

# **RISKY BUSINESS**

## **Protecting your Condominium from Occupier's Liability**

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**K**now what you're responsible for. The first place you should look to determine your responsibility as an occupier of condominium property is your provincial legislation on condominiums and on occupiers' liability. In Ontario, the *Condominium Act of 1998*<sup>1</sup> at section 1 defines

*"common elements" as all areas that are not units; and*

*"unit" means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description.*

The Condominium Act also states that for the purposes of Occupiers' Liability, the Condominium Corporation is the occupier of the common elements<sup>2</sup>. It makes no distinction between common elements and exclusive use common elements. Therefore, it would appear that the Condominium Corporation has a duty under the *Occupiers Liability Act*<sup>3</sup> with respect to all the common elements.

But is the Condominium Act and the Occupiers' Liability Act the only legislation your Condominium Corporation must consider? How far does your Condominium's exposure to liability extend? Is your Condominium responsible for what owners do in exclusive use common elements and inside their units when you have no control over these areas? This paper is designed to answer these questions and to assist you on placing limits on your Condominium's liability through establishing a prudent risk management plan for your Condominium Corporation.

### **Who is an Occupier?**

The *Occupiers Liability Act* describes an occupier as:

- Any person in physical control of the premises.
- Any person responsible for the control of any of:

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<sup>1</sup> All references to the *Condominium Act* are to Statutes of Ontario, 1998 c.19.

<sup>2</sup> Section 26 of the *Condominium Act*, *ibid.*

<sup>3</sup> All references to the *Occupiers' Liability Act* are to the 1990 Revised Statute of Ontario at Chapter O.2 as amended.

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- the condition of the premises
- the activities being carried on
- the persons allowed to enter the premises.<sup>4</sup>

There can be more than one occupier.<sup>5</sup> For example, the owner of property, a tenant, a minor left in charge. What about in the case of a Condominium... could an owner with exclusive use of a common element and the Condominium Corporation both be accountable? Section 26 of the Condominium Act<sup>6</sup> would appear to exonerate the owner from liability with respect to the common elements, leaving the Condominium Corporation vulnerable to liability regarding exclusive use common elements.

### *Duty of Care*

*“An occupier of premises owes a duty to take such care as in all the circumstances of the case that is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.”<sup>7</sup>*

This duty of care applies whether the danger is caused by the condition of the premises or by an activity carried on at the premises.<sup>8</sup> With respect to pools and recreational facilities, proper notices should 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 you are prepared to provide the appropriate supervision. You can even owe a duty of care to trespassers.<sup>9</sup> To reduce liability caused by independent contractors, the Condominium Corporation should thoroughly check out all independent contractors to ensure they are competent to perform the work.

The duty of care is also reduced if the risks are willingly assumed and in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with disregard of the presence of the person or his property.<sup>10</sup> However, the duty of care for a person who is on the premises with the intention of committing or who commits a criminal act shall be deemed to have willingly assumed all risks.<sup>11</sup> In certain circumstances, the occupier may also restrict, modify or exclude its liability, so long as the occupier has taken reasonable steps to inform all those whom are owed this duty of care.<sup>12</sup>

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<sup>4</sup> Section 1, *ibid.*

<sup>5</sup> Section 1, *supra* at Footnote 3.

<sup>6</sup> *Supra* at Footnote 1.

<sup>7</sup> Section 3, *supra* at Footnote 3.

<sup>8</sup> Section 3 (2) *supra* at Footnote 3.

<sup>9</sup> Section 4 (3) (4) *supra* at Footnote 3.

<sup>10</sup> Section 4 (1) *supra* at Footnote 3.

<sup>11</sup> Section 4 (2), *supra* at Footnote 3.

<sup>12</sup> Section 4 (3), *supra* at Footnote 3.

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While the duty is limited to a standard of reasonable safety, the courts have determined that owners and property managers must take an **active** role in ensuring the safety of all who enter the premises. In fact, in *Mortimer v. Cameron*<sup>13</sup> the duty is described as **proactive**. Mortimer sued the owner of an apartment building as a result of an alcohol-fuelled, playful shoving match turned tragedy when Mortimer fell into a wall that gave way. The Judge stated an occupier cannot “do nothing” in the face of a known risk.

Let’s play you are the Judge. In this hypothetical case, Prudent Pines Condominium Corporation has a good record of inspections, the Board of Directors makes sure that all legislation regarding safety issues are followed and maintenance and repairs are done on a timely basis. Unfortunately, a unit owner falls asleep while smoking and starts a fire. The smouldering fire quickly spreads throughout the building causing smoke inhalation injuries to other owners who were able to escape the building by following the fire procedures put in place by the management. Is Prudent Pines Condominium Corporation liable? One would think not since they obviously do not have control over careless smoking in an owner’s unit.

