LANDPRO CONFERENCE 2024

ONTARIO'S LAND CONFERENCE

APRIL 03, 2024

PROTECT YOUR BOUNDARIES

KRCMAR™

Zeifmans
Ideas with impact

LANDPRO CONFERENCE 2024

THE PREMIER "HOW-TO" CONFERENCE FOR LAND, CONDO, AND DEVELOPMENT PROFESSIONALS

Date: April 03, 2024

Time: 8:30 AM - 5:00 PM

TABLE OF CONTENTS

LANDPRO CONFERENCE 2024

OUR SPONSORS

Your sponsorship enabled us to bring together top professionals, foster invaluable networking opportunities, and delve into discussions that shape the future of our industry.

Thank you for your ongoing support, dedication, and partnership. We look forward to continuing this collaborative journey and achieving greater milestones together in the future.

01

<< BACK

THANK YOU SPONSORS

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TERANET

THE WESTLAKE

BOUNDARYWISE Academy

Diversso energy

CIBC

Torkin Manes

BILD

TitlePLUS
TITLE INSURANCE

vaughan
ECONOMIC DEVELOPMENT

egis

almadev

MELBOURNE PROPERTY MANAGEMENT

AIRD BERLIS

LANDPRO CONFERENCE 2024

PROTECT YOUR
BOUNDARIES

Your source for land and boundary expertise.

Protect Your Boundaries is for homeowners, REALTORS® and land professionals seeking the knowledge, tools and services to prevent and resolve property boundary issues and complete successful real estate transactions.

For Home Owners

Buying, Selling, building or in a dispute, this is your one-stop resource centre for all things boundary-related.

For Ontario REALTORS®

BoundaryWise™ Education, essential tools and services to help you protect your client, your deal and your reputation.

For Land Professionals

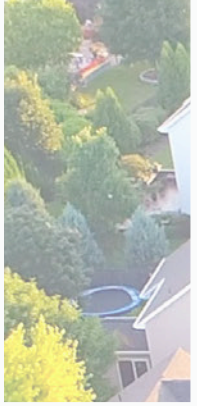
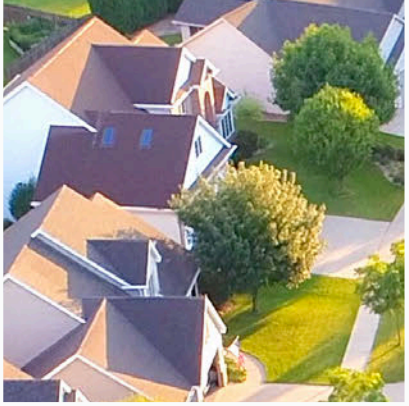
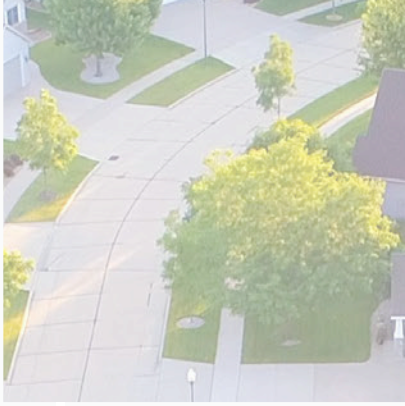
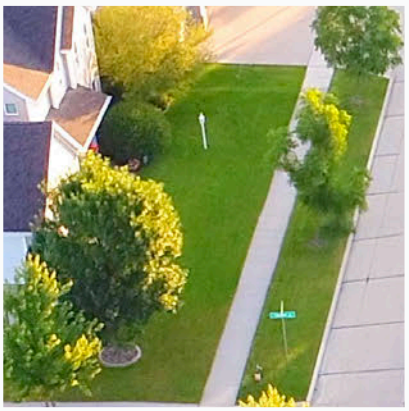
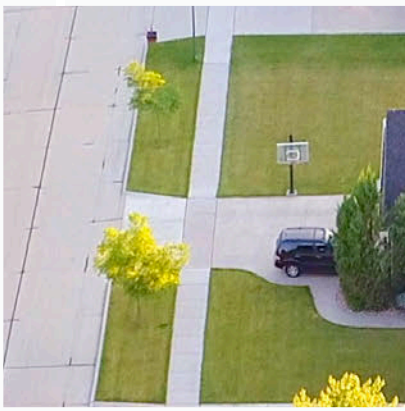
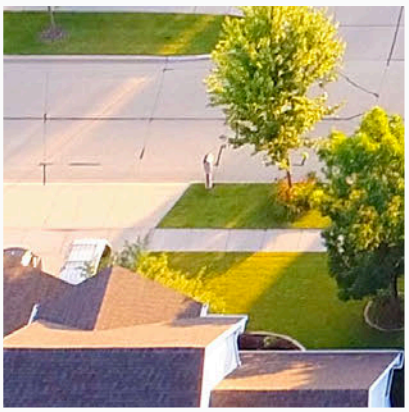
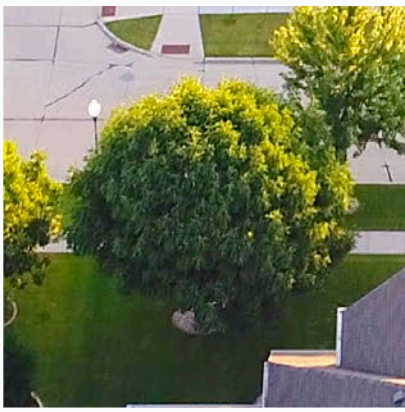
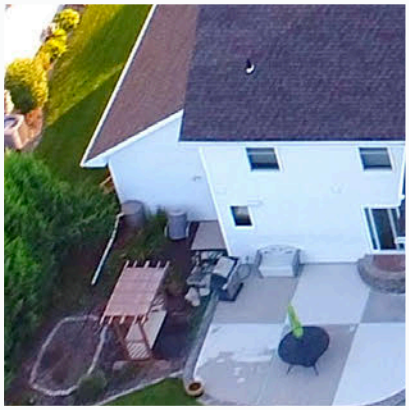
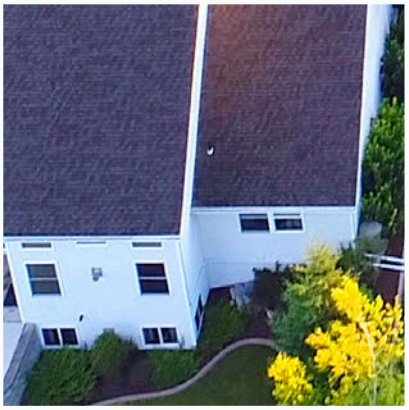
Easy instant access to the largest collection of registry and survey documents and services.

WWW.PROTECTYOURBOUNDARIES.CA

ORGANIZER

PROTECT YOUR
BOUNDARIES

YOUR **SOURCE** FOR **LAND** AND **BOUNDARY EXPERTISE.**

☎ 877.392.2662

ProtectYourBoundaries.ca

info@protectyourboundaries.ca

SURVEY PLANS

PROTECT YOUR BOUNDARIES

Here at Protect Your Boundaries, we are surveyors at heart. We offer the largest online database of existing surveys in the GTA, all of which are available at the click of a button and in the comfort of your home, office or on the go on your mobile device.

1. Visit our website: ProtectYourBoundaries.ca
2. Type in the home address.
3. Go to the Property Page to see the surveys and reports for that address.
4. Simply add to cart, proceed through the secure checkout and a PDF plan will be emailed to you instantly.

If there is no survey available, you can have us do a custom search, you can commission a new survey, or even get a boundary stakeout done by us.

What does a survey plan show ?

- Displays the legal boundaries of the property
- The size and shape of the property
- The location of right of ways and easements
- Location of physical monuments that mark the limits of land (i.e survey bars)
- The house and other buildings and physical features like fences, decks, patios, driveways and pools.

PROPERTY REPORTS

When buying a house, there are a few steps that need to be taken in order to do due diligence but also to protect yourself whether you are the agent or buying/selling the home.

Protectyourboundaries.ca offers a variety of reports (Property Reports & Easement Reports) that include vital information to help in the decision of the sale and to ensure all information is disclosed and clear.

In a Property Report, you get:

- Parcel Register (official property document from the Province of Ontario).
- Easement Instruments (official documents from the Province of Ontario).
- Plain English explanation of easements, liens and encumbrances.
- The PYB Official guide to evaluating and researching a property.
- Report does NOT include a full survey (SRPR).

*Optional: verify property area (square footage); Reports will require 1-2 business days to complete.

KRCMAR™

Founded in 1983, Krcmar Surveyors Ltd., has become one of the GTA's premier land survey firms, specializing in condominium, commercial and residential surveying.

Throughout the GTA, from complex condo development and urban construction to municipal work and transportation projects, Krcmar goes beyond the ordinary to become a valued and trusted member of your development team.

WWW.KRCMAR.CA

ORGANIZER

KRCMAR™

CONDO DEVELOPMENT.
URBAN CONSTRUCTION.
LAND DEVELOPMENT.
MUNICIPAL & INFRASTRUCTURE SURVEYS.

KRCMAR SURVEYORS LTD
1137 Centre Street, Suite 101
Thornhill, Ontario L4J 3M6
P 905.738.0053 - F 905.738.9221
info@krcmar.ca - www.krcmar.ca

KRCMAR™

At-a-Glance Overview

www.krcmar.ca

1137 Centre Street
Thornhill ON L4J 3M6
P 905.738.0053
F 905.738.9221

OUR COMPANY

At Krcmar Surveyors, we specialize in large and multi-faceted projects—condominiums, complex construction layouts and urban cadastral surveys. Our industry-leading brand is known for its professionalism, experience, reliable service and integrity and we pride ourselves on anticipating and surpassing our clients' expectations.

OUR PEOPLE

The key to our success is directly related to our investment into the quality, skill and expertise of our dedicated and talented people. Experienced both within Canada and internationally, our staff is comprised of only the best in the industry. Our professional team currently consists of 50 surveyors and technologists, with a complement of 10 survey crews – more than capable of handling any-sized development.

OUR SERVICES

While we specialize in sizeable high-rise redevelopments for condominiums and complex construction, we are also a full-service professional surveying company with expertise in all forms of cadastral, topographic and engineering surveys.

OUR HISTORY

Our company began as a small family business, established by Vladimir Krcmar working out of his basement in 1981. We quickly forged a reputation for excellence within Ontario's legal and development communities. Throughout our history, we have proudly remained a family managed business that always puts special care and attention into everything we do. We have expanded to successfully undertake countless large and complex projects throughout Ontario – becoming the recognized leader in the industry we are today.

OUR INNOVATIONS

Catapulting surveying into the digital era, Protect Your Boundaries Inc. was launched by Krcmar Surveyors in 2014. The "Uber" of the surveying world, PYB is the most comprehensive online source for boundary information available to the public. Through our cutting-edge technology and partnership with Teranet Inc., we provide customers with a database of more than 1 million Ontario survey plans. Licensed by the Association of Ontario Land Surveyors, PYB is also a provider of smaller residential surveying services and consultations.

OUR SIGNS

Our iconic sign—a common sight throughout top-tier developments in the Greater Toronto Area—stands as a hallmark for landowners and developers who have a high regard for excellence.

KRCMAR™

At-a-Glance Overview

www.krcmar.ca

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P 905.738.0053
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OUR LEADERSHIP

Committed leadership is what distinguishes our team of professional surveyors and cadastral experts. Everything we do is driven by our passion for great service to clients and our commitment to the highest levels of quality. We have eleven senior surveyors on staff with a combined 350 years of experience between them! They are supported by experienced cadastral field technologists, project directors, skilled CAD specialists and researchers. Together, there is no development challenge or deadline that our team can't meet. The following individuals make up our leadership team:

- Founder and President (since 1980)
- More than 60 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1974
- Subdivision, condominium and development specialist

Vladimir Krcmar
O.L.S.

- Managing Director, with 30 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1995
- Condominium and development specialist

Maja Krcmar
B.Sc., O.L.S.

- Managing Director, with 30 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1995
- Condominium and development specialist

Saša Krcmar
B.Sc., M.B.A., O.L.S.

- Managing Director, with 30 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1997
- Subdivision and development specialist

Tom Krcmar
B.Sc., O.L.S.

- Supervising Project Director, with 30 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1995
- Licensed by the Association of British Columbia Land Surveyors
- High-rise construction specialist

Robert Wiegenbröker
B.Sc., B.C.L.S,
O.L.S., O.L.I.P.

- Project Director, with 35 years' experience
- Graduated with a Bachelor of Science in Architecture from the University of Santo Tomas
- Condominium and development specialist

Rodrigo Batol
B.Sc.

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At-a-Glance Overview

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F 905.738.9221

OUR LEADERSHIP

- Project Director, with 25 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1998
- Condominium and development specialist

J. Eduardo Linhares
B.Sc., O.L.S., O.L.I.P.

- Project Director, with 35 years' experience
- Licensed by the Association of Ontario Land Surveyors in 1984
- Legal survey specialist

Sase N. Ramsamooj
O.L.S., O.L.I.P.

- Project Director, with 9 years' experience
- Licensed by the Association of Ontario Land Surveyors in 2021
- Legal survey, construction and development specialist

Satesh Lakhan
B.Sc., M.Sc., O.L.S., O.L.I.P.

- Legal Project Director
- Licensed by the Association of Ontario Land Surveyors in 2022
- Condominium and Development Specialist

Victoria Donko
B.Eng, O.L.S.

- Project Director, with 20 years' experience
- Licensed by the Association of Ontario Land Surveyors in 2015
- Condominium and development specialist

Mansour Ghofrani
B.Eng., O.L.S.

- Project Director, with 21 years' experience
- Licensed by the Association of Ontario Land Surveyors in 2016
- Condominium, construction and development specialist

Waldemar Golinski
B.Sc., O.L.S., O.L.I.P.

- Project Director, with 15 years' experience
- Licensed by the Association of Ontario Land Surveyors in 2012
- Legal survey and Development specialist

Jansky Lau
O.L.S.

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At-a-Glance Overview

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OUR CLIENTS

Krcmar helps clients across the GTA stay ahead of the curve, solve challenges and navigate a new era in the land surveying industry.

alectra utilities
AMACON
ANDRIN
Aoyuan
ARMOUR HEIGHTS
BALLANTRY
BAZIS
brandy Lane HOMES
BROCCOLINI
Brookfield Homes
THE BROWN GROUP OF COMPANIES INC.
BSäR GROUP OF COMPANIES
CAMROST FELCORP
CARLYLE
CASTLERIDGE HOMES
COLLECDEV
CORTEL GROUP
Cattera
Castle Royale
CASTLEPOINT
cityzen
Daniels love where you live
DASH DEVELOPMENTS
DIAMANTE
DIAMONDCORP
Devron
dream
EASTON'S GROUP OF HOTELS
Edilcan
ELADCANADA
EMBLEM
Fernbrook HOMES
FIRSTGULF
FIRST VIEW HOMES
freed
GEMTERRA
GHODS BUILDERS INC.
FOREST GATE
FOREST GREEN HOMES
FORMAT
GRAYWOOD DEVELOPMENTS
GREAT GULF
Always Innovating Greenland
harhaydevelopments
HBNG Holborn Group
HULLMARK
KingSett CAPITAL
KERBEL GROUP INC.
LAKESHORE GROUP
LAMB DEVELOPMENT CORP.
LASH
mattamy HOMES
MEDALLION CORPORATION
METROPIA
METROVIEW DEVELOPMENTS
minto
MIZRAHI DEVELOPMENTS
Morguard Real Estate Potential. Realized.
NEDAS
NORTHDRIVE
ONEPIECE DEVELOPMENTS
PRESTON GROUP
QUADCAM DEVELOPMENT GROUP
ROCKPORT ESTABLISHED 1957
RB
THE sher CORPORATION
SmartCentres
Starlight Investments
STATEVIEW HOMES Live Inspired
REMINGTON GROUP
RIOCAN
TACC DEVELOPMENTS
TORBEL
Tower Hill Development Corporation
TriAxis
Tribute communities
TRINITY
URBAN CAPITAL
URBINCO DISTINCTIVELY DIFFERENT URBAN LIVING.
WORLEY URBAN PARTNERS
WYC
Yorkwood HOMES
ZANCOR HOMES

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OUR PROJECTS

Amacon

Parkside Village Redevelopment, Mississauga

Aoyuan

M2M Condos - Newtonbrook Plaza Redevelopment, Yonge St.

Armour Heights Developments

The Kent - 89 Avenue Road, Yorkville

Bazis

Emerald Park, Yonge St.
Exhibit, Bloor St.

Broccollini

Leftbank, 83 River St.
River & Fifth

Camrost Felcorp

Yorkville (former Four Seasons)

Carterra

65 King St. E. Redevelopment, King St. E. & Church St.
Portland Commons

Castlepoint

Toronto Waterfront Film Studios, Commissioners St.

Castle Group

Insignia Condos, Sheppard Ave. E.

Cityzen/Castlepoint

L-Tower, Yonge St.

Cityzen/Fernbrook

Absolute Towers – "Marilyn Monroe" Buildings
Art on Main Condos
D'Or Condos
Garrison Point Redevelopment
Pier 27 Redevelopment

Cityzen/Greybrook

306 Davenport Redevelopment

Collecdev

2450 Victoria Park Ave.
30 Tippett Rd. Redevelopment
36 Tippett Rd. Redevelopment
300 Bloor Street West
500 Wilson Avenue
Westwood Gardens, Yonge St.

Cortel Group

Expo Condos, Highway 7
Abeja Condos Jane/Rutherford Redevelopment
OAK Condos, Dundas St. E Oakville

The Daniels Corporation

1525 Kingston Road, Pickering
Eglinton Ave. W. & Erin Mills Parkway Redevelopment
Olivia Marie Gardens
Regent Park Redevelopment
TIFF/Bell Lightbox
Waterfront, Queens Quay E.

The Daniels Corporation/Diamond/Kilmer

Humber River Hospital Redevelopment, Keele St.

Davpart

481 University Ave.
Avro Condo

Diamante

100 Davenport
The Diamond, Churchill St.
Mirabella, Lake Shore Blvd. W.

Dream/Kilmer

49 Ontario St.
Pan-Am/Canary District Redevelopment

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OUR PROJECTS

Eastons

60 Mill St.
Dundas Square Gardens, Dundas St. E. & Jarvis St.
Icona – Hilton Garden
Rosedale on Bloor Condos, Bloor St. E.
Yonge Park Plaza, Yonge St. & Wilson Ave.
Yorkdale Holiday Inn, Dufferin St.

Edilcan

Valhalla Town Square, Gibbs Rd. & Highway 427

El-Ad Group

Emerald City, Sheppard Ave. E. & Don Mills Rd.
Lansing Square Re-Development, Sheppard Ave. E. & Victoria Park Ave.

El-Ad Group/Freed

Galleria Mall Re-Development, Dufferin St. & Dupont St.

Emblem Developments

Arte Residences, 89 Dundas St. W., Mississauga
Artform, 86 Dundas St. E., Mississauga

Freed

60 Colborne, Church St.
650 King St. W., King St. W. & Bathurst St.
Art Shoppe, Yonge St. (Construction only)
Thompson Toronto Hotel & Residences, King St. W. & Bathurst St.

Ghods Builders Inc.

5959 Yonge St. Condos

Graywood Group

241 Church Street
250 Lawrence Ave. W.
33 Parliament Street
506-516 Church Street
Eastern Ave Condos, Eastern Ave.
Ocean Club, Etobicoke
Peter Adelaide Condos, Adelaide St. W.
Ritz Carlton Hotel and Residences, Wellington St. W.
Scoop Condos, St. Clair Ave. W.
Scout Condos, St. Clair Ave. W.
The Mercer, John St.
Wonder, 462 Eastern Ave.

Great Gulf

357 King West Condos
401 King St. W.
Gehry + Mirvish
One Bloor East (Construction only)
Parkside Condos, Queens Quay E. (Construction only)
PACE Condos, Dundas St. E. (Construction only)

Greenland Group

King Blue Condos, King St. W.
Lakeside Redevelopment, former Fed-Ex lands Queens Quay E.

Harhay Construction

75 The Esplanade
900 The East Mall

Kingsett Capital

2075 Kennedy Road
50 Cumberland St. & 37 Yorkville Ave. Redevelopment
Cumberland Square Condos, 2 Bloor St. W.
Valhalla Executive Centre Redevelopment, The East Mall

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OUR PROJECTS

Lamb Developments

Bauhaus, King St. E.
Bread Co., McCaul St.
East Fifty Five, Ontario St.
The Harlowe, Richmond St. W.
Television City, Hamilton
Wellington House, Wellington St. W.
The Woodsworth, Richmond St. W.

Lash Group

The Barrington, Bathurst St.
Distinction Condos, Soudan Ave.
ME Condos, Meadowglen Place

Metropia

AYC Condo, Davenport Rd.
New Lawrence Heights Redevelopment
The Rocket, Wilson Ave.

Metroview

8888 Yonge St.
9839 Yonge St.

Mizrahi Developments

The One, Bloor St. W. & Yonge St.
180 Steeles Ave. W.
181 Davenport Rd. Redevelopment

Mod Developments/Intracorp

Massey Tower, Yonge St. (Construction Only)

North American Development Group

Agincourt Mall Redevelopment

Northam Realty Advisors

2 Carlton St.
250 University Ave.

Oxford Properties Group

Square One Expansion and Revitalization

Pinnacle

Harmony Village, Sheppard Ave. E.

Remington Group

Downtown Markham, Warden Ave.

Rogers Group & Urban Capital

M-City Redevelopment, Mississauga

Talon

Former Trump Hotel and Residences, Bay St. & Adelaide St. W.

TAS

2 Tecumseth St.
385 The West Mall
888 Dupont St.

Tribute Communities

1325 The Queensway
210 Bloor St. W.
Artistry Condo, Dundas & McCaul
The College Condo, College St.
Linx Condo, Main St. and Danforth Ave.
Max Condos, Mutual St.
Parkside Square, Sheppard Ave. E.
RCMI, 426 University Ave.
The Stanley, Carlton St.
Y&S, 2161 Yonge St.

Urban Capital/Northam Realty

Kingsway on the River, Dundas St. W.
M-City
The Ravine

Zancor Homes

The Branch Condos
King City Condos

The **BoundaryWise Academy** provides education and ongoing professional development top Realtors in Ontario. It arms them with the knowledge, skills and tools they need to reduce and eliminate boundary, easement and title related risk in every sale and purchase.

At **Protect Your Boundaries** we have dedicated ourselves to helping Ontario's top agents and brokers drastically increase their knowledge and effectiveness at identifying and dealing with land, easement and boundary-related risks on both sides of the deal.

WWW.BOUNDARYWISE.CA

ORGANIZER

DON'T LET YOUR REAL ESTATE DEAL BE AT RISK

Understand Land. Protect Your Clients. Build Your Business.

BOUNDARYWISE
Accreditation

PROFESSIONAL EDUCATION PROGRAM

BROUGHT TO YOU BY PROTECT YOUR BOUNDARIES KRCMAR

- GAIN KNOWLEDGE AND SKILLS
- UNDERSTAND LAND
- WIN MORE LISTINGS
- SEAL THE DEAL FASTER
- REDUCE YOUR RISK

COURSE OUTLINE

01 SURVIVING AND THRIVING IN THE NEW BOUNDARY REALITY

Introducing the world of boundary, easement and title issues.

02a HOW TO IDENTIFY AND VALIDATE A SURVEY PLAN

This course will make you the gatekeeper for your client and your deals, ensuring that when it comes to survey plans and the decisions you make based on them, you'll stay on side and out of trouble.

02b HOW TO READ A SURVEY PLAN

In this course you will learn the six key features to look for, how to interpret them on any survey plan, how to spot trouble and what to do about it.

03 THE A-Z OF TITLE INSURANCE

Title insurance (TI) is a great product, but few understand it. Learn all about TI and how to use your new-found knowledge to add immeasurable value to your clients' buying and selling experiences.

04 THE REALTOR'S GUIDE TO BOUNDARY DISPUTES

In this course you will learn how boundary disputes happen and why they are so common in the months after the real estate transaction. Most importantly you'll learn how to give great advice without getting dragged into the dispute.

05 EASEMENTS AND RIGHT-OF-WAYS

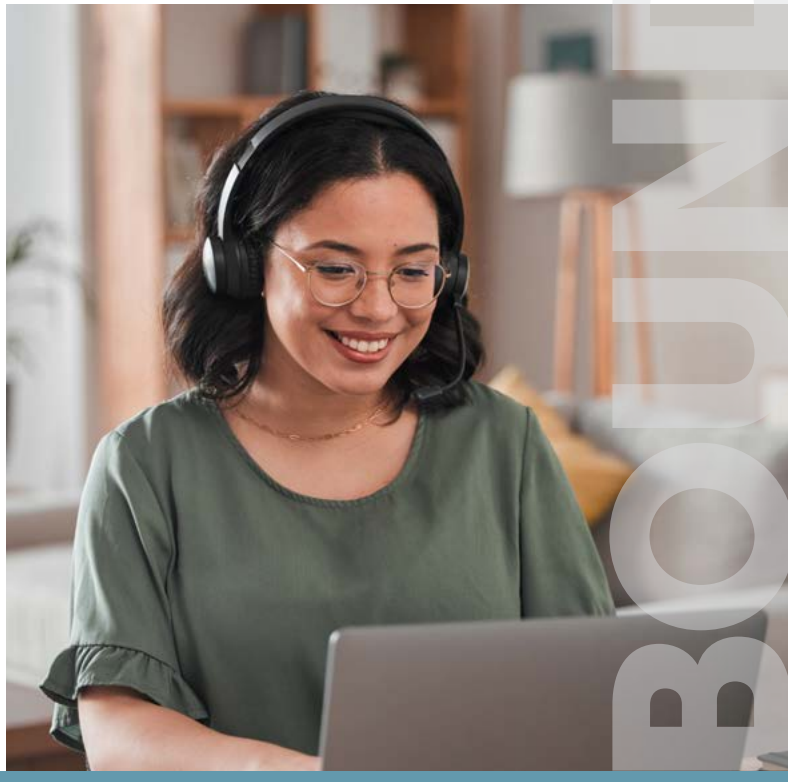
Discover easement identification, purpose, and impact on land use. Gain direct access to crucial official documentation for informed disclosure, safeguarding buyers, sellers, and yourself.

06 CONDOS 101

This course will equip you with the knowledge to identify issues, and understand the key documentation you need to review to help your client make the best condo decision possible.

07 DECIPHERING THE LEGAL DESCRIPTION

In this course you'll learn how to decipher any legal description and use the vital information in it to your clients' and your advantage.



BOUNDARYWISE

THE WESTLAKE

Canada's first Boutique Hotel centered around the Airbnb concept. Newly renovated historic brick and beam architecture, designed with upscale furniture and tailored for the modern traveler.

Smart technology with flexible keyless entry. Stunning views of Lake Ontario and Downtown Toronto from the nearby Great Lakes Waterfront Trails.

Originally known as the New Toronto Hotel in the 1920s, TheWestLake Hotel revitalizes modern design and superior finishes in an original historic brick and beam structure, totally gutted and finely re-constructed in 2018.

Featuring eleven timeless, superbly crafted, and individually-inspired designer rooms, well-equipped and thoughtfully finished for the modern traveler.

Smart Check-in Technology | Free WIFI | Smart TV | Netflix | Super-comfy Beds Kitchens, and much more!

Venu at The Westlake provides a sophisticated atmosphere fitting for any type of event. We are dedicated to helping create a memorable experience that will last a life time.

Our wedding and events coordination services are designed to make this process as smooth as can be. Our clients can rest assured that they are in good hands!

Arrange a commitment free appointment to discuss the details of your dream wedding day or special event with us at The Westlake.

WWW.THEWESTLAKE.CA

ACCOMODATION PARTNER

THE WESTLAKE

THE PLACE TO BE

Canada's first Boutique Hotel centered around the Airbnb concept. Newly renovated historic brick and beam architecture, designed with upscale furniture and tailored for the modern traveler. Smart technology with flexible keyless entry. Stunning views of Lake Ontario and Downtown Toronto from the nearby Great Lakes Waterfront Trails...

ROOM FEATURES

Featuring **eleven** timeless, superbly crafted, and individually-inspired designer rooms, well-equipped and thoughtfully finished for the modern traveler.

- Smart Check-in Technology
- Free Wifi
- Smart TV
- Netflix
- Super-comfy Beds
- Kitchens & much more

TO BOOK please visit: **www.theWestlake.ca**

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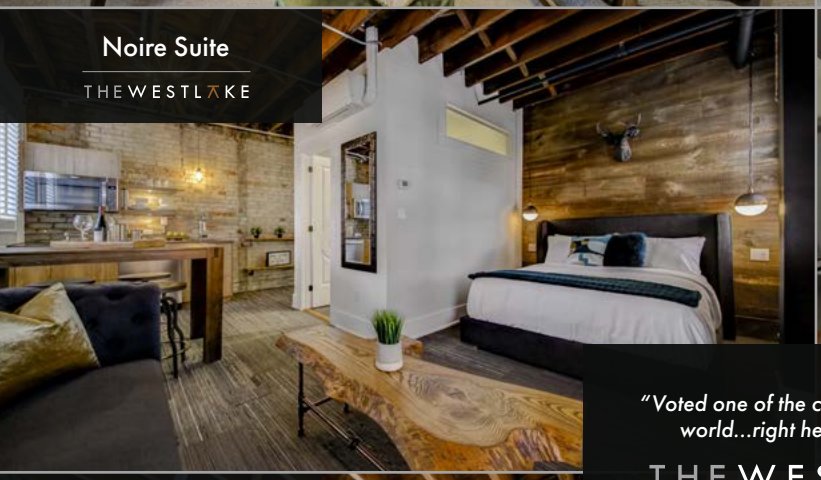

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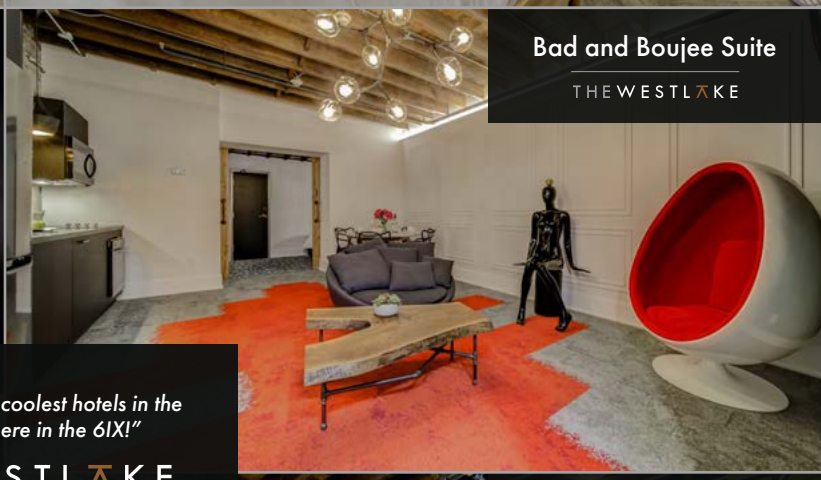

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"Voted one of the coolest hotels in the world...right here in the 6IX!"

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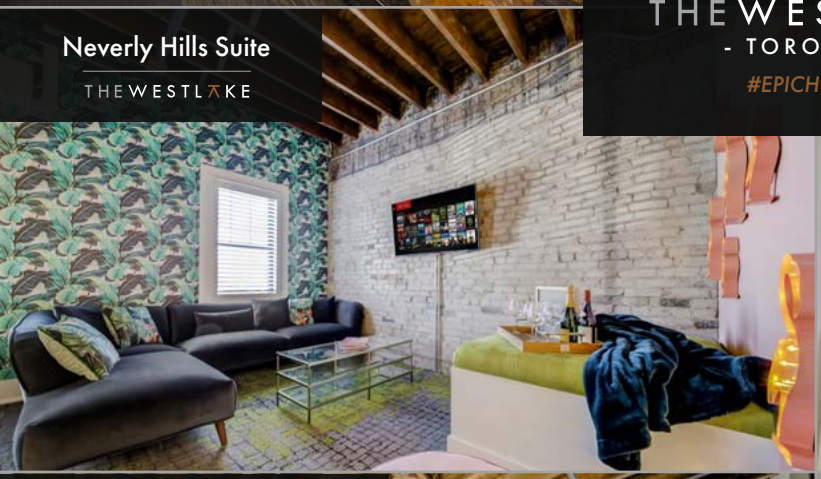

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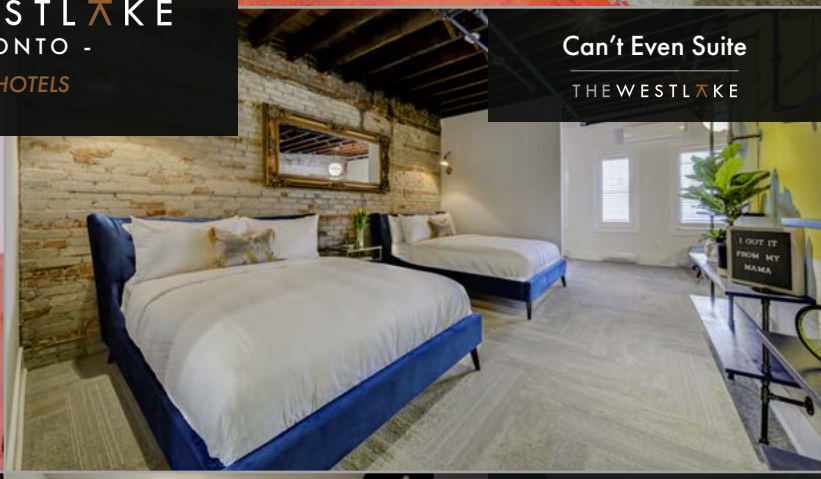

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For a comprehensive insight into our tax, accounting, and consulting services, please feel free to download our firm brochure by clicking here.

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Big business expertise, delivered with the intimacy of a small business team

Even though our team has grown to over 150 individuals servicing thousands of clients, we still maintain the small business intimacy and entrepreneurial spirit that got us started. You'll benefit from the right sized team for all your needs. Our partners draw on their combined hundreds of years of experience to provide consulting, assurance, compliance and tax services supported by their diversely skilled team members. Not only will you benefit from the experience and judgement of our senior leaders, but also from the sharp, innovative thinking of our young associates.

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Zeifmans offers you the benefit of access to a global network of accounting and consulting professionals as a member of Nexia – one of the top ten global networks of accounting and consulting firms.[2] For over 25 years, Nexia has ensured that all member firms meet and maintain high quality control standards. Meaning, we can partner with our affiliate Nexia firms operating in more than 122 countries around the world, allowing us to support you in achieving growth across multiple markets.

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Though our team has a great deal of specialized knowledge, we are anything but a niche firm. Over the years, we've proudly amassed experience accross a number of different markets throughout the globe, enabling us to provide world-class advice in several different areas, including but not limited to the following:

- Healthcare
- Real Estate & Development
- Retail
- Cannabis & Psychedelics
- Distribution
- Short-term & Long-term Rentals
- Financial Services Sports &
- Entertainment
- Manufacturing
- Not-for-Profit & Charity
- Technology & Startups

PERSONALIZED INSIGHT

Tailored solutions meticulously crafted to align with your business objectives.

Recognizing the distinct nature of each client, we acknowledge that every financial decision requires a comprehensive evaluation of various interconnected personal and business factors. Our team dedicates time to familiarize themselves with your unique circumstances, comprehending your business, family dynamics, or co-ownership intricacies. We assess your journey thus far and your envisioned destination. Subsequently, leveraging this holistic understanding, we fine-tune a bespoke business strategy. Regardless of your business's life cycle stage, we offer specialized expertise and inventive solutions to guide you toward the next echelon of success.

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Allow Zeifmans to support your business in conquering new levels of success. Let's create a lasting partnership, starting today:

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1. Zeifmans LLP is ranked 18th largest Canadian firm ranked by revenue according to The Bottom Line magazine annual ranking of accounting firms in Canada in 2016.

2. Nexia is ranked 9th largest global network by fee in come (US dollars) according to the International Acc ounting Bulletin Survey in 2018.

Zeifmans is a participant in the Canadian Public Accountability Board (CPAB) and the US Public Companies Accounting Oversight Board (PCAOB), authorizing it to audit public companies in both Canada and the US. CPAB and PCAOB are, respectively, Canada's and the US's public company auditor regulators.

4. Audits of Cayman Islands hedge funds performed by Zeifmans (Cayman).
5. Zeifmans is a panel auditor for the Investment Industry Regulatory Organization of Canada (IIROC), the national self-regulatory organization which oversees all investment dealers and trading activity in the debt and equity marketplace in Canada. Only panel auditors are authorized to audit IIROC-registered investment dealers.

* Zeifmans and Nexia by the numbers as of February, 2023.

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Teranet is Canada's leader in the delivery and transformation of statutory registry services. With extensive expertise in land and commercial registries, Teranet provides insightful property intelligence and data solutions to thousands of customers in the real estate, financial services, government, utilities and legal markets. Within Teranet's comprehensive suite of offerings is GeoWarehouse, the single source of authoritative property and land information in Ontario, serving real estate industry professionals across the province. With the ability to verify ownership, create property detail reports, access comprehensive neighbourhood sales and various demographic reports, GeoWarehouse subscribers have access to the critical property and land data they need to be successful in their business.

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Government and Utilities

Introducing the Teranet Easement Program

Easement Based Solutions for Municipalities and Utilities

One of a Municipality or Utility company's primary assets is the easements they own on a property, yet it is also an asset that is often overlooked. Incomplete and inaccurate easement information can lead to unnecessary risks in asset management, infrastructure operations and public safety.

Through Teranet's easement program, we can assist in mitigating these risks by identifying and centralizing easement data. Government organizations and Utility companies can proactively manage and protect their easement interests by accessing tabular and digitally mapped easement information enabling a more reliable, secure and managed environment.

Program Highlights

Easement Report

Contains a list of all registered easement type instruments within an organization's jurisdiction that can potentially create an easement through the Land Registration process.

Document Review and Evaluation

Review the registered easement type instruments identified in the Easement Report to evaluate whether or not easements are created.

Government and Utilities

Teranet Easement Program

Easement Mapping

Generation of polygon features identifying the spatial extent of the valid easement instruments as interpreted from the descriptions and plan information over existing parcel mapping fabric.

Easement Usage Identification

Identify the purpose of the registered easement based on document interpretation i.e. storm water, sanitary sewer, hydro, etc.

Ongoing Easement Mapping Maintenance

Upon completion of the initial easement mapping project, provide map maintenance based on monitoring of new easement and release of easement registrations.

Key Benefits

- Identify missing or misaligned easements
- Prioritize investigation and acquisition of missing easements
- Access critical information for emergency response and field operations
- Improve and standardize process for future easement acquisition
- Formalize planning for release of easements and risk mitigation
- Prioritize easement related budget planning
- Enhance municipal infrastructure GIS data
- Centralized easement inventory

Get In Touch With Us

Contact sales today to discuss how the Teranet Easement Program can help accelerate your objectives today.

Richard Norris
Senior Manager Strategic Accounts, Teranet
richard.norris@teranet.ca

Diverso Energy designs, builds, owns, and operates geothermal heating and cooling systems for multi-family, office, and institutional buildings, allowing clients to reap the benefits of geothermal without the financial or operating risks associated with the technology. The company prides itself on being the first fully integrated geothermal supplier in Canada, with engineering, construction (including drilling) and capital managed under one roof.

Unlike past solutions, clients achieve new energy and carbon targets while lowering their budget, not increasing it, thanks to the company's $0 geothermal utility model. This model converts the upfront cost of a geothermal ground loop into a long-term operating expense, providing a reliable and low-risk renewable heating and cooling solution.

With over 40 years of combined experience, Diverso's ownership team has collaborated with hundreds of clients, many in high-density urban environments. Their use of dependable financial & technical solutions is expediting the transition from fossil fuels to electric buildings. To date, they have eliminated over 9,000 tons of CO2 and served a total area of over 6,500,000 square feet of real estate. Each installation factors all stakeholders into the equation.

Tenants and Owners can take comfort knowing that their investment is secured against climate-related policy changes and carbon tax increases, as well as escalating energy costs. Meanwhile, developers benefit from a future-proofed building that improves their bottom line and carbon footprint. With a multibillion-dollar capital partner at the helm, they can also rest assured that their projects are in capable hands. Above all, Diverso's geothermal systems are good for the planet, offering an 80% carbon reduction per building on average.

"18 years ago, we created a top-notch 'Tylenol' for developers, but it took 15 years for anyone to develop a headache. Now they have a headache, and they are looking for that Tylenol. Green standards are growing stricter, carbon-tax is sky-high, and energy costs aren't decreasing anytime soon. A tipping point for green buildings is drawing near and we're prepared to take the market by storm." – Tim Weber, CEO of Diverso Energy

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Diverso energy

A Geothermal Utility Company

THE CHALLENGE
FACING DEVELOPERS

At Diverso Energy, we recognize that developers and building owners face heightened pressure to achieve new energy and carbon targets. Meeting these new standards can hurt your construction budget. Not with Diverso!

WHAT'S IN IT FOR YOU?

REDUCE CONSTRUCTION COSTS
Replace cooling towers and boilers with a geothermal borefield paid for by Diverso and convert your capital costs into off-balance sheet operating expenses.

INCREASE BUILDING VALUE
Eliminate conventional HVAC equipment and repurpose this prime real estate for additional amenities, such as a green rooftop or patio space.

EXCEED GREEN STANDARDS
Exceed government-mandated energy standards and carbon reduction targets, while improving your building's marketability.

OUR SOLUTION
$0 GEOTHERMAL UTILITY MODEL

Our geothermal utility model converts the capital cost of a geothermal ground loop into a long-term operating expense while providing a resilient, low risk renewable heating and cooling solution.

- **300+ projects**
- **1,500,000+ SQFT of drilling**
- **Vertically integrated**

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Diverso energy

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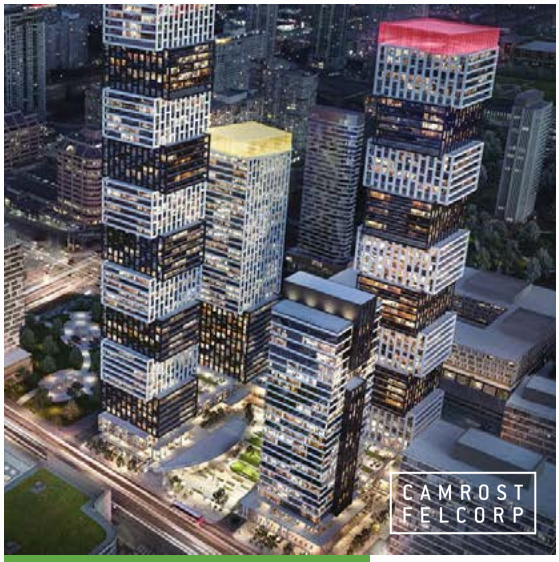
SAMPLE PROJECTS



MISSISSAUGA, ON

THE EXCHANGE

- 9 buildings, from 30-66 storeys
- Features tallest geothermal building in North America

MISSISSAUGA, ON

ALBA CONDOS

- 230,000 sq.ft condominium
- 418 units
- Borefield under 8 levels of underground parking

EXPERIENCE IS EVERYTHING

Each project we drill is a testament to our **40+ YEARS** of combined experience. In fact, all processes - from financing to engineering, fulfillment, and site maintenance - are vertically integrated! Diverso is also majority owned by CVC Capital Partners, a global private markets manager with $200 billion of assets under management. Rest assured, your next project is in good hands!

CIBC is a leading North American financial institution with 10 million personal banking, business, public sector and institutional clients. Across Personal and Small Business Banking, Commercial Banking and Wealth Management, and Capital Markets businesses, CIBC oers a full range of advice, solutions and services through its leading digital banking network, and locations across Canada, in the United States and around the world. At CIBC Commercial Banking, we help our clients create end-to-end financial solutions to address every business need at each stage of a company's development and operation. Our comprehensive approach helps companies finance growth, manage cash flow, increase eciency and mitigate risk. We provide high-touch, relationship-oriented banking and wealth management services to middle-market companies, entrepreneurs, high-net-worth individuals and families across Canada.

Most importantly, at CIBC, our purpose is to help make our clients' ambitions a reality. We live our purpose by making three commitments, and work every day to live up to them:

1. We make your goals our own.

2. We deliver excellence every day

3. We show appreciation for your business

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CIBC

CIBC COMMERCIAL BANKING

A TRUE PARTNER FOR YOU AND YOUR BUSINESS

No two businesses are exactly alike

At CIBC Commercial Banking we start by taking the time to learn your business needs, strategy, and goals for growth. Then, we build a tailored plan that supports you.

One point of contact. A team of experts.

Finding the right solutions starts by asking the right questions. As a client, you'll have a dedicated relationship manager—your main point of contact, who makes it their mission to understand your business, and pull the right resources across the CIBC network.

Each CIBC relationship manager is supported by a team with a range of expertise, connecting you to the full suite of solutions.

An approach that's designed to deliver

Having an expert supported by a team of specialists makes a big impact on your business.

Each relationship manager brings together a personal appreciation of your goals, knowledge of your industry, and a deep understanding of the CIBC resources needed to give you a strategic advantage.

That means we're able to deliver customized solutions, in real-time.

500+
Relationship managers

75
Industries

20,000
Companies

Speed, flexibility, and expertise.
What you can expect from working with us.

We'll take the time to get to know you, your business, and your goals. Together, we'll define what success looks like for you.

We'll stay on top of economic trends and advise you when and how these could affect your business or industry.

We'll provide fast, reliable access to financing at competitive rates, and tailor each solution to your needs.

We're here to help in any way we can and to serve as your point of contact to CIBC's network of industry experts and financial specialists.

Solutions to get you started

We offer end-to-end solutions, for every business need—whether you're looking to enhance cash flow, finance future growth, expand your business, or develop a transition plan.

Five goals we get asked about the most

1 Managing my cash

How we help

- Streamline procurement and payment processes
- Security and control over day-to-day transactions
- Tailor investment solutions to drive profitability
- Navigate changes in cash flow

2 Growing the business

How we help

- Growth financing or capital raising that supports:
  - Expansion and acquisition
  - New product development
  - Enhancing productivity

3 Working internationally

How we help

- Share global trade best practices
- Ensure safe and secure international transactions
- Accelerate trade-related cash flow

4 Transitioning to new owners

How we help

- Facilitate divestitures or buyouts
- Finance new owners
- Proactively develop an exit strategy that:
  - Maximizes sale value
  - Ensures financially secure retirement
  - Sets up ongoing business success

5 Managing personal wealth

How we help

- Tax savings for business owners and executives
- Withdraw funds from the businesses efficiently
- Optimize payment of officers and shareholders

The right plan starts with the right team

Start the conversation today, by visiting **cibc.com/commercial**.

With 1,500 member companies, BILD is the voice of the home building, land development and professional renovation industry in the Greater Toronto Area.

The building and renovation industry provides $33 billion in investment value and employs 271,000 people in the region.

BILD is proudly aliated with the Ontario and Canadian Home Builders' Associations.

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USE IT: OPTIMIZING MUNICIPAL DEVELOPMENT PIPELINES

A Review of the Need for and Implications of Prospective New “Use It or Lose It” Policies in Ontario

February 2024

KPEC
Planning + Economics

USE IT: OPTIMIZING MUNICIPAL DEVELOPMENT PIPELINES

A Review of the Need for and Implications of Prospective New “Use It or Lose It” Policies in Ontario

Prepared for:

BILD / OHBA

Keleher Planning & Economic Consulting Inc.

75 Main Street East, Unit 16,

Milton ON, L9T 0L8

February 2024

ABOUT

Keleher Planning & Economic Consulting Inc. (KPEC)

Keleher Planning & Economic Consulting Inc. (KPEC) is operated by Daryl Keleher, MCIP, RPP, PLE, who is a Registered Professional Planner (RPP) and land economist with 20+ years of experience in the fields of urban planning, demographic research and economic consulting. KPEC's focus is areas where the fields of land use planning, urban economics and municipal finance overlap with City building. More information can be found at www.kpec.ca

Ontario Home Builders' Association (OHBA)

The Ontario Home Builders' Association is the voice of the residential construction industry in Ontario, representing 4,000 member companies organized into 27 local associations across the province. The residential construction industry employs over 550,000 workers, paying $38.8 billion in wages and contributing over $80 billion in investment value to Ontario's economy (2022). Our members have the vital responsibility to build the housing supply that current Ontario residents are counting on at all stages of their lives and be the voice of future home buyers who want to call our province home. More Information can be found at www.ohba.ca

Building Industry and Land Development Association (BILD)

With more than 1,300 member companies, BILD is the voice of the home building, land development and professional renovation industry in the Greater Toronto Area. The building and renovation industry provides more than 230,000 jobs in the region and $26.9 billion in investment value. BILD is proudly affiliated with the Ontario and Canadian Home Builders' Associations. More information can be found at www.bildgta.ca.

EXECUTIVE SUMMARY

Background

Keleher Planning & Economic Consulting Inc. (KPEC) was retained by BILD and OHBA to review the potential implications of prospective policy changes that may involve lands with full development approvals and servicing allocation losing planning approvals, building permits, and/or servicing allocation.

The Housing Affordability Task Force commissioned by the Province of Ontario produced a report dated February 2022 – the report contained numerous recommendations to accelerate progress in 'closing the housing supply gap' in Ontario. Recommendation #43 of the Housing Affordability Task Force is to:

> *Enable municipalities, subject to adverse external economic events, to withdraw infrastructure allocations from any permitted projects where construction has not been initiated within three years of building permits being issued.*

The range of options or methods in which approvals or permissions (of various kinds) could be revoked, suspended, delayed, taxed, etc., are generally referred to as "use it or lose it" policies, referred to as "UIOLI" policies throughout this report.

UIOLI Shouldn't Impact Municipal Consistency with PPS Requirements for Minimum Amounts of Supply

Within past and current Provincially-endorsed approaches to estimating land needs, numerous important concepts are incorporated to ensure that there is sufficient housing supply to meet demand for housing in Ontario, including:

- Minimum amounts of residential designated land at all times, including throughout periods of time between reviews of land needs and planning policies;
- That minimum amounts of supply are necessary to avoid shortages which increase land and housing costs;
- Need to account for anticipated unused housing through incorporating adjustments for demolition and vacancy in estimating housing needs or the amount of available supply;
- Need for incorporation of a market contingency factor to offset risk of shortages developing from unanticipated events such as changes in the economy, changes in the housing market, landowners unwilling or unable to proceed with development;

- Housing demand should be disaggregated by dwelling unit type and compared with available housing supply by dwelling unit type.

By requiring at least 3 years of zoned land with servicing capacity, the ability to accommodate a minimum of 15 years of projected residential growth through intensification and designated land, and sufficient land more generally for up to 25 years (or longer) of projected needs, the Provincial Policy Statement 'bakes-in' the need for an ample supply of land and potential housing that will not be developed in the short-term.

The imposition of an enhanced system of UIOLI, even if applied to older, stagnant approved developments, may in many municipalities, bring the available housing supply below (or further below for those already below) minimum PPS requirements for designated and available residential supply and land with serviced capacity.

UIOLI Exists Throughout Ontario's Municipal Planning Process Providing Checks and Balances from Land Use Designation to Building Permit

There are numerous existing methods within Ontario's planning system that prevent stagnant development projects with approvals and/or permits from occupying servicing allocation, with numerous checks and balances throughout the planning and development process, including:

- Expiration of building permits;
- Registered plans deemed to be not registered after eight (8) years;
- Lapsing draft plan approvals after no less than three (3) years;
- Expiration of servicing allocation; and
- Excess land provisions in the Growth Plan where there is a surplus of designated land relative to projected need.

