OVERVIEW OF CHANGES TO ONTARIO'S CONDOMINIUM ACT

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April 3, 2017

Major changes are coming to the legislation governing Condominiums in Ontario. After years of consultation, and pleas for reform, the government of Ontario introduced Bill 106, *Protecting Condominium Owners Act*, in the spring of 2015. The bill received royal assent on December 3, 2015, and is expected to be effective sometime in 2017. The new legislation will not repeal the current act governing condominiums in Ontario, being the *Condominium Act, 1998*, S.O. 1998, C. 19 (the "Act"), but will make many amendments, which will, when fully enacted:

- establish the Condominium Authority, a body which will oversee the regulation of condominium corporations;
- establish a dispute resolution tribunal;
- establish the office of the Condominium Registrar and institute new filing requirements for condominium corporations;
- institute mandatory training for directors of condominium corporations; and
- enact a separate act to licence and regulate condominium property managers.

The new legislation makes several other technical and substantive changes to the Act, which will be discussed below. It will be essential for anyone involved in the governance of an Ontario condominium corporation to have a grasp on what the changes will mean for the long-term and day-to-day operations of a condominium.

A quick note regarding regulations. The amendments defer many items to the regulations, or permit the regulations to make adjustments to the provisions of the Act in the future. The regulations will, amongst other things: prescribe a default standard unit, establish criteria for determining if a unit is subject to a lease or not, provide a list of persons qualified to perform a reserve fund study, and determine eligibility requirements for appointments to the promised Condominium Authority Tribunal. The new regulations have not been finalized as of the date of this paper.

Condominium Authority

The amendments contemplate the establishment of the "Condominium Authority", a not-for-profit corporation (not a crown agency) charged with regulating Ontario's condominium corporations and ensuring compliance with many of the provisions of the Act. The Authority will also be mandated to oversee the new Condominium Authority Tribunal ("CAT"), which is explored in the following section. The legislation does not actually establish the Condominium Authority, but provides the process under which will it will come into existence. The Lieutenant Governor will designate, by regulation, a not-for-profit corporation as the Condominium Authority, which, as a pre-condition to receiving the designation of the "Condominium Authority" will have entered into an "administrative agreement" with the Minister[1]. This agreement is to include provisions for the governance of the authority, maintenance of adequate insurance, and all matters that the Minister considers necessary for the authority to carry out the administration of the provisions of the Act and regulations delegated to the Condominium Authority. The Condominium Authority will be charged with the administration of all of the "delegated provisions" of the Act and Regulations (the precise provisions are not defined). Although not a crown corporation or agency, once established the Minister it will be able to, in order to protect the interests of the public, unilaterally amend the administrative agreement[2], give policy directions to the Condominium Authority (which are deemed to form part of the administrative agreement)[3], and alter the objects or purposes of the Condominium Authority[4]. Additionally the Minister will be able to appoint a minority of the members of the board of directors for the Condominium Authority[5].

The Condominium Authority will also be charged with creating forms and setting and collecting fees and costs related to the administration of the delegated provisions[6]. The Authority will be funded, at least in part, by the condominium corporations themselves through new assessments, which are to be established by the Authority[7]. The amount of the assessment likely won't be a flat assessment for all condominium corporations as the amendments specifically permit the Authority to assess corporations according to their class, number and type of units (as well as any other consideration which the authority deems appropriate)[8]. Once a corporation is subject to an assessment, the assessed amount forms part of the common expenses of the corporation[9] (and therefore payable by the unit owners according to their proportionate contribution to the common expenses).

[1] Minister of Government and Consumer Services
[2] *Condominium Act, 1998*, S.O. 1998, c. C. 19, s. 1.2(3), as amended 2015, c. 28, Sched. 1, s. 2 (not in force)
[3] *Ibid.* s. 1.3(1) and (2)
[4] *Ibid.* s. 1.24
[5] *Ibid.* s. 1.10.
[6] *Ibid.* s. 1.29.
[7] *Ibid.* s. 1.30 (1).
[8] *Ibid.* s. 1.30 (2) and (3).
[9] *Ibid.* s. 1.30 (5).

Condominium Authority Tribunal ("CAT")

Anyone who has lived in a condominium complex and/or has been involved in the governance of a condominium corporation knows that condominiums are fertile ground for disputes. Among other factors, the close proximity of those who sit on the board of a condominium corporation and the unit owners often gives rise to the perception that by-laws and rules are enforced in an ad hoc and sometimes arbitrary manner. Currently, aggrieved unit owners do not have access to an inexpensive and efficient dispute resolution process. The current form of the Act mandates dispute resolution through private mediation, arbitration and/or relief from the court[10]. While mediation and arbitration promised to be a quick, inexpensive and efficient means of dispute resolution, the experience for many has been very different. Simple disputes over the enforcement of provisions in declarations often cost the parties tens of thousands of dollars in lawyer and arbitrator fees.

The Condominium Authority Tribunal (guaranteed to be affectionately known by its acronym "CAT") will be established if and when the regulation establishing the Condominium Authority has been enacted[11]. The Condominium Authority may appoint persons who meet the prescribed requirements[12] to the Tribunal for four-year renewable terms[13]. The Condominium Authority will appoint a chair and at least one vice-chair of the Tribunal[14].

With limited exceptions (e.g. determination of the priority of a lien, and issues surrounding the sale of condominium property), an owner, the corporation, or a mortgagee may apply to CAT for dispute resolution of any matter[15]. The amendments provide for a basic two-year limitation period to make an application to CAT, which runs from the date the dispute arose[16]. This will likely be a relatively soft limitation period as it can be extended by an additional year where the tribunal is satisfied that the delay was incurred in "good faith" and that no "substantial prejudice" will result to any person affected by the delay[17].

While a condominium corporation will not necessarily be involved in every dispute before CAT (owners would be able to bring other owners before the tribunal), the amendments provide that the condominium corporation must be served with all applications involving a unit within the property over which the corporation has authority. The condominium corporation will have the ability to intervene in any dispute involving a unit in the complex which the corporation governs[18].

Envisioning the potential for misuse of an efficient and inexpensive dispute resolution process and the burden that such misuse might bring to the system, the amendments specifically endow the tribunal with the authority to dismiss an application without a hearing where the tribunal is of the opinion that the application is frivolous and/or vexatious[19]. The amendments also include a "clean hands" provision, empowering the tribunal with the ability to dismiss an application where it finds that the applicant filed documents which it knew or ought to have known contained false or misleading information[20].

A dispute before CAT will not necessarily be resolved by way of a formal hearing as the amendments provide that any application may be held in writing, in person, by telephone, by video conference or by email (or other electronic means). In order to promote efficiency, CAT is mandated to adopt the most expeditious method of determining questions arising in a proceeding before it that affords all persons directly affected with an adequate opportunity to know the issues and to be heard on matters in the proceeding[21].

It should be noted that the amendments do not completely do away with the Alternative Dispute Resolution provisions of the Act (as detailed later), and the provisions establishing CAT actually provides that CAT may direct the parties to an application to participate in an "alternative dispute resolution mechanism", which includes (by definition of that term) negotiation, conciliation, mediation or some other form of informal dispute resolution process CAT deems appropriate[22]. It is not clear whether a mediator will be available during scheduled hearing days (as is the case with the Landlord and Tenant Board hearings). CAT will also be able to order compliance with a settlement reached by the parties[23].

The tribunal will have the exclusive jurisdiction to determine questions of fact and law, but will specifically not have jurisdiction to make inquiries or make a decision about the constitutional validity of a provision of the Condominium Act or the Regulations[24]. An appeal of law only will be available to the Divisional Court[25].

The Tribunal will specifically be empowered to make the following orders:

1. An order directing compliance with anything for which a person may make an application;
2. An order prohibiting a party from taking an action or requiring a party to take a particular action;

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[10] *Ibid.* s. 132 (4).
[11] *Ibid.* s. 1.32(1).
[12] Not known at this time
[13] Supra 2, s. 1.32 (2) and (3).
[14] *Ibid.* s. 1.33.
[15] *Ibid.* s. 1.36.
[16] *Ibid.* s. 1.36 (6).
[17] *Ibid.* s. 1.36(7).
[18] *Ibid.* s. 1.38 (2).
[19] *Ibid.* s. 1.41 (1).
[20] *Ibid.* s. 1.41 (2).
[21] *Ibid.* s. 1.39.
[22] *Ibid.* s. 1.40.
[23] *Ibid.* s. 1.47 (2).
[24] *Ibid.* s. 1.42 (1) and (2).
[25] *Ibid.* s. 1.46 (2).

3. An order to pay compensation for damages as a result of non-compliance up to $25,000 (or higher amount if prescribed);
4. An order to pay costs of another party and/or the costs of the Tribunal (which are to be determined with the rules of the tribunal, which are unknown at this time);
5. An order for the detention and preservation of property; and/or
6. Order security[26]

Additionally, CAT will be endowed with an equitable power to make an order directing "whatever relief the tribunal considers fair in the circumstances."[27] Finally, CAT may also impose a penalty on a condominium corporation where the corporation has failed, without a reasonable excuse, to permit a person to examine copies of records of the corporation (the penalty is capped at $5,000, or less if prescribed) [28].

