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Comments and Feedback on 'Growing Up: Ontario's Condominium Communities Enter a New Era' - Condominium Act Review: Stage Two Solutions Report

Sas Ansari
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Abstract:

The Urban Law Centre ("ULC") has carefully reviewed the Stage Two Solutions Report ("Report") on the revisions to the Condominium Act ("the Act"). Our submissions briefly address five (5) areas that will enrich the discussion on, and improve the resulting, reforms to the Act. The ULC's recommendations relate to sustainability, condominium dispute resolution, infrastructure needs, tenant and multicultural residents, and the effects of investors or absentee owners. The ULC would be happy to provide more detailed submissions on any of the issues raised as part of the final development of the proposed amendments to the Condominium Act.

Keywords:

Condominium Governance, Renters, Urban Living

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November 8, 2013: Comments and Feedback on
“*Growing Up: Ontario’s Condominium
Communities Enter a New Era*” - Condominium Act Review: Stage
Two Solutions Report.

Prepared by Sas Ansari* and Sujoy Chatterjee**

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Introduction:

The Urban Law Centre ("ULC") has carefully reviewed the Stage Two Solutions Report ("Report") on the revisions to the *Condominium Act* ("the Act"). Our submissions briefly address five (5) areas that will enrich the discussion on, and improve the resulting, reforms to the Act. The ULC's recommendations relate to sustainability, condominium dispute resolution, infrastructure needs, tenant and multicultural residents, and the effects of investors or absentee owners. The ULC would be happy to provide more detailed submissions on any of the issues raised as part of the final development of the proposed amendments to the *Condominium Act*.

The ULC's submissions are based on the following significant facts and trends:

1. Condominiums and other dense, urban living arrangements will grow to house an increasingly greater proportion of Ontario residents;
2. The increasing density of urban living arrangements through condominium development places additional demands on local infrastructure thereby straining our already over-used, underdeveloped, aging infrastructure within our communities;
3. The rate of infrastructure rejuvenation, capacity-building, and development in Toronto is greatly outpaced by the rate of condominium development over the past fifteen (15) years;
4. Condominium communities are already made up of a great proportion of renters/tenants who occupy units owned by local and global (absentee) investors/owners;
5. The proportion of renters/tenants who occupy investment-purpose condominiums will only increase over time as temporary residents, young individuals and families, downsizing retirees, and other relocating persons are priced out of condominium markets;
6. Urban condominium tenants and owners are increasingly multicultural and multinational, being made up of a mix of Canadian Citizens/Residents of various ethnic and cultural backgrounds and temporary workers from other Countries; and
7. An urban centre's future prosperity and competitiveness in a global community depends to a great extent on the ability of that centre to attract and keep talented and industrious individuals from all over the country and world.

Given the above highlighted facts and trends, the Report falls significantly short in its consideration of:

- A. Development of city infrastructure to accommodate the increase in population density associated with condominium development, particularly with the latest push to develop micro-condominium units;
- B. The rights, needs, and effects on:
 - B.1. Renters/Tenants, and
 - B.2. Multicultural/Multinational Stakeholders;
- C. The effects of investor and absentee owners on the maintenance and governance of condominium buildings; and
- D. The quality control measures necessary to allow ADR processes to be successful and widely accepted.

Urban centres are, and will increasingly become, the economic drivers of jurisdictions. To serve as economic drivers and generator, these centres must be globally attractive and competitive so as to retain local capital and talent, and so as to attract foreign capital and talent. Attractiveness and competitiveness is determined in a great part by the quality of life offered by, and available to, to residents of urban centres. Since residents of urban centres are increasingly living in condominium communities, addressing the above issues affecting stakeholder's interests will ensure that the *Condominium Act* better reflects the realities of life and ownership in condominium communities.

Our recommendations aim at making Ontario and its urban centres more productive, prosperous, and globally competitive.

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A. Adequate Infrastructure

Toronto has witnessed a significant increase in both the number of condominium buildings as well as number of units within buildings over a very short timeframe. The increase in units and accompanying residents places significant strains on existing infrastructure (e.g. public transportation) that is both aging and failing to keep pace with the rate of new development. Failing to consider this infrastructure deficit will result in significant problems that may be difficult and costly to address after the fact.