Should the Province choose to bolster some of the existing methods in which supply is rationalized and confirmed as being active and optimizing the use of public infrastructure, a first principle should be to ensure that elimination of approved supply does not violate PPS requirements for minimum supply, that any loss of servicing allocation is redistributed to other potential residential supply, and that any redistribution of servicing allocation or approvals is redirected in a transparent, clear and objective process.

Existing Municipal Supply Estimates Overstate Shovel-Ready Supply – Getting Additional Data is Crucial to Avoid Unintended Consequences

Aggregated region-wide or Province-wide surpluses of potential housing supply need to be used with caution, as each municipality in Ontario will have planning forecasts and separate requirements under Provincial Policy to have sufficient supply of their own. A surplus in one municipality is unlikely to address shortfalls in another. Provincial policy requires each municipality to have minimum amounts of designated, zoned and/or serviced supply.

The majority of estimated housing supply in municipal inventories are from applications that have not yet received a decision, or have been refused and remain under appeal, or have been approved and are under appeal from third-party appellants. There are numerous prospective developments in Ontario with servicing allocation, but without hard infrastructure available to enable development.

Beyond a few exceptions, it is found that there is a significant lack of data available to properly assess whether there are issues with dormant approved supply, particularly those with servicing allocation. Data required to be supplied by municipalities should include enough detail that analysis can be undertaken to understand the scale, scope and orientation of any existing or emerging problems with unused servicing capacity in Ontario and each of its municipalities.

Findings

There are Numerous "Use it or Lose It" Checks and Balances Already Embedded in Ontario's Planning System

The current system rationalizes, at various points in the planning process, the quantum of designated lands, the utilization of servicing allocation, the age of planning approvals, and the age of building permits. The production of housing in Ontario (as evident from data presented in Appendix A) is at 33-year highs, suggesting that any presumptions that landowners are unnecessarily holding back supply is inaccurate and not borne out by on-the-ground data.

More Data is Needed to Better Understand the Problem, but Issues Appear Oriented to Large-Lot Rural Supply and High-Density Urban Infill

There is a serious lack of data available from municipalities or the Province to adequately assess the scale and orientation of any issues related to stagnant approvals

or unused servicing capacity. More robust, mandatory data requirements would help researchers, planners, and policy makers understand the scale, scope and orientation of problems that may exist, or may emerge in the future.

Data made available from municipalities generally shows low proportions of estimated 'development pipelines' are in registered or draft approved developments with servicing allocation. The largest source of units in municipal pipeline estimates are in applications still requiring additional approvals, or municipal/OLT decisions.

Enhanced UIOLI Powers Need to Consider External Factors that May Hinder the Feasibility of Housing Development

A more strict time-based approval/permit/allocation expiry system ignores the evolving nature of markets that can make a once-feasible development type or form (residential or non-residential) significantly less marketable or feasible than when initially proposed.

The Housing Affordability Task Force recommended enabling municipalities to have the ability to withdraw servicing allocation from permitted projects included a caveat that the recommendation should be 'subject to adverse external economic events'. Given the effect that external factors can have on the ability to feasibly construct new housing, such as high interest rates, inflated construction costs and impaired availability of borrowing for builders and homebuyers, the Province should consider whether the timing of imposing more strict UIOLI policies may only serve to further impair the ability of prospective housing supply to be delivered.

Rather than punitively reducing the number of approved or permitted developments, or imposing fees and charges, the Province should be seeking to first understand 'why' approved supply may not be getting built on the same timelines or pace that municipalities expect. As noted by many municipalities, financial feasibility of construction is paramount to enable approved supply turning into built supply, but little analysis has been done to assess what municipal policies, processes, fees, charges or other requirements may do to the financial feasibility of projects.

Claims of Supply Being Withheld Ignores Amount of Development Activity Currently In-Progress

The notion that enhanced UIOLI powers are necessary on the presumption that home builders are withholding supply ignores that residential construction in Ontario is at a 33-year high, with housing completions reaching a 33-year high in 2023, and the over 164,000 units currently under construction also being a 33-year high.

Figure ES- 1

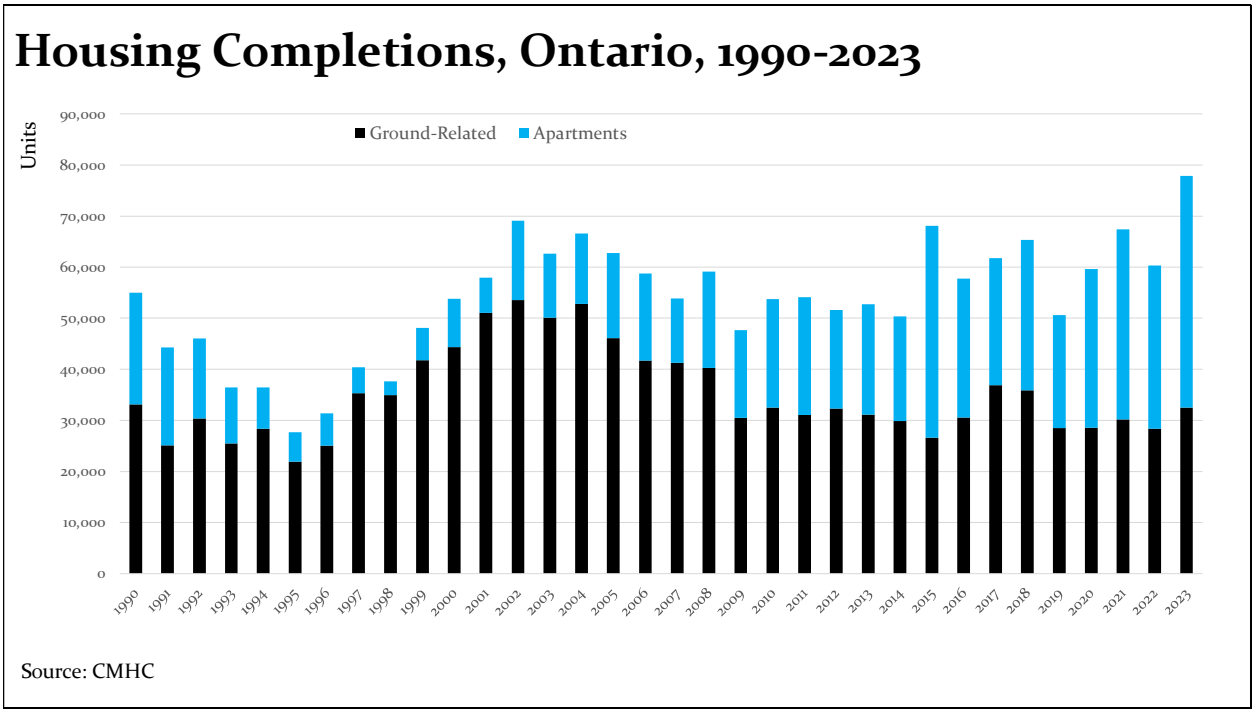


Figure ES- 2

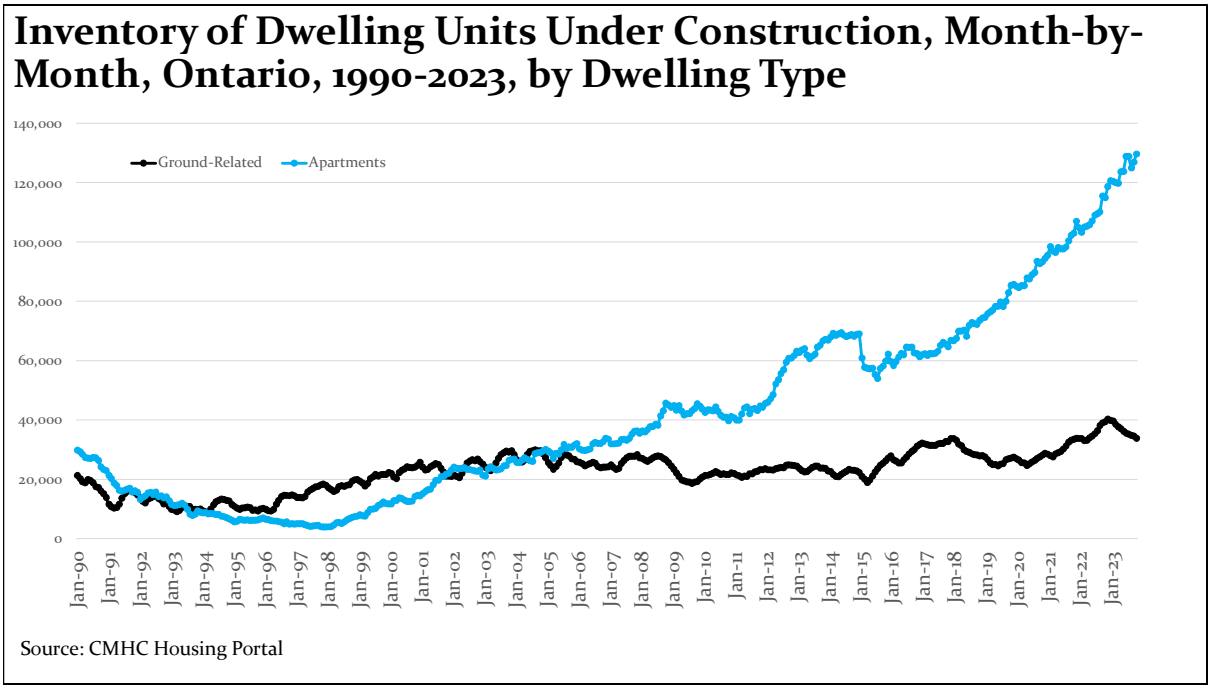
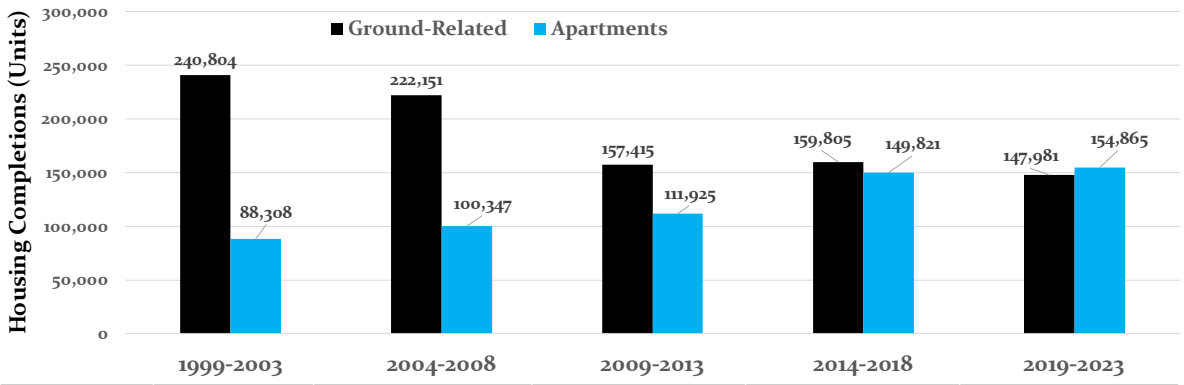


Figure ES- 3

Housing Completions by 5-Year Period, Province of Ontario, 1999-2023, by Dwelling Type



	1999-2003	2004-2008	2009-2013	2014-2018	2019-2023
GR Share%	73.2%	68.9%	58.4%	51.6%	48.9%
Apt Share%	26.8%	31.1%	41.6%	48.4%	51.1%
Total Units	329,112	322,498	269,340	309,626	302,846

Note: Ground-Related units includes single-detached, semi-detached, row houses
Source: Keleher Planning & Economic Consulting Inc. based on CMHC data

Key Recommendations

- **Data is Needed to Understand Scale of Issue and Avoid Unintended Consequences** - before an enhanced UIOLI policy is adopted, study should be undertaken to quantify the scale and potential source of problems that may exist. Currently, the relative lack of available data does not allow for proper analysis to understand the true size and scale of the problem.

- **Placing Onerous Conditions or Costs on Developments Already in Jeopardy May Exacerbate Existing Issues** – a requirement to re-apply once an approval or servicing allocation is revoked or lapsed may result in onerous conditions or costs being imposed. The time-cost of delay caused by expiry may impact smaller builders more than larger builders and exacerbate issues with feasibility that may already be present.

- **Lapsing or Revoked Planning Approvals May be Inconsistent with Municipal Planning Policy and Zoning By-laws** - If an application is approved because it conforms to the Official Plan, Zoning By-law, or the Official Plan or Zoning By-law was amended to designate or permit the land use and proposed development, it is unclear how removing its approval would conform to municipal policy. Official Plan designations and zoning permissions should not be at risk.

TABLE OF CONTENTS

1. INTRODUCTION

Keleher Planning & Economic Consulting Inc. (KPEC) was retained by BILD and OHBA to review the potential implications from a policy that may involve lands with full development approvals and servicing allocation to lose planning approvals, building permits, and/or servicing allocation.

The range of options or methods in which approvals or permissions (of various kinds) could be revoked, suspended, delayed, taxed, etc., are generally referred to as "use it or lose it" policies, referred to as "UIOLI" policies throughout this report.

1.1. Importance of Boosting Housing Supply in Ontario

The Housing Affordability Task Force commissioned by the Province of Ontario produced a report dated February 2022 – the report contained numerous recommendations to accelerate progress in 'closing the housing supply gap' in Ontario. The report noted the impact that a supply shortage is having in Ontario:

> *Shortages of supply in any market have a direct impact on affordability. Scarcity breeds price increases. …*
>
> *Businesses of all sizes are facing problems finding and retaining workers. Even high-paying jobs in technology and manufacturing are hard to fill because there's not enough housing nearby. This doesn't just dampen the economic growth of cities, it makes them less vibrant, diverse, and creative, and strains their ability to provide essential services.*

The HATF also noted the influence all levels of government have in enabling builders to deliver more homes:

> *The efficiency with which home builders can build, whether for-profit or non-profit, is influenced by policies and decisions at every level of government. In turn, how many homes developers can deliver, and at what cost, translates directly into the availability of homes that Ontarians can afford.*

1.2. What Could Use It or Lose It Policy in Ontario Entail?

Recommendation #43 of the Housing Affordability Task Force is to:

> *Enable municipalities, subject to adverse external economic events, to withdraw infrastructure allocations from any permitted projects where construction has not been initiated within three years of building permits being issued.*

A Use it or Lose It (UIOLI) policy could involve lapsing provisions of certain planning approvals (plan of subdivision, site plan), the reallocation of servicing allocation,

imposition of fees/charges to developments not proceeding, among other possibilities. However, details on the exact nature of the policy have not yet been determined.

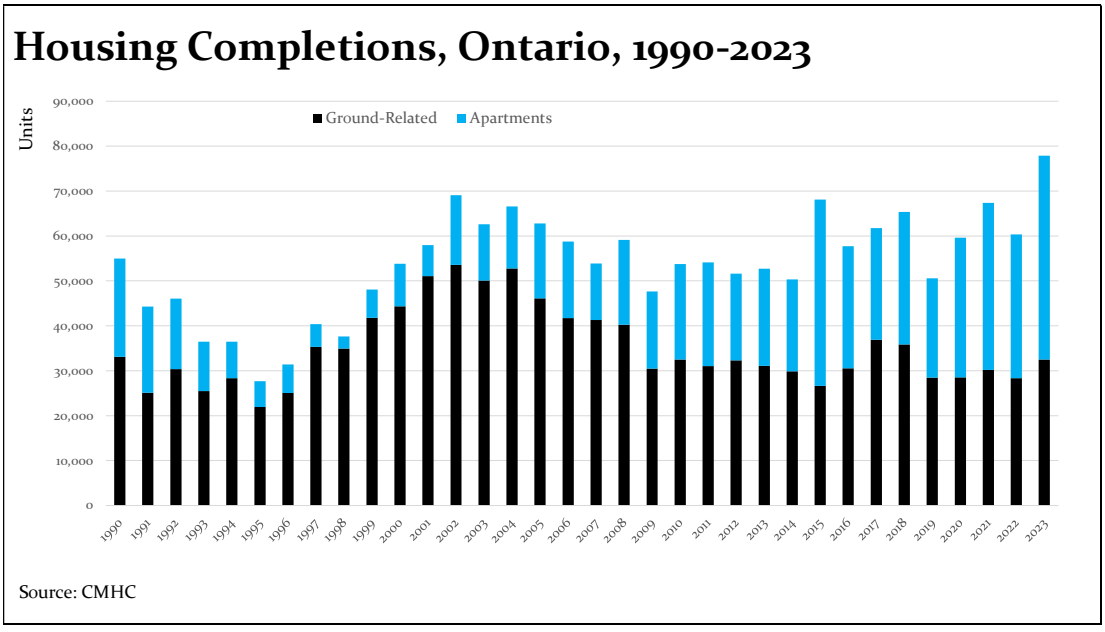
Recommendation #43 includes a crucial qualifier noting that withdrawing infrastructure allocations should be 'subject to adverse external economic events'. Among other things, 'events' that may affect the ability of housing construction may include the impact of higher interest rates and the associated reduced availability of lending, which can affect the ability of otherwise approved and permitted projects to proceed with construction.

For the purposes of this study, it is assumed that any and all fully approved developments, including those with planning permission without building permits, or those with both planning and building permission could be at-risk.

1.3. Trends in New Housing Construction in Ontario

The notion of the need for new or enhanced UIOLI policies is predicated on the presumption that approved homes aren't getting built fast enough or that housing supply is being held back. However, the data shows otherwise – in 2023, the amount of housing units completed, and inventory of units currently under construction each reached highs not seen since 1990, each being 34-year highs.

Figure 1

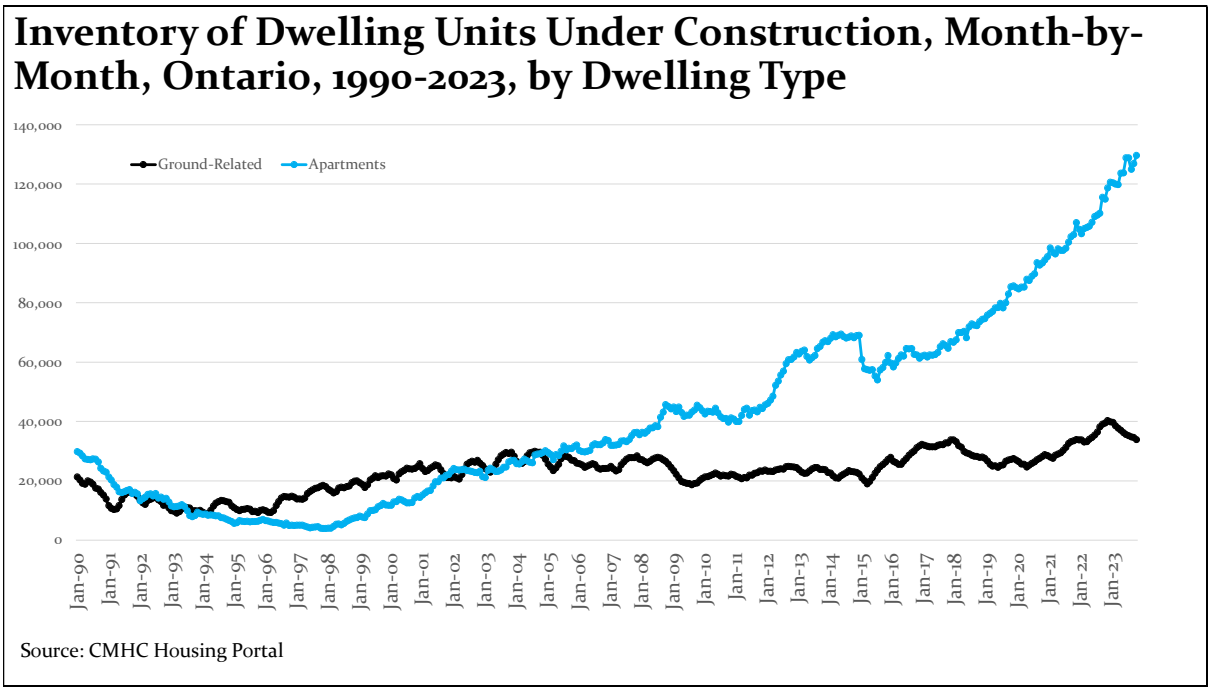


In 2023, housing completions in Ontario reached a 34-year high at nearly 77,900 units, the first year since 1990 in which completions have exceeded 70,000 units. Of the 10

years since 1990 in which completions have exceeded 60,000 units, six of them have occurred since 2015. As of October 2023, there were 163,407 dwelling units under construction in Ontario, including 33,796 ground-related units, and 129,611 apartment units.

The number of dwelling units under construction has grown primarily due to a significant increase in the number of apartment projects under construction, with approximately 130,000 apartment units currently under construction. Prior to 2020, at no point since 1990 had more than 100,000 apartment units been under construction at any given time.

Figure 2



2. PROVINCIAL DIRECTION ON MINIMUM AMOUNTS OF APPROVED SUPPLY

2.1. 1995 Projection Methodology Guideline

2.1.1. Requirements for Minimum Supply 'At All Times'

The Province of Ontario issued a Projection Methodology Guideline (the "Guideline") document in 1995, which had a stated purpose to provide municipalities with a co-ordinated set of methods for making projections of population, housing need, employment and related land requirements. The Guidelines stressed the importance of having a minimum amount of land supply that is to be maintained at all times, to avoid shortages:

> *The maximum time frame for municipal projections of population, housing need and employment for official plan purposes will normally be twenty years. … A longer time frame may only be used where it has been established for a specific regional municipality through a comprehensive provincial planning exercise…*
>
> *The Housing Policies do not mention a maximum time frame, but stipulate that* ***a minimum of ten years' supply of land for residential development be maintained at all times. The objective is to avoid shortages that would drive up land and housing costs.***

The need for a 'ten-year supply at all times' is interpreted in the Guidelines to "effectively mean that at least fifteen years should be provided for at each update of the official plan assuming an update every five years."

A review of land needs assessment studies in Ontario finds that the 'cushion' to ensure minimum amounts are available 'at all times', including between Official Plan reviews, tends to not be used in estimating housing supply needs in Official Plan reviews in Ontario.

2.1.2. Contingencies and Upward Adjustments to Baseline Housing Need

The Guideline discusses the need to account for demolitions, vacancy and other similarly nuanced considerations, but also discusses the need for a 'market contingency factor' in estimating the projection of housing need:

> *Finally, events not captured by a household projection can affect the supply of and demand for additional housing. Examples include:*

- *Swings in the housing market could cause temporary decreases (or increases) in the supply of new housing outside the average trend reflected in the projections.*
- *Changes in the economy and lifestyles could produce a greater (or lesser) demand for housing than projected using constant household headship rates*
- *Landowners might be unwilling or unable to develop their lands in accordance with the schedule assumed for purposes of the official plan.*

> *It may be prudent in certain circumstances to include a cushion in the projection of housing need to offset the risk of shortages developing from unanticipated events. This can be referred to as a 'market contingency factor'. One way to provide for this is to simply increase the projected units required by some percentage. Where a market contingency factor is included, the municipality should be able to show that this is based on an understanding of the potential volatility of its housing market. A market contingency factor may be used for the short- and medium-term projections, but is not necessary for the long-term projections because municipalities should be monitoring their housing supply situation and can take corrective action on a timely basis.*

Most municipal land needs analysis make little to no adjustment to baseline housing needs to account for market contingency factors/under-delivery of existing available supply in assessing land needs. By often ignoring this and other steps set out as necessary steps in the 1995 Projection Methodology Guideline, baseline housing forecasts in municipal Official Plans have been structurally understating the necessary housing needs.

2.2. 2020 Land Needs Assessment Methodology

The 2019 Growth Plan for the Greater Golden Horseshoe ("Growth Plan") states that the Minister of Municipal Affairs and Housing will establish a standard methodology that upper-tier and single-tier municipalities in the Greater Golden Horseshoe ("GGH") are required to use in order to assess the quantity of land needed to accommodate projected growth to the horizon of the Growth Plan.

In 2020, a Land Needs Assessment Methodology ("LNAM") was released, which has a stated purpose to provide municipalities with the requirements that must be completed to accommodate forecasted growth:

> *… the Methodology provides the key components to be completed as municipalities plan to ensure that sufficient land is available to: accommodate all housing market segments; avoid housing shortages; consider market demand; accommodate all employment types including those that are evolving; and plan for all infrastructure that is needed to meet the complete communities objective to the horizon of the Plan.*

Figure 3

Components of Community Area Land Needs Assessment

Step	Considerations
1. Population Forecasts	• Forecasts broken down by age group, based on forecasts contained in Growth Plan

2. Housing Need	• Convert population forecast into forecast of housing need by dwelling type, through use of household formation rates and propensities to occupy particular dwelling types
	• Dwelling types should be grouped into four categories:
	  • Single/semi-detached houses;
	  • Row houses
	  • Apartments
	  • Other dwellings;

3. Housing Needs Allocation	• Upper-tier to allocate projected housing need among lower-tier municipalities based on consultation with municipalities and public • Allocation based on factors such as planned urban structure, housing affordability, housing mix, **servicing capacity** and intensification potential

4. Housing Supply Potential by Policy Area	• Determine housing supply in built-up area
	• Determine housing supply in designated greenfield area, including lands:
	  • Subject to development applications or approvals – requires inventory of proposed units **by type** based on municipal tracking;
	  • Vacant, designated and available to receive development applications – estimating units **by type** premised **on the density permissions of the OP**;
	  • Vacant, not designated, and available to receive development applications – appropriate to assume a density similar to comparable areas "as long as this results in an estimate of dwellings **by type**";
	• Determine housing supply on rural lands, including rural settlement areas

5. Community Area Jobs	• Prepare an inventory of employment lands for population-related jobs and most of the major office in meeting applicable density targets
6. Need for Additional Land	• Housing supply (step 4) is deducted from forecast housing need (step 2/3) • Additional housing by type required beyond existing supply is converted to a land requirement • Housing mix may be adjusted to conform to intensification and designated greenfield area density targets, while ensuring provision of market-based supply of housing to extent possible. • Determine if excess lands are present

The Provincial LNAM is focused on estimating available housing supply by type, including within the existing pipeline of approved developments, as well as the potential for residential development on vacant designated or undesignated lands. The LNAM then requires the calculations to compare the housing supply with estimated housing demand, each broken down by dwelling unit type.

2.3. 2020 Provincial Policy Statement

2.3.1. Requirement to Make 25-Year Supply of Land Available

The Provincial Policy Statement, 2020, policy 1.1.2 requires municipalities to make sufficient land available to meet projected needs for up to 25 years, or longer where the Province has introduced an alternate time period under a provincial plan (such as the Growth Plan).

> *Sufficient land shall be made available to accommodate an appropriate range and mix of land uses to meet projected needs for a time horizon of up to 25 years, informed by provincial guidelines. However, where an alternate time period has been established for specific areas of the Province as a result of a provincial planning exercise or a provincial plan, that time frame may be used for municipalities within the area.*
>
> *Within settlement areas, sufficient land shall be made available through intensification and redevelopment and, if necessary, designated growth areas.*

2.3.2. Requirement to Maintain the Ability to Accommodate 15 Years of Residential Growth

Policy 1.4.1a) of the PPS requires planning authorities to maintain **at all times**, the ability to accommodate residential growth for a **minimum of 15 years** through intensification and redevelopment, as well as designated lands if necessary to meet projected requirements.

> *To provide for an appropriate range and mix of housing options and densities required to meet projected requirements of current and future residents of the regional market area, planning authorities shall:*
>
> *a) maintain at all times the ability to accommodate residential growth for **a minimum of 15 years** through residential intensification and redevelopment and, if necessary, lands which are designated and available for residential development; and*

2.3.3. Requirements to Maintain At Least 3 Years of Lands with Servicing Capacity

Policy 1.4.1b) requires that planning authorities maintain **at least** three years supply of land with servicing capacity

> *To provide for an appropriate range and mix of housing options and densities required to meet projected requirements of current and future residents of the regional market area, planning authorities shall: …*
>
> *b) maintain at all times where new development is to occur, land with servicing capacity sufficient to provide **at least** a three-year supply of residential units available through lands suitably zoned to facilitate residential intensification and redevelopment, and land in draft approved and registered plans.*
>
> *Upper-tier and single-tier municipalities may choose to maintain land with servicing capacity sufficient to provide at least a five-year supply of residential units available through lands suitably zoned to facilitate residential intensification and redevelopment, and land in draft approved and registered plans.*

2.3.4. Optimization of Municipal Services and Infrastructure

There are numerous policies in the 2020 Provincial Policy Statement that municipal planning policy must be consistent with, including the following policies setting out the Provincial priority to optimize the use of existing infrastructure.

> *1.6.3 Before consideration is given to developing new infrastructure and public service facilities:*
>
> > *a) the use of existing infrastructure and public service facilities should be optimized; and*
>
> *1.6.6.1 Planning for sewage and water services shall:*
>
> > *a) accommodate forecasted growth in a manner that promotes the efficient use and optimization of existing:*
> >
> > > *1. municipal sewage services and municipal water services; and*
> > >
> > > *2. private communal sewage services and private communal water services, where municipal sewage services and municipal water services are not available or feasible;*
> >
> > *b) ensure that these systems are provided in a manner that:*
> >
> > > *1. can be sustained by the water resources upon which such services rely;*

2. prepares for the impacts of a changing climate;

3. is feasible and financially viable over their lifecycle; and

4. protects human health and safety, and the natural environment;

c) promote water conservation and water use efficiency;

d) integrate servicing and land use considerations at all stages of the planning process; and …

2.4. Conclusions

Within past and current Provincially endorsed approaches to estimating land needs, numerous important concepts are incorporated to ensure that there is sufficient housing supply to meet demand for housing in Ontario, including:

- Minimum amounts of residential designated land at all times, including throughout periods of time between reviews of land needs and planning policies;
- That minimum amounts of supply are necessary to avoid shortages which increase land and housing costs;
- Need to account for anticipated unused housing through incorporating adjustments for demolition and vacancy in estimating housing needs or the amount of available supply;
- Need for incorporation of a market contingency factor to offset risk of shortages developing from unanticipated events such as changes in the economy, changes in the housing market, landowners unwilling or unable to proceed with development;
- Housing demand should be disaggregated by dwelling unit type and compared with available housing supply by dwelling unit type.

By requiring at least 3 years of zoned land with servicing capacity, the ability to accommodate a minimum of 15 years of projected residential growth through intensification and designated land, and sufficient land more generally for up to 25 years (or longer) of projected needs, the Provincial Policy Statement ‘bakes-in’ the need for an ample supply of land and potential housing that will not be developed in the short-term.

The imposition of an enhanced system of UIOLI, even if applied to older, stagnant approved developments, may in many municipalities, bring the available housing supply below (or further below for those already below) minimum PPS requirements for designated and available residential supply and land with serviced capacity.

3. EXISTING METHODS AND BEST PRACTICES

3.1. UIOLI for Land Use Designations - Excess Lands

The Growth Plan for the Greater Golden Horseshoe has a concept known as "excess lands" that rationalizes instances where there is a surplus of designated residential land.[1]

> *Based on a land needs assessment undertaken in accordance with policy 2.2.1.5, some upper-and single-tier municipalities in the outer ring will determine that they have excess lands. These municipalities will:*
>
> *a) determine which lands will be identified as excess lands based on the hierarchy of settlement areas established in accordance with policy 2.2.1.3;*
>
> *b) prohibit development on all excess lands to the horizon of this Plan; and*
>
> *c) where appropriate, use additional tools to reduce the land that is available for development, such as those set out in policies 5.2.8.3 and 5.2.8.4*

In 2021, Simcoe County considered whether to apply the Excess Lands provisions of the Growth Plan, but noted the difficulties that identifying certain designated lands as excess lands:

> *It is recognized that there are more lands designated for residential development within settlement areas in the northern regional market area than needed. There are no plans as part of the MCR to identify any lands as excess lands. Such a process would be very complicated, potentially divisive and would very much detract from the overall goal of the MCR, which is to move forward and plan for expected growth.* ***Also – eliminating excess lands will only serve to further limit choice in the market place and in settlement areas where the Growth Plan says growth should be directed.*** *Notwithstanding the above, local municipalities are encouraged to develop phasing policies to ensure growth occurs in a logical manner.*[2]

[1] Environmental Registry of Ontario posted 019-6813 would combine elements of the Provincial Policy Statement and the Growth Plan for the Greater Golden Horseshoe into a Provincial Planning Statement. The proposed Provincial Planning Statement would maintain minimum land area requirements, but the Excess Land provisions of the Growth Plan are not included in the Provincial proposal.

[2] Memorandum from Simcoe County Planning Department, (December 21, 2021), https://www.simcoe.ca/Planning/Documents/Supplemental%20Memo%20from%20Council%20Workshop%20-%20December%2021%2C%202

3.2. UIOLI for Projects Approved to Construct - Expiration of Building Permits

The Building Code Act sets out the framework for regulation of building and construction in Ontario, with a permit required to undertake construction. Once a permit is issued, there is no expiry date, but Chief Building Officials (CBOs) can revoke a permit when construction has not commenced within six (6) months of issuance, or where construction has been suspended, or discontinued for more than a year. The Building Code Act, however, does not allow CBOs to impose conditions on existing issued permits to compel holders to carry out construction within a specific timeframe.

Section 8(10) of the Building Code Act states the following:

> *(10) Subject to section 25, the chief building official may revoke a permit issued under this Act,*
>
> *(a) if it was issued on mistaken, false or incorrect information;*
>
> *(b) if, after six months after its issuance, the construction or demolition in respect of which it was issued has not, in the opinion of the chief building official, been seriously commenced;*
>
> *(c) if the construction or demolition of the building is, in the opinion of the chief building official, substantially suspended or discontinued for a period of more than one year;*
>
> *(d) if it was issued in error;*
>
> *(e) if the holder requests in writing that it be revoked; or*
>
> *(f) if a term of the agreement under clause (3) (c) has not been complied with. 1992, c. 23, s. 8 (10).*

Section 25 of the Building Code Act sets out an appeals process for persons who "considers themselves aggrieved by an order or decision" made by a CBO.

The City of Toronto Municipal Code Chapter 363 sets out a process for permits to be revoked in situations where construction has not started or has stopped, and the City has also added two additional inspections to actively monitor construction progress.

A City of Toronto Staff Report[3] discussing the City's approach to revoking building permits noted that revoking a permit may not eliminate the issues present causing construction to stall, and also noted the City's inability to force construction to continue,

[3] City of Toronto, https://www.toronto.ca/legdocs/mmis/2021/ph/bgrd/backgroundfile-168152.pdf

with the City identifying the root problem with dormant files typically being “lack of finances to continue the project”.

> *Revoking a building permit, or having an expiry date on a permit may not eliminate underlying issues of dormant, or stalled construction. Upon revocation, there is no standing and corresponding authority for the City or the Chief Building Official to remove or finish any construction that took place while the permit was in force and effect.*
>
> *When Toronto Building and other divisions are faced with a stalled construction site, the focus is on prioritizing and responding to the issues. For example, the first priority is site safety, then maintenance (tidiness/litter), followed by actions to encourage the permit holder to complete the building's exterior, thereby mitigating potential impacts on neighbours. Building inspectors work to keep builders engaged with the City. Even if the City were granted a new authority to set an expiry date on the permit, the City could not force construction to continue, as the root problem is typically the lack of finances, to continue the project.*

3.3. UIOLI for Unused Servicing Allocation - Lapse and/or Redistribution of Servicing Allocation

Policies 5.2.8.3 and 5.2.8.4 of the Growth Plan allow draft plans of subdivision to lapse, and for registered plans of subdivision to be deemed not registered:

> *3. Draft plans of subdivision will include a lapsing date under subsection 51(32) of the Planning Act. When determining whether draft approval should be extended for lapsing draft plans of subdivision, the policies of this Plan must be considered in the development review process.*
>
> *4. If a plan of subdivision or part thereof has been registered for eight years or more and does not meet the growth management objectives of this Plan, municipalities are encouraged to use their authority under subsection 50(4) of the Planning Act to deem it not to be a registered plan of subdivision and, where appropriate, amend site-specific designations and zoning accordingly.*

There are numerous instances of Ontario municipalities assigning limits to how long allocated servicing capacity can be held for registered or permitted developments:

- **Town of East Gwillimbury** – the Town has timelines in which servicing allocation is retained, but after is rescinded and may be re-allocated to other development. A summary of the Town’s timelines and triggers are provided in the table below.

Figure 4

Application Type	Council Allocation Trigger	Assignment Period	Deadline for Use
Plan of Subdivision	Draft Approval	24 months	Registration
Plan of Condominium	Draft Approval	12 months	Building Permit
Site Plan	Registration of Site Plan Agreement	18 months	Building Permit
Consent	Committee of Adjustment Decision	24 months	Building Permit

- **City of Brantford** – the City's Wastewater Allocation Policy seeks to ensure that servicing capacity is allocated in a 'sustainable and logical manner' and to 'implement Provincial policy to manage development in an orderly manner which efficiently uses land, existing resources, infrastructure and public service facilities.". A summary of the City's allocation expiration timelines is provided in the table below.[4]

Figure 5

Wastewater Allocation Expiration Timeline, City of Brantford

Development / Application Type	Expiry Date and Potential Extension
Building Permit	• If building permit is cancelled by CBO, allocation is automatically revoked
Draft Plan Approval of a Subdivision	• 1 year maximum or until Council approves the application for Draft Plan Approval (whichever is less) • If Council approved, the allocation will expire in accordance with the conditions of Draft Plan Approval • If subdivision agreement and plan are not registered and draft plan approval lapses, allocation expires as well
Amendments to Official Plan / ZBL	• Exempt
Site Plan Applications	• 1 year from time conditional site plan approval was issued • If final site plan approval is registered, allocation is tied to registered site plan agreement • If it is determined that the registered site plan agreement is not being fulfilled and is voided, all allocation will revert back to pre-application allocation

[4] City of Brantford, Wastewater Allocation Policy, Policy Number: Public Works-020

- **City of Vaughan** – servicing capacity may be redistributed if a development application does not proceed to registration or have a building permit issued within 36 months;[5]

- **Town of Newmarket** – servicing allocation is to be rescinded where development has not taken place within one year from the date servicing capacity was allocated;

- **Town of Aurora** – servicing allocation is done at time of draft approval, and if not registered within 36 months, when extension of draft approval is being considered, the Town may revoke some or all of the servicing allocation;

Many municipalities with similar policies allow for requests to extend servicing allocation, and other municipalities (such as the Township of Wellington North[6]) allow for the transferring of servicing allocation capacity with the written permission of the municipality.

3.4. UIOLI for Unused Permit-Ready Supply - Lapsing of Registered Plans and Draft Plan Approvals

Section 50(4) of the Planning Act allows municipal councils to designate any plan of subdivision that has been registered for eight (8) years or more to be deemed not registered.

> *Designation of plans of subdivision not deemed registered*
>
> *(4) The council of a local municipality may by by-law designate any plan of subdivision, or part thereof, that has been registered for eight years or more, which shall be deemed not to be a registered plan of subdivision for the purposes of subsection (3). R.S.O. 1990, c. P.13, s. 50 (4).*

Section 51(32) of the Planning Act allows municipalities to provide for draft plan approval to lapse at the expiration of a specified time period, no less than three (3) years, except in cases where there is an appeal, in which case the time period for lapsing of approval does not begin until the date the Tribunal's decision is issued. Section 51(33) of the Planning Act allows for approval authorities to extend approval for a period of time

> *Lapse of approval*

[5] Town of Whitchurch-Stouffville Council Report, DS-064-23, Subject: Proposed Redistribution Policy for Servicing Allocation, (December 6, 2023)
[6] Township of Wellington North, Sewage Allocation Policy, (April 12, 2021) https://www.wellington-north.com/sites/default/files/2021-12/sewage-allocation-policy-2021.pdf

> *(32) In giving approval to a draft plan of subdivision, the approval authority may provide that the approval lapses at the expiration of the time period specified by the approval authority, being not less than three years, and the approval shall lapse at the expiration of the time period, but if there is an appeal under subsection (39) the time period specified for the lapsing of approval does not begin until the date the Tribunal's decision is issued in respect of the appeal or from the date of a notice issued by the Tribunal under subsection (51). 2017, c. 23, Sched. 5, s. 99 (1).*
>
> *Extension*
>
> *(33) The approval authority may extend the approval for a time period specified by the approval authority, but no extension under this subsection is permissible if the approval lapses before the extension is given, even if the approval has been deemed not to have lapsed under subsection (33.1). 2022, c. 12, Sched. 5. s. 9 (2).*

Many municipalities have Official Plan policies requiring approved draft plans of subdivision to have a lapsing date, as well as policies for registered plans to be deemed un-registered if construction or installation of services has not commenced. As one example of lapsing draft plan provisions being set out in municipal planning policy, the Region of Halton's Official Plan policy 184 is as follows:

> *The Region has delegated the approval of plans of subdivision, plans of condominium, and part-lot control by-laws to the Local Municipalities. The Region will continue to comment on the conformity of these applications to The Regional Plan. In the case of Local Official Plans and amendments thereto, the Region has exempted them from its approval subject to conformity with the exemption criteria and matters of provincial interest.*
>
> *(1) All approvals of draft plans of subdivision shall include a lapsing date as per Section 51 of the Planning Act.*
>
> *(2) If an approval of a draft plan of subdivision lapses, or when a secondary plan is updated, the implementation of the Growth Plan principles and objectives shall be considered; and*
>
> *(3) If a plan of subdivision or part thereof has been registered for 8 years or more and does not conform to the Growth Plan principles and objectives, the Region may request the Local Municipality to use its authority under section 50(4) of the Planning Act to deem it not to be a registered plan of subdivision, where construction or installation of Regional or Local services has not commenced.*

3.5. Optimization of Urban Boundary Requests - Prioritization of Potential Supply

The City of Ottawa in deciding upon recommendations regarding urban expansion requests, evaluates lands on a set of detailed evaluation criteria and prioritizes urban expansion areas on the scoring against these weighted criteria.[7] The criteria are listed and summarized below:

Figure 6

Criteria	Summary Description
Water	Based on estimated scope of servicing requirements for each candidate area
Wastewater	Based on estimated scope of servicing requirements for each candidate area
Stormwater	Expected topographic constraints to drainage, capacity and condition of surface water outlets
Servicing Integration Factor	Represents the favourability for the site for delivery of infrastructure (favourable conditions, ability to deliver on-budget and on-time)
Servicing Risk Factors	Site-specific constraints that may affect development/timing (differential settlement risk, shallow depth to bedrock, parcel includes large depression, risk to private wells, etc.)
Availability of Rapid Transit	Availability of existing or planned transit within 2.5km, with grades for availability of existing or timing of delivery of new transit.
Proximity to Nearest Rapid Transit Station	Distance to nearest rapid transit station (existing or planned)
Proximity to Jobs	Rating system adds score for urban expansion areas with greatest number of opportunities for local employment (existing or planned).
Proximity to Convenience Retail	Proximity to convenience retail / major grocery store
Distance to Major City Facilities	Distance to one or more Major Recreation Facilities
Distance to Emergency Services – Fire	Estimated response within 5 minutes
Potential Arterial Road Upgrades	Relative cost of possible arterial road construction or upgrades required by future development.
Connectivity	Can the lands be developed with an urban road network, or are there barriers, physical obstructions, that limit connectivity.
Conflict with Agricultural Uses	Agricultural uses within 250 metres of the proposal
Natural Heritage Linkages	Assessment of whether a natural heritage linkage impact the development parcel

[7] City of Ottawa, Urban Expansion Detailed Evaluation Criteria, Document 6

3.6. Best Practices

The following presents a consolidated list of best practices from Ontario's existing usage of UIOLI tools, and other jurisdictions that incorporate checks and balances in the planning system. Striking a balance between goals of discouraging stagnant housing approvals and optimizing use of infrastructure servicing capacity, and ensuring sufficient timely delivery of housing supply relative to market demand will be crucial:

- **Incorporating "Under Delivery" Assumptions into Land Budgeting:** The Inspector's Report[8] of South Worcestershire and its development plan found that in determining the quantity of designated land and additional housing supply necessary to achieve forecast housing demand, it accounted for a 'non-delivery' discount of 4% of available supply, by basing it on the 'lapse' rate for each of the prior 18 years. The report recommends a 20% non-delivery 'buffer' in calculating housing land supply, in areas where there has been a persistent under-delivery of housing in a particular area.[9]

- **Appeal Rights:** The right to appeal the expiry or decision to revoke permissions on a site-specific basis should be available to ensure fairness of application, and provide for a third-party dispute resolution process. Otherwise, criteria or timelines for determining approvals, permissions or allocations as being revokable should be made as transparent and objective as possible.

- **Extension Requests Should be Allowed:** Given the high potential for and wide variety of circumstances that may arise that could impact the ability to develop a serviced and permitted residential development in a timely manner, municipalities should ensure that a process to extend draft approval periods or servicing allocation periods is available and widely allowed especially for those proponents proactively seeking extension. This approach exists in Ontario's current approach to permitting draft plan approval extensions. Based on data from Simcoe County's recent detailed land budgets, draft plan approval extensions appear to be regularly approved when requested.

- **Complex Applications Should Be Exempt or Have Less Strict Expirations -** Based on a study of South Worcestershire Development Plan, it was found that many approvals that expired were found to be caused by pre-existing issues with the site (land ownership, viability problems, site constraints, financing issues, supply chain issues, labour supply issues), evolving demand for a given type of development (form, use), or technically difficult sites (brownfields).[10]

[8] https://www.swdevelopmentplan.org/component/fileman/file/Documents/South%20Worcestershire%20Development%20Plan/SWDP%202016/Examination/SWDP_Inspectors_Report_ANNEX_A_Feb2016.pdf?routed=1&container=fileman-files
[9] Even a 'worse-case' non-delivery can be perceived as 80% market delivery rate of supply relative to demand
[10] https://lichfields.uk/blog/2021/may/26/use-it-or-lose-it-the-taxing-problem-of-undelivered-homes/, via https://www.hbf.co.uk/documents/6879/HBF_SME_Report_2017_Web.pdf?pk_campaign=newsletter_824

The applications and approvals that are most likely to have issues present with financing, feasibility, development constraints, etc. tend to be those on complex sites such as brownfields or particularly large redevelopment sites (former government lands, etc.). Making these applications the ones most likely to see approvals expire and require additional process to re-establish approvals is counter-productive to enabling these often pivotal sites to develop, by adding additional process, time and/or cost constraints.

- **UIOLI Should be Designed to Not Disproportionately Impact Smaller Builders** - a study in Britain by the Home Builders Federation (HBF) found that the general decline or stagnation of the quantity of new homes, was impacted by the general decline in the number of small builders. Relying on larger builders is crucial for the baseline supply and baseline growth, however, small builders are crucial to allowing the industry the necessary flexibility to respond to fluctuations in market demand. Imposing more strict expiries of approvals, permits or servicing allocation, or additional costs are more likely to have an outsized impact on smaller developers or construction firms who may be relying on a smaller number of projects proceeding to stay in business, and are less able to withstand additional risk.

3.7. Conclusions

There are numerous existing methods within Ontario's planning system that prevent stagnant development projects with approvals and/or permits from occupying servicing allocation, with numerous checks and balances throughout the planning and development process, including:

- Expiration of building permits;
- Registered plans deemed to be not registered after eight (8) years;
- Lapsing draft plan approvals after no less than three (3) years;
- Expiration of servicing allocation; and
- Excess land provisions in the Growth Plan where there is a surplus of designated land relative to projected need.

Should the Province choose to bolster some of the existing methods in which supply is rationalized and confirmed as being active and optimizing the use of public infrastructure, a first principle should be to ensure that elimination of approved supply does not violate PPS requirements for minimum supply, that any loss of servicing allocation is redistributed to other potential residential supply, and that any redistribution of servicing allocation or approvals is redirected in a transparent, clear and objective process.

4. ESTIMATES OF HOUSING APPROVAL PIPELINES IN ONTARIO

4.1. Regional Planning Commissioners of Ontario

In early 2023, the Regional Planning Commissioners of Ontario (RPCO) issued an inventory of "Ontario's unbuilt housing supply", noting that there were 1,250,000 "housing units approved and proposed", stating that the inventory "constitutes 85% of the Provincial 2032 goal. The 1,250,000 units includes the following components:

- **331,632 "development ready" units** (27%) – includes registered plans of subdivision with no permits issued (62,379 units), site plans with executed agreements, draft approved plans of subdivision, and site plans that are endorsed or approved in principle. Based on the Province achieving 150,000 housing units per year, these units would equate to just over 2.2-years of supply.[11]

- **731,129 units** "under application or proposed" – includes proposed plans of subdivision and proposed site plans. These units are not fully approved, and in many cases would have no planning approvals, and therefore would not likely hold any servicing allocation;

- **64,199 units** approved via Ministers Zoning Orders – there is no detail provided on the composition of these units, though it is likely some proportion of these units would be long-term care units and affordable housing units;

- **150,000 units** of estimated "as-of-right" units – based on an estimated 4% of homeowners of 3.8 million single/semi/row house units choosing to create one additional unit.

The report claims that municipalities "cannot make property owners building new housing":

> *Municipalities issue development approvals for new home construction … once development approvals are received, they remain in place until the property owner decides to proceed. … Municipalities cannot make property owners build new housing. It is up to developers to decide whether and when to develop their lands for housing.*

[11] The 50 municipalities that have been assigned housing targets have been assigned a combined 1,327,300 units. The RPCO report includes estimated supply from all six Inner Ring municipalities (Durham, Halton, Hamilton, Peel, Toronto and York), as well as the City of Barrie, City of Guelph, Niagara Region, Simcoe County, Waterloo Region, City of Kingston, City of Ottawa, Oxford County and the City of Greater Sudbury. Combined, these municipalities have been assigned 96% of the housing targets assigned to municipalities (1,267,800 units out of 1,327,300). The remaining 172,700 units are to come from smaller municipalities without housing targets, many of which would also be located within the regional and upper-tier municipalities accounted for in the RPCO estimates.

However, municipalities do impact the ability for property owners to build new housing through the use of municipal policies that can impact development feasibility such as design-based policies, set-backs, shadow policies, floor plate maximums, parking requirements, requirements for inclusion of office space, affordable housing requirements, as well as various charges and fees that may be imposed.

The report states that development approvals "remain in place" until the property owner decides to proceed. However, this ignores that there are several options available to municipalities today to push approved development to be constructed or otherwise see approvals expire or servicing allocation lapse.

The units accounted for in the RPCO analysis are comprised of a mix of 25% ground-related and 75% apartments, which appears to exclude the 150,000 units to be added as accessory apartments – once these are added to the totals, the share of ground-related units falls to 21.5%, while the share of apartment increases to 78.5%. By comparison, the Hemson forecast of housing demand by dwelling unit type in the GGH over the 2021-2051 that underpins the 2020 Growth Plan[12] is made up of a housing mix that consists of 63% ground-related units and 37% apartment units.

The RPCO analysis includes an estimated 150,000 accessory units coming from intensified use of lower-density properties, which if these are to be contribute to the achievement of the Province's 10-year housing target equates to 15,000 accessory units per year. The total of 150,000 units is more than triple the 30-year (GGH-only) forecast of accessory units of 48,500 units from 2022-2051. When the GGH forecast is expressed on an annual basis (1,617 units) and is a sub-set of what an Ontario-wide forecast would be, the estimate in the RCPO report is 828% higher than the Hemson forecast.