The fact that parties in front of CAT will almost always be a condominium corporation and a unit owner will mean that the collection of monetary awards will be highly successful. All monies to be paid under an order (whether compensation, costs or penalties) are to be paid within 30 days. Any unsatisfied amounts owing by a unit owner to a corporation after 30 days may be added to the contribution to the common expenses payable for the owner's unit[29]. Going the other way, the amendments will now permit a unit owner to offset any amounts awarded to the unit owner by the corporation against the owner's contribution to the common expenses where the award is unsatisfied for 30 days[30]. Furthermore, a corporation will not be permitted to maintain a proceeding before the tribunal or a court in Ontario (unless granted leave) where the corporation owes any amount pursuant to an order of the tribunal or under an assessment under new section I.1[31].

The amendments also mandate that all orders of CAT are to be made public (in the prescribed manner)[32]. As discussed later, this will be a welcome addition as it should create an accessible pool of precedents which is currently lacking.

It should be noted that access to the tribunal may not be available across the province. The amendments specifically state that the regulations may provide that the provisions in the Act which permit applications to be made to the tribunal and establish the jurisdiction of the tribunal to make orders are only available in prescribed geographical areas[33]. It is not known if the initial regulations will limit the geographical reach of CAT.

Condominium Returns

The amendments add Part II.1 to the Act which will establish the office of the Condominium Registrar and the new oversite regime of condominium corporations by the Registrar. The board of directors of the Condominium Authority, once constituted, will be responsible for appointing an individual to the role of Condominium Registrar. The Minister will be responsible for appointing the Registrar until such time as the Condominium Authority is constituted (or if the Condominium Authority ceases to exist)[34]. The Registrar will be responsible for maintaining a publicly available electronic database containing the information of every return and notice received under the new Part II.1[35].

Every condominium corporation will be responsible for filing an initial return, a turn-over return, and an annual return (in a form approved by the Registrar)[36]. The contents of the returns will be prescribed and are not available as of this date. Every return is to be verified by a director, officer, manager or other individual having knowledge of the corporation[37]. Corporations will be subject to late filing fees[38] and a person will be liable for a penalty for making a false or misleading statement or omission with respect to any material fact in the returns[39]. The amendments impose a positive obligation on the directors and officers of a condominium corporation to take reasonable care to ensure that the corporation does not make a false or misleading statement or omission about a material fact on the filings[40]. Such a person could be liable for a $25,000 fine (while the corporation can face a fine as high as $50,000)[41]. A defence is available to such a person who did not know of the contravention and through the exercise of reasonable due diligence could not have known of the contravention[42].

Declaration

While the Declaration (and all other governing documents of the corporation) will have to be consistent with the Act, the amendments specifically provide that a Declaration does not have to be "reasonable"[43]. This codifies the position of the courts which have held that the declaration's provisions do not have to be reasonable as is a requirement of the by-laws and rules.

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[26] *Ibid.* s. 1.44(1).
[27] *Ibid.* s. 1.44(1)(7).
[28] *Ibid.* s. 1.44 (3); Currently the penalty is a mere $500
[29] *Ibid.* s. 1.45 (1) and (2).
[30] *Ibid.* s. 1.45 (3).
[31] *Ibid.* s. 23.1 (1).
[32] *Ibid.* s. 1.48.
[33] *Ibid.* 177(1) 0.1
[34] *Ibid.* s. 9.1(1).
[35] *Ibid.* s. 9.7.
[36] *Ibid.* s. 9.2 (2).
[37] *Ibid.* s. 9.2 (3).
[38] *Ibid.* s. 9.6.
[39] *Ibid.* s. 9.4.
[40] *Ibid.* s. 136.2 (2).
[41] *Ibid.* s. 136.2 (3).
[42] *Ibid.* s. 136.2 (1).
[43] *Ibid.* s. 10(9).

Subsection 7(4) of the Act lists a number of non-compulsorily inclusions in a declaration. In addition to the discretionary matters currently permitted, the amendments will specifically allow the declaration to include a provision detailing the circumstances that may result in the addition of any amount to the contribution to the common expenses payable for the owner's unit to indemnify or compensate the corporation for an actual loss (as prescribed) that the corporation has incurred in the performance of the corporation's objects and duties[44]. The amendments also provide that the regulations may list additional content which may be included in a declaration[45].

Where the declaration is establishing a condominium corporation which will govern a conversion project (essentially the creation of a condominium complex in a pre-existing building), the amendments will require that it contains confirmation from the Registrar under the *Ontario New Home Warranties Plan Act* that the units and the common elements have been enrolled in the Ontario new Home Warranties Plan and that the builder and the vendor are registered under the *Ontario New Home Warranties Plan Act*[46].

The amendments provide that regulations may be made which govern the form and content of the declaration (and description)[47]. Currently the Act provides that provisions in a declaration (and by-laws and rules) which are inconsistent with the Act are to be read out of the declaration (or by-laws or rules). The amendments provide that the regulations may specify what does and what does not constitute an inconsistent provision[48]. It is conceivable, therefore, that the regulations in the future may include a list of specific provisions (perhaps common provisions) which are to be read out of declarations. The regulations may also include reference to a provision which is deemed to be included in a declaration that was registered prior to May 5, 2001.[49]

Determination of Contribution to the Common Expenses

Often within a development, the proportionate share each owner is required to pay towards the common expenses can vary significantly. Currently the declarant does not have to disclose how each unit's proportionate share of the contribution to the common expenses were determined. The amendments, when effective, will require an additional statement to be made in the declaration stating how the units' proportionate shares were determined[50]. Such a determination could be made in reference to the physical size of the units, or perhaps the size of the exclusive use common elements for each unit in relation to others.

Right of Entry

The right-of-entry provision (which currently authorizes the corporation to enter a unit with reasonable notice) is expanded to permit the corporation or a person authorized by the corporation to enter a unit or exclusive use common elements without notice in the event of an emergency or other prescribed events if permitted by the declaration or a by-law of the condominium corporation[51].

Corporation Can't Impose Penalties, fines, etc.

Section 17 of the Act is amended by adding a provision which specifically provides that a corporation cannot levy a fine/penalty or any amount which does not indemnify or compensate the corporation for an actual loss (to be prescribed) that the corporation incurred in the performance of the corporation's objects and duties.[52]

Shared Facilities Agreements

New Section 21.1 will require that where any of the entities listed (two or more corporations, a corporation and a person, a corporation and a declarant, two or more declarants, etc.) share or propose to share in the provision, use, maintenance repair, insurance, operation or administration of any land, property, or assets of a corporation (or proposed), or any facilities or services, the parties must enter into a "Shared Facilities Agreement". The parties to a Shared Facility Agreement may make, amend or repeal joint by-laws or rules governing the provision, use, maintenance repair, insurance, operation or administration of any land, property or proposed property subject to the shared facilities agreement[53]. These Shared Facility Agreements will also be required to be registered (in a manner to be determined by the regulations)[54].

Officers and Directors of Corporations

The amendments include a provision which expressly provides that Officers and Directors are not liable for any termination fee or monetary consequence of the termination of agreements the board votes to terminate (notwithstanding what may be included in the agreements) where the Act permits the board to terminate an agreement (e.g. telecommunications agreements, and certain leases of common elements entered into by the declarant before the turn-over).[55]

Another big change for future directors (and possibly current ones) will be the implementation of mandatory training. Individuals who sit as directors on condominium boards will (at some date in the future) have to attend and complete mandatory training. In addition to the current list of events which will automatically disqualify a sitting

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[44] *Ibid.* s. 7 (4) (a) (not in effect yet).
[45] *Ibid.* s. 7 (4) (e) (not in effect yet).
[46] R.S.O. c. O. 31.
[47] *Ibid.* s. 177(2.1)
[48] *Ibid.* s. 177(2.2)
[49] Clause 177(1) 2.1 – 2.3
[50] *Ibid.* s. 7(2)(d.1)
[51] Subsection 19(1) and (2).
[52] Subsection 17(4).
[53] *Ibid.* s. 21(4).
[54] *Ibid.* s. 21.1(1).
[55] *Ibid.* s. 22(10.1).

director (having the status of bankrupt, being found to be incapable, etc.), the amendments provide that a director will cease to be a director immediately where the individual fails to receive the prescribed training within the prescribed time[56]. The amendments permit regulations to be made authorizing the condominium authority to designate the training courses which are mandated and designate the organizations that are authorized to provide the courses[57].

An amendment to Clause 56(1)(a) of the Act (which lists matters that may be the subject of by-laws) will permit a condominium corporation to pass a by-law which will specifically deal with the disqualification of directors. Currently a director can only be disqualified where the director becomes bankrupt, is incapable of managing his/her property or where a lien has been registered against his/her unit for unpaid common expenses. Possibly a future by-law could expand the disqualifying events to include the sale of his or her unit, imprisonment or failure to pay common expenses when due (rather than require the registration of a lien by the corporation over which the director could exert control).[58]

Information Certificate

In addition to the requirements to make periodic returns to the condominium authority, the amendments also impose an obligation on the corporations to produce and circulate an "information certificate" to each of the unit owners. This certificate will have to include:

1. a statement of the address for service of the corporation;
2. a statement of the names and address for service of the directors and officers of the corporation;
3. a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;
4. a certificate or memorandum of insurance for each of the current insurance policies; and
5. all other information which is prescribed (not known at this time).

This certificate will be required to be circulated quarterly (or at other prescribed frequencies)[59]. In addition, the amendments provide that further certificates may be required to be sent to the owners featuring further prescribed information[60].