This localized strain on Toronto's infrastructure is exasperated by the development of micro-condominiums and the resulting settlement pattern. Micro-condominiums are typically around 300 square feet, and offer no more living space than that of a typical motel room (see **Appendix A**). These units are not presented as rental units, but rather, are marketed to first time home buyers as a means of home ownership in the downtown core. The profile of a typical micro-condominium dweller (though not necessarily owner) is that of a single, young, professional who works downtown and does not own a vehicle. The additional densification by persons reliant on public transportation, and therefore in need of local amenities, will result in an already strained system being a detriment rather than a benefit to Toronto and its residents.

Condominium development must be tied in with funding aimed at infrastructure development sufficient to meet the needs of that condominium development. The additional cost of infrastructure expansion is an externality that must be borne by developers and future owners. Developers ought to bear the initial costs of additional infrastructure through some form of levy or funding agreement, while future owners will have to bear the cost of maintenance through property taxes. Allowing developers to escape internalizing these costs would result in an unfair wealth transfer from city residents to developers.

B. Rights, Needs, and Effects - Condominium Residents

If, as stated in the report, one goal of reforming the existing Act is to ensure that it is responsive to, and meets the needs of, the people who make up condominium communities, then the provisions that affect the daily lives of condominium residents must be tailored to include actual (not presumed) residents.

Condominiums are increasingly populated by renters/tenants as opposed to owners, who are temporary occupy the units for a short period (a few years) time, are increasingly multicultural/multinational, and on-average occupy the lower end of the socio-economic

spectrum. This constellation of factors fits poorly with the existing governance and power distribution within condominium communities. The Report's recommendations do not address and do not remedy the disconnect between power and control over living conditions and those affected by the exercise of that power and control.

B.1 Renters/Tenants

The Report does superficially consider the existence of renters/tenants as part of condominium communities. However, the report fails to adequately deal with the rights, needs, and effects of condominium governance and dispute resolution mechanisms on this growing and important stakeholder population. The report only addresses tenants in two circumstances: (i) commercial tenants in mixed use developments/building, and (ii) the ability to enforce condominium by-laws on tenants.

In order for the amendments to the *Condominium Act* to truly and fully address the reality of condominium communities, the amendments must allow for adequate participation of renters/tenants in the governance of condominiums and provide them with rights of redress against condominium corporations and boards separate from their rights of redress against owners and land lords. This would ensure that the Act serves the needs of all community members and stakeholders.

At a minimum, the amendments ought to prevent condominiums boards from acting in ways that would trample on, or render meaningless, renter/tenant rights granted under the *Residential Tenancy Act*. Ideally, given the growing proportion of absentee or disinterested or investor-ownership of condominium units, tenants occupying condominium units who are directly affected by the condominium governance and by-laws should be given participatory rights of some kind as part of the governance of condominium corporations. These participatory rights could be limited to a right to be heard when the particular issue does not significantly affect the daily lives of condominium residents. However, where the particular issue can significantly affect the lives of residents, then all residents including renters/tenants ought to have voting or voting-equivalent rights.

Consider the following example. Land lords cannot prevent a tenant from having a pet in the rental unit or discriminate against tenants with pets. This is one of a number of important substantive rights of tenants provided for by the *Residential Tenancy Act*, 2006, S.O 2006 c 17, in section 14. Despite this right, condominium boards do, and appear to have the power to, restrict or deny the ownership of pets by tenants and/or owners. This means that the tenants

right is a hollow one where that tenant is part of a condominium community. Further, a tenant who wishes to assert a right to have a pet is limited to recourse against the owner, who will have a legitimate defence by point to his being bound by the condominium by-laws.

It is highly undesirable to allow owners to collectively and indirectly deny tenants' rights when the owners would be acting contrary to law had they attempted to deny those same rights individually and directly. Such an anomaly makes a mockery of the rule of law, and makes Ontario a less attractive city to highly mobile talent, and thereby a less competitive city.