4.2. Municipal Estimates

4.2.1. City of Toronto

The City of Toronto estimated through its 2022 Land Needs Assessment ("2022 LNA") that there is 733,607 residential units in the MCR Development Pipeline, with most units contained within three categories:

- **99,025 units in "built projects"** – those that became ready for occupancy and/or were completed between January 1, 2016 and June 30, 2021 – any comparison of

[12] Hemson Consulting, Technical Report – Greater Golden Horseshoe: Growth Forecasts to 2051, (August 26, 2020)

2021-2051 demand to potential supply would need to exclude these units from the comparison;

- **202,625 units in "active projects",** which are applications that have received at least one Planning approval (but they may need additional approvals), and may have applied for or received building permits, or is under construction but not yet built. The City's report provides no breakdown between how many units fall into the various types of 'active' projects.

- **391,713 units in "under review projects",** which are those applications that were received between January 1, 2016 and June 30, 2022 but have not yet been approved, refused, or have been approved/refused but are under appeal.

The City's current estimate (733,607 units) is more than 3-times higher than the estimate in the City's 2014 version of the pipeline estimate (191,926 units), and higher than the 539,449 units in the 'preliminary LNA'. The City attributes the surge in applications to be "applicants electing to be transitioned out of the requirement to provide units through Inclusionary Zoning as well as a very dynamic market".

The City's Land Needs Assessment Staff Report noted that not all submitted proposals end up being approved, and that a surplus of approvals relative to the quantum of units that are constructed 'ensure a steady supply of approved housing will be available':

> *Not all submitted proposals are approved, and not all approved projects are built. … about 54% of units with their first Planning Approval over the five-year period between 2017 and 2021 have been built, and about 70% of units with the final Planning Approval have been built. …*
>
> *Potential housing is drawn from each source of supply into the supply stream in a given time period to accommodate the anticipated demand in that period. Units cannot be drawn into the supply before they become available, and available units not required in the time period in which they are anticipated are carried for as potential supply in subsequent time periods. Thus, potential housing supply does not expire and is conserved over the forecast horizon. …*
>
> *…over the five years from 2017 to 2021, Council has continuously approved more residential units than were built. City Council approved an average of 29,726 residential units per year between 2017 and 2021, while 15,983 units on average were built annually. This is a surplus of 13,743 units on average or 86% of the average annual production through the Pipeline. This surplus helps to ensure a steady supply of approved housing will be available for construction and eventual occupancy.*

4.2.2. Halton Region

Halton Region Staff Report LPS48-23 estimated the Region's development pipeline consisted of 75,355 units, of which only 11% were draft approved, with 29% (22,178 units) under appeal, and 59% under review. In two of the Region's four local municipalities (Halton Hills and Oakville), the share of units draft approved was 6% of units or less.

Figure 7

Housing Units in Development Pipeline, Halton Region, by Status and Local Municipality

Category	Burlington	Halton Hills	Milton	Oakville	Total
Draft Approved	3,278	191	2,857	2,085	8,411
Under Appeal	7,269	6,680	-	8,229	22,178
Under Review	11,893	1,550	9,451	21,872	44,766
Total	22,440	8,421	12,308	32,186	75,355
% by Category					
Draft Approved	15%	2%	23%	6%	11%
Under Appeal	32%	79%	0%	26%	29%
Under Review	53%	18%	77%	68%	59%
Total	100%	100%	100%	100%	100%

Source: KPEC based on Halton Region Staff Report LPS48-23

The Region's Staff Report LPS48-23 noted that not all housing units in the development pipeline will be approved:

> *There are many factors that can influence if and when housing units identified in the development pipeline are constructed and occupied.* ***Not all housing units identified in the pipeline will advance to approval*** *– for example, the units may not ultimately be advanced by a proponent, or may not be approved by a municipal council or the Ontario Land Tribunal. When municipal approvals are in place, there can be a wide gap in the time between this approval and when housing units are ultimately constructed or occupied.* ***There are many reasons for this, which could include things such as the complexity of the project, project financing and feasibility, supply chain issues, labour constraints, and other market forces. More robust data will provide a better understanding of the timeframes between municipal approvals and the construction and occupancy of housing units.*** *This will be an important aspect of the development pipeline to monitor in relation to the 2031 housing targets – while current information identifies about 75,355 housing units in the development pipeline, this is a gauge of potential supply, and it is not certain that all these units will be approved, and if approved, constructed by 2031.* ***[emphasis added]***

4.2.3. City of Burlington

According to the City of Burlington (located within Halton Region), of the 38,219 dwelling units in the "housing pipeline"[13], only 9.5% (3,642 units) are fully approved and able to apply for building permits. Compared to the units fully approved, the City's pipeline includes 7,948 units that are under appeal to the OLT, and another 26,629 units require planning approvals.

The City's 10-year housing target is 29,000 units, or 2,900 units per year, meaning that the 3,642 units that are able to apply for a building permit represents just over 1 year of supply that can be converted to permitted and under construction.

Figure 8

Categories of Units in City of Burlington's Planning Application Housing Pipeline, (July 2023)

Application Status	Units	Notes:
Approved	3,642	Received all planning approvals from City and are able to apply for building permit
Appealed to OLT	7,948	Pending a decision from OLT
Waiting for Site Plan Application	3,112	Received zoning approval, but have not yet applied for site plan approval
Under Review	7,754	Applications received by City for consideration
Pre-Application	15,763	Developer consultations with City prior to submitting a planning application
Total	38,219	
Share of Units Approved in Pipeline	9.5%	

Source: City of Burlington

While the City's estimates do not include the quantity of units with building permit approvals, removing approvals from shovel ready projects with permits, or able to apply for permits would leave the City with little supply, and be counter-productive to the goals of increasing housing supply.

4.2.4. City of Hamilton

According to the City of Hamilton's September 2022 Revised Urban Land Needs Assessment report[14], only 12% of the residential supply was registered, or approximately 4,280 units out of a total estimated housing unit supply potential of 34,575 units.

Another 31% of units (10,855 units) had draft approval, while the remaining 55% either were pending decisions, or pending applications from landowners.

[13] The discrepancy between the numbers circulated by Halton Region for the City (22,440 units) is due in part to timing (causing minor differences in amount of approved, appealed or under review units), but also due to the City including "pre-application' units.
[14] Watson & Associates, City of Hamilton Revised Urban Land Needs Assessment (L.N.A.), 2031, Final Report, (September 15, 2022)

Figure 9

Housing Unit Supply Potential, City of Hamilton, as of December 2020

Outside Built-Up Area	Singles / Semis	Townhouse	Apartments	Total	% of Total
Registered / Final Approved	800	1,080	1,810	3,690	17%
Draft Approved	2,495	2,100	545	5,140	24%
Pending	290	1,090	4,020	5,400	25%
Secondary Plans/Other	2,045	3,605	1,785	7,435	34%
Total	5,630	7,875	8,160	21,665	
% of Total	26%	36%	38%	100%	
Inside Built-Up Area					
Registered / Final Approved	60	80	455	595	5%
Draft Approved	170	920	4,625	5,715	44%
Pending	110	670	3,945	4,725	37%
Secondary Plans/Other	705	190	980	1,875	15%
Total	1,045	1,860	10,005	12,910	
% of Total	8%	14%	77%	100%	
Total					
Registered / Final Approved	855	1,160	2,265	4,280	12%
Draft Approved	2,665	3,020	5,170	10,855	31%
Pending	400	1,760	7,965	10,125	29%
Secondary Plans/Other	2,755	3,795	2,765	9,315	27%
Total	6,675	9,735	18,165	34,575	
% of Total	19%	28%	53%	100%	

Source: KPEC based on City of Hamilton, Revised Urban Land Needs Assessment, 2031, Final Report (Sept 15, 2022)

The City of Hamilton's Staging of Development report[15] sorts various types of approvals and applications into 'short-term', 'medium-term' and 'long-term' applications, finding that applications for site plan control had a timeframe of less than 1 year, those seeking OPA or ZBLA but not yet proceeding to site plan had a medium-term timeframe of 1-3 years, and those still 'in process' were long-term projects:

> *The above timeframes are based on the level of certainty associated for each type of application. For example, at the Site Plan Control stage of development, the lands are already zoned for the permitted use. Further, many issues would have already been addressed at an earlier stage in the planning process. It is therefore reasonable to assume that an in-process Site Plan Control application could proceed to building permit issuance within one year, and is therefore considered as Short Term intensification potential.*
>
> *On the contrary, Formal Consultation applications have a low level of certainty regarding whether or not an applicant / owner will proceed to submit a full Planning Act application, or when that future application may be submitted. Formal Consultation applications are*

[15] City of Hamilton – Staging of Development Report, 2024-2026

therefore deemed to be Long Term intensification potential in light of that uncertainty and the time that will be required to obtain approvals as part of future Planning Act application(s). Staff conducted a mail-out to twenty-one applicants representing forty Formal Consultation applications submitted over the past three years to enquire whether or not they had plans to proceed with a future Planning Act application. Seven responses were received and five formal consultation applications were removed from the list in Table 7 as a result. It is important to note that the Tables below identify in-process development applications.

Inclusion in the City's Staging Report does not indicate a guarantee of approval of the development application, nor does the associated time frame identified in this Report guarantee that developments will move forward within that time period. Further, approval of the application does not guarantee that an applicant will proceed to the building permit stage. Therefore, it is not anticipated that all of the units identified in the Tables below will be realized, and for those that do proceed to development, it is not expected that the timeframes indicated in this Report will be met.

4.2.5. City of Ottawa

The City of Ottawa produces a regular report titled "Vacant Urban Residential Land Survey", with the mid-2022 update being released in December 2023. The report focuses on the City's greenfield supply, so omits development in the City's built-up area.

Of the estimated supply of 64,786 units, only 18% of the residential supply was registered, or approximately 11,500 units. Another 30% (19,700 units) had draft approval, while the remaining 52% either still required additional applications (21%), or were solely within a Community Design Plan without planning application or approval (29%), or with no applications received (3%).

Figure 10

Urban Residential Land Supply, City of Ottawa, Unit Potential and Approval Status, as of mid-2022

	Singles / Semis	Townhouse	Stacked	Apartments	Mixed-Use	Total	% of Total
Registered	2,919	4,480	355	3,732	-	11,486	18%
Draft Approved	5,149	7,761	3,019	3,773	-	19,702	30%
Pending Applications	2,559	5,364	2,111	3,289	-	13,323	21%
Community Design Plan	-	-	96	-	18,393	18,489	29%
No Applications Received	-	55	-	67	1,664	1,786	3%
Total	10,627	17,660	5,581	10,861	20,057	64,786	
% of Total	16%	27%	9%	17%	31%	100%	

Source: KPEC based on City of Ottawa Mid-2022 Vacant Urban Residential Land Survey Report, (December 2023)

The City's regular, on-going reporting allows for analysis of how the City's supply has changed over time, and what proportion of registered units were no longer 'standing inventory' a few years later. Comparing the mid-2022 VURLS report to the mid-2018 VURLS report, the total inventory of unit potential fell by 16%, from 77,404 units to 64,786 units.

Figure 11

Comparison of Units in Registered Plans, City of Ottawa, Changes from Mid-2018 to Mid-2022

Unit Type (Registered Units)	Units in mid-2018 VURLS	Units from mid-2018 VURLS Remaining in mid-2022 VURLS	Units from mid-2018 No Longer in VURLS	
			Units	Share of Units
Singles/Semis	1,941	137	1,804	93%
Townhouse	1,848	277	1,571	85%
Stacked	579	48	531	92%
Apartments	3,683	2,130	1,553	42%
Total	8,051	2,592	5,459	68%
Share by Unit Type				
Singles/Semis	24%	5%		
Townhouse	23%	11%		
Stacked	7%	2%		
Apartments	46%	82%		
Total	100%	100%		

Source: KPEC based on City of Ottawa VURLS, mid-2018 and December 2023

The changes in the City's greenfield inventory over the 2018-2022 period includes several notable changes:

- Approximately 68% of units that were registered in the mid-2018 report were no longer in the City's December 2023 inventory.
- Of the units that were registered and unbuilt, the vast majority (82%) were apartment developments. Among ground-related dwelling types, 93% of singles/semis were no longer in the City's inventory, as well as 92% of stacked units.
- Of the 3,683 apartment units in the City's inventory in mid-2018, 2,130 of these units remained in the inventory in December 2023.

Looking further back at the City's reporting since 2014, the total greenfield inventory in the City has fallen from 86,900 units in 2014 to just under 66,000 units in the mid-2022 VURLS. The number of registered, draft approved and pending units have not changed significantly over time, but the number of units on designated land or in Community Design Plans (CDPs) have fallen, suggesting that a significant proportion of designated land is moving through the planning process at a reasonable pace.

Figure 12

Trends in Greenfield Plans, City of Ottawa, by Annual Report

Status	2014	2015	2016	2017	2018	2019	2021	Mid-2022
Registered	8,836	7,501	7,958	7,474	6,242	10,004	10,626	11,486
Draft Approved	14,422	18,515	16,942	19,586	24,301	21,013	16,456	19,702
Pending	11,651	6,864	13,579	14,036	13,987	13,767	19,589	13,323
No Plan/CDP	51,994	47,831	44,481	38,369	36,757	32,620	22,407	21,275
Total	86,903	80,711	82,960	79,465	81,287	77,404	69,078	65,786
% of Total by Status								
Registered	10%	9%	10%	9%	8%	13%	15%	17%
Draft Approved	17%	23%	20%	25%	30%	27%	24%	30%
Pending	13%	9%	16%	18%	17%	18%	28%	20%
No Plan/CDP	60%	59%	54%	48%	45%	42%	32%	32%
Total	100%	100%	100%	100%	100%	100%	100%	100%
Unit Type								
Singles/Semis	8,535	8,442	7,935	9,444	13,232	12,119	11,976	10,627
Townhouses	9,112	8,750	8,425	10,823	17,470	16,904	18,541	17,660
Stacked	3,780	3,480	2,847	1,659	2,463	3,521	5,616	5,581
Apartments	5,062	5,474	6,329	7,149	11,599	13,663	10,756	10,861
Mixed-Use/CDP	60,414	54,564	57,424	50,390	36,523	31,197	22,189	20,057
Total	86,903	80,710	82,960	79,465	81,287	77,404	69,078	64,786
% of Total by Unit Type								
Singles/Semis	10%	10%	10%	12%	16%	16%	17%	16%
Townhouses	10%	11%	10%	14%	21%	22%	27%	27%
Stacked	4%	4%	3%	2%	3%	5%	8%	9%
Apartments	6%	7%	8%	9%	14%	18%	16%	17%
Mixed-Use/CDP	70%	68%	69%	63%	45%	40%	32%	31%
Total	100%	100%	100%	100%	100%	100%	100%	100%

Source: City of Ottawa Vacant Urban Residential Land Survey, various years

4.2.6. City of Kingston

The City of Kingston's inventory of pending and committed residential units included 4,230 committed units and 6,637 pending units, each of which are defined as follows:

- **Committed** – includes a mix of developments with full or partial planning approvals, (with or without building permits), including registered plans of subdivision, draft approved plans of subdivision, lands with approved OP and ZBL but no site plan application, those with site plan applications still under review, or those with approved site plans but no building permits.

- **Pending** – includes plans of subdivision without draft plan approval, applications for Official Plan or Zoning By-law amendments without approval, or applications appealed to the OLT or pending a decision from the OLT.

Figure 13

Committed and Pending Market Residential Units, City of Kingston, as of December 31, 2022

			Apartments		
Units	Singles / Semis	Towns	Condominium	Purpose-Built Rental	Total
Committed	930	1,012	541	1,747	4,230
Pending	213	633	(85)	5,876	6,637
Total	1,143	1,645	456	7,623	10,867
% of Units					
Committed	22%	24%	13%	41%	100%
Pending	3%	10%	-1%	89%	100%
Total	11%	15%	4%	70%	100%
Forecast - Market Housing Growth (2023-2033)					
Units	1,660	1,160	1,490	2,670	6,980
% of Units	24%	17%	21%	38%	100%
Surplus / (Shortfall) - 10YR Forecast	(517)	485	(1,034)	4,953	2,750

Note 1: Committed means registered and draft approved subdivisions and site plans

Note 2: Pending means plans of subdivision and site plans pending approval, secondary plans with development proposals, zoning by-law amendments pending approval, and applications appealed to OLT
Source: KPEC based on City of Kingston Report No. 23-172

4.2.7. Wellington County

According to Wellington County's Phase 2 Municipal Comprehensive Review[16] approximately 8% of the County's supply is in registered and permit-ready plans. Another 39% are in draft approved or provisional plans. The remaining 53% of residential unit potential in urban centres are either under review or undesignated lands without application on them.

[16] Watson & Associates, Phase 2 MCR Report, Urban Land Needs Assessment, County of Wellington, (August 29, 2022)

Figure 14

Vacant and Potential Supply, Wellington County, as of July 2019

Urban Centre	Lower-Tier Muncipality	Registered	Draft Approved or Provisional	Applications Under Review	Vacant Designated	Total
Elora	Centre Wellington	9	937	410	213	1,569
Fergus	Centre Wellington	489	1,413	-	1,486	3,388
Erin Village	Erin	8	1,201	33	966	2,208
Hillsburgh	Erin	4	96	643	848	1,591
Rockwood	Guelph-Eramosa	87	12	111	13	223
Drayton	Mapleton	98	174	-	170	442
Moorefield	Mapleton	10	-	-	526	536
Clifford	Minto	55	-	-	174	229
Harriston	Minto	56	256	23	70	405
Palmerston	Minto	28	143	-	382	553
Arthur	Wellington North	10	314	50	181	555
Mount Forest	Wellington North	221	536	-	513	1,270
Aberfoyle	Puslinch	3	-	-	2	5
Morriston	Puslinch	13	-	-	31	44
Subtotal Urban Centres		1,091	5,082	1,270	5,575	13,018
As % of Urban Centres		8%	39%	10%	43%	100%

Outside Urban Centres	Total Outside Urban Centres as % of Urban Centre Supply	Registered	Draft Approved or Provisional	Applications Under Review	Vacant Designated	Total
Centre Wellington	6%	47	41	69	160	317
Erin	10%	108	61	-	208	377
Guelph-Eramosa	80%	70	5	-	104	179
Mapleton	14%	101	34	-	-	135
Minto	11%	59	-	-	71	130
Wellington North	9%	80	59	-	28	167
Puslinch	780%	229	-	-	153	382
Subtotal Outside Urban Centres		694	200	69	724	1,687

Source: KPEC based on Watson & Associates, Phase 2 MCR Report: Urban Land Needs Assessment, County of Wellington (August 29, 2022)

4.2.8. Simcoe County

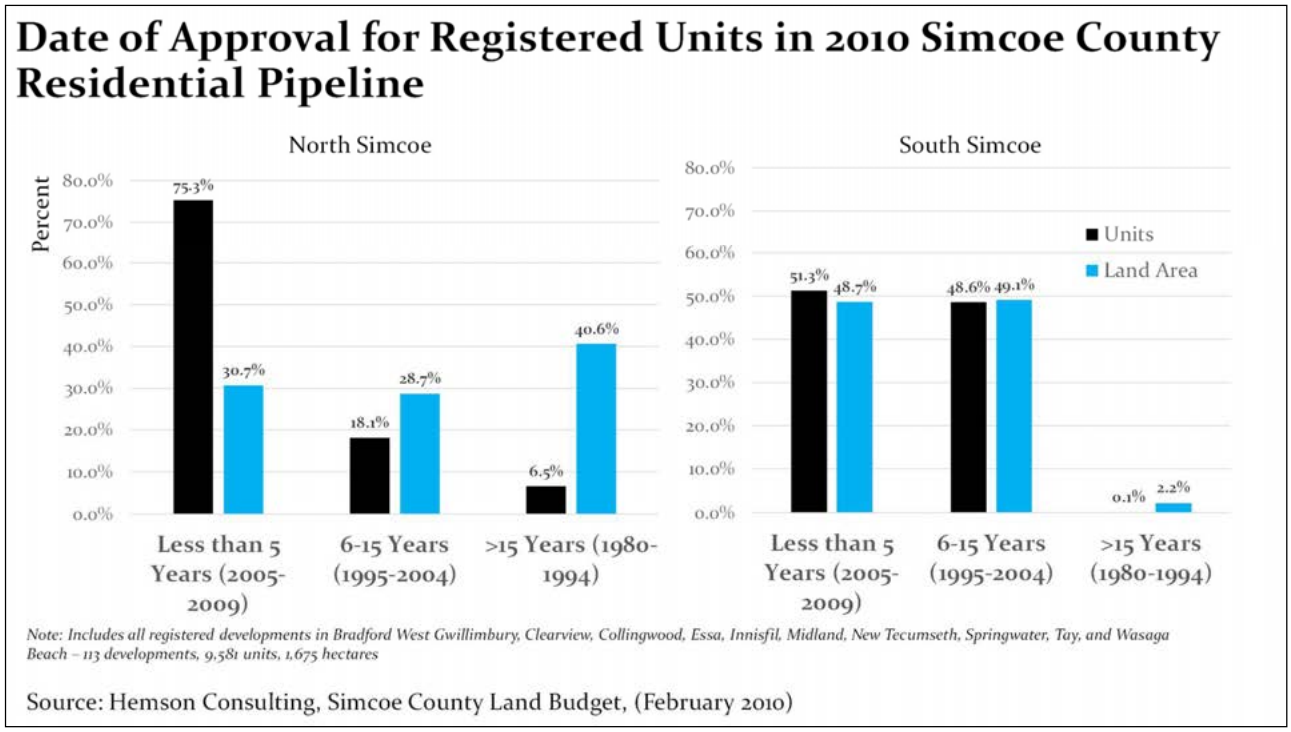
One of the most detailed reports of approved residential supply was in Simcoe County as contained in their February 2010 Land Budget document used for the land needs analysis for the 2006 Growth Plan conformity exercise. Based on review of the data in the 2010 Land Budget, several insights are evident:

- The majority of registered units (66.4%) in the County's inventory were first approved in the previous five years. These plans make up just 35% of the land associated with registered units.

- Only 4.1% of the registered units were in plans older than 15 years. The plans associated with these units make up 31.5% of the land associated with registered units, suggesting that the relatively stagnant supply in the County tends to be large-lot residential.

- Almost all (99%) of older registered units (>15 years) were in the northern parts of Simcoe County[17] and consistent with the larger lot sizes for these older units are likely to be seasonal, large-lot residential developments.

Figure 15



4.3. Considerations Missed in Estimates of Approved Housing Supply

The following table presents numerous factors that should be considered when reviewing third-party or municipal estimates of approved housing supply. Very few reports or tallies of housing pipelines report on the number of truly fully approved and fully permitted (those with building permits) developments, and often miss a substantial amount of nuance regarding the ability of the units to be constructed, permitted, serviced, approved, or marketed.

Figure 16

#	Consideration	Related Considerations
1	**How much of the municipality's development pipeline is fully approved?**	Based on review of numerous detailed residential unit inventories across Ontario, the proportion of residential development pipelines that are fully approved, and

[17] North Simcoe defined for purposes of this analysis to include: Clearview, Collingwood, Essa, Midland, Springwater, Tay, Wasaga Beach

		permit-ready is typically a small proportion of the overall residential pipeline.
2	**Even if the development is approved, does it have or is it able to apply for a building permit?**	• Are there conditions to fulfill? • Is the building permit under review? • Does it have servicing? • Did the length of time it took to gain approval or apply for a permit erode the project's feasibility?
3	**Even if the development has a building permit, are there other constraining policies or factors it has to overcome?**	• Is the site required to provide affordable housing? • Is the project required to include non-residential (retail, office) space?
4	**Is the approved/permit-ready housing in the appropriate location (near transit, amenities, in-demand locations) to fulfill demand?**	• Is the approved housing marketable based on currently available amenities and infrastructure? • Is the approved housing awaiting delivery of key municipal infrastructure before proceeding with sales and construction (particularly new transit lines)?
5	**Is the approved/permit-ready housing of the appropriate type (size, form) to fulfill demand?**	• Each municipality needs an ample supply of housing by type, price, location to match demand (i.e., a 500-sf apartment in Scarborough doesn't fulfill demand for a family of five in Etobicoke)
6	**Is the approved/permit-ready supply able to be built in a prescribed period of time?**	• Construction timelines are long and growing, occupying construction capacity (see Appendix A); • Are there financial issues that may hinder delivery of permitted housing?

7	**Will all units in a municipal development pipeline be approved?**	• Many municipal inventories include:
		  • Units 'under review', meaning they have no planning approvals
		  • Units may be on lands not designated for residential development, requiring employment land conversion
		  • Units 'under appeal', meaning they have been approved, but are under appeal, or refused by Council.
		  • Units "draft approved', meaning they have substantial conditions to clear before being able to apply for building permit.

8	**Are there servicing constraints to be overcome?**	• As shown in the subsequent subsection of this report, there are numerous municipalities with servicing issues that would need to be overcome for approved and/or permitted supply to be deliverable.

4.4. Sample of Municipalities with Servicing Issues

Many municipalities in Ontario are struggling with obtaining sufficient funding to construct needed major infrastructure investments for water treatment plants, sewage treatment plants, and distribution/collection networks.

There are numerous municipalities with significant servicing issues that are limiting, constraining or delaying growth where demand is otherwise present. The table below presents a sample of some Ontario municipalities facing servicing challenges that are hindering the pace and/or quantum of development.

Figure 17

Municipality / Area	Overview of Issue
Wellington County (Township of Wellington North)	An expansion to the wastewater treatment plant in the community of Arthur was deemed by the Township to be needed sooner than anticipated due to growth and development in the community. It is expected that by 2025, there would be no additional uncommitted reserve capacity available and continued development in the Arthur community could not proceed. The cost of the work was estimated to be $8.3 million (in 2018$)[18]
Town of Collingwood	In 2021, The Town of Collingwood had placed a moratorium on development to protect a limited remaining supply of unallocated drinking water, through the passing of an interim control by-law (ICBL). The Town has since lifted the moratorium, but instituted a service capacity allocation policy which includes a 'merit-based system' that assigns points to warrant water and wastewater capacity allocation.[19]

[18] https://www.guelphtoday.com/wellington-county/arthur-needs-more-wastewater-capacity-to-handle-growth-3515979
[19] https://www.collingwood.ca/council-government/news-notices/town-collingwood-council-pauses-development-interim-control-law

Municipality / Area	Overview of Issue
Clearview Township	In March 2023, the Township's remaining available water units were allocated through building permit issuance, with the Township notifying applicants that it will not be issuing permits for any structure in the Stayner community that requires new water capacity. According to the Township, it is working with the development community and the Province toward a financing solution for a project that will bring additional water capacity to Stayner.[20]
Halton Region	A Halton Region staff report from October 2023 set out initial terms of their 2023 Allocation Program, which is a development-financing plan used in the Region since at least 2008 that seeks agreements from landowners to provide interim financing for growth-related capital works and reduce need for municipal borrowing. Recommendation #6 from the Region's October 2023 staff report, sought to provide correspondence to the Provincial and Federal governments to emphasize "the critical need for water and wastewater servicing to support the response to the housing crisis and the accelerate housing growth reflected in the Local Municipal housing pledges…"[21]
York Region	In October 2021, the Ministry of the Environment, Conservation and Parks established the York Region Wastewater Advisory Panel to provide advice regarding whether to approve the Environmental Assessment for York Region's proposed Upper York Sewage Solutions (UYSS) project. One of the observations of the panel was that at the Region's current population growth rate, the existing upper York Region servicing will reach its service capacity limits by 2026.[22]

[20] https://www.clearview.ca/news-events-meetings/latest-news/news-release-stayner-water-supply-capacity-new-building-permits
[21] Halton Region, Report No. CA-08-23/PW-40-23/FN-36-23, Re: 2023 Allocation Program, (October 18, 2023)
[22] https://www.ontario.ca/page/report-york-region-wastewater-advisory-panel

Municipality / Area	Overview of Issue
City of Markham (North Markham)	The Upper Markham Village lands in the City of Markham require the Region of York to deliver a trunk sewer (McCowan trunk sewer from 16th Avenue to Major Mackenzie). The sewer project was included in historic DC studies (2010/2012), removed in the 2018 DC study, and included again in the 2022 DC study. A solution is being undertaken by the landowners to construct the sewer through a front-ending arrangement.
Town of Whitchurch-Stouffville	The current development applications and other proposed developments exceed the available water capacity available in the community of Ballantrae, in the Town of Whitchurch-Stouffville. Elsewhere in the Town, within the Lincolnville community, a Class EA and design was completed for a trunk sewer needed for development, but the work did not proceed, resulting in development not yet proceeding as planned despite having planning approvals.
Norfolk County	In late 2020, with servicing capacity issues already resulting in a moratorium on new development in Port Dover, other communities (Simcoe, Waterford and Port Rowan) may be subject to similar constraints. Staff are discussing with neighbouring Haldimand County the feasibility of connecting to a water treatment facility in Nanticoke, with the costs of connecting to the facility through the community of Jarvis ranging upwards of $100 million.[23]

[23] https://www.simcoereformer.ca/news/local-news/water-shortages-loom-in-norfolk

Municipality / Area	Overview of Issue
Municipality of Lakeshore	The Municipality of Lakeshore reached operating capacity of its sewage treatment facility in 2020 due to higher than anticipated growth, with an expansion not available until 2023, with a cost of $43.9 million. The project is to be funded by development charges. While the new plant was under construction, the Municipality created a framework for 'in process' applications to continue to move forward, but deferred new applications under the plant project was tendered.[24]

4.5. Conclusions

- The majority of estimated housing supply in self-reported municipal inventories are from applications that have not yet received a decision, or have been refused and remain under appeal, or have been approved and are under appeal from third-party appellants. Units still in the approvals process are unlikely to have servicing allocation, and are not permitted to proceed with construction, and are dependent on continued movement through the planning process to enable construction.

- Aggregated region-wide or Province-wide surpluses of potential housing supply need to be used with caution, as each municipality in Ontario will have planning forecasts and separate requirements under Provincial Policy to have sufficient supply of their own. A surplus in one municipality is unlikely to address shortfalls in another. Provincial policy requires each municipality to have minimum amounts of designated, zoned and/or serviced supply.

- There are numerous prospective developments in Ontario with servicing allocation, but without hard infrastructure available to enable development.

- In the cases where detailed data is available, the issue of stagnant supply, particularly with servicing allocation appears most related to more rural, large-lot developments (in the case of Northern Simcoe County), or higher-density supply within greenfield developments (in the case of Ottawa). Data in these municipalities indicate that supply, once approved, generally has been proceeding through the planning system, and its numerous checks and balances, in a steady fashion.

[24] https://www.lakeshore.ca/en/news/lakeshore-breaks-ground-on-55-million-expansion-to-denis-st-pierre-water-pollution-control-plant.aspx#:~:text=The%20expansion%20is%20a%20critical,funded%20through%20Wastewater%20Development%20Charges.

- Beyond a few exceptions, it is found that there is a significant lack of data available to properly assess whether there are issues with dormant approved supply, particularly those with servicing allocation. Data required to be supplied by municipalities through regulation O.Reg. 73/23 should include enough detail that analysis can be undertaken to understand the scale, scope and orientation of any existing or emerging problems with unused servicing capacity in Ontario and each of its municipalities.

5. FINDINGS AND RECOMMENDATIONS

5.1. Findings

5.1.1. There are Numerous "Use it or Lose It" Checks and Balances Already Embedded in Ontario's Planning System

There are currently numerous checks and balances in Ontario's planning system that can catch developments that have become stagnant and unlikely to proceed, including:

- **Expiration of Building Permits** – permission in the Building Code Act for permits to expire;
- **Registered Plans Deemed Inactive/Unregistered** – based on existing provisions in the Planning Act, registered plans not proceeding are able to be deemed to be not registered after eight (8) years;
- **Lapsing Approvals for Draft Plan Approval** – many municipalities already have policies in which draft plan approvals lapse, with the Planning Act allowing draft plan approvals to lapse after a period of no less than three (3) years;
- **Revoking of Servicing Allocation** – many municipalities have current policies that revoke and reallocate servicing allocation if it is unused for a defined period of time;
- **Excess Lands** – the Growth Plan for the Greater Golden Horseshoe contains provisions where, through land needs assessments, it is determined there is a surplus of designated land. Under the Growth Plan policies, the determination of whether there are excess lands would be done during each Official Plan conformity exercise.

The current system rationalizes, at various points in the planning process, the quantum of designated lands, the utilization of servicing allocation, the age of planning approvals, and the age of building permits. The production of housing in Ontario (as evident from data presented in Appendix A) is at 33-year highs, suggesting that any presumptions that landowners are unnecessarily holding back supply is inaccurate and not borne out by on-the-ground data.

5.1.2. More Data is Needed to Better Understand the Problem, but Issues Appear Oriented to Large-Lot Rural Supply and High-Density Urban Infill

There is a serious lack of data available from municipalities or the Province to adequately assess the scale and orientation of any issues related to stagnant approvals or unused servicing capacity, but based on the review of available data from

municipalities such as Simcoe County and the City of Ottawa that regularly produce detailed analyses of registered developments, the following insights are evident:

- In Simcoe County, the majority of registered supply in a recent land budget was approved within the prior five years. Among the instances of older registered supply (older than 15 years), the vast majority was in northern, rural parts of the County, with those tending to be large-lot residential plans of subdivision. At the time there appeared to be little issue with traditional greenfield development in South Simcoe not proceeding through the planning and construction process.

- In the City of Ottawa:

    - Over a four-year span (2018-2022), 68% of units in registered plans in mid-2018 were no longer in the City's inventory of registered units as of mid-2022, with most of those units being constructed.

    - When broken down by unit type, over 90% of ground-related units in the mid-2018 inventory were no longer in the City's mid-2022 inventory, compared to only 42% of apartment units. This suggests that in urban areas, an enhanced UIOLI policy may disproportionately affect the approvals, permissions or servicing allocation for high-density developments.

    - Over the 2014-2022 period, based on the City's annual report of greenfield inventory by planning status, the total number of units in the pipeline fell by over 24,000 units.

More robust, mandatory data requirements would help researchers, planners, and policy makers understand the scale, scope and orientation of problems that may exist, or may emerge in the future.

5.1.3. Enhanced UIOLI Powers Need to Consider External Factors that May Hinder the Feasibility of Housing Development

- A more strict time-based approval/permit/allocation expiry system ignores the evolving nature of markets that can make a once-feasible development type or form (residential or non-residential) significantly less marketable or feasible than when initially proposed.

- The Housing Affordability Task Force recommended enabling municipalities to have the ability to withdraw servicing allocation from permitted projects included a caveat that the recommendation should be 'subject to adverse external economic events'. Given the effect that external factors can have on the ability to feasibly construct new housing, such as high interest rates, inflated construction costs and impaired availability of borrowing for builders and homebuyers, the Province should consider whether the timing of imposing more strict UIOLI policies may only serve to further impair the ability of prospective housing supply to be delivered.

- Rather than punitively reducing the number of approved or permitted developments, or imposing fees and charges, the Province should be seeking to first understand 'why' approved supply may not be getting built on the same timelines or pace that municipalities expect. As noted by many municipalities, financial feasibility of construction is paramount to enable approved supply turning into built supply, but little analysis has been done to assess what municipal policies, processes, fees, charges or other requirements may do to the financial feasibility of projects.

- If even approved units aren't getting built, it is often because it is not feasible to build those units – costs are too high, revenues are too low, or both. Prolonged approval periods increase the risk of the feasibility of development applications and approvals worsening from what it may have been at the time of project inception.

- Housing projects that are built are those that are able to cover the costs. It is incorrect to assume that every project proposed will succeed in getting approved, being constructed and being marketable, in a timely-enough manner to preserve the financial feasibility necessary for projects to succeed, and in particular, obtain financing from financial institutions. When additional costs or policy requirements are introduced, the least profitable or most cost-sensitive supply subject to those additional requirements tend to be the first to drop out of the market or not get built.

5.1.4. Claims of Home Builders "Sitting on Supply" Ignores Amount of Development Activity Currently In-Progress

- The notion that enhanced UIOLI powers are necessary on the basis that home builders are withholding supply ignores that residential construction in Ontario is at a 33-year high, with over 164,000 units currently under construction (see Appendix A).

- The length of time to construct housing units, of all types, continues to increase, which results in delayed delivery of supply once begun, but has also added considerable risk for those seeking to begin construction given the longer period of time that construction loans need to be carried, contractors retained, as well as prolonged exposure to construction cost inflation.

- Data made available from municipalities generally shows low proportions of estimated 'development pipelines' are in registered or draft approved developments with servicing allocation. The largest source of units in municipal pipeline estimates are in applications still requiring additional approvals, or municipal/OLT decisions.

5.1.5. In Municipal Land Needs Assessments, Demand is Often Understated and Available Supply is Often Overstated

- Comparison of development pipelines and potential supply with housing demand set out in Growth Plan or other municipal forecasts ignores the range of non-Census population that is omitted from most municipal forecasts and therefore, also omitted from most estimates of housing needs. Therefore, most estimates of housing need are understated, and significantly understated in some municipalities.

- Despite studies finding that within any development pipeline there will inevitably be prospective developments with partial or full planning permissions that won't proceed, accounting for this likelihood should be reflected in land needs assessments, through the use of contingency factors. Very few Ontario municipalities utilized a contingency factor in their recent land needs analyses, instead planning for a precise amount of supply that matches the only the minimum population forecasts. The implications of this approach is that for a municipality to achieve its population forecasts, all anticipated supply needs to materialize. However, the inherent risk of development, unforeseen economic events, changes in demand for housing of certain types all present significant risk to the accuracy of point-in-time forecasts.

5.2. Recommendations

- **Data is Needed to Understand Scale of Issue and Avoid Unintended Consequences** - before an enhanced UIOLI policy is adopted, study should be undertaken to quantify the scale and potential source of problems that may exist. Currently, the relative lack of available data does not allow for proper analysis to understand the true size and scale of the problem. Without data to understand the source (dwelling unit types, geography) or scale of the problem, the potential solution to withdraw servicing allocation, approvals or permissions could be unnecessarily harsh.

- **Consider Amount of Unused Servicing Capacity Held by Non-Residential Approvals** - If the Province is seeking to enhance existing UIOLI to better optimize servicing capacity, a similar exercise should be considered for servicing allocations held by non-residential development.

- **Placing Onerous Conditions or Costs on Developments Already in Jeopardy May Exacerbate Existing Issues** – a requirement to re-apply once an approval or servicing allocation is revoked or lapsed may result in onerous conditions or costs being imposed. The time-cost of delay caused by expiry may impact smaller builders more than larger builders and exacerbate issues with feasibility that may already be present.

- **Lapsing or Revoked Planning Approvals May be Inconsistent with Municipal Planning Policy and Zoning By-laws** - If an application is approved because it conforms to the Official Plan, Zoning By-law, or the Official Plan or Zoning By-law was amended to designate or permit the land use and proposed development, it is unclear how removing its approval would conform to municipal policy. Official Plan designations and zoning permissions should not be at risk.

- **Phasing Large Development Sites is Necessary to Mitigate Risk and Improve Chances of Delivery of Supply:** Phasing sites is a way for homebuilders to manage cash flow and balance risk of going too fast (or too slow) – if need to rush to avoid expiry of approvals or servicing allocation results in going too fast and

increasing risk exposure, or if expiries reduce cash flow, it could prevent development that was highly likely to occur.

- **Population Forecasts Used in Planning Processes are Generally Minimums and Should be Treated as Such:** The population targets in the Growth Plan are minimums. A surplus supply relative to Growth Plan forecast needs, if utilized in the build-out of a municipality, or sooner than anticipated, only indicates that the municipality may be able to exceed the minimum as a surplus of supply may be a signal from the development industry that a particular area or municipality is in more demand than initially projected. Without a surplus of supply relative to forecast needs, there would be no way to know that actual demand exceeded anticipated supply needs.

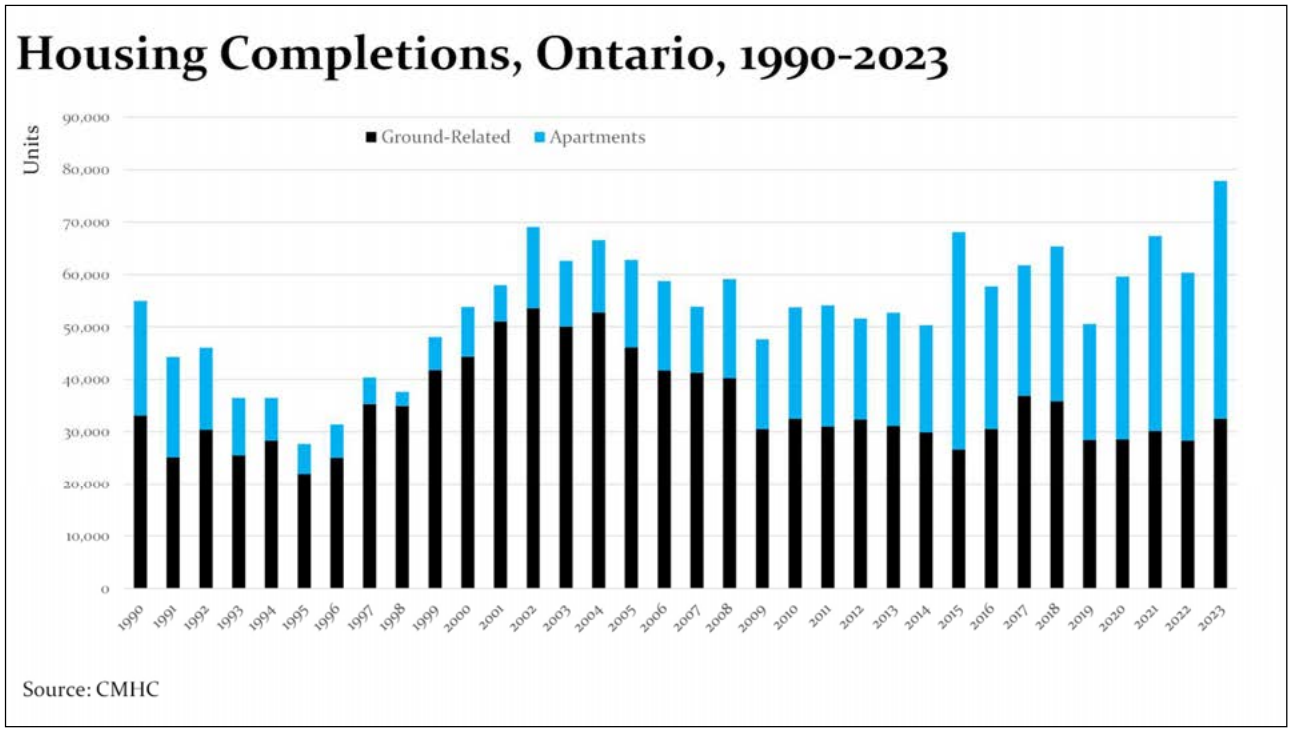
- **Sector and Firm-Based Capacity Constraints**: Given the ongoing financial risk of constructing new homes and maintaining business operations as the base long-term goal, development firms will maintain their own pipelines of approved developments. The ability to convert those pipelines to completed projects are limited by that business's financial capacity, appetite for risk, as well as other industry-level constraints such as the availability and capacity of consultants, builders, engineers, etc.

APPENDIX A – POPULATION AND HOUSING CONSTRUCTION TRENDS IN ONTARIO

Housing Completions

In 2023, housing completions in Ontario reached a 34-year high at nearly 77,900 units, the first year since 1990 in which completions have exceeded 70,000 units. Of the 10 years since 1990 in which completions have exceeded 60,000 units, six of them have occurred since 2015. Ground-related housing forms (single-detached, semi-detached and row houses) comprised 41.7% of housing completions, the second lowest such share since 1990 (the lowest being 2015 at 39.1%).

Figure A- 1



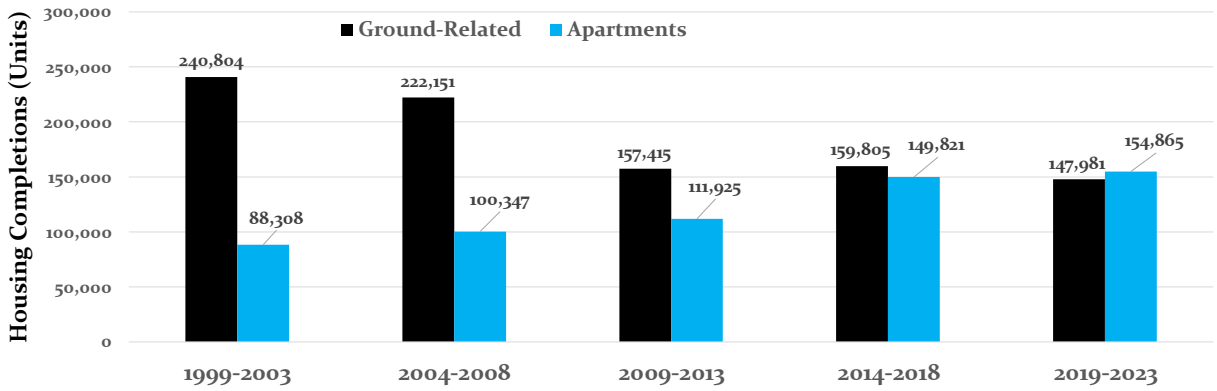
The composition of housing units in the Province of Ontario has generally shifted away from ground-related dwelling units (single-detached, semi-detached, townhouses) and towards apartment units. The share of ground-related units has fallen from 73.2% from the 1999-2003 period to 48.9% over the 2019-2023 period.

While the mix of housing units completed in Ontario has significantly shifted from ground-related units to apartments, the total number of units completed has stayed within a range of 269,300 to 329,100 units over each five-year period since 1999. The most recent five-year period (2019-2023) saw 302,800 housing completions, the second-lowest 5-year period other than the 2009-2013 period. The 2019-2023 period

had more apartment unit completions of any of the other five-year periods, but it also had the lowest number of ground-related units of any five-year period.

Figure A- 2

Housing Completions by 5-Year Period, Province of Ontario, 1999-2023, by Dwelling Type



	1999-2003	2004-2008	2009-2013	2014-2018	2019-2023
GR Share%	73.2%	68.9%	58.4%	51.6%	48.9%
Apt Share%	26.8%	31.1%	41.6%	48.4%	51.1%
Total Units	329,112	322,498	269,340	309,626	302,846

Note: Ground-Related units includes single-detached, semi-detached, row houses
Source: Keleher Planning & Economic Consulting Inc. based on CMHC data

Population Growth

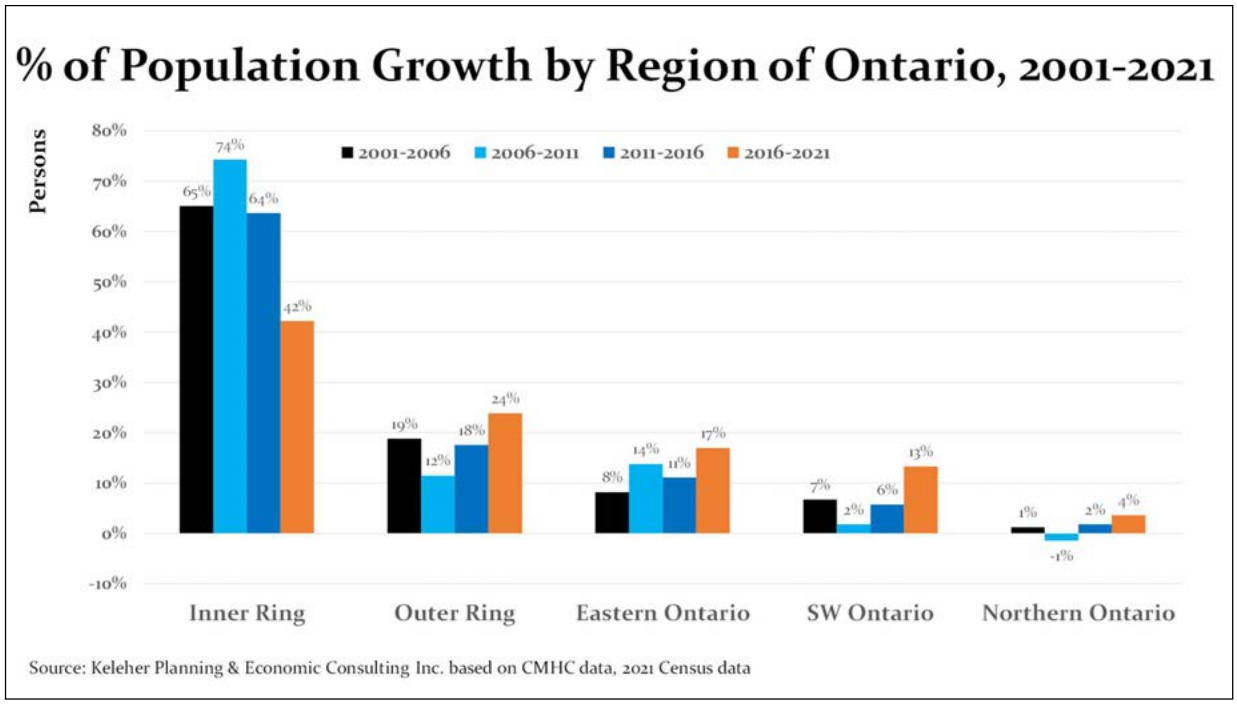
Since 2001, the population of Ontario has grown by 25%, from 11.4 million people in 2001 to 14.2 million people in 2021, equating to Province-wide growth of 2.8 million people over a 20-year period.

When population growth in Ontario is broken down into five regions, including the Inner Ring and Outer Ring of the Greater Golden Horseshoe, Eastern Ontario, Southwestern Ontario and Northern Ontario, the data shows that the location of growth has shifted away from the Inner Ring[25], which in the 2001-2006 period saw 65% of the Province's population growth, falling to 42% in the latest five-year period from 2016-2021.

The share of growth occurring in the Outer Ring[26] reached a high of 24% in the last five years, as did the share of growth occurring in each of Eastern Ontario (17% share), Southwestern Ontario (13.3% share) and Northern Ontario (3.6% share).

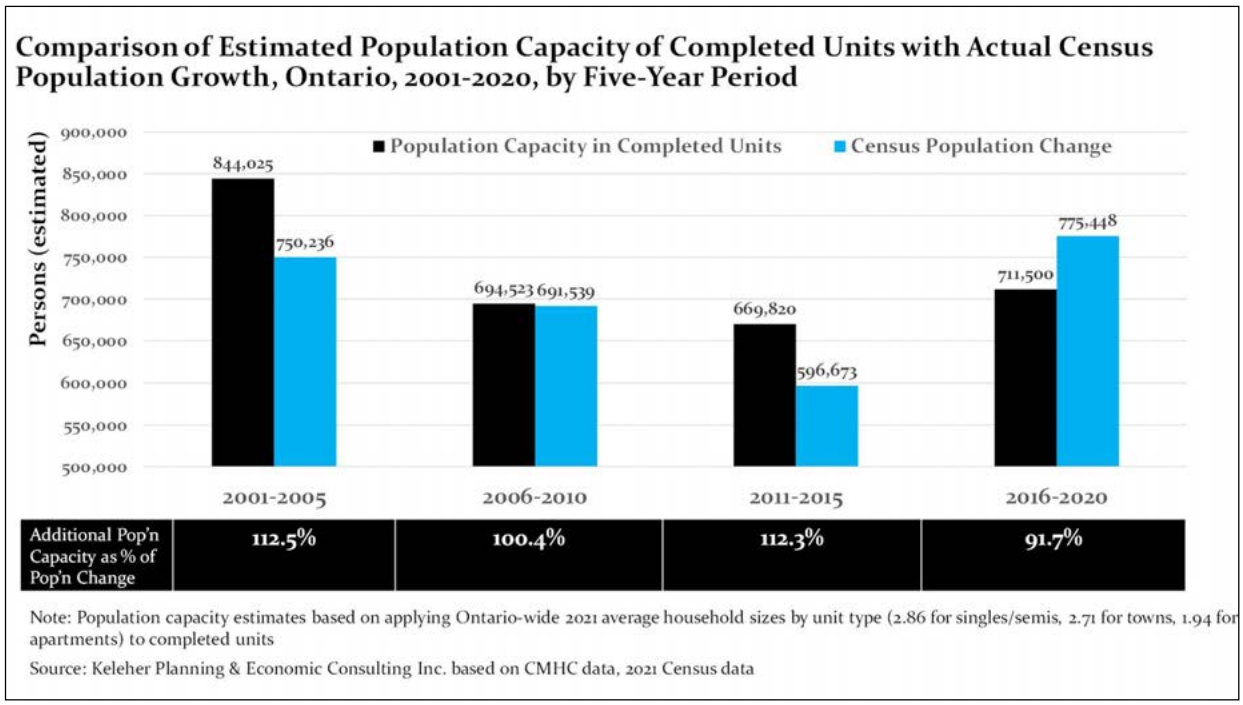
[25] Inner Ring = Census Divisions of Toronto, York, Peel, Durham, Halton and Hamilton
[26] Outer Ring = all other parts of the Greater Golden Horseshoe except for the Inner Ring

Figure A- 3



The reduced share and amount of growth occurring in the Inner Ring has occurred during a period in which Province-wide population growth over the five-year Census period was the highest it has been over the 2001-2021 period.

