

Consultation Discussion Paper

Condominium Act of Newfoundland and Labrador



Background

The Department of Government Services is currently reviewing its legislation governing condominiums in the province. The current *Condominium Act* is not reflective of the new kinds of condominiums in the marketplace. In redrafting this piece of legislation, the Government of Newfoundland and Labrador is attempting to provide protection for first-time condominium buyers and current owners, improve the day-to-day operation of condominium corporations as well as allowing for new types of condominium developments. The proposed changes to the legislation would have an impact on developers as well as lenders and unit owners. In compiling this document, the department researched condominium legislation from other Canadian jurisdictions. Nova Scotia and Ontario have the most recent and far reaching condominium legislation and are referenced throughout the document.

Traditionally, a condominium is a multiple-unit dwelling in which there is separate and distinct ownership of units and joint ownership of common areas. Condominium owners hold title to their units and share responsibility for the operating costs of the balance of the property (common elements such as lobbies) that make up the condominium. The building is managed by a condominium corporation whose board of directors is comprised of unit owners. The condominium corporation is guided by by-laws in its management of the building. The board may pass by-laws to regulate the affairs of the corporation. The by-laws must be reasonable and consistent with the act, regulations and declaration. Each by-law must be ratified by a majority of the owners at a meeting called for that purpose.

Proposed Changes

There are changes to the legislation currently under consideration that will provide consumer protection as well as assist condominium corporations to improve the day-to-day running of the corporation. If there are any additional measures that have not been included in the consultation document, please forward these suggestions to the department. Comments are asked to be submitted by October 31, 2008. This will allow time for the finalization of recommendations to government on any legislative changes for the new condominium act.

The proposed changes to the legislation are described below:

Disclosure

It is proposed that the new act provide strong protection for buyers by setting out information to be provided when they purchase a new condominium unit.

A condominium corporation is formed when a declaration and description are registered at the Registry of Condominiums. A description includes a detailed plan of layout and location of the development, surveys of land, location of the buildings, and plan of buildings and specifies boundaries of each unit. The declaration is the founding document that details what constitutes common element versus what constitutes each unit, establishes the percentage of ownership for each unit and the percentage each unit has to contribute to the common expense fees.

It has also been proposed that the new act contain a provision requiring the developer to provide the purchaser with a disclosure statement, which must have a table of contents and contain specific information concerning the unit and project including:

- General description of the property (see above);
- The number of units the developer intends to sell and/or lease;
- The estimated completion date for the construction of amenities;
- A copy of the proposed declaration and by-laws; and,
- Costs reported in the reserve fund study.

This table of contents will help purchasers find information quickly and easily in the declaration, by-laws, rules or disclosure statement about such things as whether a building on the property has been converted from a previous use or whether the building has any restrictions on pets. Purchasers are always encouraged to review the purchase agreement and the disclosure document carefully with an experienced condominium lawyer.

Should a disclosure provision be included in the new legislation?

Estoppel Certificate

The current *Condominium Act* does not require that an estoppel certificate be issued upon purchase of an existing condominium unit. It is proposed that the new legislation contain a provision that requires the issue of an estoppel certificate in the purchase of an existing condominium.

An estoppel certificate is issued by a condominium corporation to a buyer of a pre-owned unit. The estoppel certificate provides details on: the condominium monthly fees; if the current unit under sale is in default of these fees to the condominium corporation; that the condominium building is insured; the by-laws of the corporation are registered; and, that the common property of the condominium corporation has not been mortgaged or transferred. It may also contain information about the reserve fund, whether the corporation is suing or is being sued and special assessments. The purchaser's lawyer would request and obtain an estoppel certificate for the condominium and pay the appropriate fee to the condominium corporation.

Should an estoppel certificate provision be included in the legislation?

Reserve Fund and Reserve Fund Studies

Currently, the *Condominium Act* is silent on reserve funds and reserve fund studies. Reserve funds and reserve fund studies are at the discretion of the individual condominium corporations. It has been proposed that the new act contain a provision requiring mandatory reserve funds and reserve fund studies.

a) Reserve Funds

If the proposed provision is approved, each condominium corporation would be required to establish a reserve fund for the major repair and replacement of common elements including the roof, exterior of the building, roads, sidewalks, sewers, heating, electrical, plumbing, elevators, laundry and recreational facilities.

