacy.
- Understand the corporation's contractual obligations and ensure that the board approves contracts via a board resolution passed at a properly convened board meeting after an informed discussion recorded in the minutes.
- Maintain careful, complete minutes of all meetings of the board and the corporation, and keep the minutes in a secure location.
- Distinguish carefully between roles, where the role of a board member may overlap with another role as a service provider for the corporation, and know where to draw the line and declare potential conflicts of interest.
- Stay informed by reading minutes, agendas and supporting materials, attend meetings regularly, and arrive prepared for meetings ready to vote on issues. Dissenting or abstaining on a vote may not be a complete defence to potential liability, so include reasons in the record of the meeting (the minutes).
- Fiscal Responsibility and sound financial management does not mean keeping monthly condo fees artificially low by deferring needed maintenance, repairs and replacements. A wait-and-see or self-help approach that avoids investigating and making proper repairs is not always in the best interest of the corporation simply because it might save money in the short-term. This only ever results in large, unexpected special levies to pay for such repairs, which are almost always more expensive because of having been deferred.
- Listen to unit owners and consider their interests when making decisions that affect them. At all times, deal fairly and consistently with unit owners. Don't be accused of "hearing without listing".
- Don't focus overly on consensus-building at the board level. The board's job is to make decisions on behalf of the corporation, and board members should not feel forced to vote so that decisions are unanimous, or feel held hostage by one or two members who do not agree with the majority. Conversely, once a decision is made, the board should speak with one voice.
-

Board member service is not for everyone, and can often be a stressful, thankless position. And as the Lauder case shows, even when members are generally discharging their duties of good faith and acting with a view to what they honestly believe is in the best interest of the corporation, decisions by otherwise well-meaning boards can still create liability for the condominium corporation. That said, having a proper and thorough understanding of the roles and duties of board members can make serving on a condo board significantly easier and more satisfying. Learning to recognize and avoid the kinds of decision-making that may trigger liability for the corporation or for the board, such as that demonstrated in the Lauder case, will go a long way toward providing greater protection for both.

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# Decisions from the CAT: Policies Are Not Rules


**Boodram v. Peel Standard Condominium Corporation No. 843, 2021 ONCAT 31**

*Written by Jamie Cockburn, edited by Christopher Mendes, and Robert Mullin.*

### Introduction

In Boodram v. Peel Standard Condominium Corporation No. 843, the Condominium Authority Tribunal (the "CAT") discussed the difference between: (1) 'rules,' and (2) 'policies' in the enforcement context. The CAT determined that condominiums cannot use 'policies' to clarify and enforce vague requirements set out in their governing documents. Rather, for enforcement purposes, such uncertainties must be clarified by 'rules' duly enacted with the support of unit owners pursuant to section 58 of the Condominium Act, 1998 (the "Act").

### Facts

Here, the Unit Owner brought an application, challenging Board decisions related to visitor-parking. The Condominium's Declaration stipulated that only 'invitees and guests' were authorized to use the Visitor Parking spaces: i.e., residents could not use such. However, the Condominium's governing documents provided no clarity with respect to the meaning of residents or 'guests.' An individual associated with the Unit Owner frequently used the Visitor Parking spaces. Relying on enforcement-related 'policies,' the Condominium asserted that, based on the frequency of use, the individual was in fact a resident, and was thus not eligible to use the Visitor Parking spaces.

### Policies Cannot Be Used In lieu of Rules for Enforcement Purposes

While the CAT determined that there was insufficient evidence to establish that the individual was a resident rather than a guest, it proceeded to provide guidance on the distinction between 'policies' and 'rules' for enforcement purposes. In support of its use of 'policies' to clarify and enforce the Declaration's Visitor Parking requirements, the Condominium identified caselaw supporting the employment of 'policies' by condominiums, particularly in the context of facilitating section 98 agreements. The CAT acknowledged the importance of 'policies' in condominium governance, stating: "a board may have in place policies that provide a consistent and reliable framework to guide its conduct and conclusions in a decision-making process." However, the CAT determined that 'policies' cannot be used to create and enforce binding requirements on unit owners. Accordingly, the CAT determined that the Visitor Parking policy was unenforceable unless and until it was enacted as a 'rule.' The CAT's reasoning with respect to the unenforceability of 'policies' was grounded in the fact that, unlike 'rules,' the Act does not empower condominiums to create 'policies.' The CAT underscored the fact that the Legislature created a specific 'rule'-enacting regime. The CAT added that condominiums cannot: "by-pass the mandatory, democratic process for enacting rules under section 58 of the Act, and… establish by fiat – as policies, without any sort of democratic notice or review – the sorts of conditions and restrictions the Act indicates are the proper subject matter of rules made under section 58."