Election of Directors

Amendments to the provisions concerning the election of directors should improve the awareness of board elections and better solicit candidates from the owners. Currently the Act requires a notice of a meeting to elect the directors to be sent to the unit owners. The notice is to include a list of those individuals who have notified the board in writing of their intention to run as a candidate for a position on the board. The notice is also to include a statement advising if there is a board position reserved for voting by owner-occupied units (to be changed to "non-leased voting units"). Additional provisions to the Act introduce a requirement for a "preliminary notice" of a meeting to be sent to unit owners[61]. Where the preliminary notice is in regards to a meeting to elect directors, the new provision provides that the notice shall contain a request that every individual who intends to be a candidate notify the board in writing (by a date to be set in the notice and determined in accordance with the regulations).[62] This preliminary notice is to be sent twenty days prior to the notice for the actual meeting being sent (which is to be sent fifteen days before the actual meeting at which the election will take place) [63]. This is a welcome improvement from the current wording which does not contain a statutory requirement for the solicitation of candidates.

Unit Owners Requisition of Meeting

An amendment to the provision permitting unit owners to requisition a meeting removes the requirement that the owner actually be recorded on the register the corporation is required to maintain of owners and their addresses for service[64]. So long as the unit owner has given notice of its address for service, he or she will be entitled to requisition a meeting (and receive notice). The new provisions also provide that a unit owner cannot requisition a meeting if that owner is in arrears of his/her/its contributions to the common expenses for a period of 30 days or longer (parallels the current loss of voting rights for owners who in arrears)[65]. Where the meeting to be requisitioned is for the removal and/or election of a director occupying the seat reserved for voting by the owners of non-leased voting units (currently called "owner-occupied units"), the requisitioning owners must be owners of non-leased voting units[66]. The amendments promise that the new regulations will introduce a standard form for the requisition of a meeting by the unit owners which the requisitioning owners will be required to deliver to the president or secretary of the corporation[67].

Under the current wording of the Act, a condominium corporation is required to call a requisitioned meeting within 35 days (unless the requisitioning owners consent

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[56] *Ibid*. s. 29(2)(e)
[57] *Ibid*. s. 177(3.3).
[58] It is noted, however, that amended Subsection 29(2) (which lists events which will immediately disqualify a sitting director) does not include a provision disqualifying a director who violates a corporation's by-law which provides for additional disqualifying events.
[59] *Ibid*. s. 26.3(a).
[60] *Ibid*. s. 26.3(b).
[61] *Ibid*. s. 45.1
[62] *Ibid*. s. 45.1(1)(a)
[63] *Ibid*. s. 45.1.
[64] *Ibid*. s. 46.1
[65] *Ibid*. s. 46 (1)(c)
[66] *Ibid*. s. 46.1 (2).
[67] *Ibid*. s. 46 (5) and (6).

to the business to be presented at the meeting being added to the next annual general meeting's agenda). Now the board will have 10 days in which to respond to a requisition at which time it will be required to advise if the board will call a meeting or advise if there is a deficiency in the requisition. Where there is an issue, the owners will have 10 days in which to cure the defect[68]. Where no defects are identified, the board is deemed to have agreed to call the meeting, and unless the requisitioning owners have requested that the business be added to the next AGM, the board will be required to call and hold the requisitioned meeting within 40 days[69]. The requisitioning owners will have recourse to CAT where the corporation fails to respond to a requisition[70].

Record of Owners and Mortgagees

The provisions of the new section 46.1 place a positive obligation on a new owner to advise the corporation within 30 days of becoming an owner of the owner's name and identify the owner's unit (in accordance with the regulations)[71]. The corporation is required to maintain a register which will detail the names of all unit owners (and the unit(s) they own), the owner's address for service, the mortgagees name and address for service, and whether the terms of the mortgage permit the mortgagee to vote and/or consent in place of the unit owner. The register is also required to record whether the unit owner and/or mortgagee(s) have agreed to receive communication from the corporation by electronic means[72].

Notice to Owners

Notices of meetings are to be given in writing at least fifteen (15) days before the meeting (unchanged). As stated above, however, the new preliminary notice to solicit candidates for an election must be sent twenty (20) days before the actual notice is given[73]. Notices will now be permitted to be delivered via electronic commination (e.g. email) provided the unit owner (or mortgagee) has consented to receiving communication by electronic means (the regulations may provide for a standard form of consent)[74]. The default means of providing notice will remain leaving a copy of the notice in the mailbox for the unit or by personal service (note that an owner may advise that he/she/it does not wish to receive the notices in the mailbox).[75]

Voting by Mortgagee

Once the amendments are effective, in order for a mortgagee to exercise its right to vote under a mortgage, the mortgagee's name must appear in the section 46.1 register at least four days prior to the date of the notice and the mortgagee must have advised the owner and corporation at least four days prior to the meeting of the mortgagee's intention to exercise its right to vote.[76]

Declarant and the Corporation

The amendments contain new provisions which are designed to keep unit owners from being prejudiced by the conflicting interests of the declarant during the time the declarant controls the corporation. A new provision specifically provides that a corporation cannot acquire an interest in a unit at a time when a majority of the Board are those who were elected when the declarant owned a majority of the units (unless the corporation acquires the interest for no consideration)[77]. Furthermore, an attempt by a declarant to insulate him/her/itself from liability from the corporation will not be effective, as any provision in the governing documents of a corporation which purport to affect a remedy that the corporation may have at law against the declarant will not be enforceable.[78]

Quorum

Currently the quorum for a regular members' meeting remains those owners who own 25% of the units. The current wording of the Act permits a corporation to increase the threshold to 331/3 by way of a by-law[79]. The amendments would remove the ability to raise this threshold. While the new quorum provision provides that the quorum is 25% (unchanged), where the meeting is a turn-over meeting or an AGM, the new provisions provide that the quorum threshold is reduced to 15% after two attempts to achieve the standard 25% quorum (unless a by-law is passed which provides that the quorum threshold is to remain at 25%).[80]

Voting

The current wording of the Act provides that an owner must be entitled to receive notice and be entitled to vote in order to cast a ballot at a meeting where a vote is taken. The amended provision provides that the owner must be registered under the new section 46.1 registry (see above) or be required to appear in the register in order to vote[81]. This amendment removes the possibility that the owner could be disenfranchised because of a mere technicality.

Currently where at least 15% of the units are "owner-occupied units"[82] at the time of the turn-over meeting, the condominium corporation is required to reserve one board position for which only owners of the owner-occupied units may vote[83]. The amendments will alter

[68] *Ibid*. s. 46 (7).
[69] *Ibid*. s. 46 (11).
[70] *Ibid*. s. 46 (15).
[71] *Ibid*. s. 46.1 (2).
[72] *Ibid*. s. 46.1 (3).
[73] *Ibid*. 47 (1)(c).
[74] *Ibid*. 47 (4)(c).
[75] *Ibid*. 47 (4)(d).
[76] *Ibid*. s. 48 (1).
[77] *Ibid*. s. 26.1 (1).
[78] *Ibid*. s. 26.2 (1).
[79] *Ibid*. s. 50 (1).
[80] *Ibid*. s. 50 (1.1).
[81] *Ibid*. s. 51 (1).
[82] Used for "residential purposes" and not subject to a lease.
[83] Supra. 80, s. 51(6).

this situation so at least one person who is the owner of an owner-occupied unit (to be re-named a "non-leased voting unit") will have to request that the reserved position be created (as there won't automatically be a reserved position)[84]. Once the amendments take effect, so long as there is at least one non-leased voting unit, that owner can force the corporation to reserve a seat for voting by owners of non-leased voting units *provided* that the non-leased voting units do not constitute a majority of the units.[85]

Newly added section 51.1 provides that where matters require unit owners to consent (e.g. amendment to the declaration), the majority of the unit owners of a single unit may exercise a right to consent (i.e. majority among the unit owners rule). No consent can be granted, however, where the unit owners are equally divided as whether to consent or not.[86]

In addition to the current method of voting (show of hands or a recorded vote), the Act will now permit voting by ballot, or, if the corporation's by-laws allow, voting by electronic means[87]. The amendments will also specifically empower the corporation to pass a by-law to permit and establish a procedure for voting by mail-in ballot[88].

Proxies

A unit owner will now be able to execute a proxy for multiple meetings[89] (currently a proxy is only valid for one specific meeting). There will be a standard proxy form as the new wording provides that the proxy shall be in the prescribed form[90] (currently it may be in the prescribed form).

Retention of Records

Financial records are to be kept for a minimum of six years (unchanged), while the retention periods for other records are to be prescribed. The Act will now permit corporations to retain the records in electronic format only (in accordance with prescribed requirements, if any).[91] In addition to the current list of records to be retained, a condominium corporation will in the future be required to keep a copy of all of the returns it files with the registrar (pursuant to part II.1) as well as all of the proxy forms and/or ballots from a meeting of owners which are submitted[92].

Examination of Records

Corporations are required to permit a purchaser, unit owner, or mortgagee to examine or obtain copies of the corporation's records (with certain exceptions such as employment records). The amendments provide that regulations may be added which will establish processes, forms and fees for an entitled person to examine records.[93]

The current statutory penalty of $500 for non-compliance by a corporation to permit the examination of records has been repealed. The amendment provides that the regulations will set the penalty for non-compliance, which the corporation "shall pay".[94] As noted earlier, CAT is empowered to make an order requiring a corporation to pay an owner up to $5,000 where the corporation fails to make the records available. Arguably a fine imposed by CAT could be made in addition to the statutory requirement of a corporation to pay a unit owner under subsection 55(8) where it failed to make the records available.