Should a reserve fund provision be included in the legislation?

b) Reserve Fund Studies

Shortly after a condominium is registered, a physical site inspection would be done to provide an estimate of the expected life of the common elements of the corporation, together with an estimate of the replacement cost of each element. The act would stipulate that the study must be conducted by a qualified person, such as an architect or engineer. This study would be presented to the board. The corporation would be required to conduct studies at periodic intervals to ensure that the fund is adequate.

In Ontario's condominium legislation, the board of directors of the condominium corporation, within 120 days of receiving the reserve fund study, would propose a plan for future funding so that the fund will be adequate to meet the requirements of the study.

Within 15 days of proposing the plan, the board would send a notice to the owners containing a summary of the plan and areas, if any, where the proposed plan differs from the study. The board would implement the plan 30 days after sending the notice to the owners.

Nova Scotia's condominium legislation requires new condominium developments to have a reserve fund study completed by the developer and filed with the declaration. It also requires that this study be updated after five years and a new reserve fund study completed after 10 years. This requirement is limited to condominium developments with 10 units or more.

Nova Scotia also requires that a developer, who is converting an existing building into a condominium complex, complete a reserve fund study and that this study is available to potential buyers. Existing condominiums are given a transition period of two years to complete a reserve fund study.

Should a reserve fund study provision be included in the legislation?

Mediation and Arbitration

The existing *Condominium Act* does not address the issues of settling of disputes between unit owners and the condominium corporation except for appeal to be heard in the Trial Division of the Supreme Court. It is proposed that the new act would outline procedures for dispute resolution.

In other jurisdictions, disputes can be resolved through mediation and/or arbitration. In Ontario, for example, in the case of a dispute, their *Condominium Act* allows the two parties to select a mediator to attempt to resolve the dispute. The mediator recommends a settlement to the dispute that does not have to be accepted by the parties. Each party is required to share in the payment of the mediator's fees and expenses. If the parties are unable to reach a settlement through the mediation process, then the parties have the option of arbitration. Both parties agree on the selection of the arbitrator and on payment of the arbitrator's fees. The decision of the arbitrator is binding. There is no appeal to the Trial Division of the Supreme Court.

Nova Scotia's condominium legislation does not speak to mediation. It legislates arbitration. The Registrar of Condominiums recognizes a qualified list of arbitrators that disputing parties can access. The disputing parties are responsible for the fees and costs of the arbitrator. If one party requests the services of an arbitrator, the other party is bound to this arbitration.

Should a mediation and/or arbitration provision be included in the legislation?

Liens

It is proposed that the new act contain a provision stating that the condominium lien for unpaid fees ranks ahead of any mortgage, lien or charge other than a lien for taxes.

Our current *Condominium Act* allows the condominium corporation a right to a lien if there is a failure of a unit owner to pay their share of fees. The corporation also has the right to register this encumbrance over the unit and this lien can be enforced in the same way as a mortgage. However, as a result of a lack of priority standing, often there is not enough remaining equity to satisfy the condominium corporation's lien.

Should this lien provision be included in the new legislation?

Board of Directors

Traditionally, members of the condominium corporation are comprised of the unit owners. It has been proposed that the new act contain a provision regarding the composition of the board members of the condominium corporation.

Some condominium corporations have reported that there is difficulty in recruiting board members especially when many of the unit owners are seniors. It has been suggested that the corporation board of directors be allowed to be composed of unit owners and/or a designate of a unit owner that is an immediate family member. There would also be a termination clause for this member should the unit owner cease their ownership.

Should a designate provision be included in the legislation?

Insurance

It has been proposed that the new legislation contain a provision that would require condominium corporations and unit owners to carry full replacement value insurance on the common elements of the condominium corporation.

At present, the legislation is silent on the issue of insurance. However, most condominium corporations do carry insurance. Individual unit owners are responsible for their own unit insurance. Additionally, it has been suggested that appraisals be conducted on a regular basis to reflect the value of the units and the development and that these values be adjusted in the insurance policy to reflect current value.

Should an insurance provision be included in the legislation?

Different Types of Condominiums

The Department of Government Services surveyed other jurisdictions regarding the types of condominium developments that are currently recognized. Below are the different types of condominium that are being considered for the new legislation. The Department welcomes comments on any or all of the condominiums outlined.