### Bottom Line:

Governing documents cannot capture all scenarios. Instances will arise where clarification is required for enforcement purposes. However, while they are an important tool, 'policies' are not 'rules;' they cannot be used to bypass section 58 of the Act. Where ambiguities arise, condominiums must: (1) enact proper 'rules,' or (2) seek an amendment to the relevant governing document. 'Policies' should be utilized where the Act, Declaration, or By-laws permit discretion; 'policies' can guide Boards in the proper use of such discretion. Counsel should be consulted when clarification is required for enforcement purposes.
If you have any questions or concerns about these policies, contact our team of lawyers.

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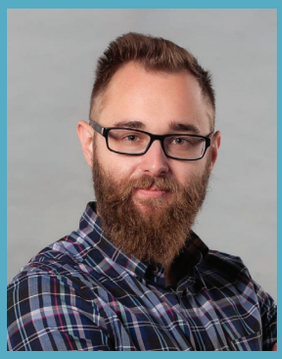
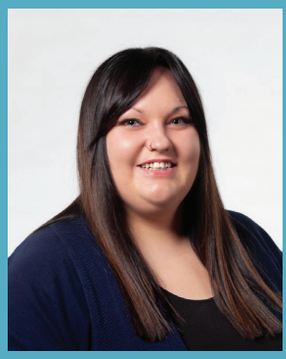


**Benoit Kuziora**
**Accountant (CPA)**



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**Property Manager**

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## Canada: Can Board Members Remove Another Board Member?

*August 25, 2021*
*by Justin McLarty*
*Miller Thomson LLP*

"One of our board members has gone rogue – what can we do?" While this is thankfully not a frequent question that we receive, it can be an extremely challenging situation for boards, property management and legal counsel to address. In the event that a member of a board has gone rogue, other board members understandably ask whether there is anything that the rest of the board can do to address the behaviour, such as removing the individual from the board. Except for specific circumstances, the board members themselves cannot remove another member from the board.

The one circumstance in which other board members alone can remove an individual board member is when the condominium corporation has a procedure to do so as a result of a violation of a Code of Ethics set out in its general operating by-law (or other stand-alone by-law).

This was the situation in the case of Gordon v. YRCC 818. YRCC 818 had passed a by-law that provided that if a member of the board violated the Corporation's Director's Code of Ethics on three or more occasions, that member of the board would be disqualified from serving on the board and deemed to have resigned.

The role of the other board members in removing a director for a breach of a Code of Ethics is to determine whether the Code has been breached and whether the board member in question is properly deemed to be disqualified from serving on the board. While the court in Gordon held that the board had not acted fairly in removing the board member in question, it ultimately upheld the board's determination that the member had been removed from the board.

In the event that a corporation does have a procedure to remove a board member for violations of a Code of Ethics, the corporation's legal counsel should be involved to ensure that the removal is done fairly and in accordance with the provisions of the by-law.

Absent a procedure to remove a board member for a violation of a Code of Ethics, the remaining board members do not have the power or authority to remove another board member. The only possible options to have that board member removed are:

1. The board member no longer meets the qualifications to serve as a director set out in Section 29 of the Condominium Act, 1998 (the "Act") or the corporation's by-laws; or
2. More than 50% of all of the owners vote to remove the member from the board, following the process set out in Sections 33 and 46 of the Act.