Figure A- 4



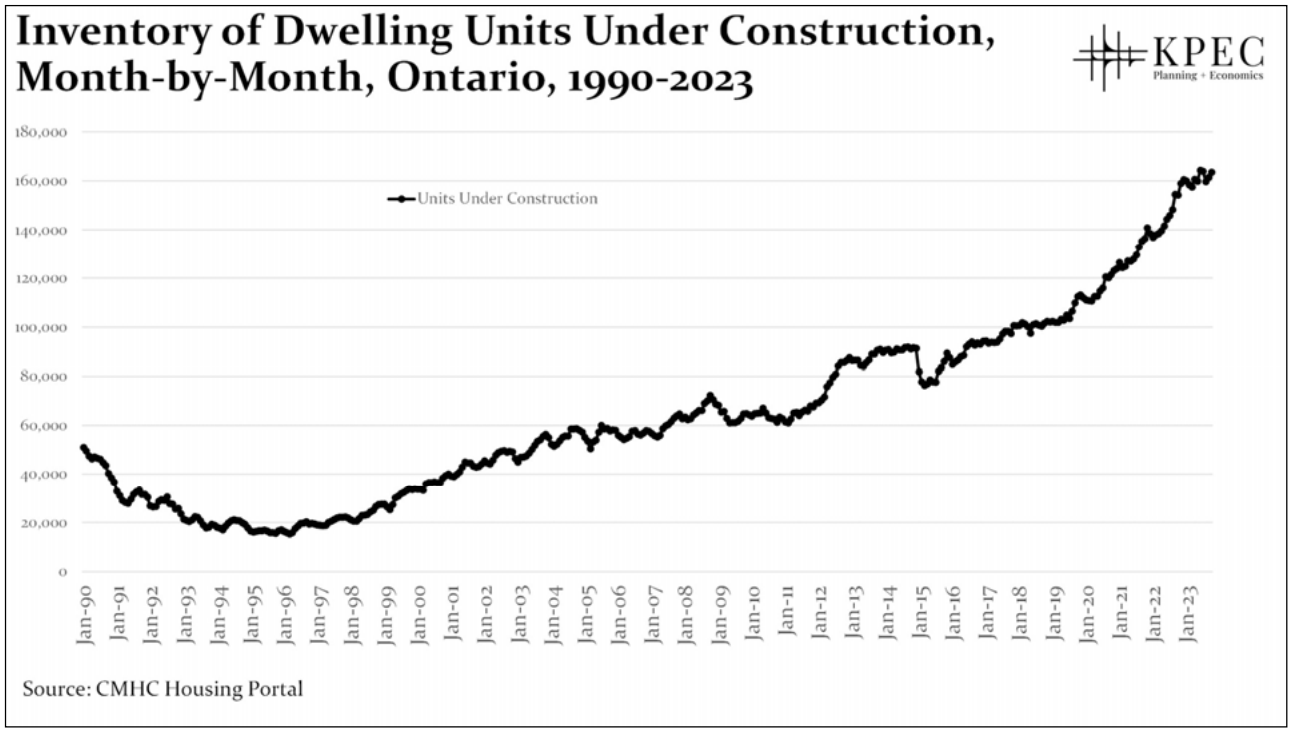
Inventory of Units Under Construction in Ontario

The notion of “use it or lose it” approvals is predicated on the presumption that approved homes aren’t getting built fast enough or that housing supply is being held back. However, the data shows that there has never been more housing units under construction in Ontario has reached 33-year highs

Units Under Construction at 33-Year Highs

Based on the amount of inventory currently under construction, there has not been a period in Ontario, since 1990 (if not further back), where more housing units were being constructed. As of October 2023, there were 163,407 dwelling units under construction in Ontario, including 33,796 ground-related units, and 129,611 apartment units.

Figure A- 5

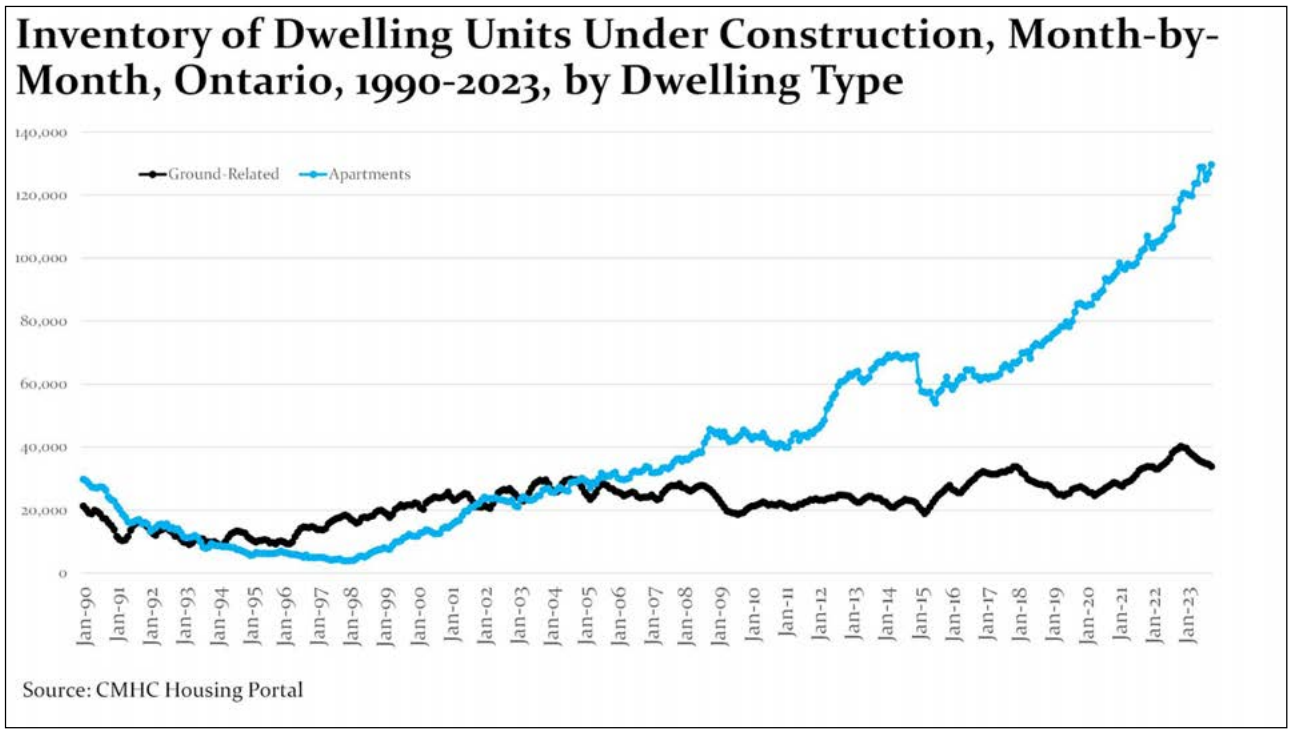


This illustrates that the construction sector may be approaching capacity, both in the construction of buildings and homes, but also the infrastructure needed to allow housing to be constructed. There is also substantial construction sector capacity being utilized in constructing major infrastructure works, including numerous housing-supportive transit network improvements being installed throughout the Province.

Share of Units Under Construction Increasingly Oriented to Apartment Units

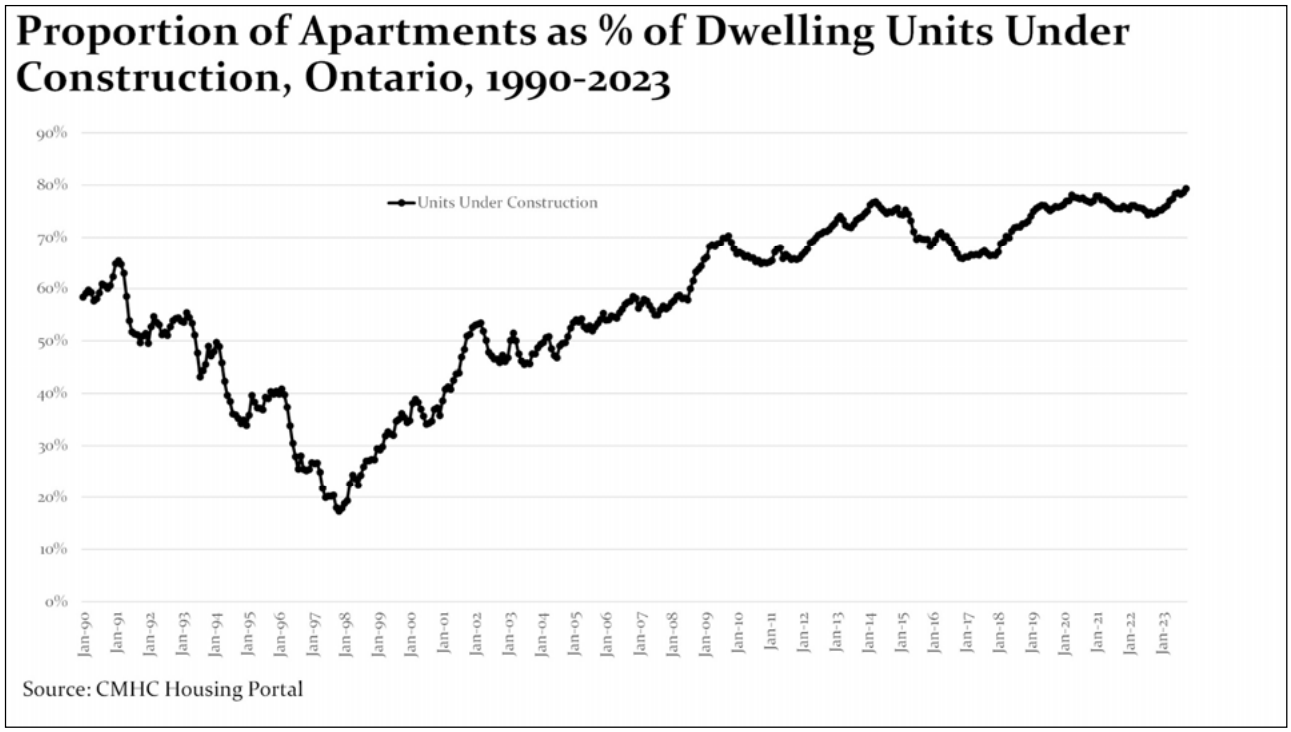
The number of dwelling units under construction has grown primarily due to a significant increase in the number of apartment projects under construction, with approximately 130,000 apartment units currently under construction. Prior to 2020, at no point since 1990 had more than 100,000 apartment units been under construction at any given time. The number of ground-related units is less than 40,000 units, and has generally ranged from 20,000 to 40,000 units since the late 1990s.

Figure A- 6



Of the 163,400 units under construction in Ontario as of 2023, nearly 80% are apartment units, the highest proportion since 1990 (at least).

Figure A- 7



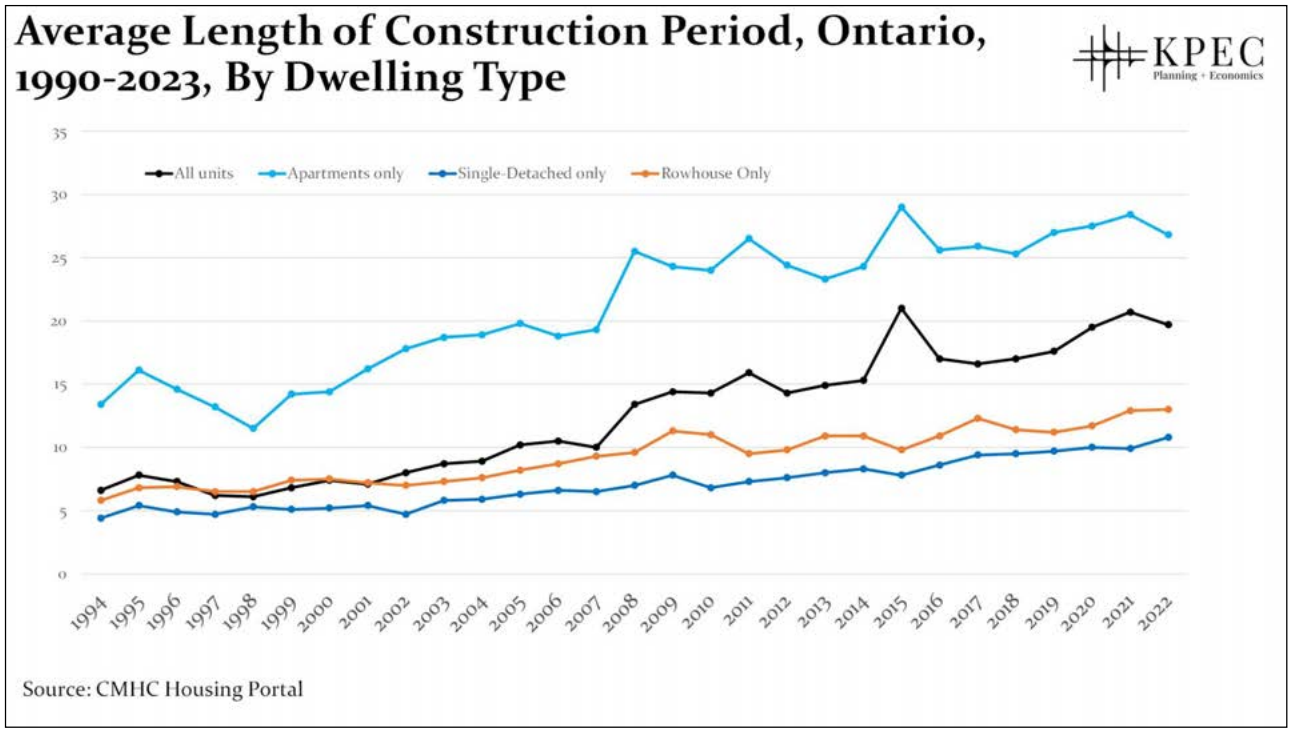
All Dwelling Unit Types Taking Longer to Construct

Based on CMHC data on the average length of construction periods by dwelling type in Ontario over the 1990-2023 period, the average period of construction has increased for all unit types.

The average length of time for constructing an apartment project has increased from 13-15 months in the 1990s to 26-28 months in the last few years. Single-detached units have also doubled from roughly 5 months in the 1990s to approximately 10 months in each of the past four years.

The gap in construction periods between single-detached and apartments have increased from roughly 9 months in the early 1990s to roughly 17 months over the past few years.

Figure A- 8



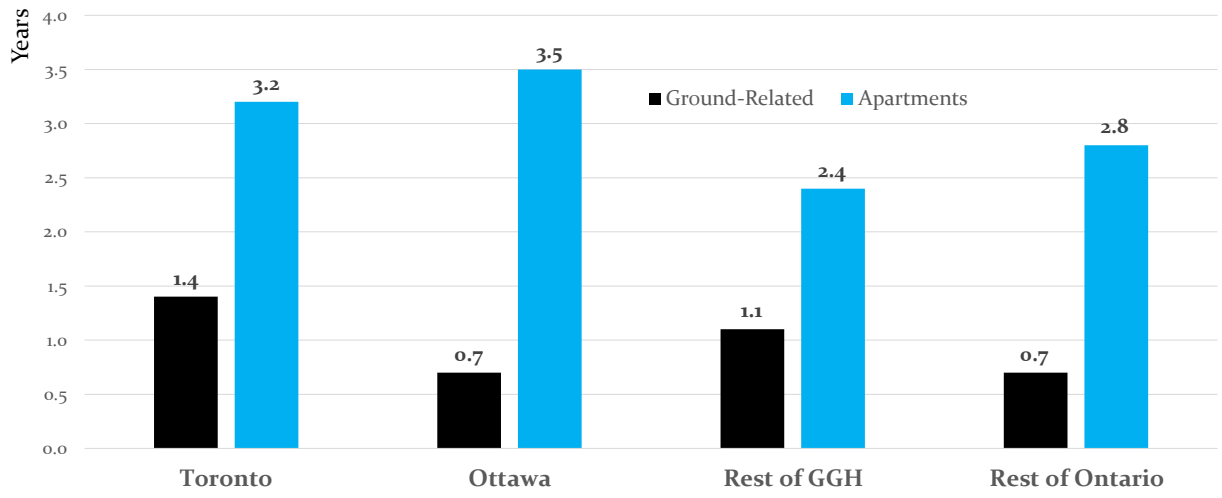
Size of Construction Pipeline Needs to Increase by 50-100% to Meet Provincial Housing Targets

The current inventory of units under construction can be translated into a rough estimate of 'years supply' of pending housing completions.

While the current amount of dwelling units under construction is at a 33-year high, the quantity of housing under construction, based on typical construction periods by unit type, amounts to 1.1 years worth of housing completions for ground-related housing forms, and 3.1 years housing completions for apartments.

Figure A- 9

Year of Pending Housing Completions Currently Under Construction, by Unit Type



Note: calculated based on inventory of units under construction divided by current average construction period. Example: Ottawa has 4,030 ground-related units under construction as of October 2023, and averaged 5,672 ground-related housing starts over the past 5 years, resulting in the current quantity of units under construction being 0.7 years worth of new housing based on recent trends.

Source: CMHC

Given timelines to construct new housing by dwelling type, if the Provincial target of 150,000 new homes per year is to be achieved, the construction pipeline will need to substantially expand.

Depending on the mix of housing units to make up the 150,000 dwelling units, the Province may need between 242,000 and 316,400 dwelling units in the 'under construction' pipeline to see 150,000 units per year be completed. This would equate to a 48% to 94% increase over the current under construction pipeline, which is at a 33-year high.

Figure A- 10

Estimates of Increase to Construction Pipeline Required to Meet Provincial Housing Targets

	Scenarios re: Provincial Target		Breakdown of Annual Units by Scenario			Units Needed in Construction Pipeline to Achieve 150,000 Completions Per Year			
	Ground-Related	Apartment	Ground-Related	Apartment	Total	Ground-Related	Apartment	Total	% Increase over Current
Scenario 1	10%	90%	15,000	135,000	150,000	14,877	301,500	316,377	94%
Scenario 2	15%	85%	22,500	127,500	150,000	22,315	284,750	307,065	88%
Scenario 3	20%	80%	30,000	120,000	150,000	29,753	268,000	297,753	82%
Scenario 4	25%	75%	37,500	112,500	150,000	37,191	251,250	288,441	77%
Scenario 5	30%	70%	45,000	105,000	150,000	44,630	234,500	279,130	71%
Scenario 6	35%	65%	52,500	97,500	150,000	52,068	217,750	269,818	65%
Scenario 7	40%	60%	60,000	90,000	150,000	59,506	201,000	260,506	59%
Scenario 8	45%	55%	67,500	82,500	150,000	66,944	184,250	251,194	54%
Scenario 9	50%	50%	75,000	75,000	150,000	74,383	167,500	241,883	48%

Years to Construct	1.0	2.2
Current # of Units Under Construction		163,407 units

Source: KPEC based on CMHC data

For construction-sector capacity to increase by 48% to 94% to expand the construction pipeline to enable annual completions to reach 150,000 units per year, it would require some combination of expansion of employment levels, productivity improvements, or some combination thereof.

Ability to Increase Construction Pipeline will Require Expansion of Labour Force or Increased Productivity

Based on the 163,400 units currently under construction, to reach 241,900 to 316,400 units in the construction (depending on the scenario), the pipeline would require an increase in the range of 78,500 to 171,900 units. Based on rough assumptions regarding unit size, unit mix, construction costs, it is estimated that expansion of the construction sector to accommodate an increase to the construction pipeline of 78,500 to 171,900 units would require an additional 111,000 to 195,300 jobs in the construction sector in Ontario.

The amount of employment in the construction sector has risen steadily since the mid-1990s, where employment has increased by 126% compared to 53% for employment across Ontario as a whole over that same period of time. In total there are 596,000 jobs in the construction sector, meaning that without productivity improvements, an additional 111,000 to 195,300 jobs to increase residential construction to targeted levels would require a 19% to 38% increase in construction sector employment.

Figure A- 11

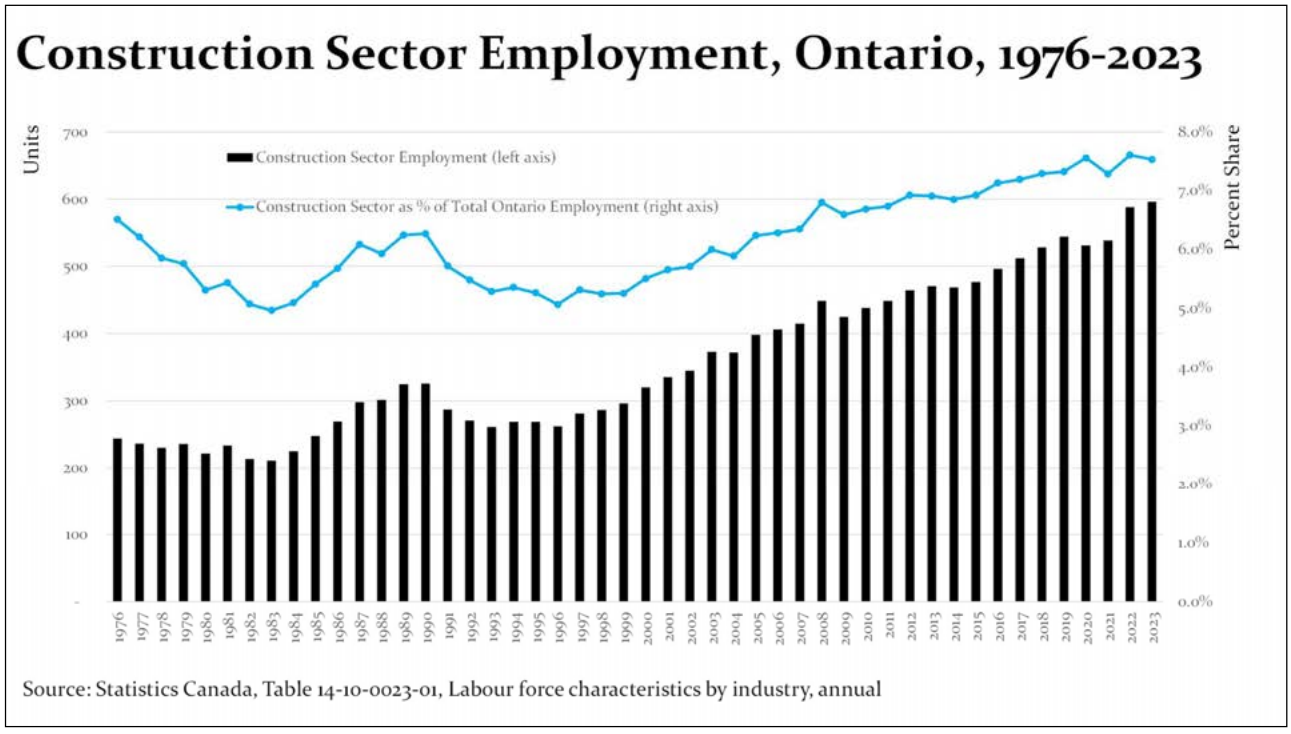


Figure A- 12

Change to 2023	Total Employment, Ontario	Construction Sector Employment
Since 1976	+112%	+145%
Since 1986	+67%	+122%
Since 1996	+53%	+128%
Since 2006	+23%	+47%
Since 2016	+14%	+20%

Conclusions

There are several trends that have combined to limit the ability of the construction industry to continue expanding pace of production and utilize other approved permit-ready supply:

- The total number of units under construction is at 33-year highs;
- The proportion of units under construction that are apartments is at 33-year highs;
- The length of time to construct all unit types are at-or-near 33-year highs.

At a time when the construction industry has never had more units in production, has never had more labour-intensive high-density projects in production, and at a time when construction periods are as long as they have been on record, it is not in the public interest to revoke permit-ready approvals when it may not be able to utilize those permissions due to being limited by the amount of construction already underway.

APPENDIX B – IMPLICATIONS OF INSUFFICIENT HOUSING SUPPLY

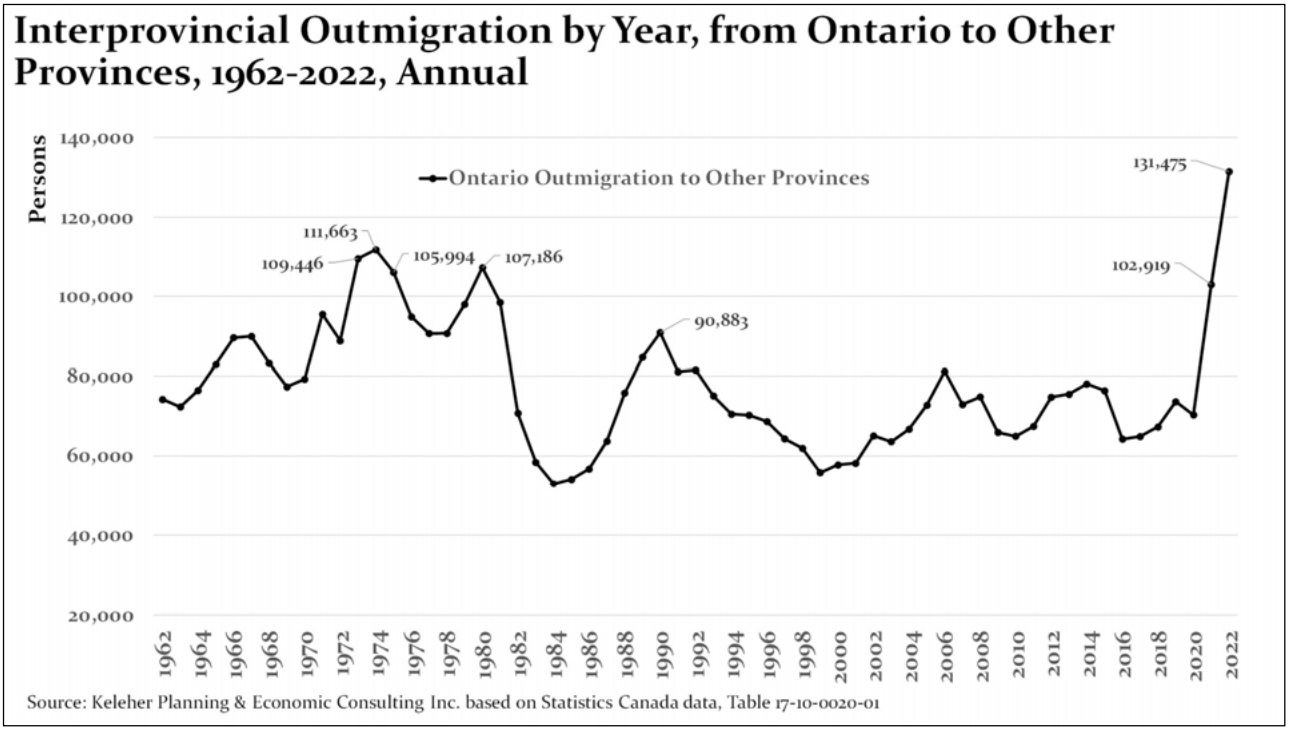
When housing supply in a given jurisdiction is insufficient to meet demand, or available shovel-ready housing supply is unable to be built, there are numerous implications that are felt in Ontario and negatively impact economic competitiveness.

People Moving Out of Ontario to Elsewhere in Canada

The movement of persons within Ontario, within Canada, and the prices or rents for homes gives an indication or signal regarding the adequacy of housing supply in Ontario municipalities.

Over the past two years, the Province of Ontario has seen the greatest amount of out-migration from Ontario to other provinces seen since the mid-1970s to early-1980s, with the out-migration of 113,475 persons in 2022 being the highest single-year since 1962 (at least).

Figure B- 1



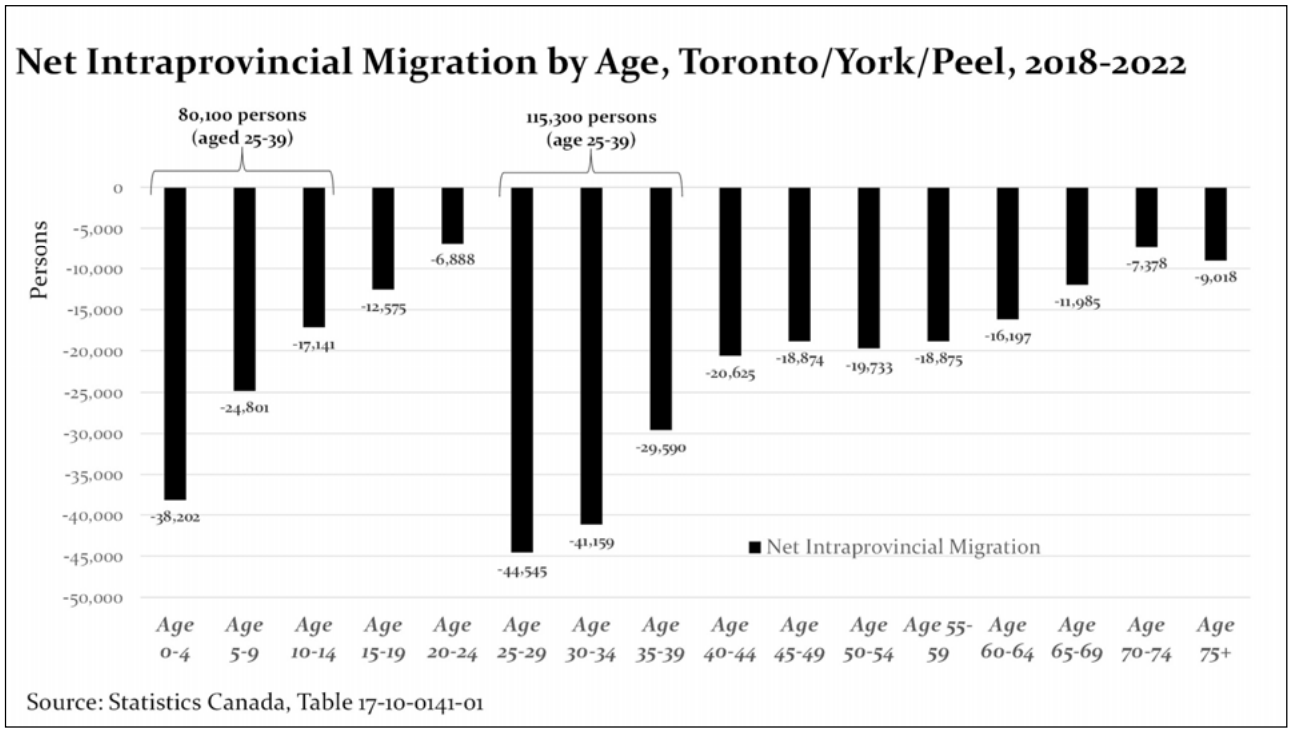
The implications of not supplying enough housing for the population that may otherwise wish to reside in Ontario, results in lost economic opportunities for Ontario residents remaining in Ontario, disruption to existing Ontario residents deciding to leave the Province, and impacts the Province's economic outlook by people that were living in

Ontario taking their skills, talent and training (often obtained in Ontario) to other Provinces thereby bolstering other economies instead.

Increased Movement of Young People within Ontario

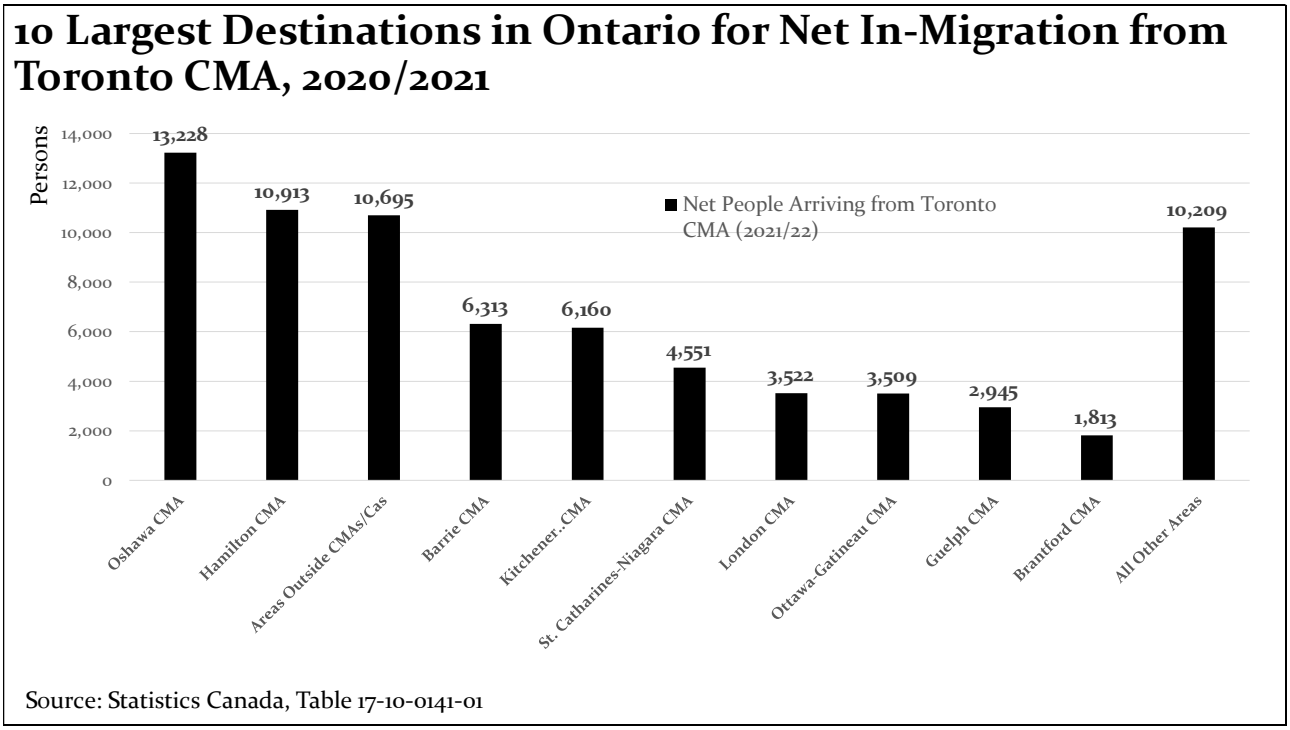
Intraprovincial migration refers to persons who moved to a different city, township, village or reserve within Canada, but stayed within the same province or territory. The majority of persons leaving the Toronto CMA on-net are young people seeking suitable housing that meets their budget. Over the five-year period from 2018-2022, a net of 205,000 persons in age groups 0-14 and 25-39 left the combined area of Toronto, York and Peel for other parts of Ontario.

Figure B- 2



Based on data from 2021 alone, the largest recipients of persons moving from the Toronto CMA (which includes Toronto, Peel, York, and parts of Halton Region and Durham Region) are areas such as the Oshawa CMA, Hamilton CMA, Barrie CMA, Kitchener-Waterloo, Niagara Region and London. There is also a substantial number moving to more rural areas (those outside of CMAs in particular).

Figure B- 3



Source: Statistics Canada, Table 17-10-0141-01

Deterioration of Affordability in Market Housing

Since 2012, the average price of absorbed single-detached dwelling units have increased by more than 100% in 11 of 16 market areas, and more than 150% five (5) of those 11, including Guelph (+230%), London (+182%), Windsor (+171%), Kingston (+167%) and Peterborough (+162%). Each of these five markets saw significant inflows from persons moving on net out of the Greater Toronto Area.

Based on data from the CMHC 2023 Rental Market Report, average rents for private apartment units (2-bedroom units), compared to 2017 data, have increased by 34%, with increases seen across Ontario ranging from 30% to 52%. Rents for condominium apartments that are rented to end-users have increased from 21% in the Toronto CMA to over 70% in the Hamilton and London CMAs.

Figure B- 4

Change in Price of Average Absorbed Single-Detached Dwelling Unit, 2012-2022

	2012	2022	% Change
Barrie	$ 425,776	$ 921,527	116%
Belleville - Quinte West	$ 318,044	$ 380,788	20%
Brantford	$ 406,489	$ 929,307	129%
Greater Sudbury	$ 383,665	$ 590,165	54%
Guelph	$ 435,506	$ 1,438,939	230%
Hamilton	$ 514,193	$ 790,750	54%
Kingston	$ 296,178	$ 791,249	167%
Kitchener - Cambridge	$ 434,415	$ 943,689	117%
London	$ 357,513	$ 1,007,848	182%
Oshawa	$ 407,418	$ 937,454	130%
Ottawa	$ 482,586	$ 900,042	87%
Peterborough	$ 329,863	$ 863,917	162%
St. Catharines - Niagara	$ 435,429	$ 958,490	120%
Thunder Bay	$ 359,812	$ 700,969	95%
Toronto	$ 672,318	$ 1,356,805	102%
Windsor	$ 330,396	$ 895,116	171%

Source: CMHC

Figure B- 5

Average Rents, 2 Bedroom Apartments, Various Ontario Census Metropolitan Areas (CMAs)

Centre	2017	2023	% Change
Private Rental Apartments			
Barrie CMA	$ 1,205	$ 1,610	34%
Belleville-Quinte CMA	$ 1,005	$ 1,333	33%
Brantford CMA	$ 955	$ 1,432	50%
Greater Sudbury CMA	$ 1,048	$ 1,361	30%
Guelph CMA	$ 1,124	$ 1,646	46%
Hamilton CMA	$ 1,103	$ 1,617	47%
Kingston CMA	$ 1,157	$ 1,609	39%
Kitchener-Cambridge-Waterloo CMA	$ 1,093	$ 1,658	52%
London CMA	$ 1,041	$ 1,479	42%
St. Catharines-Niagara CMA	$ 993	$ 1,388	40%
Oshawa CMA	$ 1,179	$ 1,613	37%
Ottawa CMA	$ 1,232	$ 1,698	38%
Peterborough CMA	$ 988	$ 1,411	43%
Thunder Bay CMA	$ 959	$ 1,320	38%
Toronto CMA	$ 1,404	$ 1,961	40%
Windsor CMA	$ 868	$ 1,253	44%
Ontario	$ 1,266	$ 1,697	34%
Rental Condominium Apartments			
Hamilton CMA	$ 1,358	$ 2,373	75%
London CMA	$ 1,200	$ 2,050	71%
Ottawa CMA	$ 1,579	$ 2,085	32%
Toronto CMA	$ 2,393	$ 2,890	21%

Source: CMHC Rental Market Reports

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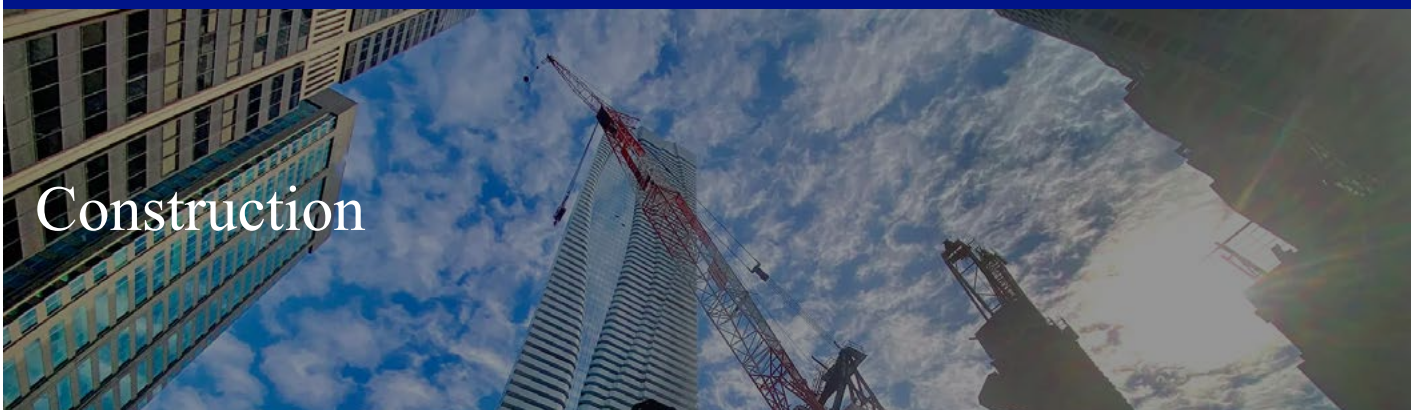

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Risk management is a critical requirement throughout the life of a construction project. Every participant in the construction pyramid must assess their risks, reduce them where possible, and act promptly to enforce or defend their interests if disputes occur. They need a law firm that can work with them through the entire process from start to finish, not just when things have gone wrong.

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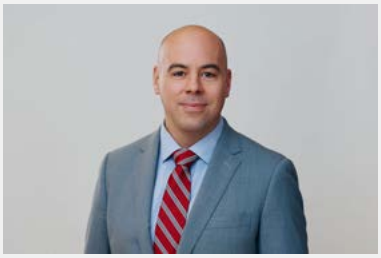
Key Contacts

Michael Tamblyn
Partner

T. 416 777 5366
E. mtamblyn@torkin.com



Ryan Hauk
Partner

T. 416 643 8810
E. rhauk@torkin.com

Aleksandar Jovanovic
Partner

T. 416 775 8823
E. ajovanovic@torkin.com

For a full list of lawyers in our Construction Law Group, please visit our website.

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We employ a judicious and strategic approach when conducting the full scope of a real estate deal, leveraging our insight into associated business considerations that might influence the outcome of any given transaction or project. At the outset of new engagements, we examine the opportunities and risks before helping clients establish strategies for buying, selling, financing, developing and leasing property. We integrate our real estate expertise with business law, planning law, tax law, mortgage and financing law, creditor and debtor law, partnership and syndication law, landlord and tenant law and litigation—all as they relate to real estate transactions and development projects. When clients require services that extend beyond our group's capabilities, we collaborate with our colleagues in other areas of practice to ensure we address everything needed to complete transactions seamlessly and without delay.

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- Zoning, planning and subdivision of land
- Legislation (analysis and recommendations)
- Title repair

Key Contacts

Aaron English
Partner and Chair

T. 416 643 8811
E. aenglish@torkin.com

Seth Zuk
Partner

T. 416 775 8822
E. szuk@torkin.com

Doug Bourassa
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T. 416 775 8827
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We strive to be market leaders in innovative property management solutions. Our goal is to deliver quality service and advice over the full lifespan of a community, while also developing positive relationships with our stakeholders. We aim to provide the highest performance and standards.

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- Ensuring our team has access to relevant expertise, training, and resources.
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Interim Occupancy Condominium Management

When opening a newly constructed community, there are several essential items that need to be given special consideration, to ensure that your purchaser's expectations are managed, and the experience they receive is reflective of your brand.

The team at Melbourne Property Management have learned a few lessons along the way, having opened hundreds of new buildings over the past decade. We understand that it is critical that a well-structured opening plan be established, to be used by both the management team and the Declarant. It is important that all parties are aligned in their approach, and that a focus and priority be given to communication with both the owners and construction team during the interim occupancy period.

We understand that Interim Occupancy Management is very different from managing an existing community, and that additional resources, subject matter experts and experience are paramount to a smooth opening and transition to a well-functioning condominium.

If you are embarking on a new condominium development, have a new community that will soon be occupying, or would simply like to know more about how the team at Melbourne might be able to help, we would be more than happy to have a conversation. We are a friendly team, committed to providing trusted and timely advice.

Meet Members from the Melbourne Property Management Team

Joff Elliot - President

Joff brings more than 15 years of sales and management experience to his position as President of Melbourne Property Management.

Prior to founding Melbourne, Joff was a principal of one of Canada's largest sub-metering companies. Joff has a proven track record in lead sourcing, developing, and executing all aspects of the sales process for new construction projects. His extensive background in building businesses, leading teams, and fostering meaningful relationships contributes directly to his clients' success.

He is also the founder and CEO of Benny Parks Services Inc., a provider of strategic business solutions to an ever-growing portfolio of clients in multiple business sectors across Canada. He serves on the boards of Illuminati Energy Corp and Ebene Services Inc.

Joff.Elliot@Melbournepm.ca 416-546-2126 ext. 101

Julian McNabb – Vice President

Julian oversees both the Operations Team and the Consulting Division, and comes with a wealth of knowledge and experience, as a well-respected member of the condominium management industry. Julian provides consultancy services to many of Ontario's top condominium developers. He is also well-known for helping, developing, and training managers to ensure that they have the requisite knowledge and understanding to meet client and resident needs in this changing industry. Over the course of his career, Julian has worked on over 900 Condominium projects in Ontario.

Julian has been a frequent speaker and presenter at LandPro, Realtor Quest, BILD and CCI \ ACMO events and has served on the CCI-Toronto Chapter board of directors and on the Communications Committee.

Julian.McNabb@Melbournepm.ca 416-546-2126 ext. 102

Matt Newton – Vice President of Operations

Matt Newton – Vice President of Operation

Matt has an extensive background with over 15 years experience in the property management, development, and real estate industry. He is responsible for overseeing the regional directors, property managers, and office operations. He is accountable for establishing and maintaining key client relationships with Board of Directors, developers, residents, and office staff.

Matt's experience leading personnel development, operational strategies, and crisis management ensures optimal business performance and significant community enhancements are achieved.

Matt is also a licensed real estate agent/broker with over 15 years experience, which will greatly enhance our rental management program.

Matt.Newton@Melbournepm.ca 416-546-2126 ext. 103

Carlo Russo – Chief Financial Officer

Carlo comes to Melbourne as an accomplished finance and accounting professional with over 25 years of progressive experience having served as a CFO for numerous companies in the GTA where his expertise in corporate development and operational activities has helped provide both growth and stability in those organizations.

Prior to joining Melbourne, Carlo worked with Bondfield Construction, Corebuild Construction, Accuworx Inc. and GFL Environmental Inc. Carlo's ability to bring a fresh financial perspective to the condominium management industry, is a huge benefit to the team at Melbourne.

Carlo has obtained his MBA, BBA, CPA, CMA and is in good standing with the Chartered Professional Accountants of Ontario.

Carlo.Russo@Melbournepm.ca 416-546-2126

Lori Melanson – Director of Accounting and Administration

Lori joins Melbourne with over 30 years of Condominium Financial Management experience in her role as the Director of Accounting and Administration. Lori brings a wealth of experience and industry best practices from her most recent role in the Condominium Management Industry, where she was responsible for overseeing all condominium financial reporting and administration, and leading the implementation of the new Condominium Authority of Ontario (CAO) and the Ontario Condominium Act changes. Previously, Lori held financial and leadership positions at two of the largest condominium management companies in the GTA.

Lori is responsible for overseeing the accounting policies and procedures, implementing proper internal controls, and uses her extensive comprehension of condominium administration to ensure all managers and clients are supported.

Lori.Melanson@Melbournepm.ca 416-546-2126 x 105

Rolland Almeida – Manager, Client Accounting

Rolland comes to Melbourne with over 30 years of accounting experience and has built up an excellent reputation over more than 15 years in condominium accounting for his ability to mentor and support both managers and fellow accountants. Rolland excels in his role of Manager of Client Accounting as he has a passion for understanding each condominium budget, how it works, and the story it tells. His insight, experience and focus on continuous improvement, provides tremendous support to the accounting team. Prior to joining Melbourne, Rolland served as a Finance Manager at one of North America's largest condominium management companies.

Rolland holds a University Bachelor's Degree in Commerce (B.Com) Majoring in Finance & Accounting.

Rolland.Almeida@Melbournepm.ca 416-546-2126 x 171

Jenna Lawson – Director of Condominium Management

Jenna is widely recognized and respected in the condominium management community. Her reputation precedes her, and her presence on Melbourne's leadership team is a tremendous advantage. One of Jenna's greatest joys is mentoring and training others, and she approaches these responsibilities with an approachable and supportive manor. Ensuring that managers and communities under her care receive excellent care and have access to necessary resources and support is a top priority for Jenna.

As the Director of Condominium Management, Jenna's role is vital in maintaining Melbourne's high standards. She oversees a team of Licensed Condominium Managers, diligently implementing policies and procedures at a site level to enhance the overall community experience. With her visionary approach and keen attention to detail, Jenna ensures that every aspect of condominium management aligns with Melbourne's commitment to excellence.

Jenna's dedication extends beyond her professional responsibilities. She is passionate about fostering strong connections within the industry and believes in the power of collaboration. By creating a supportive network and facilitating knowledge sharing, Jenna strives to elevate the entire condominium management industry.

Jenna.Lawson@Melbournepm.ca 416-546-2126 x 160

Laura Elliot – Human Resources Business Partner

Laura joined Melbourne at the beginning of 2021, to help develop company policies, foster Melbourne culture, oversee recruitment and support the growth of the team. Laura has quickly become a greatly appreciated team member, with her passion to coach and support staff, and provide a vital human resources perspective to leadership meetings and weekly team meetings.

Laura is passionate about ensuring that Melbourne is a great place to work through implementing policies that focus on the well being and experience of all employees, ensuring greater transparency in the workplace, and providing support to managers and team leads.

Laura is a valuable member of the Melbourne team, and holds a Bachelor of Arts in Political Science and Government from Western University and Human Resources Management Post-Graduate Diploma from Seneca College

Laura.Elliot@Melbournepm.ca 416-546-2126 x 106

In November of 2021, and again in 2023, the Team at Melbourne Property Management, were honoured to receive the prestigious Toronto Star Readers' Choice 2021 and 2023 award, as a winner in the Diamond category for Property Management Services.

If you have any Condominium Consulting questions or enquiries, we would love to hear about them and have a chat.

Our team prides themselves on being the go-to company for any property management related questions, specializing in new developments and new construction, and always happy to advise on the latest trends and what we are seeing.

416-546-2126 x102

almadev

Almadev is a multi-billion dollar real estate development, investment and asset management company with best-in-class master-planned communities and mixed-use properties across Canada and the United States. At Almadev, we have an impressive reputation of creating large scale, multi-phase development projects. Along with Agellan Commercial, we own over seven million square feet of industrial, commercial and retail properties.

For over two decades, Almadev has shaped and enriched communities through leadership and collaboration with a focus on delivering value and maximizing returns on our income-producing properties. We are strategic thinkers who foster long-term relationships by taking the time to listen to our communities, collaborate with stakeholders and engage experts who share our vision for building places that make our urban landscape better.

At Almadev, we build master-planned communities and manage assets across classes. We invest in a better tomorrow. We believe in our developments. We are here to foster a future you want to live , work and grow in.

