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### CONDOMINIUM LAW AND ADMINISTRATION

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#### Publisher's Special Release Note 2021

The pages in this work were reissued in April 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the April 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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Condominium Law and Administration is an invaluable resource for those involved in conveyancing, development, condominium management or the representation of condominium corporations, whether inside or outside of Ontario.

This release contains updates to the case law and commentary in Chapters 2 (Registration of a Condominium), 4 (The Declaration and Description), 5 (The By-Laws and Rules), 7 (Purchasing from a Developer: The Agreement of Purchase and Sale Post-July 1, 2008), 10 (Condominium Resale), 13 (The Corporation and the Board of Directors), 17 (Financial Management), 20 (Insurance, Maintenance and Repair), 23 (Legal Proceedings) and 24 (Oppression Remedy). Additionally, legislative updates have been made to the Ontario — Condominium Act in Appendix K.

## Highlights

- **Condominium Act — Section 84 — Non-Payment and Arrears; Section 85 — General Principles; Section 85 — Legal Expenses —** A condominium should not apply a good governance or cost benefit analysis and abandon collection efforts against a unit owner who refuses to pay common expense charges and other charge-backs mandated by the condominium declaration and by-laws when the legal costs involved exceed the amounts owed by the unit holder. If this would be done, such costs would be charged to innocent unit owners who have paid their own common expense charges. Such an approach would be unworkable and unacceptable and would encourage disregard for their financial obligations on the part of condominium owners: *Ottawa-Carleton Standard Condominium Corp. No. 671 v. Friend et al.* (November 9, 2021), 2021 CarswellOnt 16682, 2021 ONSC 7379 (Ont. S.C.J.), additional reasons (January 4, 2022), 2022 CarswellOnt 103, 2022 ONSC 47 (Ont. S.C.J.).
- **Purchasing from a Developer: The Agreement of Purchase and Sale Post-July 1, 2008 — Occupancy — Tentative Occupancy Date Addendum —** Yong Kee Ching and Margaret Ng (the “Chings”) entered into an Agreement of Purchase and Sale to purchase a condominium unit from Pier 27 Toronto Inc. The tentative occupancy date was delayed almost two years; the confirmed occupancy date (the “CO Date”) was set and then extended several times to a date that was almost two years later. By the CO Date, the Chings’ mortgage financing had expired and they could not secure alternate financing to close the sale. The Chings terminated the agreement two weeks before the CO Date and the developer refused to return the Chings’ deposit. The Chings sought the return of their deposit, damages in an agreed amount representing the increase in value of the condominium unit as of the date of termination, and punitive damages for the developer’s purportedly “dishonest performance” of the Agreement. (para. 1) Alternatively, the Chings sought relief from forfeiture of their deposit. The developer claimed that any extensions of the CO Date resulted from unavoidable delays; alternatively, if such extensions did not result from unavoidable delays, then any such anticipatory breach of the agreement was affirmed by the Chings’ conduct. The developer stated that until about two weeks prior to the CO Date, the Chings had not expressed any displeasure with the extensions and had continued to treat the agreement as remaining in force.

While nothing in the agreement permitted either party to arbitrarily extend the confirmed occupancy date, the Ontario Superior Court of Justice noted that section 4 of Schedule X to the Agreement permitted the developer to extend the CO Date in the event of causes outside the developer's control. The developer argued that the numerous extensions of the CO Date resulted from such unavoidable delays. Finding that the evidence of such delays lacked both specificity and documentary support, the court held that the developer had breached the agreement by extending the CO Date via a series of notices related to construction delays in the roughly two-year period prior to the CO Date. Nonetheless, the court found no evidence that the developer had acted dishonestly in its performance of the agreement; the developer believed that its reasons for extending the CO Date were permissible under the agreement and the *Ontario New Home Warranties Plan Act* R.S.O. 1990, c. O.31. Referencing the principles outlined by the Ontario Court of Appeal in *Ali v. O-Two Medical Technologies Inc.* (2013), 2013 CarswellOnt 17092, 2013 ONCA 733, the court also concluded that despite the developer's repeated repudiation of the agreement, the Chings continued to treat the agreement as subsisting: they chose finishes and upgrades and, in the month before the CO Date, attempted to secure the developer's permission to allow two prospective purchasers to inspect the Chings' condominium unit.

Finding that forfeiture of the Chings' deposit would not result in a "windfall" to the developer, the court declined to grant the Chings relief from forfeiture. The court noted that because of the Chings' refusal to close on the CO Date, the developer had incurred substantial occupancy costs for almost two years until the condominium unit was resold, and had paid a staging fee, listing commission and a real estate commission on the sale of the unit. Virtually all of the Chings' deposit covered those costs and fees. The Chings' action was dismissed: *Ching v. Pier 27 Toronto Inc.* (2019), 2019 CarswellOnt 17268, 2019 ONSC 6073 (Ont. S.C.J.), affirmed (2021), 2021 CarswellOnt 11021, 2021 ONCA 551 (Ont. C.A.).

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