While these options may seem frustratingly limited to board members dealing with a rogue member, they do act as a safeguard to ensure that democratically elected board members are not removed from a board if they take positions in opposition to a majority of the board. The best way to ensure that a corporation can efficiently remove a rogue board member is to pass a by-law that provides for a Code of Ethics and a process to remove a board member that violates the Code.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*


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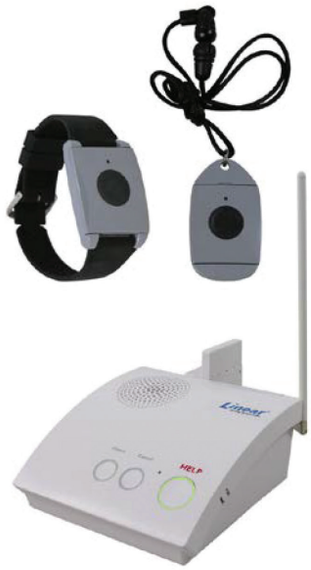

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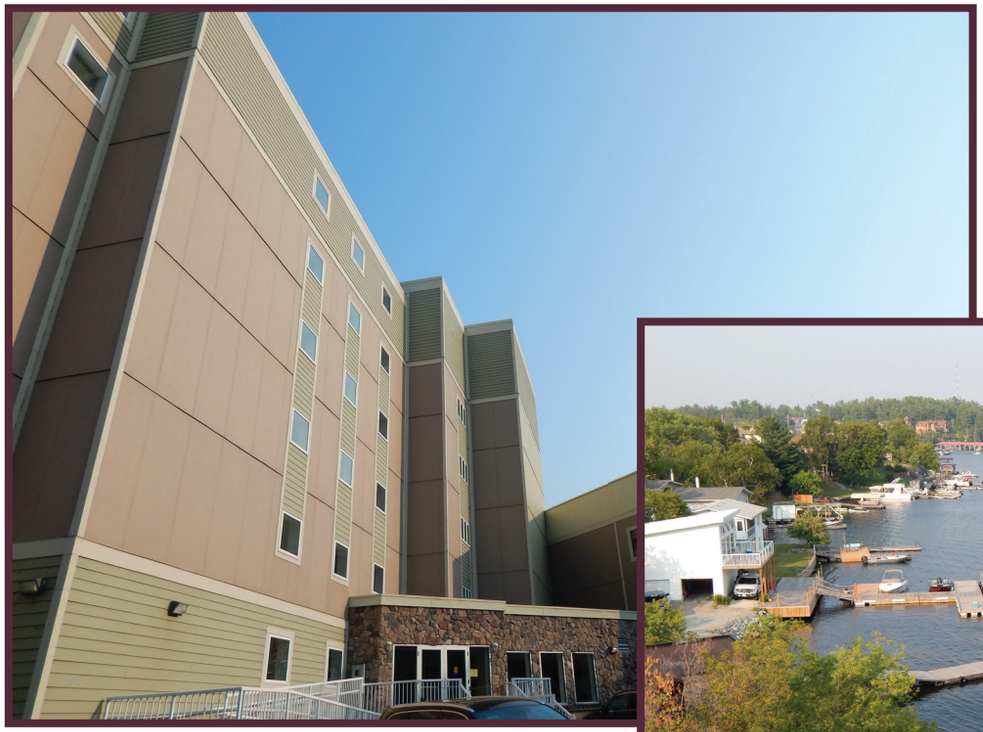