SILVER SPONSOR

AIRD BERLIS

Aird & Berlis is a leading Canadian law firm based in Toronto, serving clients across Canada and globally. Our team of more than 200 lawyers, land use planners and patent agents provides strategic legal advice in all principal areas of business law.

With one of the largest real estate practice groups in the GTA, Aird & Berlis has the breadth and depth of experience to handle any real estate deal. Our Real Estate Group assists clients with the purchase, sale and development of real property, leasing transactions and all types of real estate financing. We have extensive experience representing clients involved in the development, construction and management of office buildings, hotels, residential and commercial condominiums, residential rental projects, retirement homes and shopping centres. Our experience extends to infrastructure planning, financing and procurement.

Our Municipal & Land Use Planning Group is one of the largest and most highly-recognized practice groups of its kind in Canada. Our dedicated lawyers and skilled land use planners devote their practice to matters relating to municipal law, land use planning and development law. We act on behalf of landowners and developers, municipalities and public agencies, elected officials and local board members, institutional clients, utility companies, as well as public interest groups.

SILVER SPONSOR

AIRD BERLIS

Real Estate | Municipal & Land Use Planning Groups

Real Estate Group

With one of the largest real estate practice groups in Canada, Aird & Berlis has the breadth and depth of experience to handle any real estate deal. From acquisitions, divestitures and financings to land development, joint ventures, construction projects and major leases, we have done it all many times over.

Our Expertise

Development

Our group has had extensive experience in land development, from rural land to urban redevelopment and intensification. With the involvement of our Municipal & Land Use Planning Group, we work with our clients in developing residential subdivisions, commercial and mixed use developments and redevelopments, industrial subdivisions and condominium developments, both in an urban and suburban context. We understand the development and planning approvals processes and we can help our clients navigate through it.

Construction

The Aird & Berlis Construction Group represents clients on the full range of construction-related activities, from tendering, bidding, contract creation and defining relationships with consultants, to providing day-to-day legal resources during design and construction, to litigation and alternative dispute resolution. We act for contractors, architects, land developers and builders.

Acquisitions

We have been involved in acquisitions from coast to coast. Our depth of experience spans all asset classes, including office, retail, industrial, multi-family, raw land, institutional, government and specialty assets such as hotels, refineries and manufacturing plants. We have advised on single assets and large portfolios. In each case, we bring a sophisticated and in-depth understanding of conveyancing and real estate due diligence matters, and can assure our clients that the property title, as acquired, meets their objectives and expectations.

Financings

We act for many major lenders and borrowers throughout Canada. We have been involved in everything from simple first mortgage financings to sophisticated mezzanine deals, bonds and commercial backed mortgage security issues. Our lawyers have extensive experience in mortgage enforcement and restructuring, and remedies such as power of sale, foreclosure and actions on the covenant. We are able to offer our clients the strategic advice necessary to ensure a smooth financing transaction.

Dispositions

We have assisted clients in the disposition of real estate assets by various means, including sale through a broker and by auction. In each case, we take care that the disposition is handled expeditiously, with the client's objectives in mind, while attempting to eliminate any residual risk or liability. We are focused on getting our clients the disposition proceeds as quickly and as cleanly as possible.

Leasing

Our group handles office, industrial and retail leases, from the routine to the most complex. We have advised on major leases of hundreds of thousands of square feet with sophisticated tenants and landlords. Our professionals are very familiar with structuring credit tenant lease transactions, ground leases and using leases as a tool to achieve other structuring preferences. We have expertise in green leases and leasing in LEED buildings. Our group also has extensive experience in rooftop and telecommunication licence agreements, which provide enhanced amenities to tenants and additional revenue for landlords.

Condominiums

We act for both large and smaller condominium developers and provide experienced, cost-effective legal advice with respect to site acquisition, ownership structure, Tarion registration, disclosure and sale documentation, deposit administration, construction and deposit surety financing, condominium registration, completion of occupancy and final closings, and turnover to the unit-owner elected board of directors. Post-turnover, we also advise our developer clients on ongoing *Condominium Act* compliance matters and Tarion warranty obligations as well as operational issues with residential, commercial and mixed use developments. We have set up hundreds of condominium corporations, co-operatives and co-ownerships. Our experienced professionals are regularly involved in drafting by-laws, rules, amendments to declarations, shared facilities agreements, s. 98 agreements and other documentation.

Environmental Issues

In cases where land uses are changing or where historical activities have created environmental risks, we offer specialized expertise to ensure compliance with environmental assessment obligations. We have significant experience advising on environmental issues in large and small real estate transactions. We have advised a number of REITs, developers and lenders in the acquisition of contaminated sites and the requirements for brownfield redevelopment through the record of site condition. We work with clients to ensure that redevelopment can occur in an environmentally-acceptable and financially-viable manner.

Public-Private Partnerships

We have acted on behalf of public entities and private developers in structuring and implementing transactions involving public-private partnerships for infrastructure, hospital, school, university, office and recreational projects.

Distressed Real Estate Assets

We provide effective and practical legal advice when our clients are faced with challenging circumstances. Our team proficiently manages the full spectrum of enforcement and restructuring proceedings, which include powers of sale, foreclosures, receiverships, proceedings under the CCAA and the BIA and informal restructurings and workouts. Our team will guide you through distressed real estate situations such as construction liens, lease termination, landlord distraint, and the realization of security for landlords and tenants.

Municipal & Land Use Planning Group

The Aird & Berlis Municipal & Land Use Planning Group is one of the largest and most highly-recognized practice groups of its kind in Canada. Our dedicated lawyers and skilled land use planners devote their practice to matters relating to municipal law, land use planning and development law.

We act on behalf of landowners and developers, municipalities and public agencies, elected officials and local board members, institutional clients, utility companies, as well as public interest groups.

Specialized Expertise

Land Development

We are a recognized leader in land use planning, and are well-acquainted with the ever-evolving legislative regime governing and affecting development in Ontario.

Our services range from providing assistance with simple land use approvals, including minor variances and consent applications, to complex and lengthy development matters and disputes, such as contentious official plan and comprehensive zoning by-law amendments.

Our lawyers regularly appear before the Ontario Land Tribunal (formerly the Local Planning Appeal Tribunal), municipal councils and committees of adjustment. We also represent litigants in court applications and appeals at all levels of the courts, including the Supreme Court of Canada. Additionally, we have a well-established track record of success in the mediation and resolution of land use disputes.

Our professionals have extensive experience preparing all forms of statutory and extra-statutory development agreements, and are well-versed in providing advice and dealing with appeals related to the *Building Code Act, 1992*, and the *Development Charges Act, 1997*.

We also have specialized expertise handling *Ontario Heritage Act* matters, including heritage designations, heritage conservation districts and appearances before the Conservation Review Board.

Municipal Law

General municipal law covers a wide array of matters which deal with the core powers, duties, responsibilities and liabilities of municipalities. Our knowledge of local government jurisdiction, operations, procedure and law is second to none in Ontario. We are experts on municipal legislation and have written extensively on the subject. A number of our lawyers are former in-house municipal solicitors, senior municipal staff and/or have worked at the former Ontario Ministry of Municipal Affairs and Housing, now two separate ministries. This provides an unparalleled depth of knowledge and understanding regarding municipal by-laws, council authority, powers and procedures, elections, the open-meetings rule, the anti-bonusing provision, accessibility, transparency, councillor conduct, self-help remedies and the discretionary enforcement principle.

We regularly provide opinions on the *Municipal Act, 2001*, the *Municipal Conflict of Interest Act*, the *Municipal Elections Act, 1996*, the *Municipal Freedom of Information and Protection of Privacy Act*, procedural and governance issues and social and public housing matters. We frequently attend at council, committee and staff meetings for our municipal clients to provide opinions and make presentations on legal issues.

With respect to various municipal agreements, Aird & Berlis assists with everything from simple undertakings and releases to complex contracts and development agreements. A large component of our practice is focused on drafting municipal contracts and agreements, including those pertaining to large infrastructure financing, operating and service delivery, information technology, procurement, construction, user and licence fees, and property tax and collection matters.

We have also dealt with all types of municipal by-law interpretation, application and enforcement matters, including those under the *Municipal Act, 2001*, the *Provincial Offences Act*, the *Building Code Act, 1992*, and the *Fire Protection and Prevention Act, 1997*. Our experience includes advising on municipal signage regulation, applications for variances and amendments, provincial regulation, permit and contract litigation, Charter issues and defending against prosecutions.

Expropriation

Aird & Berlis represents a wide variety of landowners/claimants and expropriating/approval authorities across Ontario in all aspects of expropriation law. We act for municipalities and other public authorities on a wide variety of expropriations, including very large and complex linear expropriations for transportation and related infrastructure projects. In so doing, we are involved from the inception of the project, advising on related environmental assessments, preparation of notices, by-laws, plans, offers, agreements, and other documents, as well as the negotiation of compensation and the adjudication of compensation before the Ontario Land Tribunal and the courts, if necessary. Our experience includes acting for the landowner in one of the largest transportation infrastructure expropriations in Ontario, as well as numerous claimants regarding various takings by public agencies for large infrastructure projects.

Municipal Finance, Development Charges and Property Tax Assessment

Aird & Berlis has extensive experience in all aspects of municipal finance, tax and assessment, including hearings before the Ontario Land Tribunal, the Assessment Review Board and the courts. We represent municipalities and private sector clients with respect to development charges, large infrastructure financing, municipal fees and charges, as well as all aspects of property tax and collection, including tax sales.

Our Experience

We represent clients before all levels of the Ontario courts in actions, applications, appeals, claims and motions. We also represent clients before the Ontario Land Tribunal on land use planning and development matters as well as before numerous other administrative tribunals such as the Assessment Review Board and the Ontario Rental Housing Tribunal. We appear regularly before local and regional councils, land division committees, committees of adjustment and the boards of numerous public authorities.

Contacts

Monty Warsh
Practice Group Leader
Partner
Real Estate Group
T 416.865.4626
mwarsh@airdberlis.com

Tammy A. Evans
Partner
Real Estate Group
T 416.865.3411
tevans@airdberlis.com

Tom Halinski
Practice Group Leader
Partner
Municipal & Land Use
Planning Group
T 416.865.7767
thalinski@airdberlis.com

Patrick Harrington
Partner
Municipal & Land Use
Planning Group
T 416.865.3424
pharrington@airdberlis.com

Egis, formerly known as McIntosh Perry, is an award-winning North American-based consulting firm with more than seven decades of experience in all facets of engineering. Founded in the US in 1945 and with a history in Canada stretching back to 1971, with 32 office locations across North America – 13 in Canada and 19 in the U.S and with more than 1,000 people, we are North America's leading team of engineers, project managers, architects, technicians, and problem solvers.

In the last few years, we have experienced significant growth, adding to our existing expertise as well as expanding our service offerings into new areas. We've solved problems for our clients across North America, and with a commitment to deliver successful, high-quality projects, we help our clients find innovative solutions, regardless of the project size.

From our local roots beginning decades ago to our present global reach, we've remained focused on our clients. We know our client success is our success, which is demonstrated by our numerous long-term client relationships.

Our Key Areas of Expertise:

- Earth, Environment and Community.
- Buildings and Property.
- Infrastructure and Transportation.
- Water and Resources.
- Program Management.
- Rail and Transit.

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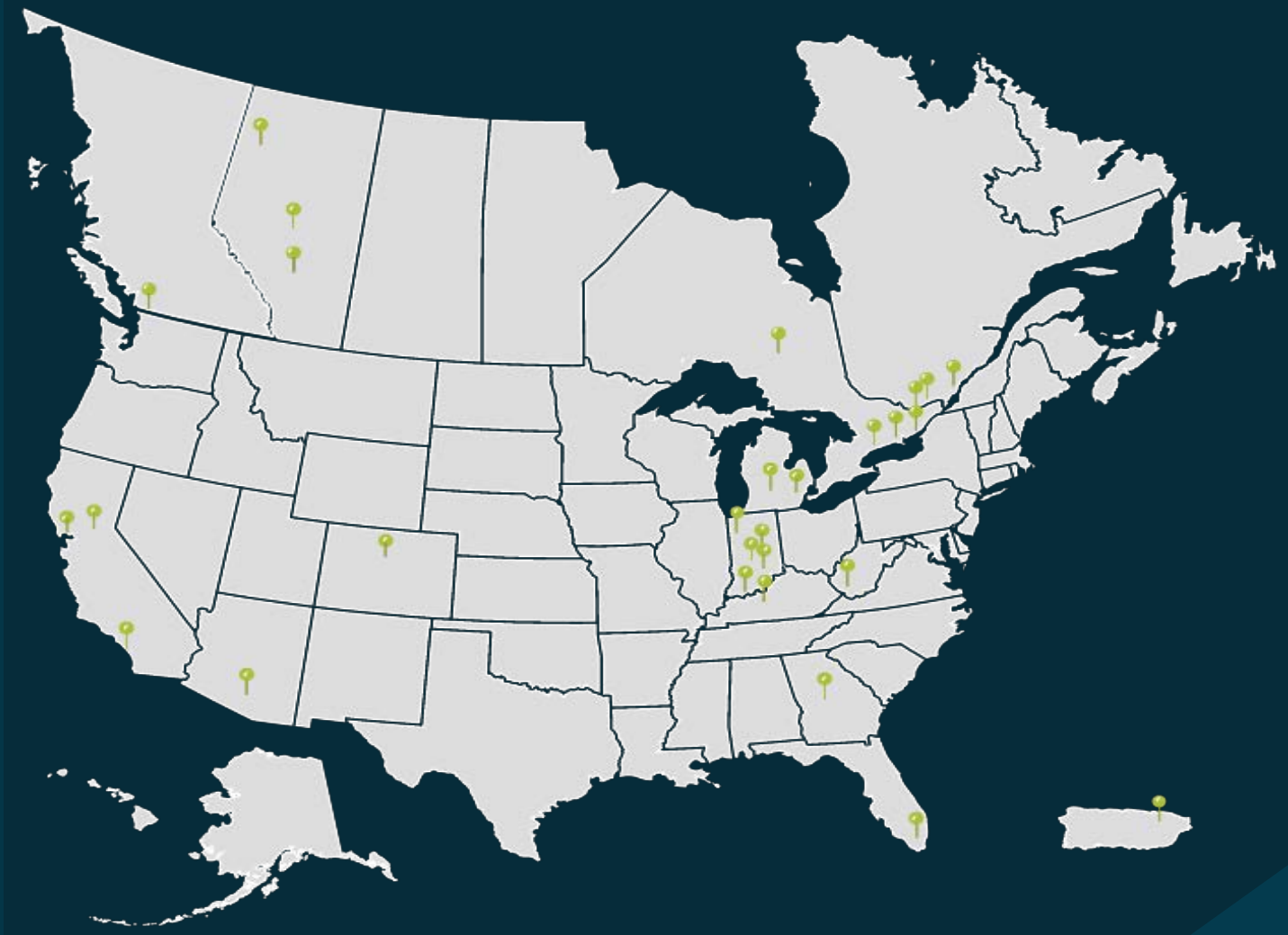
ACROSS NORTH AMERICA

13 IN CANADA
16 IN THE UNITED STATES

70+ YEARS HISTORY
IN NORTH AMERICA



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Egis Key figures

$2.13bn

2022 REVENUE

65%
international

79% Consulting & engineering

21% Operation & mobility services

2022 Revenue

Transportation — **62%**

Building, Urban Development & Energy — **38%**

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$69 M
DISTRIBUTABLE
NET PROFIT 2022

$254M
EBITDA

28
ROAD OPERATING COMPANIES

20
AIRPORTS

21
URBAN PARKING CONTRACTS IN EUROPE

ENR 21st
ENGINEERING NEWS RECORD GLOBAL RANKING

1st
FRENCH ENGINEERING COMPANY

8th
IN TRANSPORTATION MARKET

18,000
EMPLOYEES
IN THE WORLD

74% Consulting & engineering **26%** Operation & mobility services

Our Global Offer in Details

Mobility

Urban transport
- Metro
- Tram
- Bus
- Cable cars

Intercity & long-distance transportation
- Railways
- Roads
- Aviation
- Maritime and river

Structures
- Tunnels
- Bridges and viaducts

Urban & Sustainable living

Buildings
- Shops and offices
- Health
- Sports and events
- Education, culture and administration
- Housing

Water & environment
- Storage, transportation and water treatment
- Protection of biodiversity
- Natural resources
- Air, odours, health
- Littoral

Energy & Industry

Low carbon energy
- Renewable energy
- Nuclear

Industrial facilities
- Automotive
- Aeronautics
- Agrifood
- Pharmaceuticals and chemicals
- Data center
- Logistics

Building Services

Building Quality Assurance

We have provided Building Quality Assurance Services for decades. Our professional engineers have worked on buildings of all sizes throughout Canada. We diligently adhere to codes and standards and work to ensure quality is built into the project, eliminating costly rework.

Building Condition Assessment

We provide building owners and managers with the information they need to plan more effectively. Whether you're buying, selling, or planning for future repairs, you need to know what's really going on and you need expert recommendations about next steps.

Structural & Temporary Structures

We have a team can accommodate your every need. Our team has designed structural, scaffolding and platforms for a wide range of new builds and restoration projects. We are shoring engineer experts in construction requiring shoring and design systems, and our building science team works closely with contractors to meet your project requirements.

Building Restoration & Project Management

We have decades of experience not only in building construction, but in advising owners and managers on repairs and upgrades. We have worked with condo boards / strata boards, rental apartment building portfolio owners, real estate investment trusts (REITs), commercial building owners, architects, and general contractors

Reserve Fund Studies/Capital Planning

We have been helping condominium developers, managers, and owners since 1972 and started reserve fund studies before they were legislated in the 1990s. We also have extensive experience in capital planning for buildings.

egis

Earth, Water & Environmental Services

Environmental Assessments

Environmental Assessment consultants assist municipalities and provincial agencies, private landowners, and public bodies, such as conservation authorities, with the completion of environmental assessments (EAs) as required by the Environmental Assessment Act (EAA).

Water Resources

Water resources engineering consultant expertly balance land use objectives with environmental protection. Recognized for expertise in hydrology and hydraulics and a deep knowledge of the natural landscape, we deliver innovative long-term water management solutions to public and private clientele.

Geotechnical – Foundations & Pavements

The engineering consultants possess broad experience with projects of almost any size, traffic volume, or location and provide the technical and cost analysis you need to manage your assets effectively.

Hydrogeology

We offer hydrogeological services including investigations, reviews, permit assistance, construction assessments, and monitoring of groundwater and surface water. Our services also cover drainage assessment, nitrate loading studies, and source water impact assessment. We provide solutions for aggregate resources management, waste disposal sites, and low impact development.

Excess Soils

Excess Soil Engineering Management department assists our clients with excess soil issues at their sites. Our expertise ranges from soil sampling and testing programs, construction staging approach and methodology, excess soil management restrictions from multiple levels of government, and much more.

Earth, Water & Environmental Services

Planning

We provide land development and planning services, including subdivision and condominium planning, land severance consent, official plan and zoning by-law amendments, minor variances, and site plan control. Our team has the expertise to guide you through any project, big or small.

Surveying

Our surveying and mapping services include subdivision and condominium planning, boundary and reference plans, professional opinions, engineering/topographic and route surveys, construction layout, volumetric and mining surveys. Count on our team for comprehensive and reliable services.

Land Development

Our team provides comprehensive commercial site planning services, including planning, design, approvals, contract administration, and inspection. We prepare specific engineering documents and review design standards for compliance. We assess the impact on adjacent properties and downstream infrastructure, as well as natural site features, to ensure sustainability and minimize negative impacts.

Cultural Heritage

We provide access to a full range of cultural heritage consultant services in built heritage and cultural landscape conservation, planning, and management. The Cultural Heritage team works across disciplines and sectors, and partners with our Building, Infrastructure and Development Planning teams.

Materials Laboratory

Our testing services cover all aspects of construction compliance, including soil and aggregate testing, gradation analysis, standard and modified proctor testing, concrete testing, one-dimensional consolidation, moisture content, hydrometer, unconfined compressive strength of rock, asphalt compliance, and Marshall testing. We offer reliable and comprehensive services for projects of all sizes.

Egis

6240 Hwy 7 #200, Woodbridge, ON
Postal Code : L4H 4G3

+ (905) 856-5200
info.north-america@egis-group.com

www.egis-group.com

vaughan
ECONOMIC DEVELOPMENT

Vaughan's Economic Development team is the go-to source for insight into Vaughan's economic community. Our award-winning team can provide support for your expansion or relocation within the city through:

- **end-to-end customized site selection support;**
- **customized guidance and research;**
- **ecosystem connections;**
- **support accessing funding programs;**
- **and zoning, planning, and by-law information.**

Vaughan is Transformative, Ambitious, and Purpose-Driven.

TAP into Opportunity – TAP into Vaughan.

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ECONOMIC DEVELOPMENT

TAP into Vaughan:
Services for Businesses

About Us

The City of Vaughan's Economic Development department supports Vaughan's transformative, ambitious and purpose-driven economy to make Vaughan a place where entrepreneurship, business, tourism, and art can prosper and grow.

Vaughan is **Transformative**. Our economy and business community continue to change the way business is done. The Economic Development department enables transformative projects.

Vaughan is **Ambitious**. The City of Vaughan undertakes world-class projects that elevate opportunities for our talent and businesses that strive to lead their industries.

Vaughan is **Purpose-Driven**. The City of Vaughan is proud to lead a community that is dedicated to doing business with purpose. Our community works to build Vaughan as a vibrant and inclusive community where all can prosper.

The City's Economic Development team is the go-to source for insight into Vaughan's economic community. Economic Development staff are knowledge brokers and opportunity advisors who facilitate local economic capacity, resilience, and opportunity while exemplifying the City dedication to service excellence. Economic development currently supports the Vaughan business community in the following ways:

- Promote Vaughan's economic advantages and key projects in target markets.
- Support business growth and expansion through corporate calling and end to end site selection.
- Engage businesses and regional partners, provide referrals to grants, business organizations and various levels of government.
- Develop and implement economic development strategies, programs, and initiatives.
- Counsel, mentor and train business leaders and provide access to resources.
- Provide business planning support, including marketing strategies, financial forecast and cash flow, and general business development.
- Collect, analyze, and share economic, market, real estate, demographic and competitive business data with clients and partners.
- Plan and curate public art spaces and installations.
- Facilitate corporate partnerships and sponsorships for the City of Vaughan.
- Provide guidance to businesses by understanding the overall landscape of Vaughan's business industry.
- Entrepreneurship programs, including training, mentorship and opportunities to apply for provincial funding.

Tap into opportunity - **TAP** into Vaughan.

CITY OF VAUGHAN ECONOMIC DEVELOPMENT QUICK-LINK RESOURCE PAGE

Our Economic Development team provides services to expand and support Vaughan's established, growing, and emerging business clusters. Our staff can provide your business with a suite of services that include:

Corporate Visits – Staff are available to visit your location or meet virtually to provide business advisory support, learn more about your business needs, and address challenges. This includes providing information on relevant funding or financing programs, value-add partnership and business development opportunities, or advocacy and government relations toolkits.

Site Selection Assistance – Whether you're looking to expand or relocate in Vaughan, our team provides customized site location assistance. This service includes information about the community and relevant properties, inventory of vacant land opportunities, site visits, custom research, introductions to local businesses and business support organizations, and information on relevant government programs.

Data Analysis and Provision – We provide research on national, provincial, regional, and local economic trends relevant to your business and sector. Our business intelligence services include data analysis, market research, and the provision of data to support business operations, expansion, and workforce development.

Check out our quick-link resources below or connect with us today to learn more!

- **Connect** *(www.vaughanbusiness.ca/connect)*
  Have questions, or need support with your next opportunity? Reach out to the City of Vaughan's Economic Development staff!

- **Events** *(www.vaughanbusiness.ca/events)*
  Vaughan Economic Development hosts an array of events, workshops and information sessions for residents and businesses, which you can find listed and updated here.

- **MyVMC** *(www.myvmc.ca)*
  The Vaughan Metropolitan Centre (VMC) is an emerging downtown poised to be the new financial, innovation and cultural centre of the City of Vaughan. Here, you can stay up to date on new developments and opportunities as City-building continue.

- **Insighst and News** *(www.vaughanbusiness.ca/insights)*
  Stay up to date on important economic development news and insights from Vaughan and beyond.

- **Sector Profiles** *(www.vaughanbusiness.ca/key-sectors)*
  The Vaughan business community is comprised of several key industry sectors. Follow the links below for more information on the following sectors. Agri-food and food processing, automotive, construction and building Materials, healthcare, health tech and life sciences, information and communication technology, logistics distribution and E-commerce and Tourism.

- **Vacant Employment Land Directory** *(www.vaughanbusiness.ca/veld)*
  The City of Vaughan's online Vacant Employment Land Directory identifies and supports development opportunities for relevant third parties and facilitates the construction of industrial and commercial buildings.

- **Vaughan at a Glance** *(www.vaughanbusiness.ca/data)*
  Interested in learning more about the City of Vaughan? Visit Vaughan at a Glance for detailed information on our economy, demographics and building activity.

- **Vaughan Business Directories** *(www.vaughanbusiness.ca/data)*
  Vaughan is home to a diversified industrial base of more than 19,000 businesses, making the city one of the largest markets in the Greater Toronto Area (GTA). The business directory resources will allow you to explore the City of Vaughan's globally competitive businesses.

- **Vaughan Enterprise Zone** *(www.vaughanbusiness.ca/vez)*
  Learn more about the advantages the Vaughan Enterprise Zone (VEZ) has to offer, with a powerful value proposition for head offices, national logistics and distribution centres, manufacturing operations and other users needing large, new spaces. The VEZ has a vast business area with significant goods-movement infrastructure in Vaughan's west end. It borders Toronto, Brampton and Caledon, covering a total area of 1,668 hectares (4,122 acres). More than a third of the land is developed, offering one of the largest supplies of vacant employment lands in the Greater Toronto Area.

Economic Development
City of Vaughan
2141 Major Mackenzie Dr.
Vaughan, ON, Canada L6A 1T1

T: 905-832-8526
E: ed@vaughan.ca
vaughanbusiness.ca

vaughan
ECONOMIC DEVELOPMENT

The Association of Ontario Land Surveyors (AOLS) is the governing body for Ontario Land Surveyors and Ontario Land Information Professionals. It is responsible for the licensing and governance of its members and holders of Certificates of Authorization in accordance with the Surveyors Act and its regulations to ensure that the public interest may be served and protected.

See **aols.org**

SILVER SPONSOR

LANDPRO CONFERENCE 2024

EDUCATION PARTNERS

02

<< BACK

EDUCATION PARTNERS

ASSOCIATION OF ONTARIO LAND SURVEYORS

6 hours and 15 min of CPDs for members of the AOLS

ONTARIO PROFESSIONAL PLANNERS INSTITUTE

Ontario Professional Planners Institute. As Per Handbook.

LAW SOCIETY OF ONTARIO

Law Society of Ontario: Professionalism Hours: 1 hour and 5 minutes (Professionalism). Substantive Hours are at the participant's discretion.

ONTARIO ASSOCIATION OF ARCHITECTS

OAA members may claim 6 hours as per the association's handbook.

LANDPRO CONFERENCE 2024

WELCOME & OPENING REMARKS

Michael Thompson,
Councillor in City of Toronto representing Scarborough, and Master of Ceremonies.
David Wilkes
President & CEO, Building Industry and Land Development Association (BILD).
MP Melissa Lantsman
Member of Parliament for Thornhill
Deputy Leader of the Conservative Party of Canada.
PA Matthew Rae
Parliamentary Assistant to the Minister of Municipal Affairs and Housing.

03

<< BACK

OPENING REMARKS

MICHAEL THOMPSON

Councillor in City of Toronto representing Scarborough.

ROLE: MASTER OF CEREMONIES

Now in his sixth term as Councillor, Michael Thompson is widely regarded as one of Toronto's hardest working and most effective political leaders.

In addition to a strong focus on serving his constituents, Michael's commitment to developing Toronto's economy is longstanding. He regularly draws upon his widespread network of business relationships to help the city to enhance business retention, promote economic growth, advance equity and increase private-sector employment. As former Chair of the city's Economic and Community Development Committee, he convened an advisory group of leaders in business, labour, academia and the not-for-profit sectors to advise the city on its economic development strategies and priorities. The group's Collaborating For Competitiveness recommendations were adopted in full by the city and incorporated into the city's operations. Locally, he spearheaded the creation of the Wexford Heights Business Improvement Area and established a Job Fair that each year brought thousands of job seekers together with dozens of employers.

His active engagement with business has helped speed the launch of new business ventures, resolved business/residential conflicts and gained business participation in a wide range of community-building initiatives. In recent years, the international connections he has developed and nurtured have played a significant role in securing billions of dollars in new investment for the city, attracting major international conferences, growing city-wide employment and contributing to a more robust economy.

Michael is a firm believer in the critical value of culture as a builder of strong communities and a major contributor to Toronto's economy. When he first took office, he co-founded the Taste of Lawrence Festival, which brings together tens of thousands of people each year to experience local cuisine and performing arts. In 2013, he led the city's efforts to create a new arts and culture plan that provided a bold roadmap for cultural vitality, strengthened arts spending and launched a new era of collaboration among arts and culture groups across the city. Michael spearheaded the creation of Toronto's Music Office and served as the first Chair of the city's Music Advisory Committee. He also played a key role in efforts to attract international film and television productions, and studio investments to Toronto.

Throughout his years on Council, Michael's unrelenting drive for public safety in the face of increased gun violence ultimately led to the development of a city-wide Community Safety Plan, a GTA-wide police task force on guns and gangs, an increase in the numbers of police officers in the street, and a young offender program that diverts young people into jobs instead of jail.

Michael is the recipient of the African Achievement Award for Excellence in Politics, the York University International Award, the Jain Society of Toronto Community Award, the Bob Marley Award and the Bob Marley Lifetime Achievemen

OPENING REMARKS

DAVID WILKES
President & CEO, Building Industry and Land Development Association (BILD)

Dave Wilkes is a seasoned business leader with deep experience indeveloping collaborative solutions to industry challenges and opportunities. As President & CEO of BILD, he is a powerful advocate for land developers and home builders and a strategic partner to a wide variety of stakeholders and partner organizations. In 2022, Dave was a member of Ontario's Housing Aordability Task Force. With more than 1,300 member companies, BILD is the voice of the home building, land development and professional renovation industry in the Greater Toronto Area. The building and renovation industry provides more than 231,000 jobs in the region and $26.9 billion in investment value. BILD is aliated with the Ontario and Canadian Home Builders' Associations.

Moving to the “how” and “where” of housing in Ontario

April 2024

ABOUT BILD

BILD is the voice of the land development, home building and professional renovation industry in the GTA and Simcoe County.

Established in 1921.

We work with all levels of government to facilitate housing supply.

WE HAVE MADE PROGRESS

1. Consensus that housing supply must be rapidly and significantly expanded
2. Municipal housing targets & incentives
3. Recognition that GFTs erode affordability
3. Role of PBR as part of the solution is better understood and some changes made
5. Increased focus on gentle density

BILD

HOWEVER

HOW and WHERE	LAND	Construction Cost Inflation
WORKFORCE	%	Approvals

BILD

BILD RESEARCH – 20 STUDIES SINCE 2018

2023 studies

- MGP – GGH Land Use Analysis
- Infrastructure Constraints & Funding
- CoA – City of Toronto

2024 Studies

- Use it: Optimizing Municipal Development Pipelines (UIOLI) - February
- Public Attitudes to Development - May
- Municipal Benchmark 2024 (3rd edition) - September
- Radical Rethink of Ontario Government Charges System - October

(Source: https://www.bildgta.ca/news-resources/industry-reports/)

WHAT OUR RESEARCH TELLS US

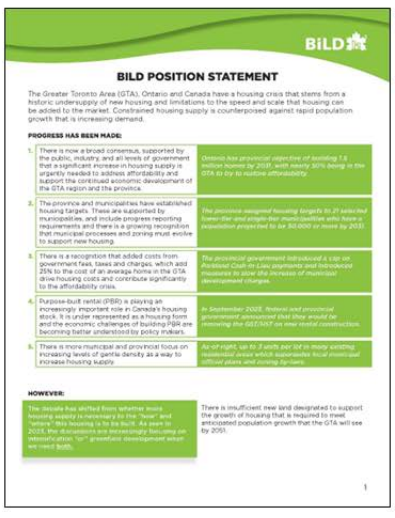
SUPPLY WILL NOT BE ADEQUATELY EXPANDED UNLESS.....

1. Adequate and predictable land supply is made available for the construction of new homes.
2. Both greenfield development and intensification are prioritized. The target not be achieved through intensification alone.
3. The current workforce is expanded and productivity of the workforce enhanced.
4. Housing supportive infrastructure is prioritized by all levels of government and infrastructure bottlenecks are addressed.
5. Faster municipal approvals are achieved to enable getting shovels in the ground faster.
6. There is a recognition that the concept of "growth pays for growth" has reached its maximum and a new funding solution is identified.

BILD & OHBA POLICY RECOMMENDATIONS

1. Speed up approvals - re-examine the fee refund provisions of Bill 109.
2. Identify land supply for growth - make adequate and predictable land supply available .
3. Enhance housing and employment infrastructure.
    a. Introduce “Use it” rather than “lose it” policies.
    b. Develop a new model for funding communities.
    c. Prioritize infrastructure projects on a per-housing unit gain basis.
4. Adopt an implementation focus.
5. Broaden HST exemption to in construction purpose built rental projects (Federal and Provincial).

BILD & OHBA HOUSING PLAN: www.bildgta.ca



BILD

BILD POSITION STATEMENT

The Greater Toronto Area (GTA), Ontario and Canada have a housing crisis that stems from a historic undersupply of new housing and limitations to the speed and scale that housing can be added to the market. Constrained housing supply is counterposed against rapid population growth that is increasing demand.

PROGRESS HAS BEEN MADE:

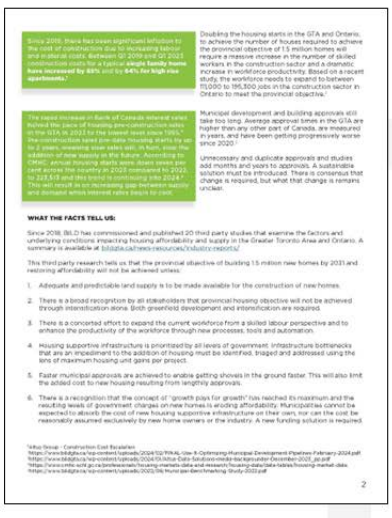
1. There is now a broad consensus, supported by the public, industry, and all levels of government that a significant increase in housing supply is urgently needed to address affordability and support the continued economic development of the GTA region and the province.
   Ontario has provincial objective of building 1.5 million homes by 2031, with nearly 30% being in the GTA to try to restore affordability.
2. The province and municipalities have established housing targets. These are supported by municipalities, and include progress reporting requirements and there is a growing recognition that municipal processes and zoning must evolve to support new housing.
   The province-assigned housing targets to 21 selected lower-tier and single-tier municipalities who have a population projected to be 50,000 or more by 2031.
3. There is a recognition that added costs from government fees, taxes and charges, which add 25% to the cost of an average home in the GTA drive housing costs and contribute significantly to the affordability crisis.
   The provincial government introduced a cap on Parkland Dedi-in-Lieu payments and introduced measures to slow the increase of municipal development charges.
4. Purpose-built rental (PBR) is playing an increasingly important role in Canada's housing stock. It is under represented as a housing form and the economic challenges of building PBR are becoming better understood by policy makers.
   In September 2022, federal and provincial governments announced that they would be removing the GST/HST on new rental construction.
5. There is more municipal and provincial focus on increasing levels of gentle density as a way to increase housing supply.
   As-of-right, up to 3 units per lot in many existing residential areas which supersedes local municipal official plans and zoning by-laws.

HOWEVER:

The decade has shifted from whether more housing supply is necessary to the "how" and "where"- this housing is to be built. As seen in 2023, the discussions are increasingly focusing on intensification "or" greenfield development when we need both.

There is insufficient new land designated to support the growth of housing that is required to meet anticipated population growth that the GTA will see by 2051.

1



Since 2015, there has been significant inflation to the cost of construction due to increasing labour and material costs. Between Q1 2015 and Q1 2023 construction costs for a typical **single family home have increased by 66%** and by **64% for high-rise apartments.**[1]

Doubling the housing starts in the GTA and Ontario, to achieve the number of houses required to achieve the provincial objective of 1.5 million homes will require a massive increase in the number of skilled workers in the construction sector and a dramatic increase in workforce productivity. Based on a recent study, the workforce needs to expand to between 111,000 to 195,500 jobs in the construction sector in Ontario to meet the provincial objective.[2]

The rapid increase in Bank of Canada interest rates halved the pace of housing pre-construction sales in the GTA in 2023 to the lowest level since 1995.[3] Pre-construction total pre-sale housing starts, by up to 2 years, meaning slow sales will, in turn, slow the addition of new supply in the future. According to CMHC, annual housing starts were down seven per cent across the country in 2023 compared to 2022, to 223,519 and this trend is continuing into 2024.[4] This will result in an increasing gap between supply and demand when interest rates begin to cool.

Municipal development and building approvals still take too long. Average approval times in the GTA are higher than any other part of Canada, are measured in years, and have been getting progressively worse since 2020.[5]

Unnecessary and duplicate approvals and studies add months and years to approvals. A sustainable solution must be introduced. There is consensus that change is required, but what that change is remains unclear.

WHAT THE FACTS TELL US:

Since 2018, BILD has commissioned and published 20 third party studies that examine the factors and underlying conditions impacting housing affordability and supply in the Greater Toronto Area and Ontario. A summary is available at bildgta.ca/news-resources/industry-reports/.

This third party research tells us that the provincial objective of building 1.5 million new homes by 2031 and restoring affordability will not be achieved unless:

1. Adequate and predictable land supply is to be made available for the construction of new homes.
2. There is a broad recognition by all stakeholders that provincial housing objective will not be achieved through intensification alone. Both greenfield development and intensification are required.
3. There is a concerted effort to expand the current workforce from a skilled labour perspective and to enhance the productivity of the workforce through new processes, tools and automation.
4. Housing supportive infrastructure is prioritized by all levels of government. Infrastructure bottlenecks that are an impediment to the addition of housing must be identified, triaged and addressed using the lens of maximum housing unit gains per project.
5. Faster municipal approvals are achieved to enable getting shovels in the ground faster. This will also limit the added cost to new housing resulting from lengthily approvals.
6. There is a recognition that the concept of "growth pays for growth" has reached its maximum and the resulting levels of government charges on new homes is eroding affordability. Municipalities cannot be expected to absorb the cost of new housing supportive infrastructure on their own, nor can the cost be reasonably assumed exclusively by new home owners or the industry. A new funding solution is required.

[1] Altus Group - Construction Cost Escalation
https://www.bildgta.ca/wp-content/uploads/2024/02/FINAL-Use-It-Optimizing-Municipal-Development-Pipelines-February-2024.pdf
[2] https://www.bildgta.ca/wp-content/uploads/2024/01/Altus-Data-Solutions-ready-for-Ipsos-vder-December-2023_ppt.pdf
[3] https://www.cmhc-schl.gc.ca/professionals/housing-markets-data-and-research/housing-data/data-tables/housing-market-data
[4] https://www.bildgta.ca/wp-content/uploads/2023/06/Municipal-Benchmarking-Study-2022.pdf

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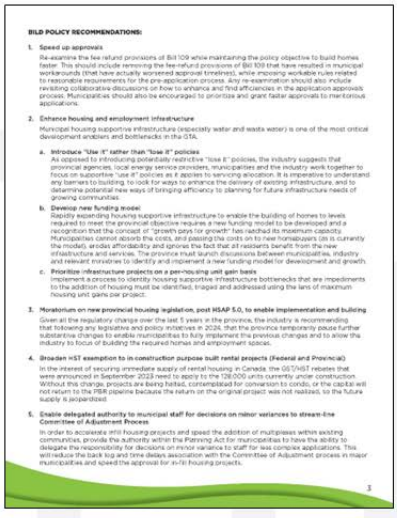


BILD POLICY RECOMMENDATIONS:

1. **Speed up approvals**
   Re-examine the fee refund provisions of Bill 109 while maintaining the policy objective to build homes faster. This should include removing the fee refund provisions of Bill 109 that have resulted in municipal workarounds (that have actually worsened approval timelines), while imposing workable rules related to reasonable requirements for the pre-application process. Any re-examination should also include revisiting collaborative discussions on how to enhance and find efficiencies in the application approvals process. Municipalities should also be encouraged to prioritize and grant faster approvals to meritorious applications.
2. **Enhance housing and employment infrastructure**
   Municipal housing supportive infrastructure (especially water and waste water) is one of the most critical development enablers and bottlenecks in the GTA.
   a. **Introduce "Use it" rather than "lose it" policies**
      As opposed to introducing potentially restrictive "lose it" policies, the industry suggests that provincial agencies, local energy service providers, municipalities and the industry work together to focus on supportive "use it" policies as it applies to servicing allocation. It is imperative to understand any barriers to building, to look for ways to enhance the delivery of existing infrastructure, and to determine potential new ways of bringing efficiency to planning for future infrastructure needs of growing communities.
   b. **Develop new funding model**
      Rapidly expanding housing supportive infrastructure to enable the building of homes to levels required to meet the provincial objective requires a new funding model to be developed and a recognition that the concept of "growth pays for growth" has reached its maximum capacity. Municipalities cannot absorb the costs, and passing the costs on to new homebuyers (as is currently the model), erodes affordability and ignores the fact that all residents benefit from the new infrastructure and services. The province must launch discussions between municipalities, industry and relevant ministries to identify and implement a new funding model for development and growth.
   c. **Prioritize infrastructure projects on a per-housing unit gain basis**
      Implement a process to identify housing supportive infrastructure bottlenecks that are impediments to the addition of housing must be identified, triaged and addressed using the lens of maximum housing unit gains per project.
3. **Moratorium on new provincial housing legislation, post HSAP 5.0, to enable implementation and building**
   Given all the regulatory change over the last 5 years in the province, the industry is recommending that following any legislative and policy initiatives in 2024, that the province temporarily pause further substantive changes to enable municipalities to fully implement the previous changes and to allow the industry to focus of building the required homes and employment spaces.
4. **Broaden HST exemption to in construction purpose built rental projects (Federal and Provincial)**
   In the interest of securing immediate supply of rental housing in Canada, the GST/HST rebates that were announced in September 2023 need to apply to the 126,000 units currently under construction. Without this change, projects are being halted, contemplated for conversion to condo, or the capital will not return to the PBR pipeline because the return on the original project was not realized, so the future supply is jeopardized.
5. **Enable delegated authority to municipal staff for decisions on minor variances to stream-line Committee of Adjustment Process**
   In order to accelerate infill housing projects and speed the addition of multiplexes within existing communities, provide the authority within the Planning Act for municipalities to have the ability to delegate the responsibility for decisions on minor variance to staff for less complex applications. This will reduce the back log and time delays association with the Committee of Adjustment process in major municipalities and speed the approval for in-fill housing projects.

3

THE GLOBE AND MAIL

BILD

Trudeau announces $6-billion housing program ahead of federal budget

IAN BAILEY >
LAURA STONE > QUEEN'S PARK REPORTER
OLIVER MOORE > URBAN AFFAIRS REPORTER

Prime Minister Justin Trudeau, flanked by Minister of Housing, Infrastructure and Communities Sean Fraser, left, and mayor of Halifax Mike Savage, makes a housing announcement in Dartmouth, N.S. on April 2.
DARREN CALABRESE/THE CANADIAN PRESS

Prime Minister Justin Trudeau has announced a $6-billion federal housing program to fund provinces and territories that commit to specific actions to increase housing supply, but one piece of the plan may lead to new conflict with Ontario.

Part of the announcement specifies signing infrastructure deals with provinces that require them to allow fourplexes broadly, putting the federal government on a collision course with Ontario Premier Doug Ford, who spoke recently against allowing more density in neighbourhoods.

But Mr. Trudeau, who did not reference the possible conflict, signalled his determination to proceed.

"We are taking very major steps to ensure that we can increase the supply of housing

OPENING REMARKS

MP MELISSA LANTSMAN

Member of Parliament for Thornhill
Deputy Leader of the Conservative Party of Canada

Melissa Lantsman is the Member of Parliament for Thornhill and Deputy Leader of the Conservative Party of Canada. First elected in 2021, she previously served as the Shadow Minister for Transport and as a senior advisor to leading Canadian political figures.

Melissa believes in breaking the mold and in bringing new ideas and energy to Ottawa. She represents the next generation in Canadian politics.

Born and raised in the community she now serves, Melissa was taught by her immigrant parents to work hard and to stand up for what's right. Those are values that have guided her in all points of her life and career.

Melissa is an award-winning communicator and was amongst Canada's most sought-after public affairs executives. She has served on various boards of directors, was a regular TV commentator and hosted her own radio show. Her writing has been featured in Canada's largest circulation publications.

Melissa is not afraid to speak out for the things that matter and she doesn't back down from holding the government to account.

OPENING REMARKS

PA MATTHEW RAE

Parliamentary Assistant to the Minister of Municipal Affairs and Housing; Vice-Chair, Standing Committee on Procedure and House Affairs; Member, Standing Committee on Heritage, Infrastructure and Cultural Policy.

Matthew grew up on his family's dairy farm just north of Harriston. From a young age, he was instilled with a strong work ethic and the importance of service to one's family, community, and country.

He is the third generation in his family to graduate from Norwell District Secondary School. He is also a graduate of The University of Guelph, and the Diplomatic Academy of Vienna.

In addition to working on the family farm, Matthew worked in the hospitality sector throughout high school. He worked in Student Services while attending the University of Guelph and was an assistant to an ambassador while attending grad school.

More recently, Matthew has worked for both John Nater, Member of Parliament for Perth-Wellington, and Randy Pettapiece, the former MPP for Perth-Wellington, at separate times. Prior to being elected in June 2022, he worked for an education non-profit focused on Science, Technology, Engineering, Mathematics (STEM) and entrepreneurship.

Matthew is an active member of the community serving on multiple local boards and committees.

LANDPRO CONFERENCE 2024

KEYNOTE: **ECONOMIC UPDATE**

Benjamin Tal
Deputy Chief Economist
CIBC World Markets Inc.

04

<< BACK

KEYNOTE

BENJAMIN TAL

Deputy Chief Economist CIBC World Markets Inc.

KEYNOTE SPEAKER: ECONOMIC UPDATE

Mr. Tal is responsible for analyzing economic developments and their implications for North American fixed income, equity, foreign exchange and commodities markets. He also acts in an advisory capacity to bank officers on issues related to wealth management, household/corporate credit and risk.

Well-known for his ground-breaking published research on topics such as labour market dynamics, real estate, credit markets, international trade and business economic conditions, Mr. Tal not only contributes to the conversation but also frequently sets the agenda.

He has close to 20 years of experience in the private sector advising clients, industry leaders, corporate boards, trade associations and governments on economic and financial issues. National and global media regularly seek him out for his insight and analysis on economic issues that impact financial markets, consumers, corporations and public policy. He is also a frequent lecturer in the economic programs of various Canadian universities.

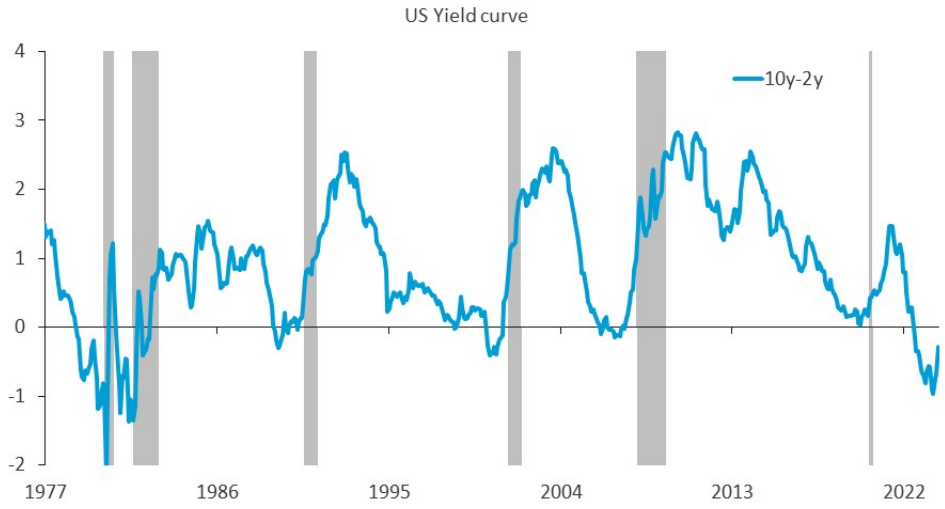
Mr. Tal is a member of the Economic Committee of The Canadian Chamber of Commerce, The Economic Development Committee of the Toronto Board of Trade. He is also a member of board of Governors of Junior Achievement of Central Ontario, and a board member of the Toronto Financial Services Alliance.