By-Laws

The current wording of section 56 the Act empowers the board to make By-laws concerning the matters listed which "are not contrary to the Act, or to the Declaration". Curiously the amendments remove the words "are not contrary to the Act, or to the Declaration".[95]

The current wording of the provision permitting condominium corporations to pass a standard unit by-law is amended so that the by-law may now apportion the responsibility for "maintaining" improvements in the units in addition to the responsibility to repair the improvements. The current wording provides that the standard unit by-law is to determine responsibility for repairing after damage and insuring the improvement. Amendments to the wording inserts "or" between "insuring" and "repairing" [96], clarifying that such a by-law may deal with insuring separately from repairs (and now maintenance).

Borrowing By-law

A Corporation will now have to seek a mandate to borrow any money. Currently the Act provides that a corporation cannot borrow money for expenditures which are not listed in the budget for the current fiscal year unless the corporation has passed a by-law specifically authorizing the corporation to borrow the money to cover the item. This section is repealed and replaced with a provision which simply provides that a Corporation must pass a by-law specifically authorizing <u>any borrowing</u> unless the regulations provide otherwise[97]. Therefore even if the expenditure was listed, the corporation would now have to seek and receive the approval of a majority of unit owners to borrow money to cover a listed expenditure if revenues were not sufficient to cover it (unless the

[84] *Ibid*. s. 51(6).
[85] *Ibid*. s. 51(6)(b).
[86] *Ibid*. s. 51.1(2).
[87] *Ibid*. s. 52(1).
[88] *Ibid*. s. 56(1)(c.1).
[89] *Ibid*. s. 52(4).
[90] *Ibid*. s. 52(4).
[91] Subsection 55(2.1).
[92] Ibid. s. 55(1)(10).
[93] Subsection 55(3) & (3.1).
[94] *Ibid*. s. 55(8).
[95] *Ibid*. s. 56(1).
[96] *Ibid*. s. 56(1)(h).
[97] *Ibid*. s. 56(3).

regulations are amended to permit borrowing without a by-law in prescribed circumstances).

Assessment By-law

The current wording of subsection 56(4) of the Act provides that where the ***board*** passes a by-law authorizing the corporation to object to an assessment under the *Assessment Act* (Ontario), the corporation will have the capacity to appeal an assessment on behalf of the owners. This provision is amended so that it is clear that the corporation must pass the by-law in the usual manner[98] (with an affirmative vote by the unit owners) and this is not a special circumstance where such a by-law would be effective without the approval of the unit owners.

By-law Effective

Subsection 56(10) is amended so that the regulations may now alter the number of votes required to confirm a By-law[99]. Currently the wording simply provides that a By-law is not effective until a simple majority of the unit owners vote to confirm it and it has been registered on title. Perhaps the regulations will be amended in the future to establish different thresholds for different types of By-laws.

Rules

The amendments will require a corporation to send a copy of the text of section 46 (requisition of a meeting of owners) and section 58 (which provides that the board may make rules to promote the safety, security or welfare of the owners or prevent unreasonable interference with the common elements, the units or assets of the corporation) in a notice of a proposed rule or amendment or repeal of an existing rule[100]. Currently the wording provides that the notice must simply contain a statement providing that the owners have the right to requisition a meeting. This additional requirement should help ensure unit owners are aware of the process to follow in order to properly requisition a meeting where the owner objects to a rule (recall that the corporation will also now have to alert the requisitioning owner of any deficiencies in the requisition).

Auditors

The current wording of the Act permits the owners to dispense with the requirement to appoint an auditor at every AGM where the condominium consists of less than 25 units and all of the unit owners consent (in writing) as of the date of the annual general meeting. The amendments, when effective, will cause an owner who is delinquent in his or her contribution to the common expenses (for at least 30 days) to lose his or her right to consent to the exemption[101]. As the exemption requires all of the owners to consent, a consequence (perhaps unintended) would appear to be that small condominiums which would otherwise be able to avoid the audit will not be able to exempt the corporation from the audit requirements where just one owner is delinquent in his or her obligations to contribute.

Financial Statements

The amendments remove the current requirement that the financial statements are to be prepared in accordance with Generally Accepted Accounting Practices and is replaced with a requirement that the financial statements be prepared in accordance with "Canadian Accounting Standards for not-for-profit organizations" as prescribed.[102]

The amendments will also alter the content of the financial statements. The amendments remove the requirement to include the balance sheet, statement of operations and a statement of changes in financial position. Replacing these items will be a) the budget of the corporation for the fiscal year to which the financial statements apply; b) a statement of the financial position; and c) a statement of operations, which is now to specifically include: a statement of changes in net assets and a statement of cash flows.[103]

Contents of Auditor's Report

The amendments provide that the auditor's report will have to contain an auditor's statement advising whether the statement of reserve fund operations (and any other prescribed information that relates to the operation of the reserve fund and that is contained in the financial statements) do or do not fairly represent the information contained in the reserve fund study and the plan to implement the reserve fund study.[104] This additional requirement should provide unit owners with an easy to understand red flag where the reserve fund is not meeting the funding recommendations of the reserve fund study or the requirements of the plan.

Condominium Guide

In an effort to better educate new condominium owners about the nature of condominiums and how they are governed, a new Condominium Guide, which is to be prepared by the Minister or the Condominium Authority, will be required to be delivered to potential purchasers of a unit. The information contained in the Condominium Guide is to include: a) information for purchasers of units or proposed units, which the Minister or the Condominium Authority considers appropriate; b) Information about the rights and obligations of owners, occupiers of units and the board in a corporation; and c) such other matters as the Minister considers appropriate[105]. The production of this guide will be

[98] *Ibid*. s. 56(4).
[99] *Ibid*. s. 56(10).
[100] *Ibid*. s. 58(6)(d).
[101] *Ibid*. s. 60(6).
[102] *Ibid*. s. 66(1).
[103] *Ibid*. s. 66(2).
[104] *Ibid*. s. 66(4).
[105] *Ibid*. s. 77.1.

welcome, provided it will be produced in a format that is easy to digest and understand for the average person (and hopefully more inviting than the bulky disclosure statements and convoluted table of contents which are currently mandated).

The rescission rights of a prospective purchaser (purchase from the declarant) are enlarged so that the purchaser may now rescind an agreement to purchase a unit within ten days of the latest of the date the purchaser received the signed agreement of purchase and sale, the disclosure statement and the new Condominium Guide.[106]

Declarant's Website

Where a declarant maintains a website concerning a condominium project, the declarant may, in the future, be mandated to include certain material on the site. Pursuant to the amendments, regulations may be made to govern the material that is to be made available on a website that a declarant or an affiliate of the declarant maintains or makes use of in relation to a property or proposed property[107].

Disclosure Statement

The amendments will eliminate the requirement to include a Table of Contents in the disclosure statement (which is required to be delivered to a prospective purchaser). In its place will be a requirement to provide a "summary prepared in accordance with the prescribed requirements[108]." It is not known at this time what the regulations will require to be included in the summary.

Once the amendments are effective, disclosure statements will be required to be made in accordance with the regulations[109]. Therefore future disclosure statements may be more uniform than they are now.

In addition to the budget statement (which is the statement for the one-year period following registration of the declaration), the declarant will have to include in the disclosure statement a statement whereby the declarant indicates what matters, if any, he/she/it knows or ought to know may result in an increase in the common expenses of the corporation after the budget statement year, and a statement of the amount of any potential increase that is likely to take place a result of any of the circumstances disclosed[110].

Requirement for Disclosure Statement for Conversion Projects

The amendments, when effective, will extend many of the warranty protections afforded to newly constructed condominiums to purchasers of units in conversion projects. Where a proposed condominium is a conversion project (e.g. from a residential apartment complex), the disclosure statement will now be required to include a number of new items, including: a statement that the project is a conversion project; a list of the pre-existing elements (essentially what will become the common elements); a copy of a "pre-existing elements fund study" (which the amendments will require); a statement that the statutory warranty that every home is constructed in a good and workmanlike manner and free from defects found in the *Ontario New Home Warranties Protection Act* (ONHWPA) does not apply to the pre-existing elements; and a statement that the Registrar under the ONHWPA has confirmed that the conditions set out in subsection 17.2(1) of the ONHWPA have been met (the Bill amends the ONHWPA to add these conditions, which provide that the builder is registered under the ONHWPA, the vendor is a registered vendor under the Act, and the project, including units and the common elements, have been enrolled under the plan)[111].

Material Change

The Act requires a declarant to prepare and deliver a revised disclosure statement where a "material change" has occurred in the information required to be included in the disclosure statement[112]. The amendments will add three additional matters which will specifically not be considered a "material change" (and therefore not necessitate revised disclosure statement), which are: an increase of less than ten percent or less in the common expenses as stated in the budget statement; an increase in the common expenses where the increase is the result of the application of any prescribed taxes, levies or charges; and anything else that may be prescribed in the future[113].

The time for the delivery of the revised disclosure statement is altered from "within a reasonable time" (current wording) to "as soon as reasonably possible". In any event the revised disclosure statement must be delivered at least ten days before the delivery of the deed to the purchasers unit[114].

Where a declarant fails to deliver the revised statement (and required content) and/or refund money to a purchaser where the purchaser is able and has elected to rescind an agreement to purchase, an aggrieved purchaser's recourse lies with an application to the Superior Court of Justice (and not to CAT). The purchaser may seek a court order for compliance with the requirements of the applicable provisions, an order for payment of costs of the application, payment of damages, as well as an order that the declarant pay the applicant an additional amount up to $10,000[115].

