

## Hydro Expense Dispute in Mixed Commercial/Residential Condominium

There is frequently friction in mixed-use commercial/residential condominiums about the allocation and sharing of costs. The owners of residential units do not want to “subsidize” commercial units that are often heavier users of utilities and/or services provided to the condominium.

In a recent case, [Middlesex Condominium Corp. No. 195 v. Sunbelt Business Centres \(Canada\) Inc.](#), the condominium corporation was successful in its claim to recover hydro expenses for six years from the owner of the commercial units on the basis that the costs claimed related exclusively to those units.

The commercial units occupied the first two floors of the seven-storey condominium. Hydro to the residential units was provided through a bulk feed, while hydro to the commercial units was provided through 11 meters which were separate from the bulk feed. All of the commercial units were owned by one owner and rented out. Several of the units were combined to form larger suites and in most cases the alterations to accomplish this (which included alterations to the electrical wiring) were done without the knowledge of the condominium Board.

For a number of years, the condominium corporation paid the hydro accounts for the 11 meters and included the costs in the common expenses charged to all of the unit owners. The corporation subsequently hired an electrician, who determined that the 11 meters provided hydro exclusively to the commercial units and the common elements separating the individual commercial units. The corporation then stopped paying those accounts and claimed reimbursement of the amounts it had previously paid, as the corporation’s declaration provided that utilities were to be included in common expenses unless separately metered.

The owner of the commercial units took the position that the corporation’s claim was statute-barred as the hydro accounts went back to 2006 and the legal proceedings were not commenced until 2014. (Section 4 of the [Limitations Act](#) provides that legal proceedings cannot be commenced after the second anniversary of the day on which a claim was discovered.)

In response to this, the corporation argued that the waiver clause set out in the condominium declaration amounted to an agreement which operated to extend the limitation period. This argument failed as the Court determined that the condominium declaration, being a statutorily prescribed document prepared by the developer and not entered into with another party, was not an agreement.

Alternatively, the corporation successfully argued that it only became aware that the hydro accounts were “properly chargeable” to the owner of the commercial units in 2013, after it sought legal advice. In accepting this argument, the Court noted that the prior decisions of the Board who had paid the accounts in the past did not estop the corporation from now seeking payment for these accounts, as the corporation was obliged to enforce the declaration, which provided that separately metered utilities were not to be included in common expenses.

While the corporation was successful in its claim relating to hydro expenses, it was not successful in another claim by the corporation that the owner of the commercial units was responsible for the cost of replacing the window frames of its units, which replacement was necessitated by movement of the building walls. The Court concluded that there was nothing in the declaration which specified that the window frames were part of the unit. Furthermore, the window frames were not exclusive use common elements as there was no schedule in the declaration listing any exclusive use common elements. As the window frames were part of the common elements, it was the responsibility of the corporation to maintain and replace them.

The findings and conclusion of the Court in this case confirm that the provisions in the condominium declaration prevail, and as set out in the Condominium Act, 1998, the condominium Board is bound to enforce the declaration. Actions taken by a prior Board that were not consistent with the declaration will not estop the current Board from now complying with the declaration.