When bad news is good news

Benjamin Tal

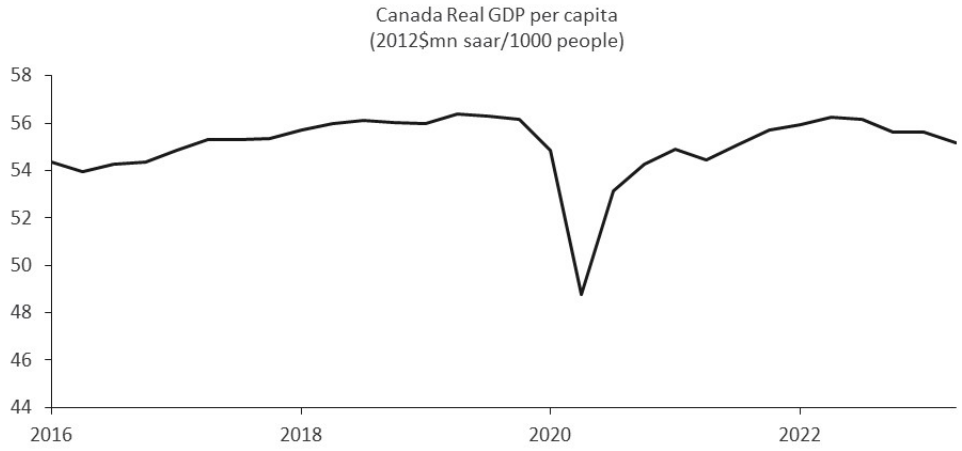
March 2024

The yield curve has been signaling negative growth for a while



Source: Bloomberg, CIBC

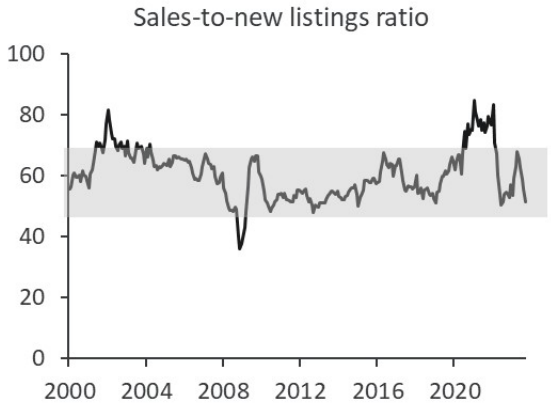
Per capita recession

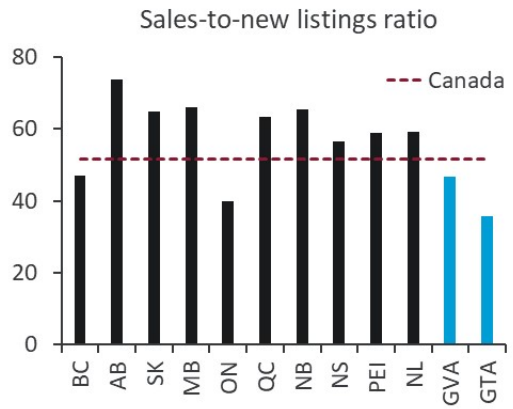


Source: Haver Analytics, CIBC

CIBC

Approaching a buyers' market with no buyers

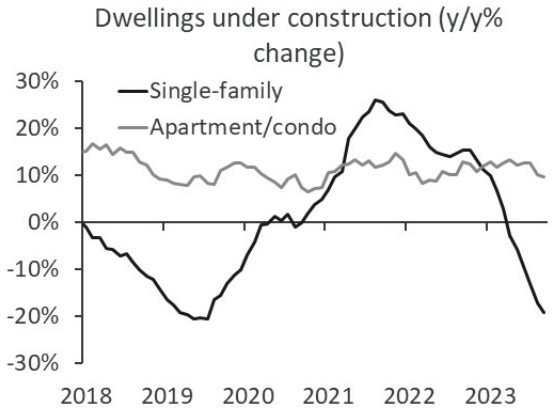


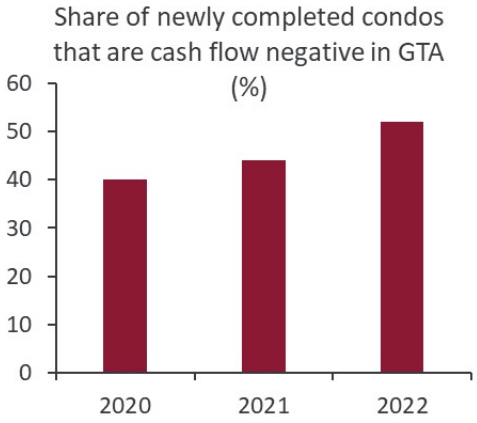


Source: CREA , CIBC

CIBC

The condo market to face some pressure in the short term

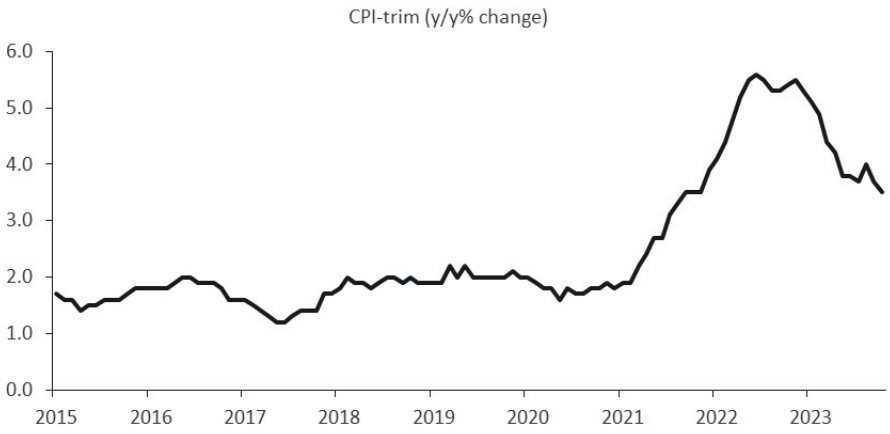




Source:

CIBC

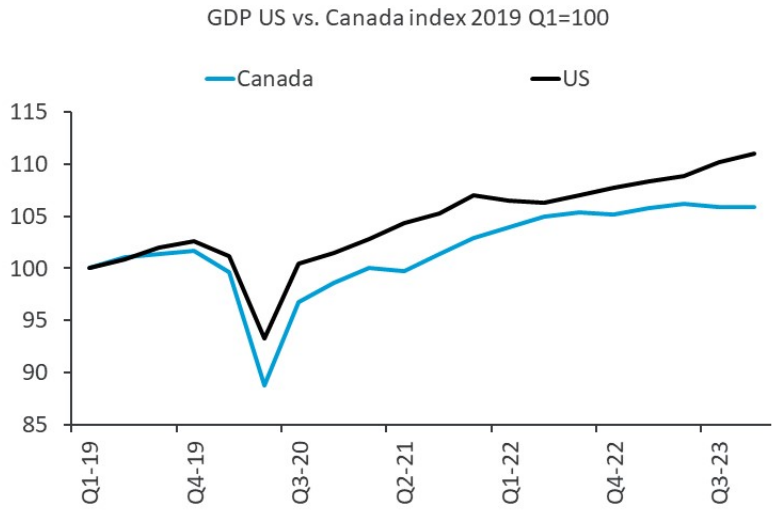
The last mile….



Source: Haver Analytics, CIBC

CIBC

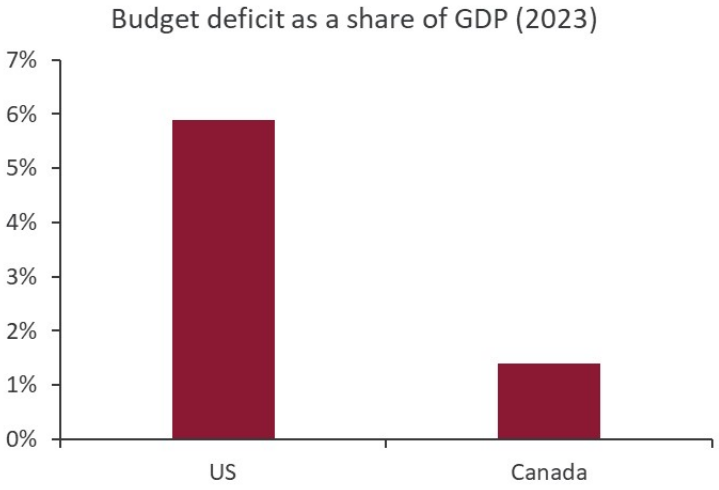
Spot the difference



Source: Statistics Canada, Bureau of Economic Analysis, CIBC

CIBC

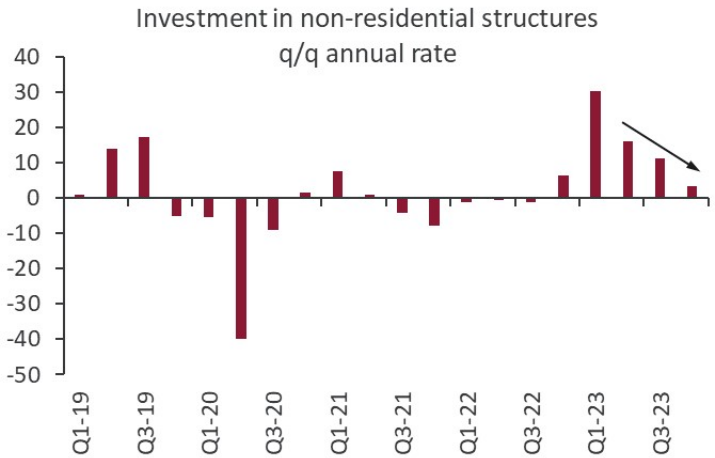
Fiscal policy more generous south of the border



Source: Department of Finance (Canada), Congressional Budget Office, CIBC

CIBC

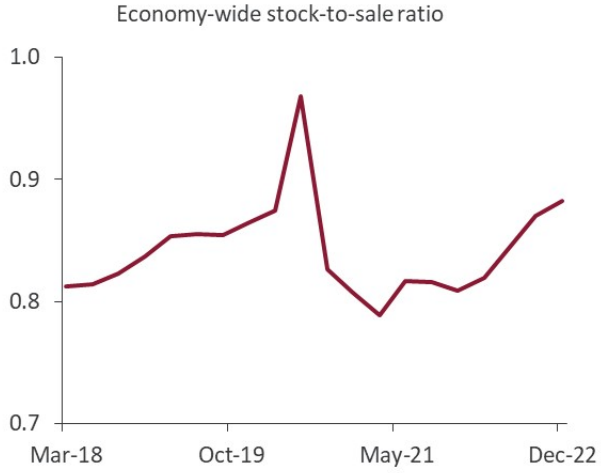
Slowing capex



Source: BEA, CIBC

CIBC

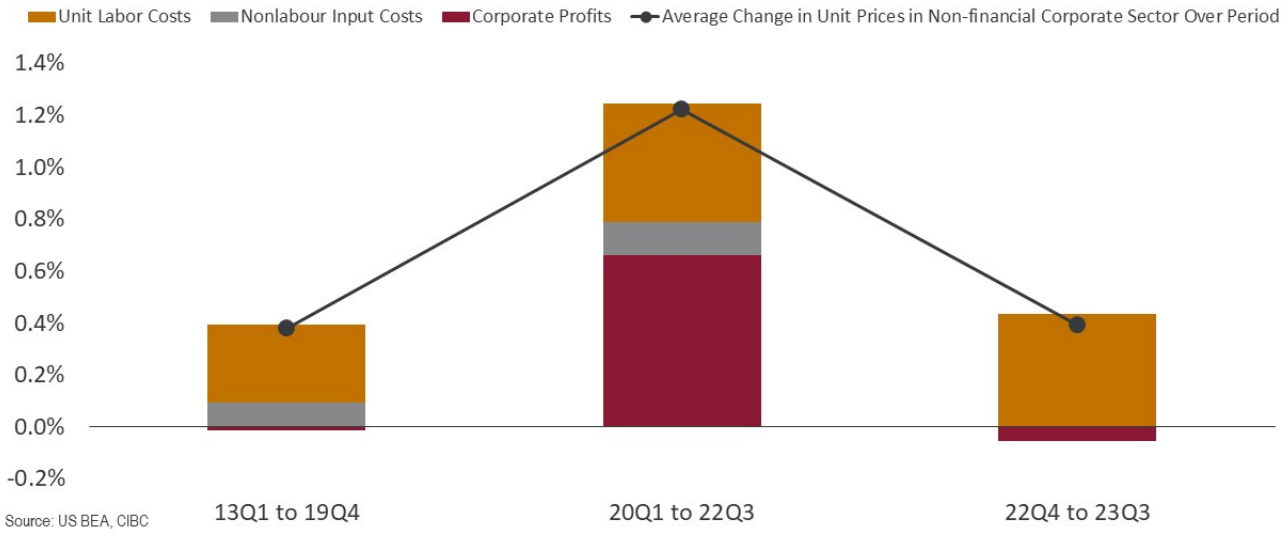
Global supply chain pressure index improves (L); Inventories no longer so lean in Canada (R)



Source: NY Fed, Statistics Canada, CIBC

CIBC

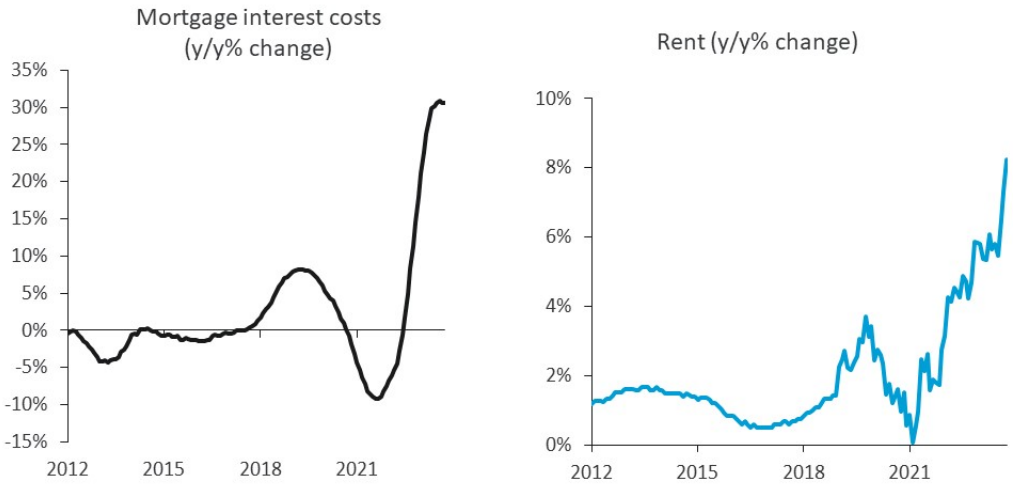
Corporate profits margins normalizing as supply disruptions ease



Source: US BEA, CIBC

CIBC

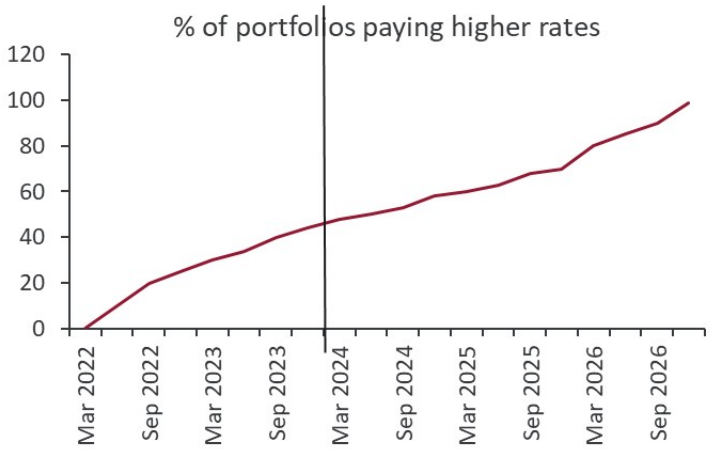
Surging shelter costs driven by higher interest rates



Source: StatCan, CIBC

CIBC

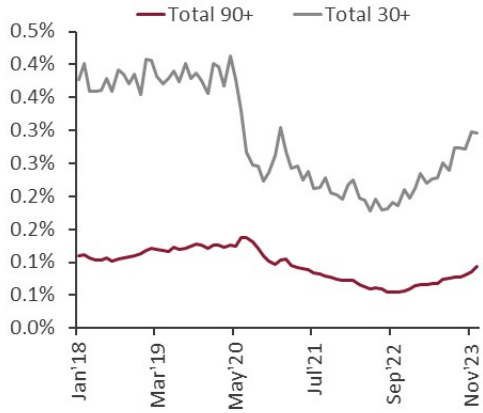
Half way there



Source: CIBC

CIBC

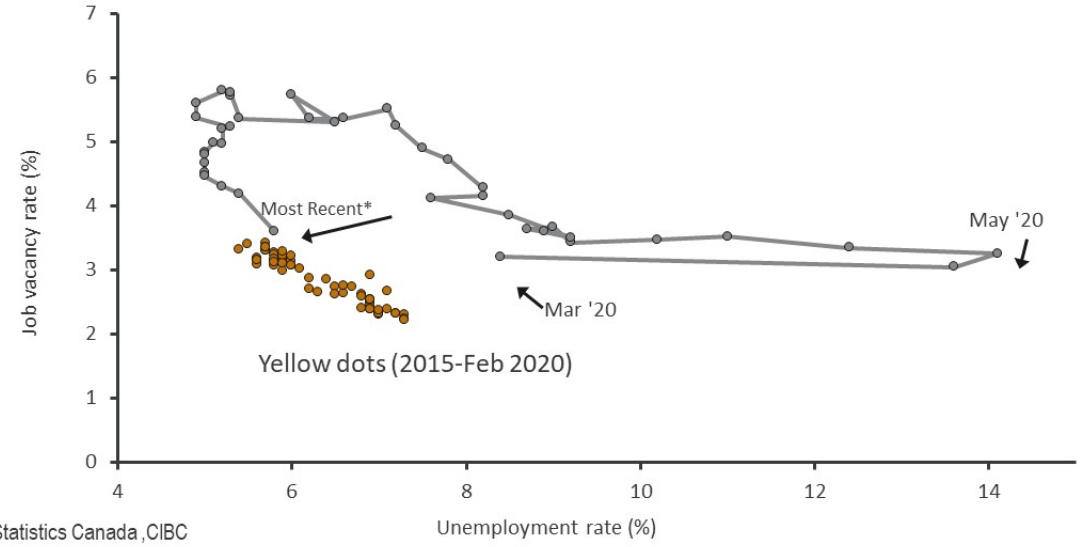
Mortgage delinquencies – approaching 2019 levels



TU, CIBC

CIBC

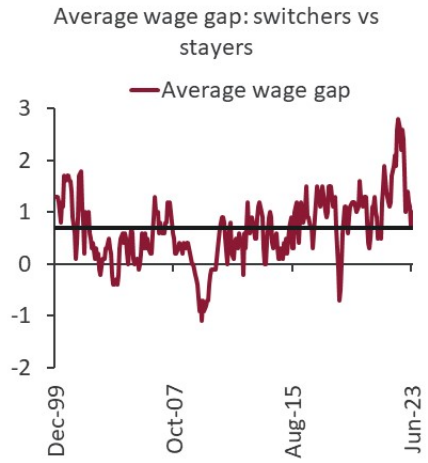
Canada sees rising unemployment, fewer vacancies

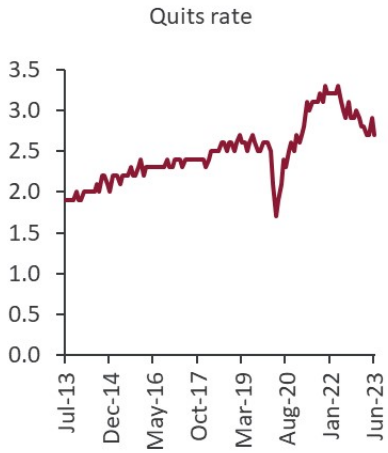


Source: Statistics Canada ,CIBC

CIBC

Bargaining power deteriorating





Source: Current Population Survey, Bureau of Labor Statistics, Federal Reserve Bank of Atlanta, CIBC

CIBC

Inflationary buffet

	y/y%	y/y% 3mma	m/m% ann.	3-mo% ann.	6-mo% ann.
CPI	2.9	3.1	-1.5	1.8	2.6
Ex. food/energy	3.1	3.4	0.8	2.4	2.9
CPIX	2.4	2.6	0.8	1.6	2.0
Trim	3.4	3.5	1.2	3.3	3.3
Median	3.3	3.4	1.7	3.2	3.3
Services ex. shelter	2.3	2.8	-0.5	0.6	2.1

Sc

LANDPRO CONFERENCE 2024

PRESENTATION:
STATE OF THE MARKET: GTA RESIDENTIAL LAND VALUES & FORECAST.

Jeremiah Shamess
Executive Vice President,
Colliers Private Capital Investment Group.

05

<< BACK

PRESENTATION

JEREMIAH SHAMESS

Executive Vice President, Colliers Private Capital Investment Group.

STATE OF THE MARKET: GTA RESIDENTIAL LAND VALUES & FORECAST.

Jeremiah Shamess leads a team at Colliers Private Capital Investment Group, a team of 6 professionals in the sale of buildings and re-development land in the GTA and downtown Hamilton.

Since the team inception, the team has closed 52 sales valued at $708,000,000, resulting in the top team in Eastern Canada for Middle-Market Investment Sales (of office, retail and land). Some of their noteworthy clients include Canadian Tire, Silver Hotel Group, Marlin Spring Development, One Properties (AIMCO) and Greybrook, among others.

In 2018, Jeremiah was ranked in Colliers' "Top 6 under 6," recognizing him as one of the top real estate sales professionals in the country with less than six years tenure at Colliers, the largest commercial real estate firm in Canada by number of brokers. In 2019 and 2020, Jeremiah was recognized in the top 10%, and 15% respectively for Colliers, the top 0.2% and 0.5% respectively for Toronto Regional Real Estate Board.

His experience with a vast array of building sales, redevelopment properties, and land dispositions allows Jeremiah to maximize value, mitigate risk and increase the probability of successful sales. His team increases value from unsolicited offers through their proven disposition process that protects land and building owners.

Jeremiah, along with his team, the Colliers Private Capital Investment Group offer clients the capabilities to capitalize on the current GTA market. He leads a full-service land brokerage team within the Group, specializing in the areas of:

- Re-development Land
- Mixed-Use Investment Properties
- Retail Investment Sales
- Office Investment Sales
- Historic Property Repositionings
- Land Assembly Strategies
- Highest and Best Use Studies
- Market Analysis

State of the Market
Residential Land Market

LandPro 2024

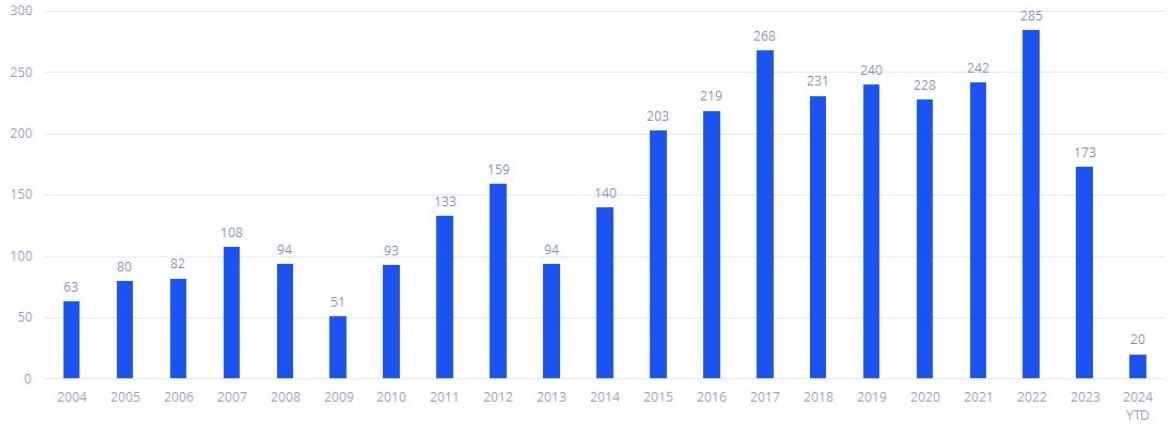
Jeremiah Shamess
Executive Vice President
Colliers Private Capital Investment Group

Accelerating success.

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

High Density Land Transaction Volume

Number of Transactions

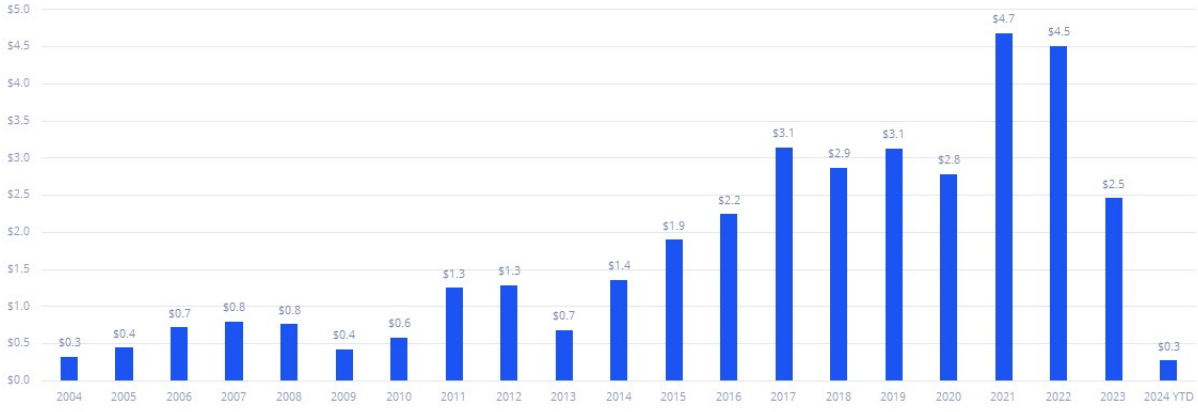


Sources: Colliers, Altus

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

High Density Land Transactions

$Dollar Volume

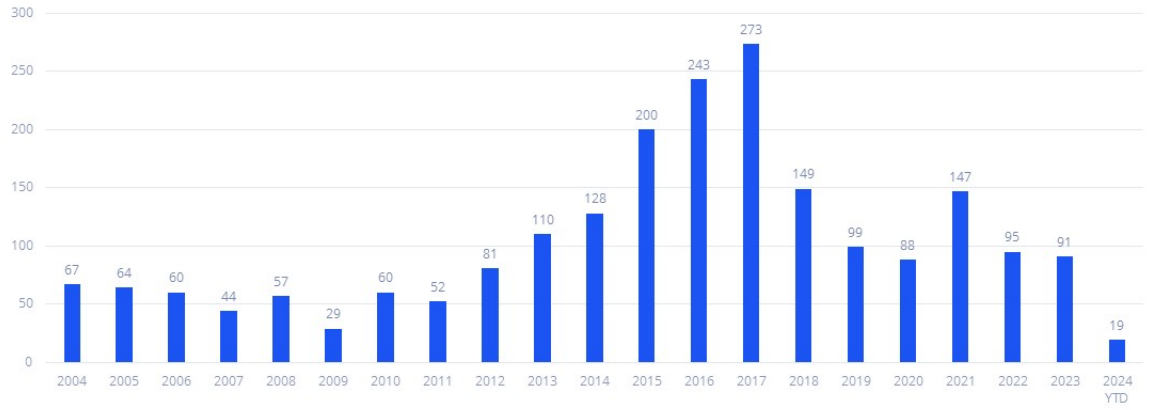


Sources: Colliers, Altus

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

The Townhouse

Medium Density Land Transaction Volume – Number of Transactions

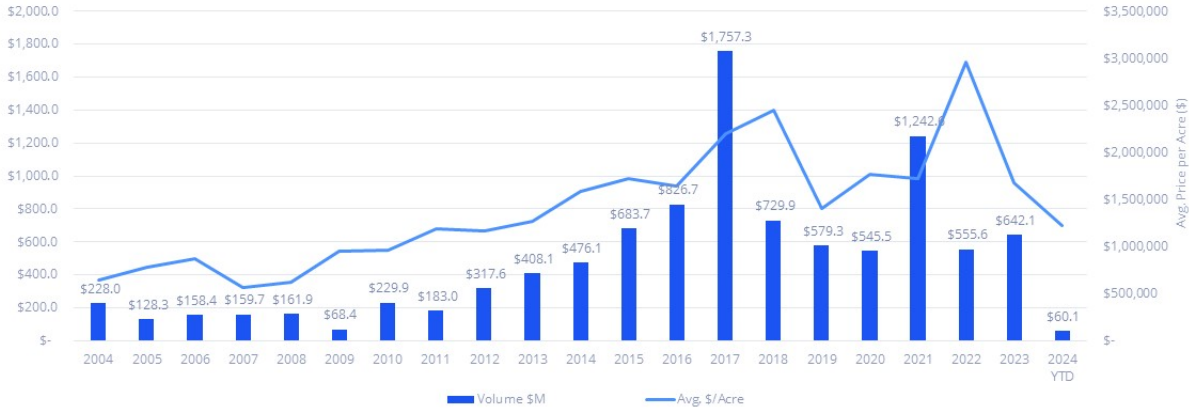


Sources: Altus

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

The Townhouse

Medium Density Land Transaction Volume – Total Value and Avg. Price Per Acre

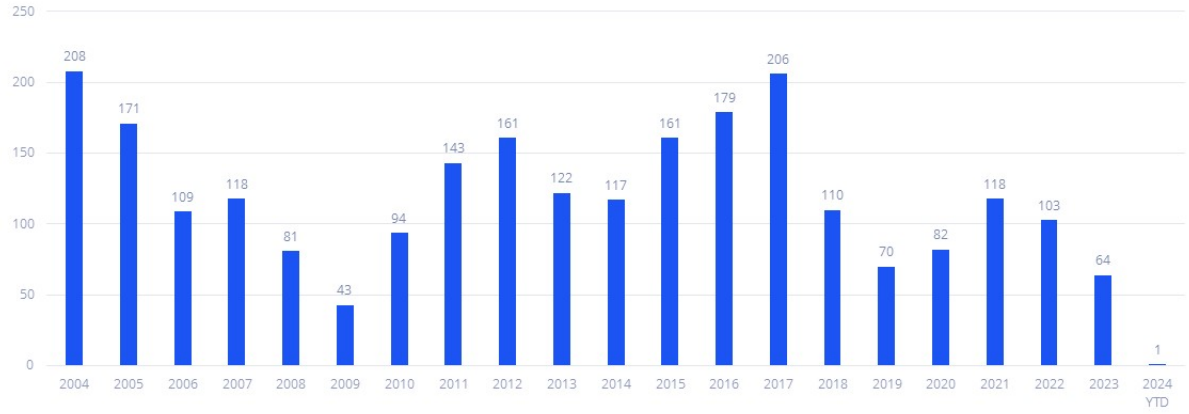


Sources: Altus

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Greenfield

Low Density Land Transaction Volume – Number of Transactions

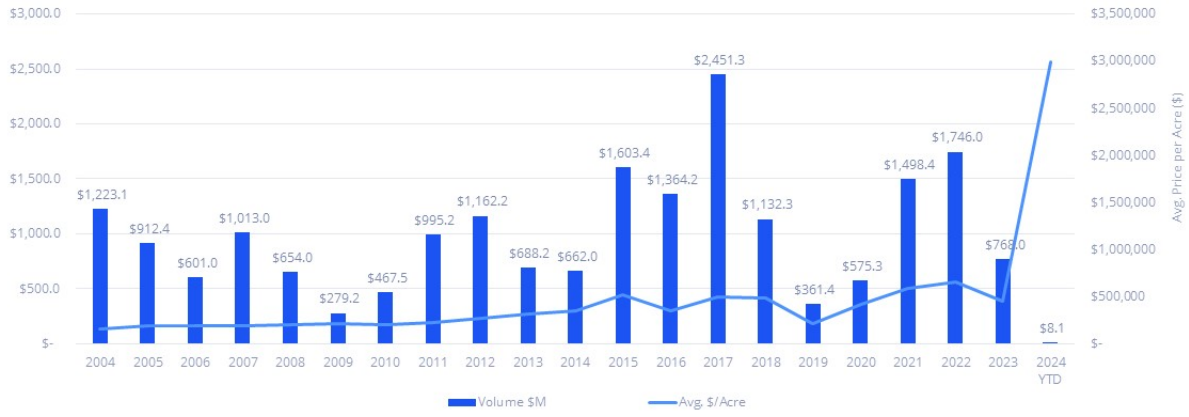


Sources: Altus

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Low Density

Transaction Volume - Total Value and Avg. Price Per Acre



Sources: Altus

EVOLVING GROUNDS: NAVIGATING GTA RESIDENTIAL LAND VALUES

Driving Forces: What's Moving Values?

Drivers of Change

- Price reductions
- Rising interest rates
- Escalating construction costs
- Policy changes – Bill 23, TO Housing Action Plan, Inclusionary Zoning
- Longer absorption timelines

- 3% decrease in revenues from price reductions
- 7% increase in construction costs partially offset by policy changes and efficiencies
- 43% decrease in implied residual land values

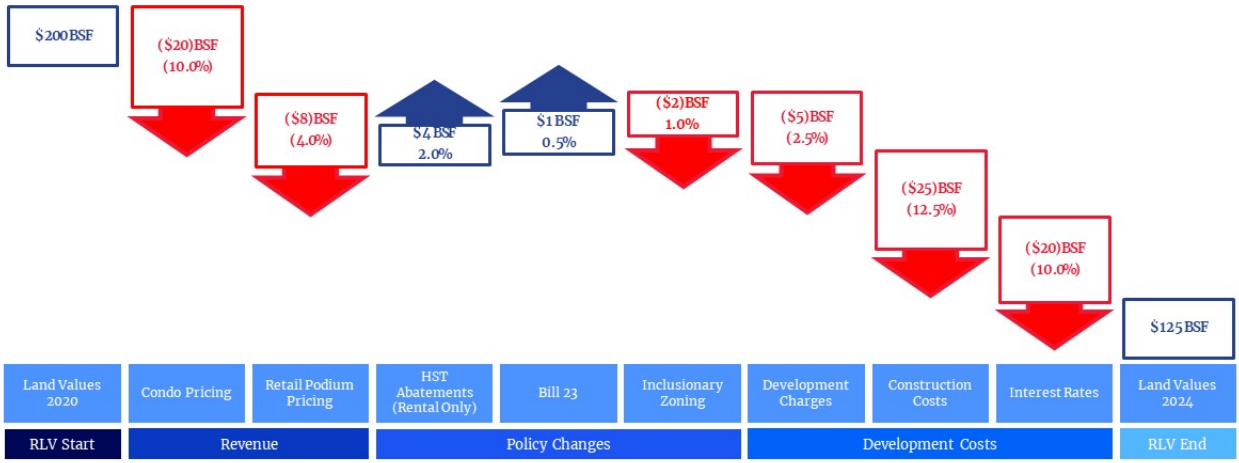
	Sample Toronto Development 2022	Sample Toronto Development 2024
	$PSF GFA	$PSF GFA
Value as Complete - Residential	$1,282	$1,239
Value as Complete - Retail	$22	$16
Value as Complete - Parking Stalls	$36	$36
HST on Condo Sales (% of Total Sale Price)	($114)	($110)
Total Value As Complete Net of HST	**$1,226**	**$1,182**
Construction Costs		
Development Charges, Municipal Fees & Permits	$97	$99
Community Benefit / Section 37 / Heritage	$5	$5
Demolition Costs	$3	$3
Below-Grade Construction Costs	$33	$35
Construction Hard Costs	$341	$369
Construction Soft Costs (60%)	$136	$148
FF&E	$19	$19
Cost Contingency (8%)	$41	$44
Total Construction Costs	**$675**	**$723**
Project Management Fees (4%)	$21	$22
Total Management Fees	**$21**	**$22**
Closing Costs & Land Transfer Taxes	$13	$8
Total Closing Costs	**$13**	**$8**
Financing Costs + Loan Set-Up and Monitoring Fee	$96	$108
Total Financing Costs	**$96**	**$108**
Total Development Costs	**$804**	**$861**
Development Profit (20%)	$235	$227
Residual Land Value ($BSF)	**$217**	**$124**

43% Decrease in Residual Land Value

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Impact on Residual Land Valuations

Estimated changes in residual land values 2020-2024



Construction Costs

Growth in Construction Costs Remains a Major Factor Influencing Underlying Land Values

Construction costs continue to outpace CPI with an average 5-year increase for construction hard costs of ~40%, representing a CAGR of ~7%, while near term changes include 11% cost decrease.

Policy makers demanding new residential supply with all levels of government working towards putting shovels in the ground.

Interest rates expected to experience some relief in 2024 with prime lending rates anticipated to decrease 100-150 bps.

Major cost drivers include rising costs of raw materials, increases in development charges and labour costs.

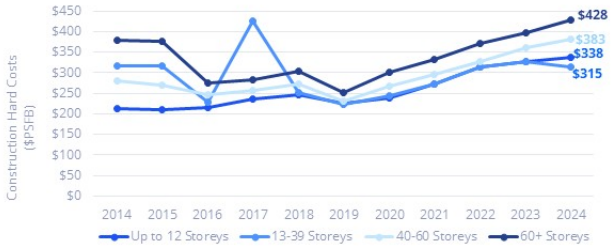
Any potential cost savings in the short-run will be driven by efficiency, innovative technologies and prudent construction management

Sources: Colliers, Altus Group, Ontario Construction Report

2024 Construction Hard Costs

Residential	Low	High
Condominiums/Apartments		
Up to 12-Storeys	$285	$390
13-39 Storeys	$295	$380
40-60 Storeys	$340	$425
60+ Storeys	$365	$490
Premium for High Quality	Up to	$245
Wood Framed Residential		
Row Townhouse with Unfinished Basement	$205	$250
Single Fanily Residential with Unfinished Basement	$210	$285
3-Storey Stacked Townhouse	$240	$275
Up to 6-Storey Wood Framed Condo	$245	$330
Custom Built Single Family Residential	$520	$1,130
Parking		
Surface Parking	$15	$30
Underground Parking Garages	$175	$300

Historical Construction Costs – Condominiums/Apartments ($PSFB)



LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Non-Bank Lenders Rule the Land World

73% of Lending is lead by Non-Bank lenders in the past 5 years

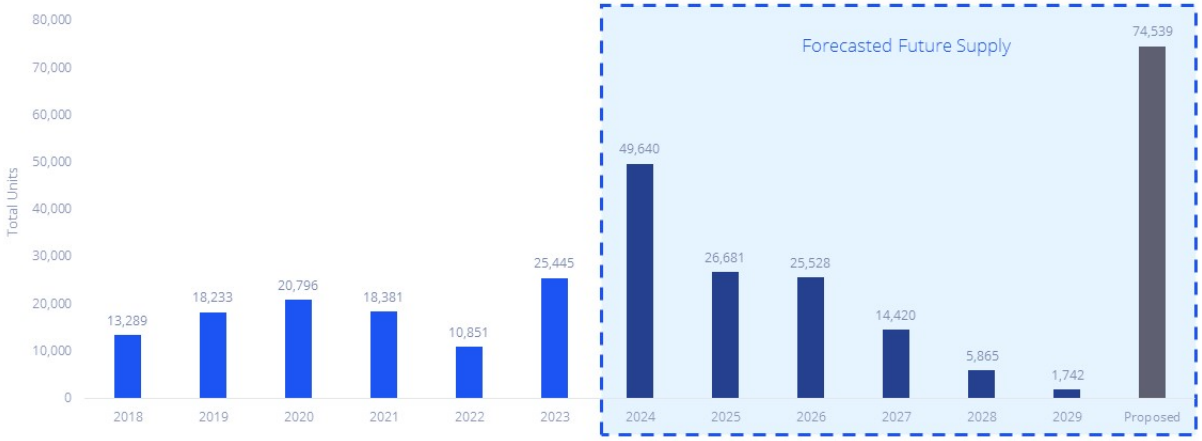
(without including Seller financing)

- Land is considered "risky" by conservative Charter Banks
- Typically 1st position land loans represent up to 65% loan-to-value ("LTV") and are priced as a spread to Prime Rate. (which means 100 – 500 bps), depending on sponsor and lender's perceived risk
- In some instances in a rising land market, developers would add mezzanine loan subordinate
- Major Players in GTA land include Cameron Stephens, Kingsett Capital, Atrium, Firm Capital, Marshall Zehr, Fiera

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Looking Forward: Unveiling Opportunities

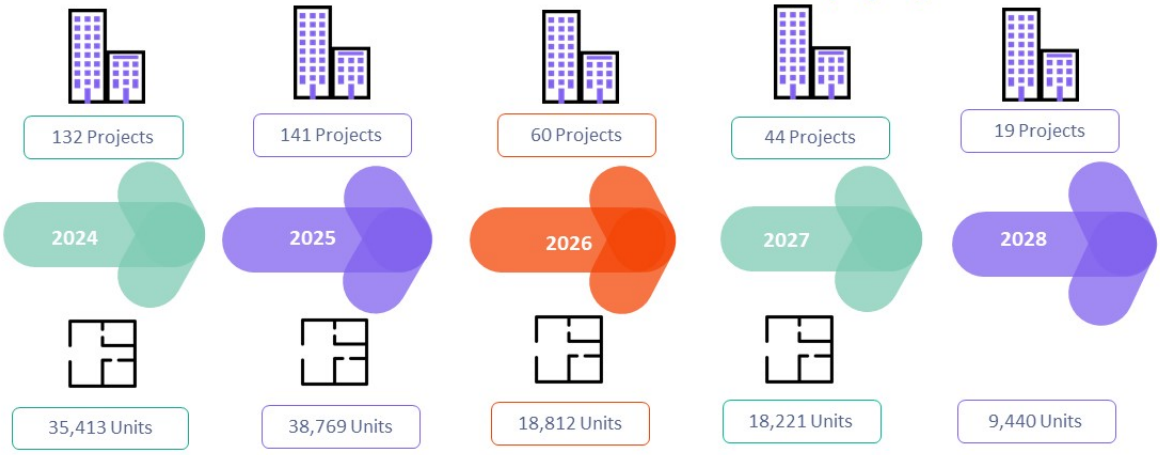
Historical Condominium Completions



Source: Altus based on first occupancy date

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

New Construction Future Supply



Source Zonda. Urban

Lay of the Land

GTA Development Pipeline

2,400
Condominium & Purpose-Built Rental Projects

4,574
Total Buildings

1.2 M
New Suites

840.6M SF
of Total Gross Floor Area

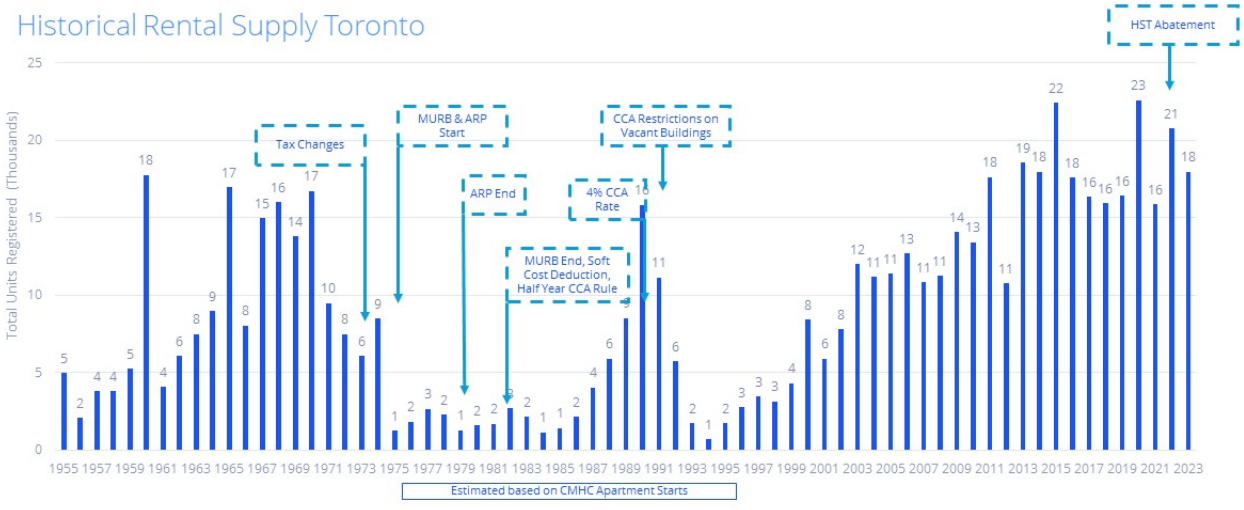
785.8M SF
of Residential Gross Floor Area

Source: Colliers, Urbanation

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Looking Forward: Unveiling Opportunities

Historical Rental Supply Toronto



Sources: Urbanation, CMHC

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Looking Forward: Unveiling Opportunities

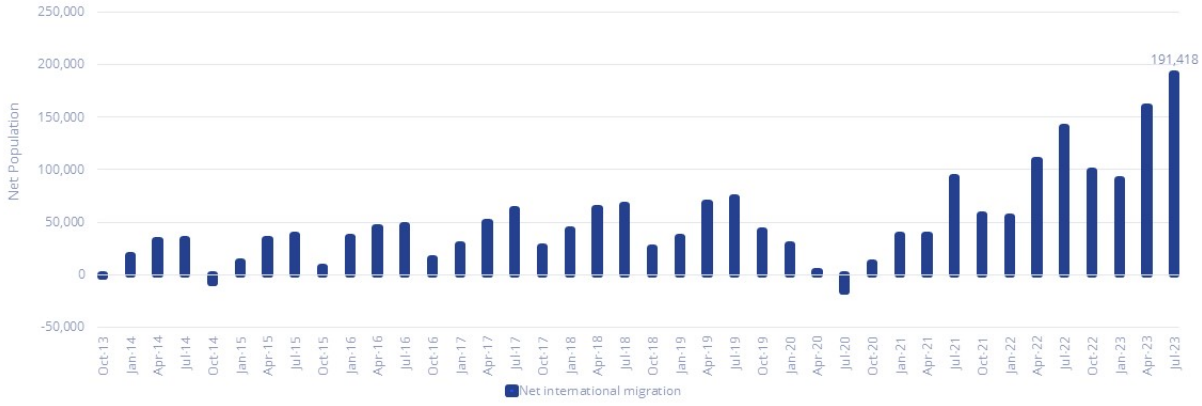
Ontario Population and Growth

[1] Rolling 12-months Q3-2022 to Q3-2023
Source: Statistics Canada

LAND PRO 2024: NAVIGATING GTA RESIDENTIAL LAND MARKETS

Looking Forward: Unveiling Opportunities

Ontario International Immigration



[1] Rolling 12-months Q3-2022 to Q3-2023
Source: Statistics Canada

Jeremiah Shamess

Executive Vice President
Private Capital Investment Group
jeremiah.shamess@colliers.com

+1 647 884 5449

Accelerating success.

LANDPRO CONFERENCE 2024

PRESENTATION: **TARION'S NEW CUSTOMER SERVICE STANDARD AND WARRANTY MODERNIZATION.**

Peter Balasubramanian,
President and CEO, Tarion.

06

<< BACK

PRESENTATION

PETER BALASUBRAMANIAN

President and CEO,
Tarion

TARION'S NEW CUSTOMER SERVICE STANDARD AND WARRANTY MODERNIZATION.

Peter Balasubramanian joined Tarion in January 2004 as Corporate Counsel, after practising for several years at Torys LLP. In 2009, he took on the role of Vice President, Claims, and in 2014, Vice President, Licensing & Underwriting.

Peter became Senior Vice President, Strategy in 2018 and Chief Operating Officer in 2019. On January 1, 2020, Peter became President & Chief Executive Officer.

TARION
SUPPORTING YOUR NEW HOME WARRANTY

Tarion – LandPRO Presentation

Home Construction Regulatory Authority

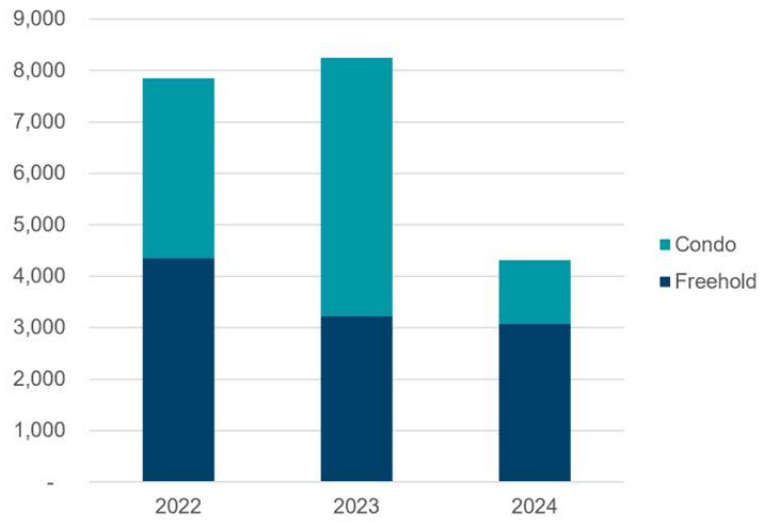
- Licence and regulate new home Vendors/Builders
- Complaints against Vendors/Builders
- Illegal building
- Ontario Builder Directory
- Promote best practices in home construction

TARION
SUPPORTING YOUR NEW HOME WARRANTY

- Authorize construction and sales plans of Vendors/Builders
- Underwrite and backstop builder warranties
- Administer the new home warranty and protection plan
- Promote best practices in home construction

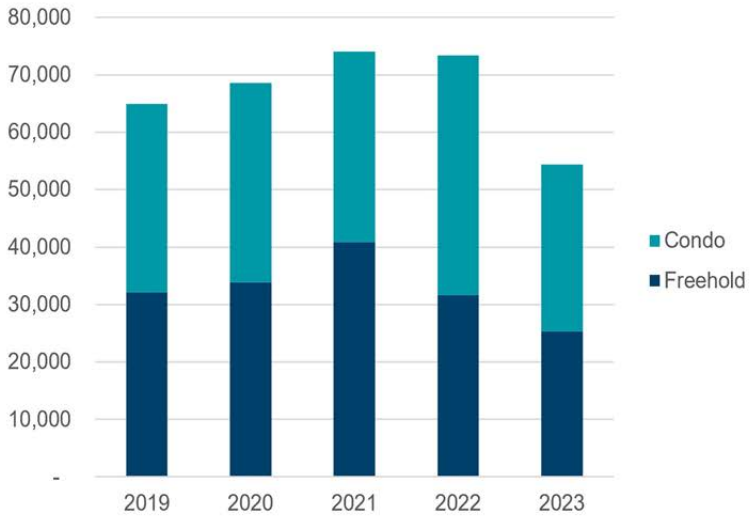
TARION

Year to Date Enrolments



TARION

Annual Enrolments



TARION

Most builders resolve issues that are submitted on Forms

TARION

New Mediation Service For Consumers

Tarion has implemented a mediation option for homebuyers. Tarion maintains a roster of mediators, and will fund the cost of up to a half day mediation. The service is voluntary, and is available after a Tarion conciliations.

Early Intervention

Requested if communication between the homeowner & builder has broken down, or if one of the two parties are not acting in good faith.

When to Request it:
Before making a claim, or any time during the regular claims process.

Investigative Inspection

Assessment of a warranty claim item to determine whether the item involves health & safety, an emergency, or extraordinary circumstance that require immediate attention.

When to Request it:
Before or after submitting a form.

Independent Mediation

An independent way to dispute Tarion's warranty assessments through an easy & cost-effective process than a formal hearing at the Licence Appeal Tribunal.

When to Request it:
After conciliation & Tarion Assessment

Arbitration/Litigation

Pursue a home warranty dispute in the court system which is a unilateral process that you can initiate, or through private arbitration requires that all parties agree to the process.

When to Request it:
After completing the regular claims process.

License Appeal Tribunal

An independent agency established by the Ontario government that, among other things, resolves disputes related to Tarion.

When to Request it:
If you disagree with an assessment in a conciliation assessment report & after reviewing & deciding to challenge a Tarion decision Letter.

TARION

SUPPORTING YOUR NEW HOME WARRANTY

Customer Service Standard (CSS) Changes

What Isn't Changing

- No changes to Builder Repair Periods
  - Builders will still have the initial 120-day, and the second 30-day builder repair periods
- No changes to the second year or seven-year process.
- No changes to common element process.
- No changes to special/seasonal process.
- No changes to the emergency process.

Key Changes

For homes **with a date of possession of May 1, 2024, or after:**

- The initial homeowner submission period is now be 40 days (from 30).
- Homeowners can make mid-year submission at six months.
- Homeowners can now request a conciliation for each submission from the time it is submitted up until the next submission date- the conciliation will be scheduled on a date after the repair periods finish.

TARION

SUPPORTING YOUR NEW HOME WARRANTY

HomeHub Innovation

VIDEO

TARION

SUPPORTING YOUR NEW HOME WARRANTY

Illegal Deposit Risk and Voluntary APS Registration

TARION

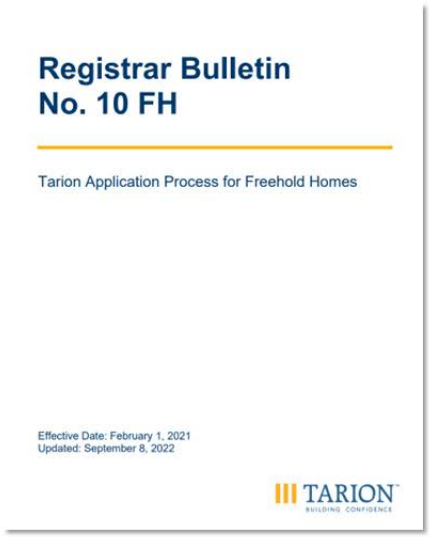
SUPPORTING YOUR NEW HOME WARRANTY

QFE Process

TARION

QFE Process – Know The Requirements

- Vendor can apply to the HCRA and Tarion at the same time
- Refer to the applicable Registrar Bulletin 10 at https://www.tarion.com/registrar-bulletins
- **For Condo applications see the requirements listed in the Condominium Project Profile Form – see https://www.tarion.com/builders-forms**


Registrar Bulletin No. 10 FH

Tarion Application Process for Freehold Homes

Effective Date: February 1, 2021
Updated: September 8, 2022

TARION
BUILDING CONFIDENCE

TARION

SUPPORTING YOUR NEW HOME WARRANTY

Contact Info

TARION

Underwriting / Condo / Technology Contacts

Kirk Rowe

Director, Underwriting

For concerns related to Tarion Applications, Enrolments, or Security.