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[106] *Ibid.* s. 73(2)(b).
[107] *Ibid.* s. 177(4.1)
[108] *Ibid.* s. 72(3)(a) – not in effect.
[109] *Ibid.* s. 72(3).
[110] Ibid. s. 72(3)(q.1).
[111] Ibid. s. 72(3)(f.1).
[112] *Ibid.* s. 74(1).
[113] *Ibid.* s. 74(2)(f)(g), and (h).
[114] *Ibid.* s. 74(4).
[115] *Ibid.* s. 74(12).

Declarant's Accountability for First Year

In addition to the current requirement that a declarant pay the corporation an amount equal to the shortfall of the common expenses incurred and the amount stated in the budget statement in the first year, the amendments also make the declarant accountable to the corporation for non-compliance with clause 72(6)(e)[116]. This provision requires the declarant to include in the disclosure statement a statement of the portion of the common expenses to be paid into the reserve fund. Where the declarant has failed to comply with this requirement, the declarant will pay to the corporation the amount required for compliance with clause 72(6)(e). Exactly how the cost of compliance will be calculated is to be determined in accordance with the regulations[117].

The declarant will also be accountable for a portion of the annual budget of the corporation (to be determined by the regulations) for its first fiscal year (to be required by the new section 83.1), which represents the one-year period immediately after the registration of the declaration and registration[118].

Status Certificate

Amendments to the provisions concerning the preparation of status certificates add a requirement that a status certificate will now have to include a statement as to the financial implications (as may be prescribed) of all outstanding judgements and legal actions to which the corporation is a party[119]. The amendments will also require the status certificate to include a list of all the shared facilities agreements to which the corporation is a party (new section 21.1 agreements)[120].

Implied Covenants

The amendments add some additional statutory covenants (which cannot be altered) to the ones currently found in section 78 of the Act. Currently every agreement of purchase and sale for a proposed unit is deemed to contain three implied covenants: 1) that the declarant will take all reasonable steps to sell the other residential units in the property without delay; 2) that the declarant will deliver a deed to the purchaser without delay; and 3) a covenant to hold in trust for the corporation all monies the declarant receives on behalf of the corporation[121]. Once the amendments are effective, the Act will require that every agreement of purchase and sale for a unit or proposed unit entered into by a declarant will be deemed to include the following additional covenants: 1) that the purchaser will not acquire any interest in property (real or personal) that is intended for the collective use or enjoyment of the owners which is not owned by the corporation or that is not the common elements; 2) that the declarant will not charge any amount that is or is intended to be a projected or actual contribution to the reserve fund of the corporation unless permitted by the Act; and 3) that the purchaser shall not directly or indirectly indemnify, reimburse or otherwise compensate the declarant for any remedies exercised by or on behalf of a corporation against the declarant or affiliates (except where the declarant receives judgment against the corporation)[122]. With regards to the second additional covenant, the Act provides that the declarant can collect an amount which is designated as a contribution to the reserve fund as part of the occupancy fees (from the period from occupancy of a residential unit to the date of registration of the declaration and description), however the Act requires that after the sixth month of collecting occupancy fees, any amounts collected as a contribution to the reserve fund are to be held in trust by the declarant for the corporation and remitted to the corporation upon registration[123].

Corporation's Sale of Property (new Section 82.1)

The amendments add section 82.1 which will permit a corporation to sell the entire condominium property to a third party where the owners representing 80% of the units vote in favour of the conveyance. All owners are to share in the proceeds of the sale in the same proportion as their common interests[124]. The exception to the even division rule is where a portion of the proceeds is attributable to exclusive-use common elements, in which case such a portion of the proceeds would be divided between the owners of the units which enjoyed the exclusive-use of the common elements which are sold[125].

Owners who vote in favour of the sale will have an obligation to ensure that fair market value is received for the property. Dissenting owners will have the right to serve notice of intention to object and submit to the s. 132 mediation/arbitration process for a determination that the consideration received for the property less than fair market value. A dissenting owner will be entitled to receive the amount he/she/it would have received had the sale been at fair market value. Liability for the difference will be borne by the unit owners who did not dissent (and will be added to the common expenses for their units)[126].

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[116] *Ibid.* s. 75 (1) (a).
[117] *Ibid.* s. 75(1.1).
[118] *Ibid.* s. 75(1)(b).
[119] *Ibid.* s. 76(1)(h.1).
[120] *Ibid.* s. 76(1)(j), not in effect.
[121] *Ibid.* s. 78(1).
[122] *Ibid.* s. 78(1.1).
[123] Ibid. s. 80 (5). This provision is unchanged from the current wording except that the regulations may alter the six-month period.
[124] *Ibid.* s. 82.1(1).
[125] *Ibid.* s. 82.1(4).
[126] *Ibid.* s. 82.2. A question arises here: if the property is sold, how would the unpaid deficiency be added to the common expenses owing for a unit which would cease to exist?

It is noted that section 124 of the Act (as currently worded) already provides a mechanism for selling the condominium property which is essentially identical to the new section 82.1. The only major difference is that the provisions of section 124 permit the sale of all or part of the condominium property while s. 82.1 is apparently concerned with the entire property[127]. Given that the amendments make some minor adjustments to the wording of s. 124, and given that the amendments give no indication that s. 124 is to be repealed, the two provisions may curiously exist in the Act simultaneously. Perhaps the reasoning behind the retention of s. 124 and the addition of 82.1 will become clear when the regulations are released.

Leasing

Subsection 83(1) is amended to provide that a unit owner must advise the corporation within 10 days of entering into a lease (or a renewal) of the lease agreement[128]. Currently an owner must provide notice within 30 days.

Annual Budget (new section 83.1)

While the current wording of the Act references the corporation's annual budget, there is no actually statutory requirement to have an annual budget prepared. The only budget that is currently expressly mandated is the budget statement to be prepared by the declarant (which covers the first year following the registration of the declaration and description). The amendments add section 83.1, which explicitly provides that a corporation is to have an annual budget prepared for each of its fiscal years in accordance with the section[129]. The first fiscal year will cover the period from the date the declaration and description is registered to the last day of the month in which the first anniversary of the registration of the declaration and description takes place[130]. Subsequent fiscal years will end on the date specified in a by-law passed by the post-turnover board. If such a by-law is not passed then the fiscal year end will occur on a date specified in a resolution of the board. If no by-law or resolution is passed, then the year-end will continue to occur on the anniversary of the year end of the first fiscal year[131].

The budget for the first fiscal year, which will be prepared by the declarant, is to be prepared "within the prescribed period of time", and is to be delivered to the first board if it has been appointed by the declarant, or to the corporation if the first board has not yet been appointed[132].

The budget for subsequent fiscal years is to be prepared by the board at least thirty days before the start of the fiscal year for which the budget covers[133]. The board is then required to provide notice to the owners within fifteen days of the preparation of the budget. The notice is to be in the prescribed form (if any) and include a copy of the budget[134]. Any amendments to the budget which are made by the board are similarly required to be delivered to the owners[135]. The board is prohibited from implementing a budget or an amendment before providing the required notice to the owners (which at the very least will contain a copy of the budget or amended budget)[136].

The amendments further mandate that a special notice (in the prescribed manner, delivered in the prescribed time) will have to be provided to owners where the board proposes that the corporation incur a "prescribed expense" that exceeds (in the manner prescribed by the regulations) the budgeted amount for the expense[137]. As the regulations have not been drafted as of this date, it is not clear what types of expenses will attract the requirement to provide the special notice, what the content of the special notice will be, or by how much the proposed expense would have to exceed the budgeted amount before the special notice would have to be sent.

No Avoidance for Contribution to Common Expenses

Subsection 84(3) of the Act currently provides that a unit owner is not able to avoid the requirement to contribute to the common expenses because he or she waived or abandoned his or her right to use the common elements, is making a claim against the corporation, or the declaration or a by-law restricts an owner from using the common elements. The amendments expand the anti-avoidance provision to provide that avoidance to the contribution is not possible where the unit owner has waived or abandoned his or her right to use an asset of the corporation or any land or facilities which is the subject of a shared facilities agreement [new section 21.1 agreement] or a mutual use agreements[138].

Addition to Contribution

The amendments require a condominium corporation to provide notice to a unit owner within fifteen days of making a "prescribed addition" to the amount of the contribution to the common expenses for an owner's unit[139]. As the new regulations have not been developed, it is not known at this time what the "prescribed additions" will be. It is conceivable, however, that the notice requirement will be prescribed for matters where the corporation is able to add amounts to the required contribution for an individual unit due to a breach of the unit owner's obligations. An owner receiving the notice will be required to pay the additional amount within

[127] *Ibid.* s. 124.
[128] *Ibid.* s. 83(1).
[129] *Ibid.* s. 83.1(1).
[130] *Ibid.* s. 83.1(2).
[131] *Ibid.* s. 83.1(2)(b).
[132] *Ibid.* s. 83.1(3).
[133] *Ibid.* s. 83.1(4).
[134] *Ibid.* s. 83.1(5).
[135] *Ibid.* s. 83.1(7).
[136] *Ibid.* s. 83.1 (9).
[137] *Ibid.* s. 83.1(10).
[138] *Ibid.* s. 84(3), not in effect.
[139] *Ibid.* s. 84(4).

thirty days, or, if he or she disputes the requirement to pay, may apply to CAT for resolution of the matter[140]. An owner who applies to CAT for resolution is not required to pay the additional amount until such time as the tribunal has made a decision requiring the additional amount to be paid[141]. Where the unit owner has sold his or her unit, and conveys the unit within the thirty-day period, the amendments will require the additional amount to be held in escrow from the date of the conveyance until such time as it is to be paid to the person to whom it is to be paid[142].