# CCI-NWO - 2020 - 2021 Membership List

*CCI-NWO has 42 condominium memberships representing a total of 1707 units.*

| Condo # | Name | # of Units |
|---|---|---|
| 1 | The Carriage House | 22 |
| 2 | Varsity Square | 48 |
| 3 | Guildwood Park | 70 |
| 4 | Guildwood Park | 40 |
| 5 | Waverley Park Towers | 151 |
| 6 | Guildwood Park | 40 |
| 7 | McVicar Estates | 54 |
| 8 | Glengowan Place | 54 |
| 9 | Parkwest Meadows I & II | 54 |
| 10 | Maplecrest Tower | 98 |
| 12 | Parkwest Meadows III | 50 |
| 13 | Victoria Park | 35 |
| 14 | Parkview Condo | 17 |
| 15 | Boulevard Park Place | 72 |
| 16 | Leland Court | 13 |
| 17 | Signature Court | 36 |
| 18 | Parkwest Manor 1 | 31 |
| 19 | Harbourview Terrace I | 67 |
| 20 | King Arthur Suites | 36 |
| 22 | Parkwest Manor II | 31 |
| 25 | Harbourview Terrace II | 35 |
| 26 | Brookside Place | 24 |
| 28 | Banting Place | 48 |
| 29 | Brookside Manor | 48 |
| 31 | Fanshaw Place | 36 |
| 33 | Marina Park Place | 29 |
| 38 | Hilldale Gardens | 38 |
| 39 | Silver Harbour Estates | 29 |
| 40 | Foxborough Greens | 26 |
| 41 | Pinecrest Manor | 32 |
| 42 | Fanshaw Place II | 30 |
| 48 | Mariday Suites | 32 |
| 50 | Lakeview Suites | 24 |
| 51 | Superior Lofts | 14 |
| 52 | Allure Building | 51 |
| 54 | Terravista Townhomes | 18 |
| 55 | Terravista Condos | 30 |
| 56 | Aurora Building | 48 |
| 58 | Hillcrest Neighbour Village | 19 |
| 60 | Hillcrest Neighbour Village II | 15 |
| 61 | Fountain Hill | 24 |
| **KCC #** | | |
| 10 | Island View | 38 |

## MEMBERS - CATEGORIES

**LEGAL**

| | |
|---|---|
| Cheadles | 622-6821 |
| Rene Larson | 622-2777 |
| Common Ground Condo Law | 416-467-5712 |

**ACCOUNTING**

| | |
|---|---|
| LCPS Professional Corporation | 623-0600 |

**FINANCIAL INSTITUTIONS**

| | |
|---|---|
| Copperfin Credit Union | 877-202-5722 |

**CONSTRUCTION / CLEANING / SECURITY**

| | |
|---|---|
| Carpet Crusader | 251-9313 |
| Clow Darling Mech. Contractors | 623-7485 |
| North-West Electric | 345-7475 |
| Paul Davis (Thunder Bay) | 344-7566 |
| Winmar | 623-8855 |
| Apex Security | 344-8491 |
| Architecture 49 Inc. | 625-6700 |
| DRD Construction Services | 623-4540 |
| First General – Thunder Bay | 623-1276 |
| National Service Professionals | 623-4000 |
| Superior Property Maintenance | 629-6400 |
| Pinchin | 631-5300 |
| KEM Construction | 620-2702 |
| Robert's Plumbing | 345-9353 |
| The Lock Shop | 625-9494 |

**PROPERTY MANAGEMENT / REAL ESTATE**

| | |
|---|---|
| Mirabelli Real Estate Corp. | 346-5690 |
| Synergy Property Mgmt, Inc. | 620-8999 |
| The Property Managers NWO | 630-3098 |
| ReMax First Choice Realty | 344-5700 |
| Mario Tegola, ReMax First Choice Realty | 473-7206 |
| Vince Mirabelli, ReMax First Choice Realty | 474-1765 |
| Alexander Mirabelli, ReMax First Choice Realty | 629-4410 |
| Christine Lannon, Royal LePage Lannon Realty | 620-3217 |
| Kelsey Belluz, ReMax Generations | 472-9292 |

**INSURANCE**

| | |
|---|---|
| Gillons* Insurance | 345-3611 |
| J.D. Barnes | 622-6277 |
| Jones & Associates Insurance | 343-9444 |
| Aon Reed Stenhouse Inc. | 346-7450 |

## Have an idea for the newsletter?
## Have a suggestion for a Seminar topic?

**E-mail nwontario@cci.ca with your ideas,**
**we'd love to hear from you!**

# Times Have Changed!

## An Important Notice to Our Readers

This issue will be our final in-print publication. Beginning with our next issue, we will be sending out information via e-mail, so please make sure you have your e-mail address current with us.

**You can reach us at nwontario@cci.ca to ensure you are up to date.**

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