Now let’s look at the decision in *Bakhtiarti v. Axes Investments*<sup>14</sup> wherein a fire in a residential building was caused by a careless smoker. The Judge relying on the decision in *Mortimer v. Cameron* stated:

*“In my view, the law required (the Owner/Property Manager) to take **positive** action to make their premises reasonably safe in the circumstances which prevailed between 1986, when they first bought the premises, and 1995 when the fire occurred, notwithstanding the fact that **they did not create the danger**. During that period of time, the publicly available information regarding the vital role played by self-closing suite doors in preventing the spread of smoke throughout the whole building was so compelling that any reasonable landlord/occupier ought to have realized that their absence created a situation of danger to all the tenants in the entire building in the event of a fire in a suite. They had an ongoing obligation to review the safety of their building in the light of developments in fire safety. Given the great danger and the simple and inexpensive solution, reasonable care required prompt action. **It was not “reasonable care” in such circumstances for them to wait until legislation forced them to remove the danger...**” (Emphasis added.)*

So surprisingly, Prudent Pines Condominium Corporation could be found liable if the safety issue should have been known to them by taking “reasonable care” even if it was not a legislated requirement to do so.

This proactive duty goes beyond mere liability. Provincial and Criminal Code charges may also be faced. Let’s look at *City of Toronto v. York Condominium Corporation No. 60*. In this case, a fire started in a condominium unit which did not have a smoke alarm.

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<sup>13</sup> [1994] O.J. No. 1356 (Ont. Ct. Appeal).

<sup>14</sup> (2001) 24 MPLR (3d) 248 (Ont. Sup. Ct.).

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Both the unit owner and the Condominium Corporation 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.”*

Despite the fact that York Condominium Corporation No. 60 had encouraged and even obtained smoke alarms for unit owners to purchase at a low price, the fact that compliance was not confirmed for all units resulted in it 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.<sup>15</sup>

More commonly known examples of Occupiers’ Liability are failure to maintain and repair the common elements and failure to ensure adequate security measures are taken to protect owners on the common elements. In a British Columbia case, the court ruled that the condominium and the property manager were largely accountable for injuries sustained by a child who fell in a pot hole. It was revealed that the child’s parents complained about the pot hole to the property manager and no action was taken. In a Toronto case, a landlord was held responsible for damages resulting from an assault against a woman in the underground parking garage. The court reviewed the security measures in place for the building and found it sorely lacking. There was no adequate lighting, no surveillance cameras, no patrols and no closure to the garage entrance.<sup>16</sup>

These examples clearly show that Condominium Boards and management have a positive duty of care. If they see a potential problem they must act. They cannot rely on the unit owner. The *Condominium Act, 1998* provides the power to act when it states:

*“If an owner has an obligation under this Act to maintain the owner’s unit and fails to carry out the obligation within a reasonable time and if the failure presents a potential risk of damage to the property or the assets of the corporation or a potential risk of personal injury to persons on the property, the corporation **may** do the work necessary to carry out the obligation.”<sup>17</sup>*

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<sup>15</sup> “The Ontario Fire Code: Don’t Get Burned”, 2002 article by Jim Davidson, Esq., Nelligan, O’Brien Payne LLP.

<sup>16</sup> “Director & Manager’s Responsibility and Liability”, article by Ronald S. Danks, Esq., Simpson Wigle.

<sup>17</sup> Section 92 (3), supra at Footnote 1.

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Given the above examples, perhaps the word “may” should be interpreted as “shall” for the purposes of legal obligations and liability concerns. Insurance policies should be carefully reviewed on a regular basis and a plan for risk management should be put in place. It is better to be safe than sorry.

Condominiums can also be deemed a “workplace” under the Occupational Health and Safety Act<sup>18</sup> which will trigger the Condominium to comply with its workplace safety obligations under the governing legislation. An example where workplace safety will be triggered is high-rise window cleaning.

### **And now Negligence may mean Jail...**

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.

**Section 217** states: *“Every one who undertakes, or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person arising from that work or task. Convictions can result in jail time or serious fines for criminal negligence causing bodily harm or death.”*

A condominium that is convicted can be charged with the following:

- i) fines up to \$100,000 on summary conviction;
- ii) fines, with no stated limits, for a conviction by indictment;
- iii) probation orders that can include orders for restitution for losses, and orders requiring the condominium to publish its conviction, sentence and remedial measures being taken.