The *Condominium Act* ought to explicitly state that the condominium board and corporation cannot take any action or enact any by-law that is contrary to, or would have the effect of denying rights granted by, the *Residential Tenancy Act*.

B.2 Multicultural/Multinational Stakeholders

Canada's population (particularly in urban centres) is becoming increasingly multicultural and multinational. This diversification is more prominent in condominium communities, and creates a potential for conflict and discrimination. The failure to adequately protect the rights and interests of the increasingly diverse membership within condominium communities will make Ontario and its urban centres less attractive to global talent and capital which makes our province less competitive globally.

There have been a number of cases throughout Canada where condominium by-laws were directly or indirectly discriminatory towards the lifestyles, religions, and practices of minority populations. For example, there have been cases where condominium by-laws directly or indirectly interfered with the ability of persons to exercise their religious beliefs or meet their religious duties (See [Syndicat Northcrest v. Amselem \[2004\] 2 S.C.R. 551](#) or the [Heenan Blaikie LLP Condo report](#) for more recent examples). These by-laws, whether directly or indirectly interfering with human rights of occupants of condominium units, have the effect of marginalizing members of the condominium community.

Though it is possible for those discriminated against to obtain relief as against the condominium corporation through the Ontario *Human Rights Code* and Commission, such relief can be costly and time consuming. Also, the mere existence of these types of disputes will have the effect of damaging the international reputation and attraction of Ontario and its urban centres. Condominium communities must be able to meet the living needs of all members and

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stakeholders of an increasingly diverse population. It is diversity after all, that makes a community resilient, competitive, and prosperous.

The *Condominium Act* ought to explicitly provide that condominium boards and corporations cannot act in a manner that is likely to contravene the *Human Rights Code*, R.S.O. 1996 c H-19. This would short-circuit the potential for discriminatory actions and by-laws, and therefore help promote Ontario and its urban centres' global image, attractiveness, and competitiveness.

C. Absentee/Investor Owners

As previously mentioned, a continuing trend in Toronto has been that residents of condominiums are not owners but tenants. Increasingly, the owners of condominiums are investors who are either local or foreign (absentee). The development of comparatively cheaper micro-condominiums can potentially result in more renter-occupied, rather than owner-occupied, condominium communities. This is because the relatively low purchase price of the micro-condominium combined with the existence of floor-prices for rental accommodation, results in micro-condominiums providing a higher return on capital with lower risk than traditional condominiums. This makes these units particularly vulnerable to investment purchase, perhaps in large numbers by a limited number of investor-owners.

The interests of investor-owners and renter/tenant-residents are not aligned, and are in fact often contrary. Randy Lippert of the University of Windsor has commented on the effects of condominium governance changes when buildings are predominantly owned by non-resident investor-owners. The investor-owners is interested in maintaining and augmenting resale property values and maximizing rental income, and are not necessarily involved in the daily life of condominiums. They are incentivized to vote against decisions that may result in increased maintenance fees which can be used by condominium management to improve services in a building.

An example of the opposing interest of, and disproportionate effects on, tenants versus owners is spending money on the building's recreation facility to address repairs to equipment before the facility is safe for use by residents. Non-resident owners would not be affected by the absence of such a facility and thus may find it easier to vote against increases that would benefit renters/tenants and their quality of life. This would result in renter/tenants being deprived of an amenity without recourse or compensation, and may have the effect of degrading the quality of housing stock available in Ontario and its urban centres.

Any amendments to the *Condominium Act*, if genuinely intended to address the realities of condominium living and ownership, must allow renters/tenants to be able to affect decisions that directly impact the daily life of residents. A workable scheme would allow participation of, and perhaps voting by, tenants/renters on matters that significantly affect daily lives of residents within that condominium building, while allowing owners to have sole control over matters that do not affect the daily lives of residents. This would strike an appropriate balance between the interests of property owners and residents, and recognize the reality of condominium living, especially in dense and thriving urban centre.