Phased condo. Under the proposed legislation, units and common elements would be permitted to be added in stages, over a maximum 10-year period and still be part of one condominium corporation. Phased condominiums would eliminate the current need of constructing and registering individual buildings as condominium corporations and establishing extensive easement and cost-sharing agreements allowing the unit owners in these properties to have the benefit of the use and enjoyment of the shared facilities and services and ensuring that each of the corporations bears its proportionate share of responsibilities imposed by these agreements.

Common elements. Common elements condominium corporation (CECC) consist only of common interests. They are condominium corporations that have no units. For example, homes could be on separate pieces of land, with facilities such as a golf course or recreational centre as the common elements condominium.

Vacant land or bare use condominiums. Under this type of condominium corporation, the units can consist of vacant land upon which, following registration, owners can decide later what to build. A vacant land condominium allows a developer to sell land as units in a condominium corporation rather than in a plan of a subdivision. This permits the developer to create a development where the purchasers can build their own homes or buildings on the units but the costs for the roads, facilities and services will be commonly shared expenses of the corporation.

Commercial condominiums. Similar to residential condominiums, these types of arrangements are growing in the business market. The purchaser owns the title to a unit of real property which is the space the office or store occupies. The owner of the condominium also owns a common tenancy with owners of other units in the common area, which includes all the driveways, parking, elevators, outside hallways, recreation and landscaped areas, which are managed by a business, homeowners' or tenants association.

Hotel condominiums. Condominium hotels are developed and operated as luxury hotels. The unit owner essentially owns the condo deed to a specific hotel room and pays property taxes, insurance and maintenance fees as with a traditional condominium. Most owners then opt to participate in the hotel's rental program in exchange for management fees and a share of the rental revenues. The hotel management company rents out the room on a rotating basis with other available units.

Should these different types of condominium provisions be included in the legislation?

Additional changes

In addition to the major changes outlined above, the Department is also contemplating the inclusion of the following provisions:

- Consent of an encumbrancer will no longer be required for any amendments to the declaration.
- A detailed list outlining the powers of the corporation that are only excisable with the owners' consent will be provided for in the new act. For example, the condominium corporation, with the owner's consent may: acquire by purchase, gift, bequest or any other means, real or personal property and sell, mortgage, convey or otherwise deal with the property; borrow money; grant easements affecting the common elements; grant leases of the common elements; make capital expenditures; and, levy special assessments for extraordinary common element expenses.
- The duties of the Declarant, after a sale of the majority of units in a condominium development to the condominium corporation will be included in the new act. Some of these duties include: provide the seal of the corporation; the minute book for the corporation containing copies of the declarant, by-laws, rules and regulations and any amendments; any existing warranty or guarantee for equipment, fixture or chattel included in the sale of either the units or common elements; any architectural, structural, engineering, mechanical, electrical and plumbing plans; any plans for underground site service, site grading, drainage and landscaping and any cable-television drawings.
- A provision for the amalgamation of condominium corporations will be included in the new act.
- The process to be followed where substantial damage through fire or natural disaster has occurred will be provided in the new act.
- Provisions in the sales and purchase agreement that would include: a definition of a unit as a percentage of the condominium corporation; a stipulation that common area charges are done at the same rate; the definition of parking; how condominium fees are paid; the rules and regulations of the condominium corporation; a copy of the budget; and a schedule in which the purchaser acknowledges they are purchasing a condominium.
- A provision that it would no longer be necessary to file duplicate copies of deeds in the Registry of Condominiums when a unit is sold.
- Condominium corporations would be required to prepare annual financial statements that are to be made available to the unit owners upon request. The Registrar of Condominiums may also request a copy of these statements.
- A provision that expropriation would not alter the status of a property as a condominium and that the expropriating authority does not become a member of the condominium corporation.
- Every condominium corporation will be required to submit an annual filing with the Registry of Condominiums.

Should these provisions be included in the legislation?

These are the measures being considered for inclusion in the new act. If there are any additional measures that have not been included in the consultation document, please forward these suggestions to the department. Comments are asked to be submitted by October 31, 2008. This will allow time for the finalization of recommendations to government on any legislative changes to the new condominium act.

Please forward comments to:
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