An individual director could face criminal charges if he was aware of the 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.

### **Plan for Risk Management**

There are many laws, local ordinances, and by-laws in addition to your provincial and federal legislation governing condominiums and occupiers’ liability that may impose liability on Condominium Corporations, so a Board is well advised to seek assistance of experts for establishing a risk management plan. Consider the following tips for establishing a risk management program for your Condominium:

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<sup>18</sup> R.S.O 1990 c. O1.

***Establish Risk Management Goals***

- ✓ Establish risk management goals by consulting with your local fire and police departments and your condominium professionals, such as your property manager, your insurer, your lawyer and your engineer.
- ✓ Determine what inspections are needed and how often.
- ✓ Keep a log of the inspections completed and any remedial action taken.
- ✓ Maintain appropriate insurance.

***Fire Safety and Prevention***

- ✓ Consult the Fire Department to ensure that your building is fire safe.
- ✓ Have a plan for a safe exit from fire or other emergencies.
- ✓ Test fire equipment regularly to ensure it will function properly when needed and keep records of the results and the maintenance and repair work completed.
- ✓ Ensure fireplace flues and dryer vents are maintained and free from debris.
- ✓ Ensure doors have self-closing latches to prevent the spread of fire and smoke.

***Roadway Safety***

- ✓ Post speed limit controls for common area driveways and garages and enforce them.
- ✓ Keep common element roadways, driveways, parking lots and side walks free from debris, snow and ice and repair damage to these areas immediately.

***Common Area Safety & Security***

- ✓ Consult your Police Department for advice with respect to security issues specific to your condominium and enact a security plan. Follow the plan.
- ✓ Define duties and reporting relationships for board members, managers and staff to ensure common elements are constantly monitored.
- ✓ Fence off unsafe common areas and repair them immediately.
- ✓ Keep dangerous areas locked, for example the roof or the boiler room.
- ✓ Take necessary action to remove dangerous animals/pets.

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- ✓ Ensure that all indoor and outdoor recreational/ exercise equipment are well-maintained and safe for use.
- ✓ Maintain adequate lighting, gates, patrols and surveillance cameras.
- ✓ Have elevator equipment and balcony railings tested regularly and keep records of the results and the maintenance and repair work completed.

### ***Pool and Recreational Safety***

- ✓ Post notices around pools and other recreational areas that if no supervision is being provided, the user is at his own risk. Include notices that minors require adult supervision.
- ✓ Mark the deep end and the shallow end of the pool (show water depths) and post a sign that no diving is allowed.
- ✓ Close pool and recreational facilities after midnight. Most accidents occur at night.
- ✓ Pass a rule to prohibit alcohol on the common elements including the pool area.
- ✓ Install sturdy hand rails and non-slip tiles with traction strips around the pool area and on pool steps.
- ✓ Install self-locking gates to securely enclose outdoor pools and ponds.
- ✓ Maintain life-saving equipment near the pool and exercise facilities.
- ✓ Keep pool chemicals and other hazardous substances in a locked storage facility.
- ✓ Maintain and check pool water to ensure proper levels of pool chemicals.

### ***Workplace Safety***

- ✓ Carefully check out all independent contractors to ensure they are competent to perform the work and have the proper liability insurance and workers' compensation coverage for employees.
- ✓ Hire qualified contractors to perform regular maintenance work. Avoid using volunteers where trained professionals are required.
- ✓ Develop workplace safety protocol and inspect the common areas where the work will be completed to ensure it is safe.

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- ✓ Ensure staff and contractors are properly trained to carry out the work, including safety training.
- ✓ Ensure staff and contractors are not instructed to complete any work that is dangerous and which they are not trained to do.

### *The Obligation to Insure*

- ✓ Identify your risks and consult your Insurance Agent to ensure adequacy of the Condominium's insurance policy.
- ✓ Conduct proper insurance appraisals on a periodic basis to ensure adequate insurance coverage is in place.

### *Tips for Reasonable Safety*

- ✓ Establish communication channels with owners and tenants.
- ✓ Listen to concerns of owners, tenants and visitors and take appropriate action.
- ✓ Have regular meetings between the Board and owners to discuss liabilities and risks faced by the Corporation.
- ✓ Have a written plan that can be passed on to new personnel or Board members when personnel and the Board changes.
- ✓ Remember waivers and releases will not likely help if the Corporation was negligent.
- ✓ Be vigilant! If you think there may be a liability issue, there probably is.

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This paper has been prepared in summary fashion on March 31, 2006. You should not rely on this information without consulting your professionals.