Competing Priority of Liens

New subsection 86(1.1) addresses the possibility of competing liens which two or more corporations may have against the same property. The regulations (not yet drafted) will determine priorities between such liens[143].

Repair and Maintenance

The amendments will shift the statutory obligation to repair the units from the corporation to the unit owner. The Current wording of Section 89 of the Act provides that the corporation is obligated to repair the common elements and the units (unless, as is often the case with respect to the units, the declaration provides otherwise). The amended subsection 89(2) provides that the statutory default position is that the unit owner is obligated to repair the owner's unit[144]. This default position may be altered by the declaration so that the corporation will be responsible for the repair of the unit (excluding "improvements"), or any part of the unit[145].

The amendments also change the wording in this section from "repair after damage" to "repair"[146]. Likely this was done to reflect the fact that an asset, common element, etc. may require repair during the normal course of its life span and not necessarily after a specific event which caused damage.

A declaration will also be able to provide that the unit owners are responsible for repairing and/or maintaining the common elements (or any part of the common elements)[147]. The current wording of the Act only permits the declaration to shift the obligation for maintaining the common elements to the unit owners (there's no provision to permit the declaration to obligate the unit owners to repair the common elements).

Currently Section 92 of the Act provides that where an owner is required by the declaration to maintain or repair and fails to discharge his or her obligations, the corporation can carry out the maintenance and/or repair obligations and add the costs to the contribution for the common expenses for the unit. This Section is amended to provide that where the Act (not the declaration as the provision currently states) imposes an obligation to maintain or repair, the corporation may step in and make the necessary repairs or required work to maintain or repair[148] (and then add the costs to the contribution for the common expenses payable for the owners unit, as is currently provided). This change is likely made to clarify that the costs of repair and/or maintenance which the corporation undertakes can be added to the common expenses for a unit where the obligation is statutory.

Note that a declaration may now provide that the corporation shall carry out an obligation to repair or maintain on behalf or for the benefit of an owner and add the costs of the repair to the contribution to the common expenses payable for the owner's unit[149]. Such an inclusion in the declaration would apparently permit the corporation to carry out repair or required maintenance immediately without having to wait (for a "reasonable time") for the unit owner to fail in his or her obligation to maintain or repair.

Reserve Fund

The current wording of the Act limits what the reserve fund may be used for to matters: "solely for the purpose of major repair and replacement of the common elements and assets of the corporation." The amendments provide that the reserve fund is to be used for the purpose of major repair of units, common elements, or assets of the corporation IF the corporation has the obligation to repair[150]. Therefore if the declaration provides that the corporation is obligated to repair a unit, for example, then the reserve fund may be used to cover these repair costs. The Act in its current form does not include a definition of "major repair". The amendments do not include a definition in the Act, but do provide that the regulations (not yet drafted) may include a definition of "major repair"[151]. The amendments also provide that, subject and in compliance with the regulations, the reserve fund may also be used for the purposes of complying with any special or general Act or regulation or by-laws made under such an Act[152].

In addition to the mandated reserve fund studies, to be conducted at prescribed periodic intervals (currently every three years), the amendments will expressly permit a corporation to obtain a reserve fund study at any other time[153].

The amendments also introduce a requirement for a corporation to seek a written opinion from a qualified

[140] *Ibid.* s. 84(5).
[141] *Ibid.* s. 84(6).
[142] *Ibid.* s. 84(5)(b).
[143] *Ibid.* s. 86(1.1).
[144] *Ibid.* s. 89 (2), not in effect.
[145] *Ibid.* s. 91(a)
[146] *Ibid.* s. 89(1), not in effect
[147] *Ibid.* s. 91(b), not in effect
[148] *Ibid.* s. 92(1) and (2), not in effect.
[149] *Ibid.* s. 91(e).
[150] *Ibid.* s. 93(2), not in effect.
[151] *Ibid.* s. 93(2.1).
[152] *Ibid.* s. 93(2)(b).
[153] *Ibid.* s. 94(1.1).

reserve fund study provider (see requirements of reserve fund study provider) where the amount of money in the corporation's reserve fund falls below a prescribed level (not yet known). In such a situation, the reserve fund study provider is to provide an opinion as to whether he or she recommends that the corporation obtain a reserve fund study before the next one is required to be obtained[154]. This requirement should provide an early warning mechanism for corporations with inadequate reserve funds and help ensure the issues are addressed in a timelier manner (while not increasing the burden on all corporations by increasing the frequency of studies).

Reserve Fund Study Provider

The amendments require that a reserve fund study be conducted by a "reserve fund study provider" [155], which is defined as a person who meets the prescribed requirements[156]. The current wording of the Act provides that the reserve fund study is to be prepared by a person who meets the prescribed requirements and who is not affiliated the board (as provided in the regulations). The amended section does not exclude an affiliated person from being a reserve fund study provider (although the regulations may). It will not be known if the requirements of the reserve fund study provider will differ significantly from the current class of persons permitted to conduct the reserve fund studies until the regulations are drafted and released.

Plan for Funding

The amendments will not alter the 120-day period which the board has to review the reserve fund study and propose a plan for the future funding of the reserve fund. There is a slight change in the amended provision (subsection 94(8)) which provides that the plan is to ensure that the amount of money in the reserve fund will be adequate, as determined by the regulations, for the purposes of the reserve fund[157]. As the new regulations have not been drafted, it is not clear how the regulations will provide guidance.

Use of Reserve Fund

Currently the Act provides that the board does not have to receive the approval of the owners to make an expenditure from the reserve fund. The amendments to this provision would qualify this permissive provision by making it subject to the regulations[158]. Again, as the new regulations are not available at this time, it is not known what, if any, expenditures from the fund might require the owner's consent in the future.

Changes to the Common Elements and Assets

The amendments, when effective, will repeal and replace the entire current Section 97 (the provisions which deals with changes to the common elements made by the corporation). Where the current form of the Act is concerned with "changes", which include an addition, alteration or improvement to the common elements, or a change to the assets; the new provision is concerned with a "modification", which, in addition to the foregoing, will also include a "change in the services that the corporation provides to the owners"[159].

Currently the Act provides that a board does not have to provide notice to the owners where the estimated cost of the addition, alteration or improvement would not be more than the greater of $1,000 or 1% of the annual budgeted common expenses for the current fiscal year. The amendments will raise the threshold to a cap of $30,000 or 3% of the budgeted common expenses for the current fiscal year (whichever is lesser)[160] and stipulate that the modification can only proceed without notice if the owners would, on an objective basis, not regard the modification as causing a material reduction of their use or enjoyment of their unit, common elements or assets[161]. A modification can also proceed without notice if it is necessary to make the modification in order to comply with a shared facility agreement[162]. Finally the amendments provide that the regulations may prescribe certain purposes for which a modification may be undertaken without notice[163].

Where the modification would require notice (i.e. doesn't meet on of the above-mentioned exemptions), the corporation will be required to send the owners a notice which describes the proposed modification and contains at least one prescribed statement (the exact text won't be known until the regulations have been released). One such statement will be required where the board has determined that the owners, on an objective basis, would regard the modification as causing a material reduction of their enjoyment of their unit, the common elements or assets[164]. Alternatively a second statement will be required which states the estimated cost to the corporation of making the proposed modification, and indicating the manner in which the corporation proposes to pay the cost[165]. The notice will also have to include a copy of the text of section 46 (right of owners to requisition a meeting)[166].

The amendments do not alter the requirement to have 662/3 of the owners approve a "substantial modification"[167].

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[154] Ibid. s. 93(5).
[155] Ibid. s. 94(6).
[156] Ibid. s. 1(1).
[157] Ibid. s. 94(8), not in effect.
[158] Ibid. s. 95(2), not in effect.
[159] Ibid. s. 97(2)(c).
[160] Ibid. S. 97(5)(c)(i).
[161] Ibid. s. 97(5)(c)(ii).
[162] Ibid. s. 97(5)(a).
[163] Ibid. s. 97(5)(d).
[164] Ibid. s. 97(6)(a)(ii)(A)
[165] Ibid. s. 97(6)(a)(ii)(B).
[166] Ibid. s. 97(6)(a)(iii) and (iv).
[167] Ibid. s. 97(7); the estimated cost would be at least 10% of the annual budgeted common expenses for the current fiscal year.