Ryan Haley

Director, Common Elements

For concerns related to Condo Projects, Commons Elements, and RB19 Process.

Renee Morris

Manager, Builder Services

For concerns related to BuilderLink and HomeHub.

TARION

Industry Relations Team Contacts

Gerald Premachandran

Builders in the Southwest Ontario region can reach Gerald at

Gerald.Premachandran@Tarion.com
416-229-7908

Danny Conte

Builders in the GTHA & Golden Horseshoe regions can reach Danny at

Danny.Conte@Tarion.com
647-494-9843

Bryan Stott

Builders in the East, Central and North regions can reach Bryan at

Bryan.Stott@Tarion.com
647-496-6844

Nicole Kennedy

Builders in the GTHA & Golden Horseshoe regions can reach Nicole at

Nicole.Kennedy@Tarion.com
647-361-8631

TARION

Additional Tarion Contact Points

Questions about BuilderLink

- **Email builderLink@Tarion.com**

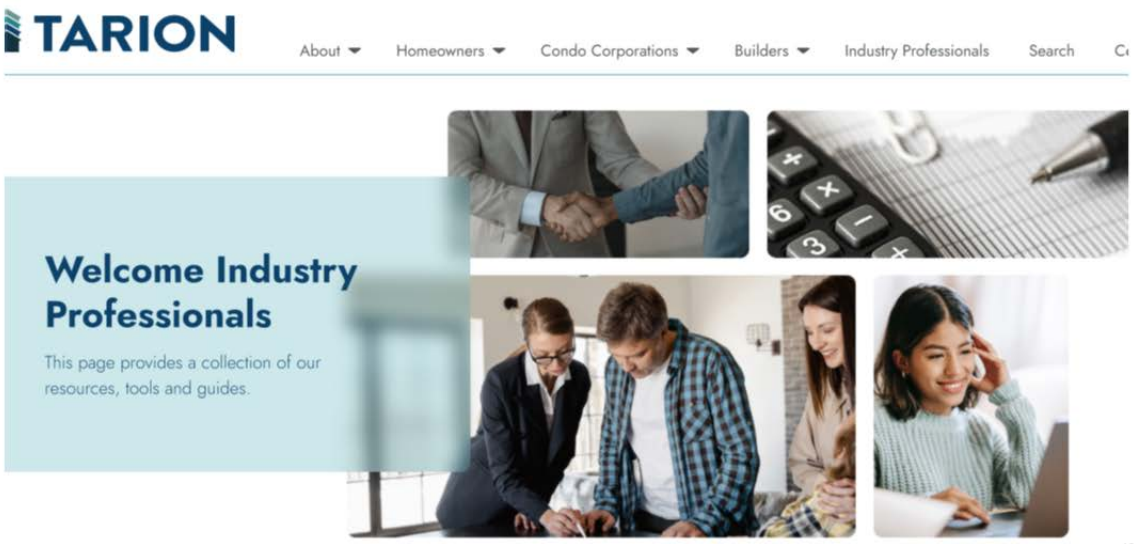
Questions about Early Intervention

- **Email customerservice@tarion.com**

Questions about Vendor Builder Integrated (VBI) Web Services

- **Email webservice@tarion.com**

Sign up for Legal Professionals Newsletter @Tarion.com



Tarion Handout

Required Documents for Condominium Projects

TARION

SUPPORTING YOUR NEW HOME WARRANTY

TARION

5160 Yonge Street, 7th Floor
Toronto, ON M2N 6L9
877.982.7466 | tarion.com

Required Documents Checklist

Please include the following documents required to process your application. Submission of an incomplete application will delay the processing and potential approval of your application.

Note: Additional information may be requested on a case-by-case basis.

☐	Condominium Project Profile Form
☐	Information Sheet for Buyers of Pre-Construction Homes About Possible Termination of Purchase Agreements
☐	Warranty Information Form
☐	Agreement of Purchase and Sale with Tarion addendums, if available (drafts acceptable)
☐	Disclosure Statements, if available (drafts acceptable)
☐	Declaration, if available (drafts acceptable)
☐	Undertaking (if declarant or beneficial owner is different from the vendor and if vendor meets definition of vendor ONHWPA)
☐	Construction Management Agreement (if a separate vendor and builder)
☐	Renderings and Architectural Drawings/Plans
☐	Written notice from your lawyer explaining any title restrictions, if applicable
☐	Geo-technical studies
☐	List of components to be retained by the Condominium Corporation upon registration/turnover, if applicable

5160 Yonge Street, 7th Floor
Toronto, ON M2N 6L9
877.982.7466 | tarion.com

Additional information required for Type C/D condominium projects:

☐	Budget/Pro Forma (This should include: Soft and hard construction costs; Development costs and fees; Financing costs; Contingencies; Environmental remediation costs; Projected after sale service costs; Source of funding; and, Pro-forma cash flow.)
☐	Land Mortgage (Latest mortgage statement(s))
☐	Construction Financing Agreement/Discussion Paper/Intent to Finance (Must be issued on financial institution letterhead with either final or conditional licensing terms or a discussion paper with intent to finance the proposed project)
☐	Zoning Approval Status (If municipal approval has not been achieved, please provide current status and timeframe for achieving them)
☐	Site Plan Status (If municipal approval has not been achieved, please provide current status and timeframe for achieving them)

The following reports are mandatory for a Residential Condominium Conversion Project (RCCP):

☐	Property Assessment Report (PAR)
☐	Capital Replacement Plan (CRP)
☐	Pre-Existing Elements Fund Study (PEFS)

LANDPRO CONFERENCE 2024

PANEL: **DEVELOPERS MOUNT RUSHMORE.**

Roger Greenberg,
Executive Chairman, The Minto Group.
Brian Johnston,
Multiple Directorship; Panel Moderator.
Niall Haggart,
President, GTA Urban Division,
Mattamy Homes Canada.
Jim Ritchie,
President, Tridel.
Lino Pellicano
Vice President High Rise
Greenpark Group.

07

<< BACK

DEVELOPERS MOUNT RUSHMORE

The most experienced condominium builders in the industry will be sharing their insights as to "the state of the industry", and their respective responses to the following questions:

1. The most difficult and/or most time-consuming issue(s) that they've had to endure or overcome in the past decade.

2. The best and worst mixed-use projects that they've been involved in, and why?;

3. The impact of higher interest rates on construction completion costs and new sales;

4. Innovations in construction technologies, in heating and cooling systems, and in building network/smart home technologies;

5. Trends for future building design and suite layouts and sizes; and

6. Insights and predictions about the future of the condominium development industry.

DEVELOPERS MOUNT RUSHMORE

ROGER GREENBERG

Executive Chairman,
The Minto Group

Roger Greenberg is the Executive Chairman of the Board of The Minto Groupand Chairman of the Board of Trustees of Minto Apartment REIT. In addition, he is the the Executive Chairman and Managing Partner of the Ottawa Sports and Entertainment Group (OSEG), sits on the Board of Governors of the Canadian Football League, and was one of five members of Ottawa's business community leading the Lansdowne Transformation Plan.

Roger joined Minto Group on a full time basis in 1985 and became CEO in 1991. He has since divided his time and passion between overseeing operations of Minto and lending his expertise to philanthropic causes in the community. In October 2013, Roger turned over the CEO reins to Michael Waters.

Throughout his career, Roger has received many distinguished awards, including being appointed a Member of the Order of Canada, the Federation of Rental-housing Providers of Ontario (FRPO) Lifetime Achievement Award, the Queen Elizabeth II

Diamond Jubilee Medal, the Gilbert Greenberg Distinguished Service Award by the Ottawa Jewish Community, Ottawa Business Journal's CEO of the Year in 2004 and United Way Community Builder in 2001, to name a few.

Roger obtained his Bachelor of Commerce degree at the University of Toronto and his law degree at Osgoode Hall Law School. After completing his bar admission in 1982, Roger practiced real estate law at Toronto law firm Blaney McMurtry for three years.

DEVELOPERS MOUNT RUSHMORE

BRIAN JOHNSTON
Multiple Directorship

PANEL MODERATOR

Mr. Johnston has held a number of executive roles in the real estate industry. He is a Chartered Professional Account with more than 30 years as both as the CEO as well as CFO (12 years for a public company). His most recent full time role was as the Chief Executive Officer of CreateTO, the City of Toronto's real estate arm with a mandate to develop City buildings and lands for municipal purposes. Mr. Johnston served as Chief Operating Officer of Mattamy Homes from 2012 to 2018. Prior to joining Mattamy, he worked in several management roles at Monarch Corporation from 1984 to 2012, serving as President from 2000 to 2012. Mr. Johnston currently serves as a Director of the C.D. Howe Institute, the Bruce Trail Conservancy and Victoria University at the University of Toronto. He is also a Director of Sienna Senior Living and Mortgage Corporation of Canada Inc.

In addition to being a CPA, Brian holds a Bachelors of Commerce degree from the University of Toronto, and resides in the City of Toronto.

DEVELOPERS MOUNT RUSHMORE

NIALL HAGGART

President, GTA Urban Division, Mattamy Homes Canada.

In my role as President of Mattamy's GTA Urban Division, I am responsible for expanding and enhancing Mattamy's multi-family mid- and high-rise offering in the Greater Toronto Area (GTA). Alongside a team of dedicated professionals, I'm passionate about growing Mattamy's footprint in Toronto's urban market, with a particular focus on developing and designing communities that reflect how people live, work, shop and visit.

I have more than 30 years of urban real estate development experience, having spent most of my career with The Daniels Corporation, one of Canada's top builder/developers. During my career with Daniels, I had the opportunity to lead the development of many iconic and award-winning GTA projects, including TIFF Bell Lightbox (380-unit mixed-use condominium tower), the Mississauga City Centre (home to 3,000+ residential units together with commercial uses at grade) and Daniels City of the Arts (encompassing 950 residential units, atop a large commercial podium complex).

I'm also an active member of the development industry, including as a sought-after speaker, consultant, lecturer and a member of BILD's principals committee, helping to create city-building policies and frameworks for responsible and inclusive development throughout the GTA.

DEVELOPERS MOUNT RUSHMORE

JIM RITCHIE
President, Tridel

Tridel is Canada's leading developer and builder of condominium residences with more than 8 decades of homebuilding experience. To date, the Tridel Group of Companies is responsible for producing over 85,000 homes. The company focuses on customer service, innovation, environmentally sustainable design, performance in construction, and corporate stewardship.

Tridel is the 2019 Ontario Homebuilder of the Year, as awarded by the Ontario Homebuilders Association.

Tridel is committed to building the highest quality condominiums possible and has won virtually every award in the industry for design, marketing, sales, construction excellence, and customer service. Tridel has over 20 new condominium communities currently under development in the Greater Toronto Area.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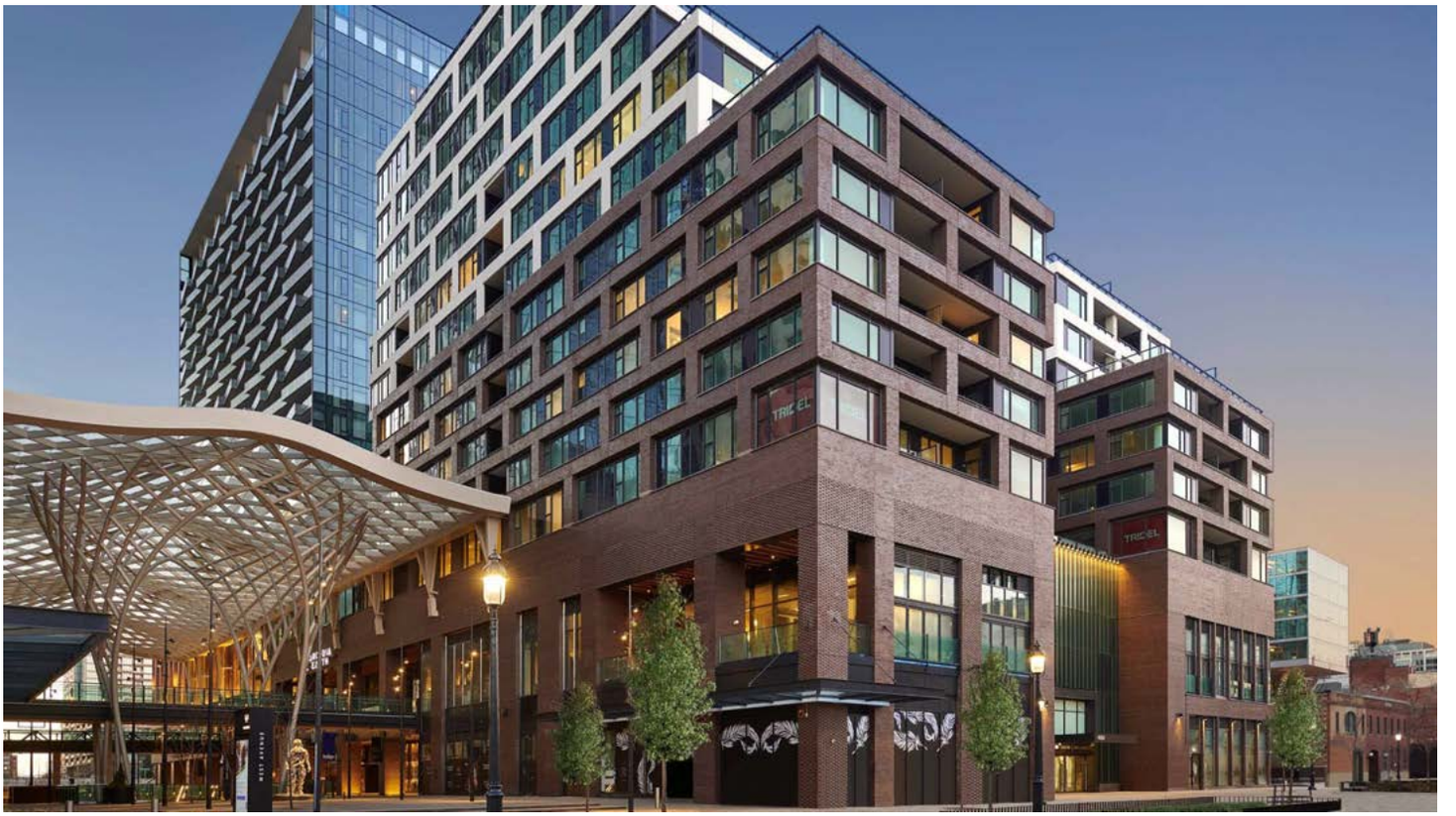

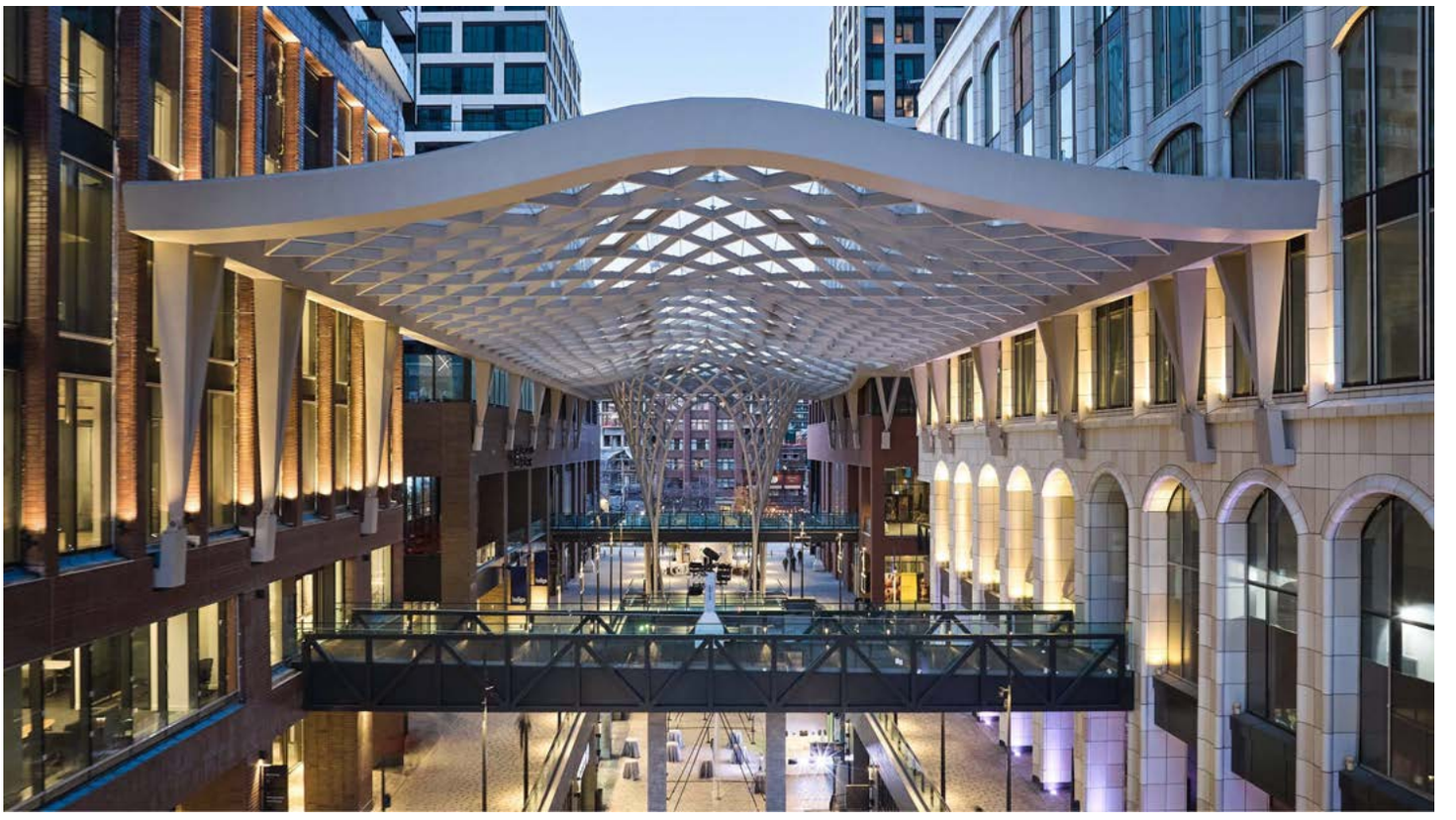

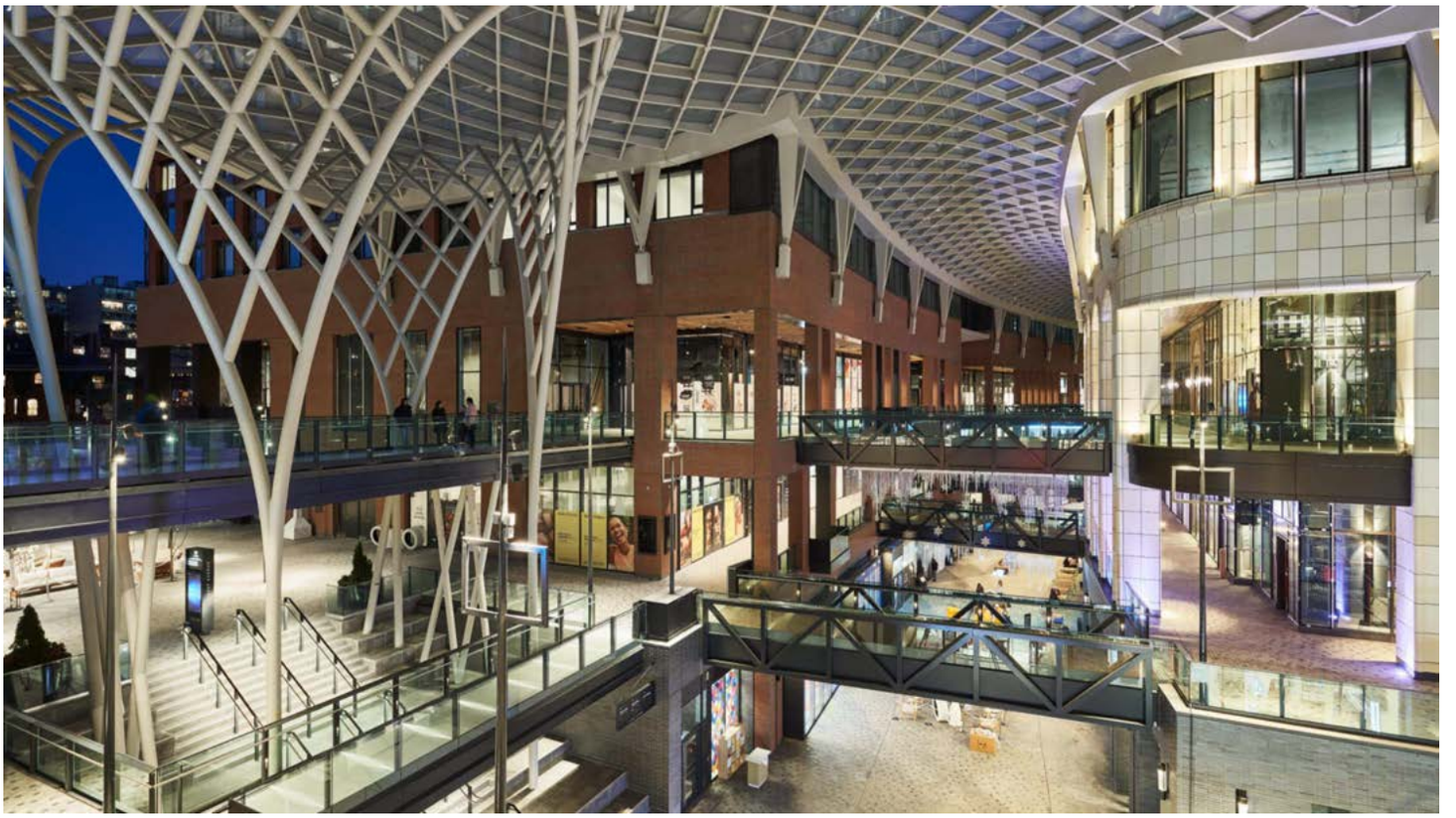


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HULLMARK CENTRE

DEVELOPERS MOUNT RUSHMORE

LINO PELLICANO
Vice President High Rise
Greenpark group

Lino Pellicano is the President High Rise Division at Greenpark Group, leveraging over 25 years of expertise in the high-rise sector. A distinguished graduate of Toronto Metropolitan University School of Urban Regional Planning, Lino passion for shaping urban landscapes has been evident throughout his career. Their leadership extends beyond Greenpark Group, having served as a board member and executive committee member at BILD, showcasing a commitment to industry excellence and innovation.

Greenpark Group

Prepared for: Land Pro Conference 2024

April 3, 2024

Greenpark GROUP

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UNITS BUILT

36,000
JOBS CREATED

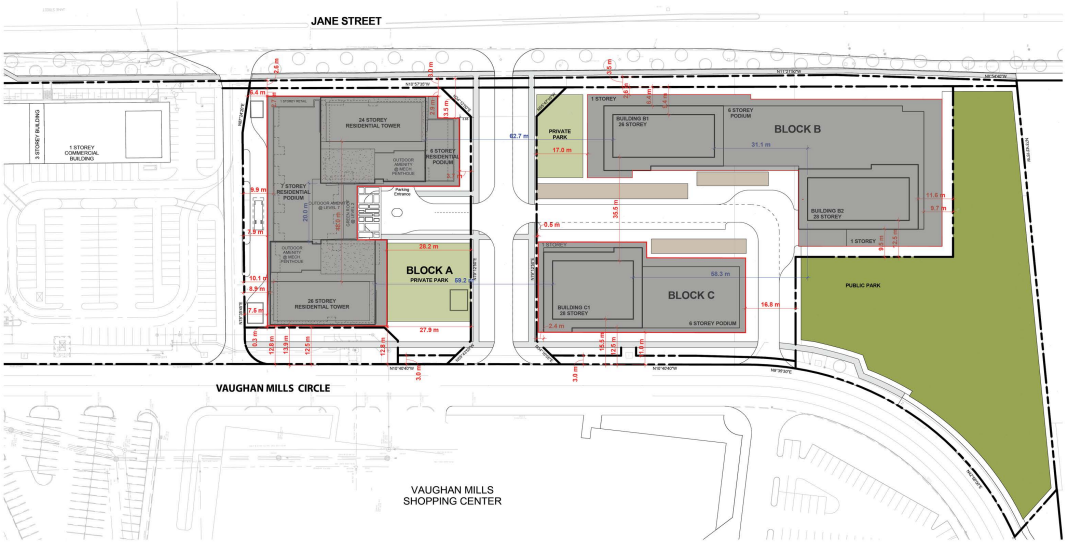
520
COMMUNITIES BEING DEVELOPED

VAUGHAN

Charisma Condominiums

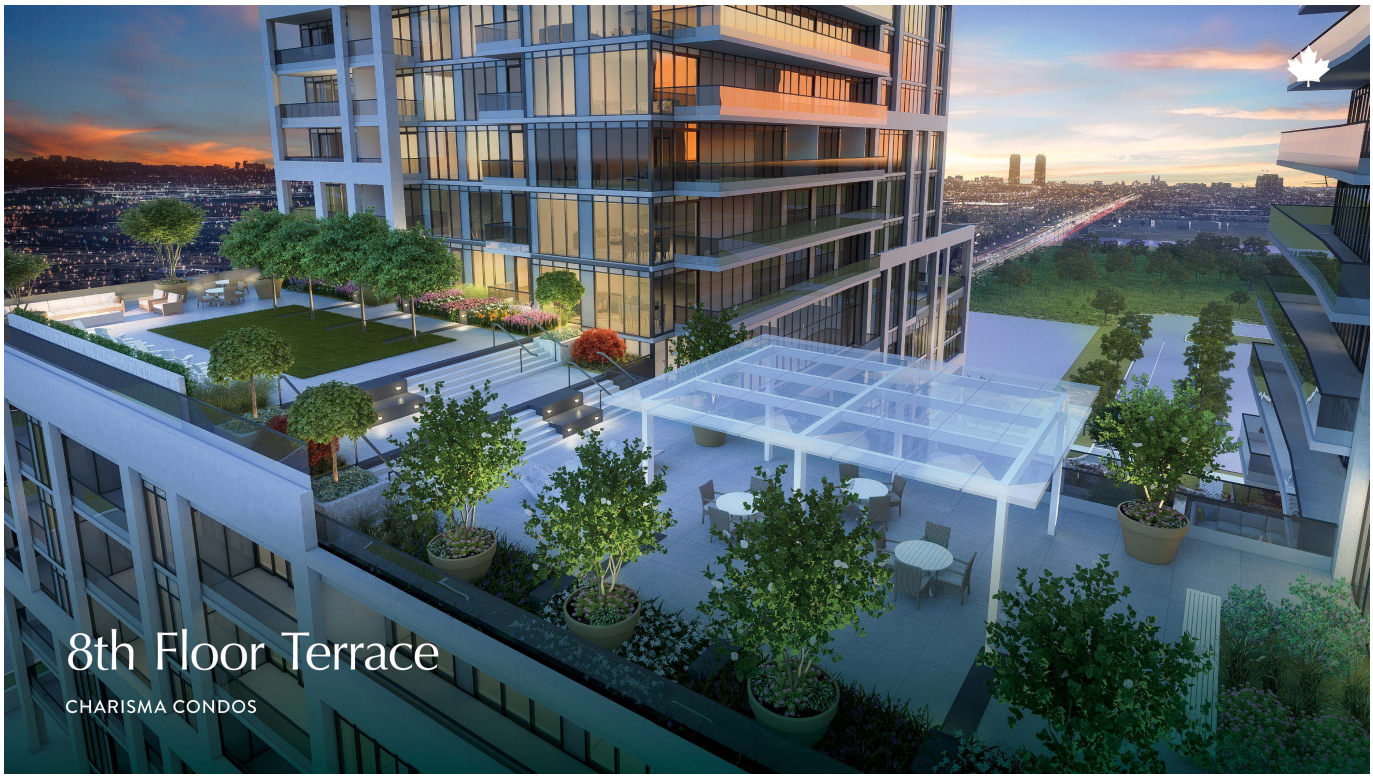
A Master-Planned Community

CHARISMA SITE PLAN



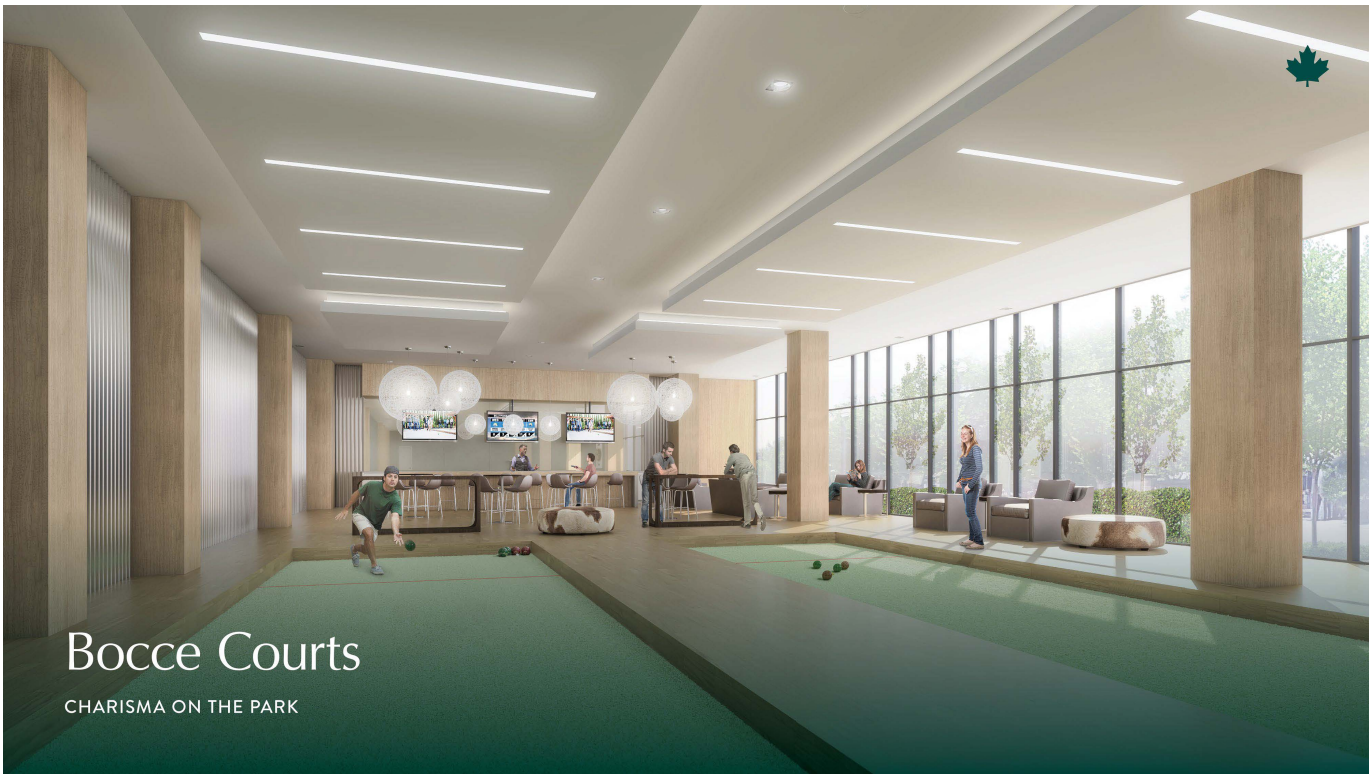
Porte Cochere

CHARISMA CONDOS



8th Floor Terrace

CHARISMA CONDOS



Bocce Courts

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Party Room

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RISE AND ROSE

Outdoor Pool

RISE AND ROSE

Track & Fitness Area

RISE AND ROSE

Thank you!

Greenpark GROUP

LANDPRO CONFERENCE 2024

PRESENTATION:

RECENT COURT DECISIONS IMPACTING CONDOMINIUM DISPUTES IN ONTARIO.

Harry Herskowitz,
Senior Partner, DelZotto, Zorzi LLP.

08

<< BACK

PRESENTATION

HARRY HERSKOWITZ

Senior Partner, DelZotto, Zorzi LLP.

RECENT COURT DECISIONS IMPACTING DISPUTES IN ONTARIO.

Harry Herskowitz is a graduate of Osgoode Hall Law School and was called to the Bar of Ontario in 1979. Harry is qualified as an arbitrator/mediator, having completed a course in arbitration/mediation at the University of Toronto's School of Continuing Studies in 1994. Harry's practice is devoted to real estate, mortgage lending and commercial transactions, with emphasis on land development and condominium law. Harry's practice also includes arbitrating disputes involving commercial real estate transactions and condominium issues, and providing legal opinions on various aspects of real property law. Harry has represented numerous subdivision and condominium developers throughout Ontario, from simple stand-alone residential projects to complex mixed-use, multi phased and leasehold condominium projects. Harry is qualified as an expert witness before the Ontario Superior Court of Justice, and frequently provides opinions on real estate conveyancing and condominium issues.

RECENT APPELLATE COURT DECISIONS IMPACTING CONDOMINIUM DISPUTES IN ONTARIO

BY HARRY HERSKOWITZ & AMY CRYSTAL – DELZOTTO, ZORZI LLP

For the LandPro Conference held on April 3, 2024

SUMMARY

1. INTRODUCTION

The condominium landscape in the Greater Toronto Area, and across the Province of Ontario, is evolving at an unprecedented pace, accompanied by an increase in the complexity of disputes that arise between condominium corporations, unit owners and other stakeholders. Due to the communal nature of condominium tenure and the shared ownership of the common elements by the respective unit owners, the resolution of any disputes in connection therewith in a timely, non-adversarial and cost-efficient manner is of paramount importance, in an effort to reduce the ongoing conflict, frustration and/or hostility between the parties, to the extent reasonably possible. It is not surprising, then, that alternative dispute resolution lies at the heart of the province's condominium legislation, where Section 132 of the *Condominium Act 1998*[1] (hereinafter referred to as the "***Condominium Act***") mandates that disputes or disagreements regarding the provisions of the declaration, by-laws or rules of a condominium between the condominium corporation and any unit owner(s), as well as all disputes regarding the provisions of any agreement between the declarant and the condominium corporation, or between two or more condominiums, shall be resolved by mediation and arbitration, in lieu of recourse to the courts.

In addition, over the past two decades, the downtown core of the City of Toronto has witnessed the development of numerous mixed-use, multi-phased and highly-integrated projects, involving one or more residential condominiums connected to freehold commercial/retail and/or office premises, or two or more residential condominiums linked by a podium (with or without a retail component at grade), where various facilities, amenities and/or services are intended to be shared and utilized by different components or entities, and where mediation and/or arbitration are almost always contractually mandated as the mechanism for resolving disputes involving the

[1] S.O. 1998, c. 19, as amended.

shared facilities and/or the costs associated therewith, pursuant to the provisions of a shared facilities agreement that typically governs the use, operation, insurance, maintenance and/or repair of same.

Despite the clear advantages of alternative dispute resolution mechanisms, a party to a dispute may nevertheless seek judicial intervention in the first instance, in the absence of a statutory or contractual requirement to pursue mediation and/or arbitration for resolving the dispute, as was the case in *Carleton Condominium Corporation No. 519 v. Ottawa-Carleton Standard Condominium Corporation No. 656*[2] (hereinafter referred to as the "**CCC 519 Case**"), where the doctrine of unjust enrichment was considered in the context of a dispute amongst several condominiums, where no cost-sharing agreement was in existence to govern the operation of critical infrastructure that was utilized and shared by each of them. Even in those circumstances where alternative dispute resolution is mandatory, a party to a dispute who is dissatisfied with the decision of the arbitrator may ultimately seek to appeal the arbitrator's decision, and request judicial intervention to set aside the arbitral award, if and where the avenue of appeal is permitted by the applicable agreement governing the arbitration of the dispute (or in the absence of such an agreement altogether), and/or based on one of the enumerated grounds specified in the *Arbitration Act, 1991*[3] (hereinafter referred to as the "***Arbitration Act***"), as was the case in *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*[4] (hereinafter referred to as the "**Mensula Case**").

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[2] 2023 ONCA 848.
[3] S.O. 1991, c. 17, as amended.
[4] 2022 ONCA 769.

The purpose of this paper is to review and analyze the decision in each of the CCC 519 Case and the Mensula Case, and which decisions will impact the resolution of condominium-related grievances or disputes in Ontario going forward.

2. THE CCC 519 CASE

a) The Facts of the Case

The applicant, Carleton Condominium Corporation. No. 519 (hereinafter referred to as "**CCC 519**"), and the two respondents, Ottawa-Carleton Standard Condominium Corporation No. 656 (hereinafter referred to as "**CCC 656**") and Carleton Condominium Corporation No. 522 (hereinafter referred to as "**CCC 522**"), were constructed and developed by the same declarant, Rockwell Investments Ltd. (hereinafter referred to as the "**Declarant**"), and are located in close proximity to one another in the City of Ottawa. CCC 519 is a seven-storey high-rise condominium containing 108 dwelling units, CCC 656 is a townhouse condominium containing 92 dwelling units, and CCC 522 is a townhouse condominium containing 44 dwelling units. Each of the three residential condominiums is served by (or benefits from) a single electric transformer or vault, including a major piece of electrical equipment known as an electric switchgear, and all ancillary equipment appurtenant thereto (hereinafter collectively referred to as the "**ESG**"), all of which are situate upon or within (and correspondingly comprise part of) the common elements of CCC 519. The ESG has two dedicated circuit breakers or switches, one that directs power to CCC 656 exclusively, and the other that directs power to CCC 519 and to a portion of CCC 522. All three condominiums are separately metered (and separately invoiced) for their respective electricity consumption.

Despite the fact that all three condominiums are dependent upon the ESG for electric power, all costs and expenses incurred in connection with the maintenance and repair of the ESG were being borne and paid for solely by CCC 519. The ESG was over 30 years old, and was at risk of failing at any time. In November 2021, the ESG malfunctioned twice, necessitating emergency repair work thereto, at a cost of approximately $10,000 (which was paid for entirely by CCC 519). Both Hydro Ottawa and CCC 519's electrical contractor recommended the urgent replacement of the ESG. A dispute subsequently arose between CCC 519 on the one hand, and CCC 656 and CCC 522 on the other hand, regarding the obligation of the latter parties to contribute, on an equitable basis, towards the replacement cost of the ESG (in the aggregate amount of approximately $174,000), together with all past and future maintenance and/or repair costs incurred in connection therewith (hereinafter collectively referred to as the "**ESG Costs**"). Regrettably, when developing and registering the three condominiums, the Declarant failed to create (and to correspondingly take the requisite steps to bind each of the three condominium corporations to) a cost-sharing agreement or shared facilities agreement governing the shared use, operation, insurance, maintenance and/or repair of the ESG, and the corresponding allocation of the costs associated therewith.

b) <u>The Position of the Respective Parties</u>

Prior to the commencement of trial, CCC 522 agreed to pay its proportionate share of the ESG Costs, on a pro rata basis, predicated or based on the respective dwelling unit count of each condominium. However, CCC 656 refused to contribute any monies towards any portion of the ESG Costs, contending that its declaration did not require or oblige it to do so, given that the ESG comprised part of the common elements of CCC 519 exclusively (notwithstanding the fact that one of the two dedicated circuit breakers in the replacement ESG would continue to solely serve CCC 656). CCC 656 further submitted that CCC 519 was obligated to maintain and repair (and to

replace, by virtue of the definition of the term "repair" in the *Condominium Act*) the ESG, at CCC 519's sole cost and expense, inasmuch as CCC 519's declaration required it to maintain and repair its own common elements.

CCC 519 argued that CCC 656 was obligated to bear an equitable share of the ESG Costs, based on the doctrine of unjust enrichment. It contended that there was no fair or juristic (or legally-justified) reason for CCC 656 to continue to benefit from the use of the ESG (a portion of which serviced the power needs of CCC 656 exclusively), without contributing towards the ESG Costs. In support of its claim, CCC 519 relied on the decision of the Ontario Superior Court of Justice in the case of *Middlesex Condominium Corporation 229 v. WMJO Limited et al.*[5], in which a condominium corporation pursued its neighbours for a pro rata contribution towards the costs of operating and maintaining a private sewage system that was connected to other residential properties, and that correspondingly serviced their respective sewage needs. In that case, the court held that the shared use of the private sewage system required the defendant to pay an equitable share of the expenses incurred in connection therewith.

c) The Lower Court's Ruling

At the outset, Justice Hackland noted that the doctrine of unjust enrichment is well-established in Ontario, and proceeded to cite the three-part test for invoking this remedy as espoused by the Supreme Court of Canada in the case of *Garland v. Consumers' Gas Co.*[6], pursuant to which a plaintiff must establish:

i) an enrichment of the defendant (i.e. a tangible benefit that has been conferred upon the defendant);

ii) a corresponding deprivation of the plaintiff; and

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[5] 2015 ONSC 3879, which decision was upheld on appeal (see *Middlesex Condominium Corporation 229 v. WMJO Limited et al.*, 2017 ONCA 27).
[6] 2004 SCC 25, [2004] 1 S.C.R. 629.

iii) an absence of a juristic reason for the enrichment (i.e. a reason or explanation for the enrichment that makes it fair and "just" or equitable).

At law, the provision of services will constitute a benefit in those circumstances where the services were performed at the request of the defendant, or where the defendant has been "incontrovertibly benefited", namely by receiving a benefit that is demonstrably apparent and not subject to debate and conjecture[7]. Justice Hackland found that CCC 656 had been incontrovertibly benefited by having CCC 519 assume responsibility for the maintenance and repair of the ESG entirely, and that such a benefit would continue (and would become much greater) if CCC 519 were required to pay for one hundred percent of the ESG Costs, and to assume ongoing maintenance and repair costs going forward. Indeed, by its own admission, CCC 656 obtained a significant benefit from using the ESG, arguing before the court that it would be oppressive for CCC 519 to deprive CCC 656 of its use of the ESG, if the latter refused to contribute towards the costs of maintaining and replacing same.

Parenthetically, the court did not specifically discuss or address the second element of the tripartite test for unjust enrichment (namely the establishment of a corresponding deprivation suffered by CCC 519), but it should be pointed out that in the case of *Peter v. Beblow*[8], the Supreme Court of Canada stated that as a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff, then the court will infer (as a matter of course) that the plaintiff suffered a deprivation of some kind, in the absence of evidence to the contrary.

The real issue at the heart of this case was whether there was a legitimate juristic reason that justified CCC 656's non-payment of the obvious benefits that it had received and derived (and would continue to receive and derive) from its use of the ESG. In this regard, Justice Hackland

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[7] *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762.
[8] [1993] 1 S.C.R. 980.

referred to the Supreme Court of Canada's decision in the case of *Kerr v. Baranow*[9], where Justice Cromwell adopted a two-step analysis to determine the presence or absence of a juristic reason. The first stage of the analysis involves determining whether there exists a reason to justify the enrichment based upon established categories (e.g. a contract, a disposition of law, a donative intent, or any other valid common law, equitable or statutory obligation). If there is no juristic reason from one or more established categories, then it is open to the court to consider all of the surrounding circumstances of the transaction in the second stage of the analysis, including the reasonable expectations of the parties and public policy considerations, in order to assess whether the party obtaining the benefit can continue to do so without assuming a corresponding burden in connection therewith.

CCC 656 submitted that the juristic reasons to justify its retention of the enrichment (without a corresponding obligation to assume its fair share of the ESG Costs) were the absence of any duty or requirement in its declaration to incur or share in the ESG Costs, as well as the requirement in CCC 519's declaration to be responsible for maintaining and repairing its own common elements (inclusive of the ESG) and to correspondingly bear all costs associated therewith. Justice Hackland rejected this argument, noting that there was no evidence before the court as to the intentions of the Declarant regarding the responsibility for the costs of replacing the ESG that served the needs of third parties residing outside of each condominium, and that neither the declaration of CCC 519, nor the declaration of CCC 656, addressed that issue. Additionally, it was unclear on what basis CCC 656 claimed the right to enforce (and benefit from) the declaration of CCC 519, which is a declaration of the rights and obligations of the respective unit owners of CCC 519 and the condominium corporation itself, *inter se*, or as between themselves. There is no

[9] 2011 SCC 10, [2011] 1 S.C.R. 269 at paras 43-45.

provision in the *Condominium Act*, nor in the declaration of CCC 519, requiring it to continue to supply benefits to any third party, such as CCC 656. On the contrary, the condominium corporation's obligation to maintain and repair its common elements is an obligation that it owes to its own unit owners exclusively, unless it has expressly assumed (or is bound by a duty in its declaration to assume) an obligation to third parties.

CCC 656 also purported to rely on the absence of any cost-sharing agreement amongst the three condominiums that imposed an obligation on CCC 656 to contribute towards the ESG Costs. However, Justice Hackland agreed with CCC 519's submission that since there was no cost-sharing agreement amongst the parties, CCC 519 was not required to continue to supply the benefit of the ESG to CCC 656 free of charge. Justice Hackland therefore concluded that CCC 656 had failed to discharge its *de facto* burden of proof to show any juristic reason that justified the retention of the enrichment (namely the benefits derived from the continued use of the ESG), without a corresponding obligation to pay its fair share of the ESG Costs.

Justice Hackland also rejected CCC 656's assertion that promissory estoppel prevented CCC 519 from seeking contribution for the ESG Costs simply because there had been no such request during the previous 30 years in which CCC 656 had been using (or had benefitted from) the ESG. However, it was not until the ESG's failure in 2021 that the parties became aware of the urgent need to replace the ESG. Additionally, only with the intervention of Hydro Ottawa, and CCC 519's electrical contractor, did the parties come to appreciate the unusual power distribution system connecting the three condominiums. Following the initial ESG failure in 2021, CCC 519 immediately commenced a joint approach to addressing the replacement of the ESG (with CCC 656's involvement), but CCC 656 ultimately declined to participate in any cost-sharing arrangements regarding same. In light of the foregoing, Justice Hackland found no promissory

estoppel to have occurred, nor any detrimental reliance by CCC 656, merely because of the latter's use or enjoyment of the ESG for such a long period of time without any corresponding payment or contribution.

Furthermore, the court agreed with CCC 519's submission that CCC 656's own declaration implicitly imposed an obligation on the latter to share in the ESG Costs. As Justice Hackland explained, since CCC 656 had a statutory duty to manage its property and assets (including its common elements) on behalf of its unit owners, it must also be presumed or implied that this duty required the condominium corporation to ensure that the dwelling units within CCC 656 have a continuing supply of electricity. Moreover, Schedule "E" to its declaration stipulated that all sums of money levied against (or charged to) the condominium corporation on account of any and all services and equipment shall comprise part of the common expenses of the condominium. In other words, between the condominium corporation and its unit owners, the cost of supplying power or electricity to the respective dwelling units were specifically contemplated as part of the common expenses. Accordingly, the court concluded that the cost of contributing funds towards the replacement of the ESG, which supplied power to CCC 656, fell within the purview of the common expenses specifically contemplated by the condominium's declaration.

In the end, Justice Hackland held that the principles of unjust enrichment required both CCC 656 and CCC 522 to equitably share in the costs to be incurred by CCC 519 for the replacement of the ESG (together with the costs previously expended by CCC 519 for emergency work in November 2021, when the ESG malfunctioned, and a deposit was paid to Hydro Ottawa for planning/design work in connection with the ESG replacement). Justice Hackland confirmed that the equitable sharing of such costs did not contravene the respective declarations of the three condominium corporations, but rather was consistent with same. Additionally, the court affirmed

that each of the three condominium corporations shall be responsible for their respective equitable share of all ESG Costs incurred thereafter from time to time. However, somewhat surprisingly, the court did not prescribe the appropriate formula or methodology for the sharing of the ESG Costs (e.g. predicated upon their respective or relative dwelling unit count, or their respective or relative gross floor area), and instead directed a reference to be held before an associate judge of the court to make such a determination (noting that the parties could alternatively choose to proceed by mediation and/or arbitration to resolve the matter).

d) The Appellate Court's Ruling

In a unanimous decision, the principle of unjust enrichment was sustained on appeal and prevailed. The appellate court found that while CCC 519 did have a statutory obligation to maintain and repair its own common elements, including the ESG, this obligation did not extend to repairing the ESG for the benefit of CCC 656, without compensation. More importantly, the appellate court rejected the argument of CCC 656 that the lack of a cost-sharing agreement justified a perpetual imbalance in the responsibility for payment of the ESG Costs, or constituted a juristic reason for CCC 656 to attain the benefit of the ESG without a corresponding burden or obligation to pay for same. The Court of Appeal expressly confirmed that if the absence of a shared facilities agreement constituted a juristic reason for CCC 656 to retain a benefit without any quid pro quo obligation, then such an argument or premise would entirely oust the law of unjust enrichment in the context of disputes between condominium corporations, and would be manifestly unfair.

e) Critique of the Appellate Court's Decision

An ever-increasing number of condominium projects within the Greater Toronto Area, and throughout the Province of Ontario, will invariably have certain amenities, facilities, equipment

and/or services that are intended to be used or enjoyed (and correspondingly shared) by different parties, entities or components, and the ongoing operation, insurance, maintenance and/or repair thereof (and the allocation and payment of all costs and expenses incurred in connection therewith) will ideally be governed by the provisions of a reciprocal cost-sharing agreement or shared facilities agreement. However, in the absence of such an agreement, the parties sharing facilities will be left to either deal with one another in good faith, or to have resort to the courts to enforce obligations imposed by the principles of equity.

It should be pointed out that the *Condominium Act* was amended in December 2015 to include a new Section 21.1 that requires a shared facilities agreement to be entered into by a condominium corporation whenever any land, assets, facilities or services are shared by said condominium with one or more other parties (and to correspondingly apportion the costs associated therewith, predicated on an objective formula or other prescribed criteria). Unfortunately, this amendment has not yet been proclaimed into force.[10] Nevertheless, it is reassuring to know that the doctrine of unjust enrichment is alive and well in condominium law, and that no party shall be entitled to obtain a benefit (or be enriched) at another party's expense, without a legal justification underlying same, as demonstrated by the appellate court's ruling in the CCC 519 Case.

One possible argument in favour of CCC 656 that could have been judicially considered is the fact that CCC 519 may have required the same ESG (in terms of size, capacity and cost) in order to provide sufficient and reliable electrical power to its own unit owners and residents, regardless of the fact that the ESG also provided power to the other two condominiums, and to their respective unit owners and residents, and therefore CCC 519 arguably never suffered or

[10] Bill 106 (formally entitled the *Protecting Condominium Owners Act, 2015*) received Royal Assent on December 3, 2015 and introduced a new Section 21.1 of the *Condominium Act*.

incurred a corresponding detriment in connection with the ESG and/or the ESG Costs. This argument (and the evidence from a qualified electrical consultant supporting same) does not appear to have been raised by CCC 656, or judicially considered, in the reported decisions. Rather, the deprivation suffered or incurred by CCC 519 (sufficient to satisfy the second element of the unjust enrichment test) was simply inferred by the lower court, based on the undeniable fact that CCC 519 was paying one hundred percent of the ESG Costs, including the costs of maintaining a dedicated circuit breaker or switch that directly provided power to CCC 656 exclusively, and which presumably reflected (either directly or indirectly) an increased cost associated therewith that was ultimately borne by CCC 519 alone.