D. Quality Alternative Dispute Resolution (ADR)

Though the discussion surrounding ADR in condominium dispute resolution has been rich, there is little talk about ensuring competence and quality in the provision of the ADR procedures. The use of ADR to resolve conflicts can and does provide benefits in the form of freeing up judicial resources, conserving funds, devising creative and tailored resolutions, and resolving conflict in a timely manner. However, the benefits of ADR only exist if the ADR system is, and is seen by participants to be, of high quality. If ADR measures are to be made mandatory in disputed within condominium communities, then stakeholders buy-in (as well as the systems legitimacy) requires that participants be assured that those providing ADR services meet minimum standards of education, experience, and professionalism.

In previous rounds of this consultation, mediation and arbitration have been suggested as suitable means of dispute resolution within condominiums. In Ontario, ADR services are provided by a number of charitable and for-profit agencies. However, mediation is unregulated with neither a governmental agency nor a self-governing body overseeing the training and provision of mediation services. While the ADR Institute of Canada has a program in place for credentialing ADR practitioners, the process for credentialing is not standardized across Ontario or Canada. It is legal for unlicensed individuals to call themselves mediators, and to provide mediation services.

It is unadvisable, both from a quality perspective and from a participant buy-in perspective, to continue to allow mediation services to be unregulated, with *caveat emptor* as the protective maxim for participants. Legislation and regulation will be needed to ensure that mediation, and other ADR, services are provided by those who are adequately educated, trained, and monitored in the provision of these services.

Summary

The Report does not do enough to address the lived-reality within condominium communities - specifically that of: (A) strained and inadequate infrastructure; (B) renter/tenant stakeholder and multicultural/multinational stakeholder rights, interests, and needs; (C) increasing separation of ownership from occupation and the effects caused by competing and conflicting interests; and (D) the need for quality assurance mechanisms in the provision of mediation and other ADR services.

The *Condominium Act* permits for collective and indirect discrimination and prejudicial treatment that would not be possible were owners acting alone or directly, or that would not occur if the interests of condominium communities were adequately represented in governance and dispute resolution mechanism affecting condominium stakeholders. Particularly with renters/tenants, there exist no adequate redress mechanisms to protect their rights as against condominium boards and corporations.

The Report recognizes that condominium governance has come to be considered, and functions in reality, as a fourth level of government. These self-governing communities have been delegated rule-making powers. It must be ensured that these rule-making powers are not exercisable in ways that would violate human rights legislation, rights granted by other statutes, or other protected rights (such as *Charter* rights, as it is inconceivable that the government could grant another entity rule-making powers that the government itself lacks). Additionally, the effects of increasing separation between ownership and occupation of condominium units, and the resultant impact on the competitiveness and liveability of urban centres, requires that governance structures be developed so as to accord with the lived reality of these important communities.

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Recommendations

A modernization of the *Condominium Act* must directly deal with the realities of condominium living. It is suggested that, in addition to supportive legislation, the amendments to the Act ought to:

- I. Provide for mandatory contribution by developers towards the costs of infrastructure necessitated by the increased densification resulting from an increased number of condominium buildings and condominium units in buildings;
- II. Provide for participatory rights for renters/tenants in the governance of condominium communities with an effective redress mechanism as against the condominium corporation and board;
- III. Expressly provide that the condominium board and corporation cannot act in any manner that is likely to violate the rights or tenants under the *Residential Tenancy Act*, and the rights of persons under the *Human Rights Code*; and
- IV. Provide that mediation and other ADR services are only valid and binding where provided by persons whose education, training, and performance is adequately regulated to ensure quality services.

Thank you for taking the time to read and consider these brief comments. We are at your disposal should you require further input, analysis, or direction.

These submissions are prepared by Sas Ansari and Sujoy Chatterjee, and are made on behalf of the Urban Law Centre (ULC). The ULC is a research group housed under the Critical Research Laboratory at Osgoode Hall Law School in Toronto, Ontario, Canada. The ULC does not provide legal services to the community, but is a research centre focusing on municipal law, urban governance and democratic politics in the City of Toronto. Located in Canada's largest city, the ULC's research topics include land use planning, urban development, culture, and citizen participation in Toronto. Please visit www.urbanlawcentre.org for more information.

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Appendix A:

Figure 1: Sample floor plan for a micro condominium development in Toronto.

This floor plan is reproduced from Canuckpost.com.

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