Modifications Made by Owners

The amendments would completely replace section 98, being the section which mandates the process an owner must follow in order to make an alteration, addition or improvement to the common elements. The new section is not substantially different, but does include some changes which should be noted. The current section provides that an owner may make an alteration, addition or improvement to the common elements that is not contrary to the Act or Declaration. The new section 98 uses the same language as the new section 97; an owner will now be permitted to make a "modification" if the owner receives the approval of the board and has entered into a "Section 98" agreement with the board (allocating the cost between the corporation and the owner and setting out the parties' duties and responsibilities with respect to the modification)[168]. In order to qualify as a "modification", the addition, alteration or improvement to the common elements or the assets must be not contrary to the Act, Declaration, or Rules[169]. The new provision won't drastically overhaul the owner-modification regime, but it will permit owners to propose and possibly make modifications to the assets of the corporation; and now the proposed changes must not be contrary to the Rules (in addition to the declaration and the Act). Currently the board would not be required to provide the other unit owners with notice of the proposed addition, alteration or improvement where it will only relates to the exclusive-use common elements of the owner and, among other listed criteria, "will not have an adverse effect on the units owned by other owners". The amendments will change this and require the board to satisfy itself that the other owners, on an objective basis, would not regard the proposed modification as causing a material reduction or elimination of their use or enjoyment of units that they own or the common elements or assets, if any, of the corporation, as determined by the regulations[170]. Presumably amendments to the regulations will include some additional guidance to boards in making this objective determination.

A new provision specifically provides that any easements or covenants, whether positive or negative in nature, created in the agreement run with the unit[171]. The current wording simply states that the agreement binds the owner's units and is enforceable against the owner's successors and assigns. Furthermore, amended subsection 98(7), recognizing that the agreements may create covenants and obligations on the part of the corporation (as well as the owner), provides that the Section 98 agreement can be enforced by the unit owner, a subsequent unit owner, the corporation, or any other party to the agreement[172].

Insurance

The amendments will repeal subsections 99(5) and (6) of the Act. Subsection 99(4), which is not amended, provides that the obligation of the corporation to insure the units and common elements against major perils (perils of fire, hail, storms, etc.) does not extend to improvements in a unit. The subsections to be deleted currently provide that what constitutes an improvement is to be defined by reference to the corporation's standard unit by-law (i.e. what is not included in the standard unit), or, if no such by-law has been passed then it is to be defined by the standard unit schedule provided by the declarant at the turnover meeting. The amendments would now define "Improvement" in the definition section of the Act to be any part of a unit which is not a standard unit, OR any repair or modification that is done using materials that are higher in quality, as determined in accordance with the current construction standards[173]. A standard unit would now be defined as the standard unit described in the corporation's standard-unit by-law, or, if one has not been passed, the standard unit that is defined by the regulations[174]. The amendments, when effective, will repeal the provision which require the standard unit schedule to be delivered at the turnover meeting by the declarant. Therefore all reference will be made to a prescribed standard unit (not known at this time) until such time as the corporation has passed a standard unit by-law. This change will ensure (assuming the prescribed standard unit is actually added to the regulations) that all condominiums will have a defined standard unit (some older condominium corporations may not actually have a defined standard unit).

Insurance Deductible

The amendments, when effective, will remove the ability of a corporation to pass an insurance deductible by-law. Such a by-law currently permits the corporation to provide circumstances under which a unit owner will be liable for the payment of the corporation's insurance deductible (beyond the statutorily imposed requirement that the unit owner pay the deductible when the owner, or guest, caused the damage). The new section 105 provides that only an amendment to the declaration can extend the circumstances in which the unit owner will be required to pay an insurance deductible. After the election of a post-turnover board, a declaration may alter the circumstances under which an amount may be added to the contribution to the common expenses for an owner's unit (beyond the situation of the requirement to pay an insurance deductible where the damage was caused by the owner or guest) [175]. Therefore if the declaration did not already expand situations where insurance deductibles could be added to the common expenses payable for an owner's unit, it would appear that the unit owners would have to pass an amendment

[168] *Ibid.* s. 98(1), not in effect.
[169] *Ibid.* s. 98(2).
[170] *Ibid.* s. 98(3)(a).
[171] *Ibid.* s. 98(6).
[172] *Ibid.* s. 98(7).
[173] *Ibid.* s. 1(1).
[174] *Ibid.* s. 1(1).
[175] *Ibid.* s. 105(4).

to the declaration, which would require the consent of the owners representing at least 90 percent of the units[176].

New Notice Requirements Regarding Insurance

The amendments add section 105.1 to the Act, which, when effective, will require the board to give notice to all owners providing information about insurance purchased by the corporation (including director/officer liability insurance, property insurance, occupier liability insurance, and information about the deductibles)[177]. It is not known at this time the specific information required in the notice as amendments to the act leave it to the regulations to determine.

Amendments to Declaration

The amendments will permit the regulations to alter the threshold required to amend a declaration for those matters which currently require the approval of 90% of the owners of the units[178] (e.g. altering the proportion of the contribution to the common expenses for a unit(s), or expanding situations where the insurance deductible will be added to the common expenses for a unit), as well as those requiring an 80% approval (any other matter not currently requiring the approval of 90%)[179].

Termination of Agreements

Amendments to sections 111 to 114 of the Act ("Termination of Agreement" section) specifically provide that the directors, officers and unit owners are not liable for any obligation under an agreement entered into by the declarant prior to the turnover which the Act permits the post-turnover board to terminate[180] (essentially any agreement except a shared facilities agreement). Moreover the amendments would provide the directors, officers and owners with statutory immunity from any contractual fee, cost or administration charge which an agreement might include as a deterrent or penalty for the termination of the agreement[181]. Monetary obligations under such agreements will only extend to the time-period prior to termination[182].

Use of Common Elements and Assets

The amendments will alter section 116 to provide that unit owners will now (subject to the declaration, by-laws and rules) be able to make reasonable use of the assets of the corporation in addition to the common elements of the corporation[183].

A similar amendment to Section 117 is made to provide that no person shall cause a condition (or through an omission) to exist which is likely to damage the assets of the corporation in addition to the common elements[184]. Of greater consequence, the amendments will add Subsection 117(2) which provides that no person may carry out an activity or permit an activity to be carried out in a unit, the common elements, or assets, if the activity results in the creation or continuation of unreasonable noise (or any prescribed nuisance, annoyance or disruption) that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets of the corporation[185]. This amendment would provide a statutory prohibition against the creation of a nuisance within the boundaries a unit. Even though similar prohibitions are included in the rules of many corporations, the inclusion of such a prohibition in the Act against the creation of unreasonable noise in a unit will undoubtedly lead to more disputes between unit owners being brought to the attention of the board and/or brought before CAT.

Enforcing Compliance

Section 119 of the Act is the statutory authority mandating that the corporation, directors, officers, unit owners and occupants comply with the Act, the Declaration, by-laws and rules. Currently Subsection 119(3) provides that the Corporation and an owner have the right to require an owner or occupier of a unit to comply with the Act, declaration, by-laws and rules. The amendments change this provision so that a corporation or an owner will have the "right to require that a person who is required to comply with this Act, the declaration, the by-laws and the rules shall do so"[186]. The significance of this amendment is that as the class of persons required to comply includes the corporation (and directors and officers), a unit owner would now have the statutory authority to require the corporation to comply with the Act, declaration, by-laws and rules. An owner currently does have the ability to seek a compliance order from the court against a corporation, however, as discussed below, the remedy is only available in limited circumstances.

Amalgamation

The amendments will extend the amount of time unit owners will have to provide their consent to the amalgamation of their corporation with another corporation. The Act requires that at least 90% of the Unit Owners consent to the amalgamation. Currently this threshold must be met within 90 days of the meeting required to be held in order to consider the proposed declaration and description of the amalgamated corporation. The amendments will extend the amount of time required to receive the consent to 120 days[187]. An addition to this section of the Act provides that a unit owner loses his/her/its right to consent to the amalgamation where the unit owner is in arrears for 30 days of his/her/its obligation to contribute to the common

[176] *Ibid.* s. 107(4), not in effect.
[177] *Ibid.* s. 105.1.
[178] *Ibid.* s. 107(d).
[179] *Ibid.* s. 107(e).
[180] *Ibid.* s. 111(1), not in effect; and 112(1), not in effect.
[181] *Ibid.* s. 111(3)(a); and s. 112(4.1)(a).
[182] *Ibid.* s. 111(3)(b); and s. 112(4.1)(b), not in effect.
[183] *Ibid.* s. 116, not in effect.
[184] *Ibid.* s. 117, not in effect.
[185] *Ibid.* s. 117(2).
[186] *Ibid.* s. 119(3), not in effect.
[187] *Ibid.* s. 120(1)(b), not in effect.

expenses payable for the owner's unit during the 120 day period[188].

Termination

Currently a corporation is required to register a notice terminating the government of the property by the Act where 80% of the unit owners and 80% of those persons having claims against the property vote in favour of termination. The amendments alter this section to provide that any prescribed provision must also be complied with as well before termination[189]. It is not known at the present time whether the regulations will mandate any additional requirements.

Termination upon Sale of Property

The amendments clarify that where the common elements, or part of the common elements, are sold that the Act ceases to govern the common elements which are conveyed[190].

Expropriation

The current wording of Section 126 provides that where part of the common elements are expropriated, the owners of the units will share in the proceeds in the same proportions as their common interests (or if exclusive-use then in proportion to which their interests are affected). The amendments provide that the owner (and therefore the person who will be entitled to the compensation) is to be determined by the regulations[191]. Presumably the regulations will include a mechanism for determining who is to be considered an owner where such a determination is not clear.

Mediation and Arbitration

The current wording of the Act provides that every agreement between a declarant and a corporation, every agreement between a corporation and a unit owner, a section 98 agreement and an agreement between the corporation and a person for the management of the property is deemed to include a clause which provides that a disagreement between the parties to the agreement with respect to the agreement will be submitted to mediation and/or arbitration. The amendments add shared facilities agreements to the list of agreements which are subject to the mediation and arbitration provisions of the act[192]. The amendments make it clear, however, that the mandatory mediation and arbitration provisions for agreements (other than shared facility agreements), disagreements on budgetary matters, and/or a disagreement with respect to the declaration, by-laws and rules do not apply to any matter in dispute for which a person may apply to CAT, provided the tribunal has been established[193] (and presumably the tribunal is available in the geographical area). Note that new part I.2, which establishes the jurisdiction of the tribunal, provides that the types of disputes which may form the subject-matter of a CAT application will be prescribed[194]. Therefore it is not clear at this time when, if ever, a dispute involving an agreement, a budget matter, or with respect to the governing documents will be required to be submitted to mediation and/or arbitration.

While mediated settlements will not be made public, the amendments will require a copy of the arbitration award to be provided to the Condominium Authority[195]. The Authority will be required to make a copy of the award made public (in the prescribed manner)[196].

The amendments will permit a unit owner to offset an award for compensation and/or costs against future contributions to the common expenses payable by the unit owner where the corporation fails to satisfy the award within thirty days[197].

False, Misleading Statements by the Declarant

The current wording of the Act provides that a corporation or unit owner is entitled to apply to the Ontario Superior Court of Justice to seek an order for an award of damages suffered due to the reliance upon a statement or omission made by the declarant where the corporation or unit owner (as the case may be) relied upon the statement or omission[198]. The amendments provide that the application for damages under this section cannot be brought by a corporation or owner where the application could be brought under subsection 43(8) or subsection 74(11)[199]. Subsection 43(8) permits a corporation to bring an application for damages where the corporation has suffered damages due to the failure of the declarant to comply with his/her/its turnover obligations. Subsection 74(11) is a new provision which permits an owner to make an application for damages where a revised disclosure statement was not provided (when the Act would require one to be provided) and the owner has suffered damages. These two provisions provide specific instruction to a court making an order under these provisions in favour of an applicant: namely that the applicant's costs shall be paid in full and providing that court may impose a penalty not exceeding $10,000 in addition to an award for damages.

Compliance Order

Currently section 134 of the Act provides that a corporation, unit owner, declarant etc. may make an

[188] *Ibid*. s. 120(3.1).
[189] *Ibid*. s. 122(1)(c).
[190] *Ibid*. s. 124(1), not in effect.
[191] *Ibid*. s. 126(3), not in effect.
[192] *Ibid*. s. 132(2)(3.1).
[193] *Ibid*. s. 132 (4.1) and (6), not in effect.
[194] *Ibid*. s. 1.36 (1) and (2).
[195] *Ibid*. s. 132 (9).
[196] *Ibid*. s. 132 (10).
[197] *Ibid*. s. 132 (11).
[198] *Ibid*. s. 133 (1).
[199] *Ibid*. s. 133 (3).

application to the court for a compliance order, whereby the court would order that the respondent comply with the Act, Declaration, By-laws, rules, and/or agreement. This relief is not available, however, where mediation and arbitration are available (the amendments will change "available" to "required"[200]). The amendments to this section also provide that an owner of a unit must be given reasonable notice where the occupier of the owner's unit is the subject of the application[201]. This notice is to be provided by the applicant and is to be in the prescribed form[202]. A compliance order under this section will not be available if the matter is a dispute for which a person may apply to CAT for resolution[203].

Compliance order of Registrar

The amendments will empower the Registrar to make a compliance order in certain situations. As detailed above, section 1.30 grants the condominium authority the power to impose an assessment against condominium corporations in order to recover the costs and expenses the condominium authority incurs in exercising its powers and duties[204]. The Registrar will have the ability to make a compliance order directing a corporation to pay the amounts it has been assessed[205]. The Registrar will also be able to order a corporation to file condominium returns (as required in the sew Part II.1) and require an arbitrator to file a copy of an arbitration award with the condominium authority[206]. The amendments will require the Registrar to provide notice of the proposed compliance order together with written reasons on the person to which the proposed order relates[207]. Where the proposed order is disputed, the effected person will be entitled to a hearing by the Licence Appeal Tribunal (which may order that the proposed order be made, order that the registrar refrain from making the order, or may substitute its own order)[208].

Offences of the Condominium Authority

The amendments provide that where the Condominium Authority knowingly contravenes the Act and/or regulations that it is liable for a maximum fine of $100,000 per day on which the offence occurs or continues. Individual directors and officers can be held personally liable for a maximum fine of $25,000 per day[209].

Fines for Making False Statements

The amendments provide for potentially heavy penalties against officers and directors of corporations who make false or misleading statements in the condominium returns to be filed with the registrar, or fails to take reasonable care to prevent the corporation from making a false or misleading statement, or fails to comply with the obligation to remit amounts assessed against the corporation. The maximum fines are $50,000 in the case of a corporation, and $25,000 in the case of an individual[210].

Order for Permanent Removal of Occupant

The amendments add section 135.1 which provides the basis for a statutory test which a court will be required to apply before ordering the permanent removal of an individual from a unit (whether an owner or a tenant). Such an extreme order is only to be made where one or more of the three following tests has been met:

1. Where the person is found to have caused a condition to exist or an activity to take place in a unit or on the common elements which is likely to cause damage, injury or illness AND poses a serious risk to the health and safety of an individual, or poses a serious risk of damage to the property, or assets of the corporation[211];
2. The person is found to have failed to comply with a compliance order and on the basis of the person's non-compliance, the person is unsuited for the communal occupation of the property or the communal use of the property, and no other order would be adequate to enforce compliance[212]; or
3. The person is found to have engaged in conduct which is oppressive, or which is unfairly prejudicial, or which unfairly disregards the interests of an applicant, is unsuited for communal occupation or communal use of the property and the court finds that no other order would be adequate to prohibit the conduct[213].

It will be interesting to see how often this relief is sought in the future. Such a drastic measure—removing an individual from his or her home—must, of course, be reserved for the most egregious threats to the communal living aspects of the condominium lifestyle. The courts will undoubtedly be called upon in the near future to draw a distinction between factors which make one "unsuited for communal occupation and use" and factors which simply makes one a terrible neighbour. It should be noted that the above-mentioned remedy is expressly not available to residential landlords who may wish to seek an order to remove a tenant from the owner's unit[214].

General Offences

Section 137 of the Act lists a number of offences which, if committed, can lead to fines being imposed against a corporation or individual (such maters include the failure

[200] *Ibid*. s. 134 (2), not in effect.
[201] *Ibid*. s. 134(2.1).
[202] *Ibid*. s. 134(2.2).
[203] *Ibid*. s. 134(2.3).
[204] *Ibid*. s. 1.30(6).
[205] *Ibid*. s. 134.1(1).
[206] *Ibid*. s. 134.1(1).
[207] *Ibid*. s. 134.1(2).
[208] *Ibid*. s. 134.1(3) to (8).
[209] *Ibid*. s. 136.1.
[210] *Ibid*. s. 136.2(3).
[211] *Ibid*. s. 135.1(1)(a).
[212] *Ibid*. s. 135.1(1)(b).
[213] *Ibid*. s. 135.1.(1)(c).
[214] *Ibid*. s. 135.1(2).

of the declarant to call a turn-over meeting in a timely manner, failure to provide a disclosure statement, or a failure of the corporation to keep required records). The amendments will add two additional offences which could attract fines. The first being the failure by a declarant to provide a prospective purchaser with a copy of the annual budget of the corporation and/or the promised condominium guide (if one exists) at least ten days prior to delivering the deed to the unit. The second being a failure to adhere to regulations made governing material placed on a website maintained by a declarant or an affiliate of a declarant. [215]

The maximum fines which can be imposed for an offense under this section will be increased from $100,000 to $250,000, in the case of a corporation, and from $25,000 to $50,000 in the case of an individual. In addition to monetary fines, an offence under this section can lead to imprisonment for a term of no more than two years less a day for an individual who commits one of the listed offenses[216].

In addition to the increased fines and possibility of imprisonment, the amendments will empower a court to order an offending corporation to pay compensation or make restitution[217].

Conclusion:

The amendments to the Condominium Act, in the writer's opinion, are for the most part welcome, and should help to realize the consumer protection goals of the Act through better oversight of the corporations, greater disclosure and the promise of access to an efficient and affordable tribunal to settle disputes. While many directors will initially find the additional requirements burdensome (such as ensuring returns are filed, that new notice requirements are observed, and that mandatory training courses are attended); most of the new provisions geared towards governance should, in the long run at least, raise the competency level of the directors, which will make for better and more responsive boards.

The exact scope of the Condominium Authority's mandate is not known at this time as the provisions of the act to be delegated have not been fully established. Only time will tell how effective the new regime will be in mandating compliance with matters under its authority. Certainly the potential exists for the Authority and Registrar to provide effective oversight of the corporations and become a good source of information and education for unit owners. Furthermore the authority may provide a valuable avenue for stakeholders to provide input through the advisory councils which it may be called upon to strike. It will also be interesting to see how the tribunal will evolve over time: what types of disputes it will be concerned with adjudicating; how formal the hearings will be; and how uniformly available it will be throughout the province.

It is certainly advisable that all boards undertake a careful review of the amendments to the Act in order to appreciate and understand the new requirements, timelines and obligations. A similar review should be undertaken when the regulations are finally released.

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April 3, 2017

[215] *Ibid.* s. 137(1), not in effect.
[216] *Ibid.* s. 137(4).
[217] *Ibid.* s. 137(7).