In our respectful opinion, the appellate court was correct in confirming two essential points relative to the unjust enrichment argument raised by CCC 519, namely that:

i) no obligation was imposed upon CCC 519 (either at law, in equity or by statute) to provide the benefit of the use of the ESG (or any replacement thereof) to CCC 656 in perpetuity, without receiving any compensation whatsoever therefor from CCC 656; and

ii) there was no basis in law for CCC 656 to enforce (or claim the benefit of) the declaration of CCC 519 (i.e. which obliged it to maintain and repair the ESG as part of its common elements), in the absence of any express duty in the declaration which also obliged CCC 519 to confer any benefit or service regarding the ESG to (and in favour of) CCC 656, without any compensation or contribution in return.

3. THE MENSULA CASE

a) The Facts of the Case

Halton Condominium Corporation No. 137 (hereinafter referred to as "**HCC 137**", or the "**Condominium**") is a residential condominium located in the town of Oakville, containing 82 dwelling units and 166 parking units. Mensula Bancorp Inc. (hereinafter referred to as "**Mensula**") is the owner of 43 parking units situate on level 1 within the Condominium's parking garage

(hereinafter collectively referred to as the "**Parking Units**"), many of which were used by Mensula's employees who work at its nearby business (located outside of the condominium property). Mensula does not own any dwelling units within the Condominium, and there was no prohibition or restriction in the Condominium's declaration that prevented any non-dwelling unit owners from acquiring, leasing or otherwise using any of the Parking Units. Since November 2019, Mensula had been seeking access to certain common element areas of HCC 137, including the Condominium's lobby, hallways and a locked stairwell located at the west end of the parking garage, for the purpose of enabling or facilitating a more convenient route for pedestrian ingress and egress to each of the Parking Units. Such access would provide Mensula's employees with a more direct and closer route to its business premises. However, Mensula's requests for access were denied by the board of directors of HCC 137, who asserted that such access should only be obtained through an external staircase located at the far east end of the Condominium's parking garage.

The declaration of HCC 137 provided that each owner (which is defined to include the owner of a parking unit) has the full use, occupancy and enjoyment of the whole or any part of the common elements, subject to certain exceptions expressly set out therein. One such exception pertained to the Condominium's recreational facilities and amenities, which may only be accessed, used and enjoyed by the respective owners, residents and tenants of the dwelling units in the Condominium, and by their respective invitees from time to time. Access through the Condominium's lobby and/or hallways for pedestrian ingress and egress purposes was not similarly restricted to only the owners of dwelling units, nor was such access to same ever expressly mentioned in the declaration.

b) **The Position of the Respective Parties**

Mensula contended that as the owner of the Parking Units, it was legally entitled to pedestrian access and egress over the non-exclusive use common elements of the Condominium, in accordance with the provisions of the Condominium's declaration, which included the lobby and hallways. Conversely, HCC 137 took the position that its lobby and hallways were designed or intended for recreational purposes, and therefore could only be accessed and used by the respective owners, residents and tenants of the dwelling units in the Condominium, and by their respective invitees from time to time, and that access by the respective owners and/or tenants of the Parking Units through the east end stairwell exclusively (without access to the lobby and/or the hallways) was reasonable, and was always intended or implied by the Condominium's declaration.

The dispute was ultimately referred to an arbitrator (hereinafter referred to as the "**Arbitrator**"), who was granted the jurisdiction to resolve all issues in dispute between HCC 137 and Mensula regarding the access by the owners and tenants of the Parking Units over the Condominium's common elements, and there was to be no right of appeal from the Arbitrator's decision.

c) **The Arbitrator's Decision**

The Arbitrator rejected HCC 137's assertion that the lobby and hallways were for recreational purposes, but nevertheless concluded that Mensula was not entitled to the access that it had claimed. The Arbitrator noted that Section 116 of the *Condominium Act* places two limits on an owner's use of the common elements. First, the use must be reasonable, and second, the use may be further restricted by the provisions of the declaration, by-laws or rules of the Condominium. The Arbitrator also confirmed that his interpretation of the provisions of the

declaration was subject to the rules governing contractual interpretation, and must be read in the context of the document as a whole, consistent with the surrounding circumstances. He also indicated that the declaration should be read in the context of it being the formational document of the Condominium, and therefore should be interpreted or construed in a way that promoted harmonious (as opposed to contested) relationships within the Condominium community.

The Arbitrator took the position that a plain reading of the declaration would provide for a broad right of use of the common elements, which in turn would lead to an absurd result because it would mean that Mensula (and its employees and invitees) would be entitled to wander throughout the Condominium for no known purpose. The Arbitrator concluded that such a result could not have been intended, since it would be antithetical to the paramount purpose of the declaration to provide sensible rules or guidelines governing communal living within the Condominium. In the end, the Arbitrator ruled that Mensula (along with its employees and invitees) was only entitled to access the Parking Units through the east end stairwell of the Condominium's parking garage.

Mensula subsequently brought an application, pursuant to Section 46(1) of the *Arbitration Act*, in order to set aside part of the arbitral award on the basis that the Arbitrator exceeded his jurisdiction by essentially re-writing the declaration and/or introducing new terms thereto, and effectively amending same. Relying on Section 109 of the *Condominium Act*, Mensula argued that only the Ontario Superior Court of Justice has the jurisdiction to amend a condominium's declaration, but only if the court is satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears therein, or that arises out of the carrying out of the intent and purpose thereof.

d) The Lower Court's Ruling

At the outset, Justice Vermette noted that By-law No. 6 of HCC 137 (which, together with Section 132 of the *Condominium Act*, represented the "arbitration agreement" between the disputing parties, and correspondingly established the jurisdiction of the Arbitrator) excluded from its scope those disputes that must be resolved in the courts, or disputes that may be resolved in the courts unless the parties agree to submit same to mediation and arbitration. Justice Vermette framed the issue to be determined as whether the Arbitrator simply engaged in an interpretation of the declaration exercise that fell within the scope of his jurisdiction, as alleged by HCC 137, or alternatively whether the Arbitrator went beyond a contractual interpretation exercise, and effectively amended the Condominium's declaration in order to correct what the Arbitrator believed was an error or inconsistency therein, thereby exceeding his jurisdiction, as alleged by Mensula.

In Justice Vermette's view, the Arbitrator crossed the line between contractual interpretation and amendment, and thereby engaged in the type of analysis that is required under Section 109 of the *Condominium Act*. While the issue of Mensula's access to the common elements of the Condominium was properly before the Arbitrator, he could only decide that issue by interpreting the Condominium's declaration, and not by amending same. Although the Arbitrator had indicated that Mensula had a right to make use of all of the common elements of the Condominium (save and except for the recreational facilities and amenities, and certain restricted common element areas), he nevertheless concluded that this result could never have been intended, and was antithetical to the very purpose of the declaration. Justice Vermette held that this approach, in effect, constituted a finding of an error or inconsistency arising out of the carrying out of the intent and purpose of the declaration, which the Arbitrator thereafter purported to correct

by construing the declaration based on the surrounding circumstances, and in a way which effectively amended same. Citing the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*[11], Justice Vermette affirmed that the surrounding circumstances can only be used as an interpretive aid for determining the meaning of the written words chosen by the parties (or in this case, by the declarant who drafted the declaration), and not to change or overrule the meaning of those words. Consequently, the Arbitrator broadened the categories of common elements that comprised the restricted areas (and that cannot be used by all unit owners), in a way that was not specified in the declaration. In doing so, the Arbitrator decided a matter that was beyond the scope of the arbitration agreement (namely the correction of an error or inconsistency in the declaration, which is a matter for the court alone to undertake and decide, pursuant to the provisions of Section 109 of the *Condominium Act*). Accordingly, pursuant to the provisions of Section 46(1)(3) of the *Arbitration Act*, Justice Vermette set aside the Arbitrator's award as it related to the issue of Mensula's access to the common element lobby and hallways.

c) The Appellate Court's Ruling

Justice Zarnett, on behalf of a unanimous appellate court, confirmed that Section 46(1)(3) of the *Arbitration Act* provides an extremely narrow basis upon which a court may intervene to set aside an arbitral award, particularly in the face of an arbitration agreement that expressly provides for no right of appeal therefrom (as in the case at bar). Referring to the decision of the Court of Appeal in the case of *Alectra Utilities Corporation v. Solar Power Network Inc.*[12], Justice Zarnett noted that Section 46(1)(3) of the *Arbitration Act* only allows for a limited review based on jurisdictional error, and does not authorize a review of the merits or substance of the arbitral award.

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[11] 2014 SCC 53, [2014] 2 S.C.R. 633 at paras 57 and 60.
[12] 2019 ONCA 254.

In order to succeed on an application to set aside an arbitral award, an applicant must establish either that the award deals with a dispute that the arbitration agreement does not cover, or contains a decision on a matter that is beyond the scope of said agreement. In other words, Section 46(1)(3) of the *Arbitration Act* requires an arbitrator to act within the bounds of the authority granted to him or her by the arbitration agreement, and does not create an appeal route, nor does it contemplate a review of the correctness or reasonableness of the arbitrator's decision.

In addition, Section 46(3) of the *Arbitration Act* expressly provides that the court shall not set aside an arbitral award if the parties in dispute have agreed to the inclusion of the dispute or matter, or have waived the right to object to its inclusion, or have agreed that the arbitrator has the power to decide the dispute that has been referred to the arbitrator. Accordingly, where a reviewing judge finds that an arbitrator had the authority to interpret an agreement, and did so, the role of the court under Section 46(1)(3) of the *Arbitration Act* is at an end.

In Justice Zarnett's view, the application judge in this case contradicted the approach that was mandated by the appellate court in the *Alectra* case, *supra*. Although Justice Vermette accepted that the Arbitrator had the authority to resolve the dispute regarding access over the common elements by interpreting the declaration, she nevertheless proceeded to superimpose a different characterization of the Arbitrator's decision (calling it "in effect" an amendment) by reviewing the substance of the award, and finding that a proper interpretive analysis could not justify the conclusions reached by the Arbitrator. Justice Zarnett found that the Arbitrator was clear about his task and responsibility to interpret the declaration, and specifically defined the essence of the dispute as one of interpretation, and correspondingly framed the parties' respective positions as being rooted in the interpretation of the declaration. However, once the application judge had confirmed that the Arbitrator had the jurisdiction to interpret the declaration, and proceeded to do

so, the task of the court under Section 46(1)(3) of the *Arbitration Act* was concluded. As Justice Zarnett observed, issues such as whether the Arbitrator gave effect to the plain language of the declaration, or used surrounding circumstances beyond their proper limit, were matters that affected only the quality of the Arbitrator's interpretation, in terms of its correctness or reasonableness, and therefore pertained to the manner in which the Arbitrator exercised his jurisdiction, which thereby became a matter beyond the scope, power or purview of the court to overturn. Simply put, whether there were errors in the Arbitrator's interpretation of the declaration (and his consequent ruling in connection therewith) was irrelevant to the purposes of judicial review, and did not result in a loss of jurisdiction.

Justice Zarnett also pointed out that the fact that the Arbitrator's analysis went beyond the text of the declaration, by considering the surrounding circumstances, as well as the purpose and meaning of the declaration as a whole, and the intention of the parties, were not departures from the interpretive process, but rather were steps in that process. It was not open to the application judge to find that the Arbitrator must have amended the declaration, rather than interpreted same, because (in her view) a proper use of interpretive principles could not yield the result that the Arbitrator reached. In the end, Justice Zarnett found that the application judge erred in setting aside the arbitral award, inasmuch as the Arbitrator clearly engaged in the interpretation of the declaration, which was within the authority conferred upon him by the arbitration agreement (irrespective of whether he did so incorrectly or unreasonably). The appellate court therefore restored the award of the Arbitrator, and ordered costs of the appeal in favour of HCC 137.

f) Critique of the Appellate Court's Decision

Section 132 of the *Condominium Act* is evidence of the provincial government's recognition that alternative dispute resolution offers a more expeditious, restorative and cost-

effective method of settling condominium disagreements in an environment where, by its very nature, the disputing parties often have ongoing involvements or dealings with one another. Both mediation and arbitration provide opportunities for the parties to a dispute to resolve their conflicts collaboratively, privately and with more flexibility than traditional litigation, while reducing the strain placed on the backlogged court system.

One of the key attributes of arbitration is the principle of finality, which ensures that the decision rendered by the arbitrator will be binding upon the parties and dispositive of the matter(s) in dispute, and will obviate protracted and more costly litigation. The appellate court's decision in the Mensula Case reinforces the finality of arbitral awards, by confirming that the court shall only intervene to set aside an arbitral award in very narrow or limited circumstances, in strict accordance with the provisions of the *Arbitration Act*.

It is respectfully submitted that because the common elements are owned by all unit owners as tenants-in-common, and that the cost of operating, insuring, maintaining and/or repairing the common elements are funded by the common expenses paid for by all unit owners (in accordance with the proportions of common interests and common expenses outlined in Schedule "D" to the declaration), any restriction or prohibition on access to (and/or use of) certain common element areas (such as the lobby or hallways) should be explicitly outlined in the declaration, and in the absence of any such restrictions, Mensula (and the respective tenants of the Parking Units) should have been allowed to access the Condominium's lobby and hallways, as they naturally would have expected to do so when the Parking Units were first acquired, based on a plain reading of the declaration. However, while we respectfully disagree with the Arbitrator's interpretation of the declaration, and are correspondingly sympathetic with the application judge's attempt to overrule the arbitral award (i.e. because of the judge's view that the Arbitrator's interpretation was

tantamount to an amendment of the declaration), the correctness or reasonableness of the Arbitrator's decision is ultimately irrelevant for the purposes of the court's limited right of review of an arbitrator's decision, pursuant to the provisions of Section 46(1)(3) of the *Arbitration Act*.

The Mensula Case therefore serves as an important reminder that the parties' choice of an arbitrator is a decision of paramount significance. It is critical that the parties select an arbitrator who has expertise and skills in the subject matter of the dispute, and who understands both the applicable condominium law and the practical realities of condominium living. Additionally, the arbitrator should possess arbitration experience, and have a reputation for being balanced and fair, so that all parties to the dispute will ultimately have confidence and trust in the process, and respect for the arbitrator's decision, particularly in light of the fact that the right to appeal or invoke judicial intervention regarding the arbitrator's decision will be exceedingly limited, as the appellate court in the Mensula Case has commendably confirmed.

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LANDPRO CONFERENCE 2024

PRESENTATION:

UPDATE ON THE PLANNING LANDSCAPE AND WHAT DOES IT LOOK LIKE NOW.

Patrick Harrington,
Partner, Aird & Berlis LLP.

09

<< BACK

PRESENTATION

PATRICK HARRINGTON

Partner, Aird & Berlis LLP.

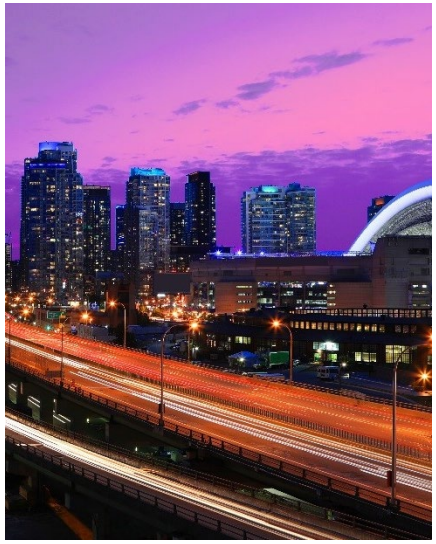
UPDATE ON THE PLANNING LANDSCAPE AND WHAT DOES IT LOOK LIKE NOW.

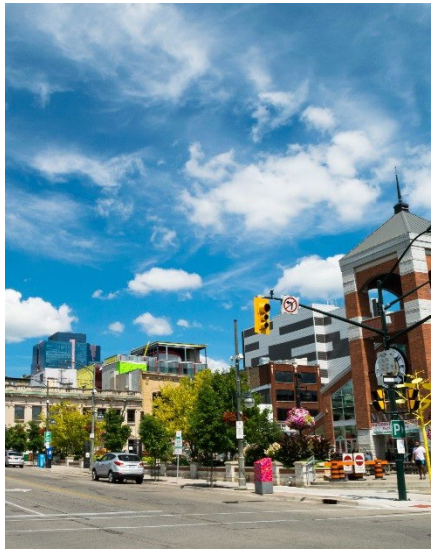
Patrick Harrington is a member of Aird & Berlis LLP's Municipal & Land Use Planning Group. He frequently appears before the Ontario Land Tribunal, seeking or opposing development approvals for a broad range of clients. Patrick regularly advises municipalities, private businesses, landowners, property managers and ratepayer groups on a broad range of regulatory matters, including zoning and Building Code infractions, by-law interpretation, sign regulation, property standards, development charges and minor variances. Patrick also represents private/public housing landlords and tenants on a variety of matters before the Landlord and Tenant Board.

Patrick has a patient and engaging approach to municipal and land use planning matters. He excels at narrowing issues through research and consensus and devising comprehensive solutions acceptable to all parties within the legal and political framework. A strong written and oral advocate with a background in Theatre Arts, Patrick is outstanding at crafting his clients' positions into compelling and persuasive cases.

Patrick advocates for both public and private sector clients on motions, actions, applications and appeals before the Superior Court of Justice, the Divisional Court, the Court of Appeal and the Supreme Court of Canada.

Patrick is recognized in The Best Lawyers in Canada in the field of Municipal Law and is named a leading lawyer in the area of Property Development by The Canadian Legal Lexpert Directory.





The Planning Landscape:
A Snapshot

Patrick Harrington
Partner
Municipal & Land Use Planning

Wednesday, April 4, 2024
LandPRO Conference 2024

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Review of Significant Changes

Ontario Introduces Bill 162: The Get It Done Act, 2024 (airdberlis.com)

Ontario Advances Changes to Conservation Authorities Act for Safer Development (airdberlis.com)

Ontario's Affordable Homes and Good Jobs Act, 2023 Receives Royal Assent (airdberlis.com)

Ontario Introduces Legislation to Reverse Certain Provincial Planning Decisions (airdberlis.com)

Analyzing Bill 97, the Helping Homebuyers, Protecting Tenants Act, 2023 (airdberlis.com)

- If you want your e-mail added to the A&B circulation list, please let us know.
  - Natalie Proia – nproia@airdberlis.com

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Bills, Bills, Bills

- Bill 276 – *Supporting Recovery and Competitiveness Act, 2021*
- Bill 12 – *Supporting People and Businesses Act, 2021*
- Bill 109 – *More Homes for Everyone Act, 2022*
- Bill 23 – *More Homes Built Faster Act, 2022*
- Bill 97 – *Helping Homebuyers, Protecting Tenants Act, 2023*
- Bill 112 – *Hazel McCallion Act (Peel Dissolution), 2023*
- Bill 134 – *Affordable Homes and Good Jobs Act, 2023*
- Bill 136 – *Greenbelt Statute Law Amendment Act, 2023*
- Bill 150 – *Planning Statute Law Amendment Act, 2023*
- Bill 162 – *Get It Done Act, 2024*

Intention vs. In-Force vs. Implementation

- A&B's Municipal and Land Use Planning Practice Group is frequently called upon to answer questions about how changes impact both existing and proposed development applications.
- Not everything you have heard about is currently in-force.
- Even where a new feature is in-force, the transition associated with the change may exclude your project.
- Transition is often one of the most difficult legal questions. The transition provisions are scattered throughout and not always intuitive.
- Local implementation can differ.

Format of Presentation

- Last year, we went Bill-by-Bill to discuss what was proposed, what was in-force as of last year's conference and what was yet to come.

- This year, we will undertake a similar review, but will organize by different types of applications:

  - **Official Plan Amendments**
  - **Zoning By-law Amendments**
  - **Plans of Subdivision**
  - **Site Plan Approval**
  - **Minor Variances / Consents**
  - **Development Charges**
  - **Conservation Authorities**

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Official Plan Amendments

- **Can You Apply?**
  - Need Council permission to apply to amend the following within a designated *Protected Major Transit Station Area*:
    - (a) minimum number of residents and jobs, collectively, per hectare;
    - (b) uses of land/buildings/structures in the area; and
    - (c) minimum densities requirements in the area.
- **Can You Appeal?**
  - Third-party appeals permitted.
  - No appeals re New Settlement Area or Settlement Area Expansion
    - Unless implementing upper-tier official plan
  - No appeals of Employment Land Conversion
    - New definition of "area of employment"
  - No appeals of Additional Residential Units (ARUs) on a single lot.

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Official Plan Amendments

- **Complete Applications / Refunds**
  - Pre-consultation can be required
  - Checklists are not statutory, but are for the Applicant's benefit
  - Requirements must have a basis in the Official Plan
  - Response re: completeness owed within 30 days of fee payment
  - OLT Motion available if Notice of Incomplete is contested
  - 120-day appeal period runs from day a complete application and required fee was made available to municipality
  - Refund is owed if OPA is paired with a ZBA and a decision is not rendered within 120 days if applications filed after July 1, 2023

Official Plan Amendments

- **Who Comments/Approves?**
  - Conservation Authorities no longer commenting on *Planning Act* applications.
  - Certain upper-tier municipalities are proposed to lose their "planning responsibilities".
- **2023 Wind Backs (x2)**
  - Greenbelt removals reversed.
  - Urban boundaries were expanded via Minister's Decisions…
  - … then reversed (Bill 150)…
  - then re-expanded for some (Bill 162).

Zoning By-law Amendments

- **Can You Apply?**
  - No restriction on applications – but certain appeals are restricted.
  - Settlement area expansion, employment land conversion, inclusionary zoning, ARUs (single-lot), PMTSAs (uses, min/max densities, min/max heights).
- **Complete Applications / Refunds**
  - Same requirements for pre-con and complete applications.
  - Refunds owed if a decision is not made within 90 days, but only for applications filed after July 1, 2023.

Zoning By-law Amendments

- **Who Comments/Approves?**
  - Same as OPAs.
  - Third party appeals are permitted
- **Community Housing and Infrastructure Accelerator (s. 34.1)**
  - Council-led zoning order approved by Minister.
  - Zoning approved by CHIA does not need to conform with any Provincial Plan or Policy (except for the Greenbelt) or a municipal official plan.
  - All subsequent licenses, permits, approvals, permissions, etc. are to be in conformity with CHIA Order.

Draft Plan of Subdivision

- **Who Comments/Approves?**
  - Currently, same authority (lower or upper)
  - May change if relevant upper-tier loses its "planning responsibilities"
- **Who Can Appeal?**
  - Applicant upon expiry of 120 days after *complete application*.
  - Public body that made a submission.
  - "Specified person" that made a submission.
    - Utilities, propane storers, pipelines, railways, telecoms
  - No third-party landowner/ratepayer appeals.

Site Plan Control

- **When Does Site Plan Apply?**
  - Does not apply to residential development of 10 units or less on a parcel of land unless the parcel is
  - May change if relevant upper-tier loses its "planning responsibilities"
- **What Does Site Plan Govern?**
  - Deployment of the use/built form on the parcel, including massing, layout, design, access, walkways, sustainable and accessible elements and general site alteration (including grading).
  - Does not apply to interior or exterior design.
  - Does not apply to "*the appearance of the elements, facilities and works on the land or any adjoining highway… except… impacts [to] matters of health, safety, [etc.]*"

Site Plan Control

- **Complete Application?**
  - Yes, with a 60-day appeal period thereafter. Refunds owed if no decision after 60 days.
  - Decision on SPA required to be delegated to staff.
  - Difficulties may arise as between 60-day SPA appeal and 90-day ZBA appeal.
- **Bill 150 Issue?**
  - *Official Plan Adjustments Act, 2023* (i.e. Schedule 1 to Bill 150)
  - *2. (2) Any decision of a municipality or the Ontario Land Tribunal made under the Planning Act, as well as any by-law passed or public work undertaken by a municipality, on or after the date on which the approval of an official plan or an amendment to an official plan is deemed to have been given under [this Act] must conform with the official plan, as approved or amended, while that approval is in effect.*

Minor Variance / Consents

- **Who Can Appeal?**
  - Applicant within 20 days of decision
    - But be careful re: decision vs. notice of decision.
  - Public body with an interest.
  - "Specified person" with an interest.
    - Utilities, propane storers, pipelines, railways, telecoms
  - No third-party landowner/ratepayer appeals.
    - Though can seek Party Status before the Tribunal.
    - Applies to appeals not scheduled for merits hearings before Oct. 25/22.
- **Complete Application?**
  - Yes for consents. No for minor variances.

Development Charges Act [Bill 134]

- **Affordable Residential Unit, Rental**
  - The rent is no greater than the lesser of:
    - the *income-based affordable rent* for the residential unit set out in the Affordable Residential Units bulletin, as identified by the Minister of Municipal Affairs and Housing; and
    - the average market rent identified for the residential unit set out in the Affordable Residential Units bulletin.
- **Income-Based Affordable Rent**
  - determine the income of a household that, in the Minister's opinion, is at the 60th percentile of gross annual incomes for renter households in the applicable local municipality; and
  - identify the rent that, in the Minister's opinion, is equal to 30 per cent of the income of the household.

Development Charges Act [Bill 134]

- **Affordable Residential Unit, Ownership**
  - The price of the residential unit is no greater than the lesser of:
    - the *income-based affordable purchase price* for the residential unit set out in the Affordable Residential Units bulletin, as identified by the Minister of Municipal Affairs and Housing in accordance with subsection (6); and
    - 90 per cent of the average purchase price identified for the residential unit set out in the Affordable Residential Units bulletin.
- **Income-Based Purchase Price**
  - determine the income of a household that, in the Minister's opinion, is at the 60th percentile of gross annual incomes for households in the applicable local municipality; and
  - identify the purchase price that, in the Minister's opinion, would result in annual accommodation costs equal to 30% of the household's income.

Conservation Authorities Act O. Reg. 41/24 – April 1, 2024

- Revokes 36 individual CA Regulations and replaces with 1 Regulation applicable to all CAs.
- Updates the definition of "watercourse" and adjusts the scope of development restrictions around wetlands (120m down to 30m).
- Certain low-risk activities exempt from permit requirements (seasonal docks; non-habitable structures).
- "conservation of land" and "pollution" tests removed and replaced with "unstable soils and bedrock" resulting in the following: "*the activity is not likely to affect the control of flooding, erosion, dynamic beaches or unstable soil or bedrock*"
- Complete application and internal review process.
- Applicant can refuse CA request for additional studies or technical analyses after an application is deemed complete.

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LANDPRO CONFERENCE 2024

PRESENTATION: **AN ESSENTIAL GUIDE TO THE LAW OF BOUNDARY TREES IN ONTARIO.**

Paula Lombardi,
Partner & Department Head,
Environmental, Municipal &
Planning, Regulatory Law,
Siskinds LLP.

10

<< BACK

PRESENTATION

PAULA LOMBARDI

Partner & Department Head, Environmental, Municipal & Planning, Regulatory Law, Siskinds LLP.

AN ESSENTIAL GUIDE TO THE LAW OF BOUNDARY TREES IN ONTARIO.

Paula Lombardi is a partner at Siskinds LLP and has a diverse regulatory practice providing advice and representation in the areas of environmental, municipal/planning, and administrative law.

Paula has a great deal of experience in providing strategic and practical advice on environmental liabilities and deal structures, contamination issues, handling of hazardous wastes, development applications, litigation matters, environmental compliance, environmental aspects of agreements of purchase and sale and indemnifications, transactional due diligence and compliance, regulatory compliance and assists clients in navigating the permit and approvals process.

Paula successfully defends clients charged with environmental and regulatory offences under federal and provincial legislation, appeals before the Environmental Review Tribunal, and defends and prosecutes environmental litigation claims before the Ontario Court. Paula also regularly represents clients in connection with planning applications, expropriation proceedings and appeals to the Local Planning Appeal Tribunal. Paula has represented clients at all levels of the Ontario Courts on actions, applications, judicial reviews and appeals.

Paula gained a great deal of experience working for an international crossing, and was responsible for all Canadian legal and business matters relating to the import and export of goods, transportation of hazardous materials, remediation of Canadian (and CERCLA) sites, construction of large infrastructure projects, regulatory compliance, NAFTA matters, and preparation of environmental assessments in both the United States' and Canada.

An Essential Guide to the Law of Boundary Trees in Ontario

March 2024

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Paula Lombardi
Siskinds LLP

paula.lombardi@siskinds.com

Tel: 519.660.7878

First Clarification
Private Boundary Trees v. Public Boundary Trees

- Private Boundary Trees
  - Trees that are on the boundary between your and your neighbour's property
- Public Boundary Trees
  - A tree that is on the boundary of your property and public property
- Municipal By-laws govern Private Boundary Trees and their removal, applications, permits, fees and/or inspections
- We are speaking about Private Boundary Trees

Private Boundary Trees v. Public Boundary Trees

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- Public Boundary Trees
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- Municipal By-laws govern Private Boundary Trees and their removal, applications, permits, fees and/or inspections
- Focus is on Private Boundary Trees

Common Questions

Can my neighbour cut down a tree crossing the property line without consent of the other property owner?

- No
- Where a tree truck is growing across a property line it is considered to be shared property
- Tree truck is the key factor
- Provincial Offence to cut don or injure a tree whose trunk is growing across a property line
  - May result in fines and jail time

Common Questions

The majority of the tree trunk is on my property line - can cut it down?

- No
- In circumstances where the majority of a tree trunk is growing on one side of the property it is still a shared tree and common property
- This is the case even if only a few centimeters crosses the property line s and jail time

Common Questions

What is the trunk of the tree?

- Where the base of the tree meets the roots or where the tree sends out its first branches
- Includes everyone from the base/root (which can be underground) to where the tree begins to first branch
- If any portion crosses the property boundary it is a boundary tree = common property

Common Questions

If the base of the tree at ground level is entirely on one side of a property line does it belong to that property owner?

- No
- The Ontario Superior Court has ruled that if any portion of the trunk crosses the property line it is a boundary tree
- It is common property and protected by the *Ontario Forestry Act*
- If any portion of the trunk crosses the property line it is a boundary tree

Common Questions

Can I get a municipal permit to remove a boundary tree?

- No
- Municipal The Ontario Superior Court has ruled that if any portion of the trunk crosses the property line it is a boundary tree
- It is common property and protected by the *Ontario Forestry Act*
- If any portion of the trunk crosses the property line, it is a boundary tree

Forestry Act, R.S.O. 1990, c.F.26

- Boundary Trees are common property of the owners of adjourning lands:
- Section 10 of the *Forestry Act* states:

Boundary trees

10 (1) An owner of land may, with the consent of the owner of adjoining land, plant trees on the boundary between the two lands.

Trees common property

(2) Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands.

Offence

(3) Every person who injures or destroys a tree growing on the boundary between adjoining lands without the consent of the land owners is guilty of an offence under this Act.

Key Matters for Consideration

- Boundary Trees under the *Forestry Act* are the common property of adjoining landowners
- With consent the neighbouring landowner may plant trees along a common property line
- Barring exceptional circumstances you cannot remove a tree commonly owned (Boundary Tree) unilaterally
- Character of the neighbourhood is an important factor in determining whether a boundary tree can be removed

Key Matters for Consideration

- It is an offence under the *Forestry Act* to injure or destroy a tree growing on a boundary without the consent of the all the landowners
  - Offence is prosecuted under the *Provincial Offences Act*

- Strict liability offence (see *R. (ex rel. Scheuermann) v Gross*) meaning that the action itself is sufficient for conviction – being the removal without consent – unless it can be demonstrated that all reasonable care was taken to avoid committing the offence or there was a mistaken belief that was exculpatory

Key Matters for Consideration

- There are no words in the statute at 10(2) that limit the meaning to the "trunk" at ground level – such an interpretation would be arbitrary (see Hartley v. Cunningham)

- Maintenance and pruning of a common tree is not an injurious act (see *Laciak*)

Case Law

Hartley vs. Cunningham et al. 2013 ONSC 2929

- Katherine Hartley wanted to cut down a Norway maple whose trunk grew at the boundary with her neighbours.
- The neighbours were absolutely opposed to the destruction of the tree.
- Without notice to the neighbours a permit to destroy the tree from was obtained from the Municipality on the basis that the tree was dangerous.

Case Law

Hartley vs. Cunningham et al. 2013 ONSC 2929

- Hartley sought a declaration from the Court that she owned the tree and was entitled to cut it down. Hartley lost this case.
- This was surprising as the courts generally at the time allowed neighbours to cut branches or roots (though perhaps not stems) that extend across a property line.
- In this case the trunk of the tree straddled the property boundary, not just the roots or branches.

Case Law

Hartley vs. Cunningham et al. 2013 ONSC 2929

- The Court took a liberal approach in this case to protecting straddle trees (trunk straddles common boundary at ground level).
- The Court found:
  1. The tree was a straddle tree because part of the trunk rose over the property boundary, whether or not the trunk was on both properties at ground level.
  2. The mere presence of the straddle tree gave both neighbours part-ownership, regardless of who originally planted the tree.
  3. Hartley's claim that the tree was dangerous was not supported, finding that any danger could be adequately managed by professional cabling, which the neighbour had offered to pay for.
- Both neighbours owned the tree, and one neighbour could not cut it down without the permission of the other neighbour.

Case Law

***Freedman v. Cooper*, 2015 ONSC 1373 (CanLII)**

- Mature maple tree on the boundary between the Applicant's property and the Respondent's property was damaged in an ice storm. A large branch fell and damaged the roof of a neighbouring property. The Applicant obtained several arborists' reports that the tree was unsafe and obtained a permit under the *City of Toronto Municipal Code* to remove it. The Respondent refused to permit anyone to enter onto his property to cut down the tree. The Applicant applied for an order that the Respondent not interfere with the removal of the tree and that he indemnify her for one-half of her expenses.
- Held, application allowed.

Case Law

***Freedman v. Cooper*, 2015 ONSC 1373 (CanLII)**

- Section 10(3) of the *Forestry Act*, provides that "every person who injures or destroys a tree growing on the boundary between adjoining lands without the consent of the landowners is guilty of an offence under this Act", does not apply to the owners of the boundary tree. The common law of nuisance applied to the circumstances of this case. The tree constituted a patent nuisance which the respondent was obliged to take steps to abate.
- Applicant was of the view that Court approval required to remove the tree because otherwise would be committing an offence under s. 10(3) of the *Forestry Act* even if had a permit for its removal.
- The Court disagreed. Section 10(3) of the *Forestry Act* was interpreted as simply not applying to the owners of the boundary tree in question here and they remained liable to each other in accordance with the common law.

Case Law

***Freedman v. Cooper*, 2015 ONSC 1373 (CanLII)**

- Confirmed that the legislation preserves rather than changes the common law. It is presumed legislator will not change common law without expressing clear intent to do so.
- Common law tort of nuisance applied and imposes responsibility on landowner for the natural state of property conditions if aware or ought to have been aware that the state is resulting in a nuisance to the neighbours (see *Schoeni*).
- Respondent held to indemnify Applicant for half the expense of removal, removal not barred by the *Forestry Act* in this case.
- The case of *Vigna v Toronto* also holds there is no conflict generally between Municipal by-laws on tree removal and the *Forestry Act*. A Municipal By-law does not prevent the operation of the *Forestry Act.*
- Note that in this case is the tree caused damaged and was confirmed unsafe by the arborist reports submitted.

Case Law

***R. (ex rel. Scheuermann) v. Gross*, 2015 ONCJ 254 (CanLII)**

- Private information bringing charges under the *Forestry Act* claiming that an individual injured or destroyed and boundary tree without the consent of the adjoining landowner.
- Offence under Part III the *Provincial Offences Act* - and is a strict liability offence.
- The Court noted at paragraph 70:

  "[70] . . . Very few regulatory offenses require the Prosecution to prove wrongful intention or knowledge in addition to the prohibited conduct"

Case Law

***R. (ex rel. Scheuermann) v. Gross*, 2015 ONCJ 254 (CanLII)**

- No consent obtained for the removal of the tree, but a permit was obtained from the Municipality to remove the tree following it being assessed as hazardous.
- Argued that if tree was not removed property owner would be liable to any accident due to its collapse and that his property insurance would not cover any damage on the basis that the Municipality identified the tree as being hazardous.

Case Law

R. (ex rel. Scheuermann) v. Gross, 2015 ONCJ 254 (CanLII)

- Prosecution argued that there is a positive requirement in the *Forestry Act* not to destroy a tree, healthy, good, damaged or dead if it is a boundary tree.
- Cannot injure or destroy or do anything to a boundary tree without the consent of both property owners.
- The Court, in its reasons, was critical of why the defendant waited over three years from receiving information the tree was hazardous to cutting it down, suggesting that if it truly was a danger a reasonable person would not have waited that long.

Case Law

R. (ex rel. Scheuermann) v. Gross, 2015 ONCJ 254 (CanLII)

- The Court found that the defendant has not satisfied the court on balance that they exercised all reasonable care to avoid committing the offence, or that they had an honest but mistaken belief in facts that would have rendered the act innocent or been exculpatory.
- Convicted of the strict liability offence under 10(3) of the *Forestry Act* for cutting down the tree without consent.
- The Court stated at paragraph 101:

Based on my reasons herein, **I further find the defendant has not satisfied the court on a balance of probabilities either that he exercised all reasonable care so as to avoid committing the offence, or that he had an honest but mistaken belief in facts which, if true, would have rendered the act innocent and could have exculpated him.**

Case Law

Gallant v Dugard, [2016] O.J. No. 5998

- Few cases considering the issue of nuisance as it relates to natural-growing trees. There is little caselaw dealing with naturally-growing things, such as fruit or nuts, falling from trees. The bulk of the cases relate to falling trees damaging property or where roots of trees have damaged things like drains or swimming pools:

  > See *Freedman v. Cooper* (2015), 2015 ONSC 1373 (CanLII), 124 O.R. (3d) 793 (S.C.J.); *Doucette v. Parent*, [1996] O.J. No. 3493 (Gen. Div.); *Bottoni v. Henderson* (1978), 1978 CanLII 1278 (ON SC), 21 O.R. (2d) 369 (H.C.J.); *Yates v. Fedirchuk*, 2011 ONSC 5549 (CanLII), [2011] O.J. No. 4718 (S.C.J.); *Hayes v. Davis*, [1991] B.C.J. No. 635 (C.A.); and *Wallace v. Joughin*, 2014 BCPC 73.

- Most successful nuisance claims stem from allegations of damaged property from roots or falling trees. As it relates to boundary trees the test to meet the threshold of a nuisance to justify the removal of the tree is high.

Case Law

Gallant v Dugard, [2016] O.J. No. 5998

- The tree located on the boundary dropped nuts onto the roof of the applicant's house, which they claimed often woke them up at night
- Order from the Court requested requiring the Respondents to execute the form required by the Municipality for the removal of the tree and mandatory injunction requiring the removal of the tree. Or alliteratively, an order permitting the Applicant to remove the tree and requiring the Respondents to contribute one-half of the cost.

Case Law

***Gallant v Dugard*, [2016] O.J. No. 5998**

- Comments from the Court:
  - The Applicant chose to purchase a house in a district that was heavily populated by trees – character of the neighbourhood is important and will assist in justifying non-removal of the tree
  - The goal of the community was to preserve the trees in this historic district.
- The Application for removal of the tree was denied on the basis that it was not unreasonable for Applicant to tolerate the degree of interference the falling nuts represent given the all the context of the case.

Case Law

***Allen v MacDougall*, 2019 ONSC 1939 (CanLII)**

- Owners of neighbouring properties shared a large tree that straddles the boundary line between their two properties.
- The tree was a mature maple, some 104 cm in diameter at the trunk, and is estimated to be 50 or 60 years old. It is 2/3 on one property (Applicants') and 1/3 on the other (Respondents') property.
- Court confirmed that under the *Forestry Act* "Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands." The large maple in this case therefore belonged to both property owners.
- The Applicants wanted to remove the tree as part of their home renovation and expansion. The Application to cut down the tree was dismissed.

Case Law

***Allen v MacDougall*, 2019 ONSC 1939 (CanLII)**

- The tree at issue:
  - had not caused damage to the applicants' house or to any other structure or amenity;
  - did not interfere with their enjoyment of the property;
  - pre-dated the arrival of the current property owners and was one of the defining characteristics of the neighbouring properties;
  - was not a nuisance simply because it prevented the building of the extension in its proposed form;

Case Law

***Allen v MacDougall*, 2019 ONSC 1939 (CanLII)**

- There was no indication that the Applicants had explored any alternative design for the proposed expansion.
- Failed to demonstrate that there was no reasonable alternative to removing the tree.
- The Court stated that "Contemporary environmental considerations have emphasized the increased importance of trees. While this is not an inflexible rule, the tendency of courts today is that trees are not lightly ordered removed on the basis of being a nuisance."
  - See Yates v. Fedirchuk, [2011] O.J. No. 4718, 2011 ONSC 5549 (S.C.J.), at para. 59

Reminder
Key Matters for Consideration

- Boundary Trees under the *Forestry Act* are the common property of adjoining landowners
- With consent the neighbouring landowner may plant trees along a common property line
- Barring exceptional circumstances, you cannot remove a tree commonly owned (Boundary Tree) unilaterally
- Character of the neighbourhood is an important factor in determining whether a boundary tree can be removed
- Public boundary trees are different from private boundary trees

Offence

Section 10(3) *Forestry Act* - Tree Removal Offences

- On conviction a person found guilty of such an offence is liable to a fine of not more than $20,000 or to imprisonment for a term of not more than three months, or to both.

- In addition, section 135(1) of the *Municipal Act, 2001* provides that municipalities may prohibit or regulate the injuring or destruction of trees.

Questions?

Paula Lombardi
paula.lombardi@siskinds.com
Tel: 519.660.7878
Fax: 519.660.7879

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LANDPRO CONFERENCE 2024

PRESENTATION:

CLEARING THE MUDDIED WATER - CHALLENGES AROUND BUILDING SERVICING AND METERING FOR MIXED-USE BUILDINGS.

Bram Atlin,
Principal, Smith and Andersen Consulting Engineering.
Ralph Simone,
President, Provident Energy Management Inc.

11

<< BACK

PRESENTATION

BRAM ATLIN
Principal, Smith and Andersen
Consulting Engineering

CLEARING THE MUDDIED WATER - CHALLENGES AROUND BUILDING SERVICING AND METERING FOR MIXED-USE BUILDINGS.

Master of multi-unit residential.

Since first joining Smith and Andersen more than 12 years ago, Bram has designed and managed the delivery of numerous projects, taking on increasingly complex roles. His roots with Smith + Andersen run deep - he worked with the firm as a co-op student while completing his undergraduate degree at the University of Waterloo and joined S+A the same year he graduated. Bram leads the multi-unit residential team based out of Toronto, providing innovative solutions on some of the GTA's most impressive high rise developments. Bram has designed and managed a wide variety of projects across the country, including high-rise residential, institutional, commercial office, data centres and community centres, and continues to grow his extensive technical experience. preparation of environmental assessments in both the United States' and Canada.

PRESENTATION

RALPH SIMONE
President, Provident Energy Management Inc.

CLEARING THE MUDDIED WATER - CHALLENGES AROUND BUILDING SERVICING AND METERING FOR MIXED-USE BUILDINGS.

Ralph Simone has enjoyed an extensive 30-year career in energy services. After completing his business studies, Ralph started his career as a financial analyst before assuming leadership roles at a prominent utility and an international HVAC services provider. In 2019, Ralph joined Provident where he mentored under its retiring founder before assuming the role of President in 2020. Since then, Provident's submetering business has doubled in size with over 1 million submetering bills expected to be delivered in 2024.

Ralph likes to keep things simple in his approach to balancing client (developer/landlord) and customer (bill payer) submetering objectives. As a key custodian of client brands, Ralph is a strong proponent of "Resident Town Halls", during which Provident's leadership team explains submetering services directly to bill payers while giving them a forum to ask questions. During those forums, Provident's objective is to communicate its simplest purpose: to allocate bulk utility bills between bill payers and condo boards/landlords in an accurate and efficient manner, fostering a pay-per-use system that drives energy conservation.

However, current market trends are making it more difficult for submetering providers to keep things simple. These trends include a growth in multi-use properties, increased regulatory oversight, and rising energy costs. During his presentation, Ralph will discuss these market trends, as well as design considerations to help developers and landlords strengthen their relationship with future residents.

CLEARING THE MUDDIED WATER

Challenges around Building Servicing and Metering for Mixed-Use Buildings

LANDPRO CONFERENCE Smith + Andersen Provident

THE TEAM

BRAM ATLIN

Principal, Smith + Andersen

- 15+ years of industry experience
- Leads the multi-unit residential team based out of Toronto
- Designed and managed the high-rise residential, institutional, commercial office, data centres, and recreation centres across Canada
- Our vast project portfolios includes some of the largest, tallest and more complex ICI and residential projects in the country

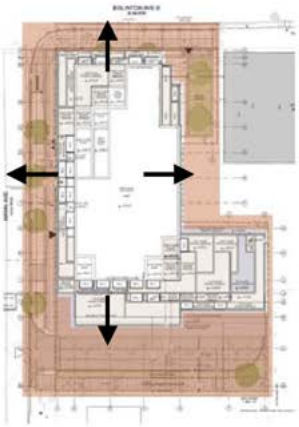
RALPH SIMONE

President, Provident Energy Management Inc.

- 30+ years of energy service experience
- Has led Provident's submetering business to double in size, with over 1 million bills to be issued in 2024
- Keeps things simple in his approach to balancing client (developer/landlord/condo corporations) and customer (bill payer) submetering objectives
- Background includes business studies, financial analysis, and utility and HVAC services knowledge

WHY ARE WE HERE

DISCONNECT BETWEEN CIVIL, MECHANICAL AND OWNER'S PREFERENCE



CIVIL

- Civil generally concerns itself with what is happening **outside of the building**
- How do public services (Wet Utilities) connect to buildings (Sanitary, Storm, Fire, Domestic, Ground Water)
- Private 'Dry' Utilities
  - Other utilities need to service the buildings as well. These include Hydro (electricity), Communications and Gas
  - These are generally negotiated and coordinated directly

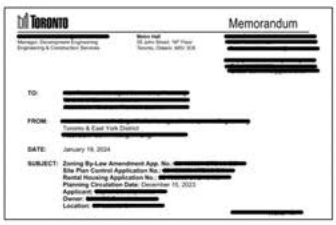
MECHANICAL

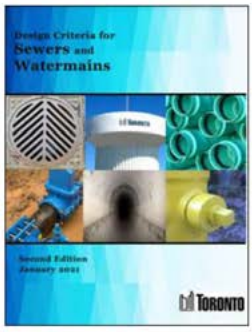
- Mechanical generally concerns itself with what is happening **inside the building**
- How do all areas get connected (plumbing fixtures, roof drains, fire protection system) using these services

Provident

CIVIL AND MUNICIPAL REQUIREMENTS

- Municipal guidelines are available for the 'wet services' in each jurisdiction
- The 'design team' receives most of the feedback through ESC and other city comments through municipal approvals and the entitlement process
- Cost and technical serviceability
- Around 2016 (through ECS comments) the City of Toronto has required that number of public services be based on 'building form'





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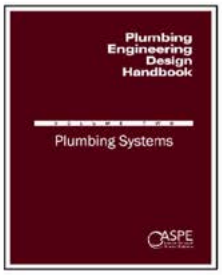
MECHANICAL

GOVERNED BY BUILDING CODES AND STANDARDS

- Building Codes such as IE Ontario Building Code and other adopted and widely recognized standards such as CSA, NFPA, ASHRAE, etc.
- Cost, operations, shared facility agreements
- Other than very specific items related to life safety, mechanical and plumbing codes and standards do not prescribe the way a building is serviced from the city infrastructure



ASHRAE

CSA STANDARDS

Provident

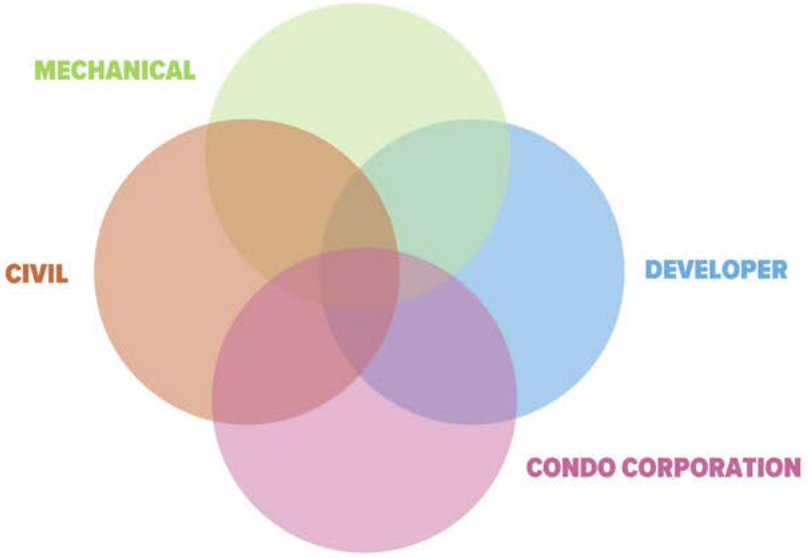
OWNER(S) – DEVELOPER AND FUTURE CONDO COORDINATION

GOVERNED BY TARION AND SHARED FACILITY AGREEMENTS

TARION

Provident

WHAT IS THE DISCREPANCY



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SUB – METERING PURPOSE

+ To allocate bulk utility bills between unit occupants and building owners in an accurate and efficient manner, fostering a pay-per-use system that drives energy conservation

Provident

SUBMETERING PRIMARY BENEFIT #2: ENERGY CONSERVATION

- Because bill recipients pay for what they consume, they have a financial incentive to change consumption habits
- a 2016 Navigant study found that by introducing sub-metering in the Ontario multi-residential sector, the average electricity dropped by approximately 40%

SUBMETERING PRIMARY BENEFIT #3: BETTER SERVICE AT A LOWER COST

- Submetering providers are not monopolies, we earn our business
- With contract retention on the line, contracting counterparties compare customer experience and lower fees
- The last published Power Advisory Report in 2019 revealed a $9+ fee savings per month per bill payer when compared to regulated fees charged by utilities

EXAMPLES

**SINGLE TOWER –
ALL RESIDENTIAL**

**TOWER AND PODIUM –
ALL RESIDENTIAL**

**MULTIPLE TOWER AND PODIUM –
ALL RESIDENTIAL AND ONE CONDO CORP**

Condo Non-Residential Rental

EXAMPLES

**TOWER WITH DIFFERENT USES –
RENTAL AND REPLACEMENT CONDO**

**PODIUM AND TOWER WITH DIFFERENT
USES – COMMERCIAL AND CONDO**

**TOWERS AND PODIUMS WITH TWO CONDO
CORPS, COMMERCIAL AND RETAIL**

Condo Non-Residential Rental

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LANDPRO CONFERENCE 2024

PANEL:
LEGAL PANEL

Harry Herskowitz
Senior Partner, DelZotto, Zorzi LLP.
PANEL MODERATOR.
Leor Margulies,
Partner, Robins Appleby LLP.
Sarah Turney,
Partner, Fasken.
Doug Bourassa,
Partner, Torkin Manes LLP.
Craig Garbe,
Partner, Bennett Jones LLP.
Patrick G. Duffy,
Partner, Stikeman Elliott LLP.

12

<< BACK

PRESENTATION

HARRY HERSKOWITZ

Senior Partner, DelZotto, Zorzi LLP.

PANEL MODERATOR

Harry Herskowitz is a graduate of Osgoode Hall Law School and was called to the Bar of Ontario in 1979. Harry is qualified as an arbitrator/mediator, having completed a course in arbitration/mediation at the University of Toronto's School of Continuing Studies in 1994. Harry's practice is devoted to real estate, mortgage lending and commercial transactions, with emphasis on land development and condominium law. Harry's practice also includes arbitrating disputes involving commercial real estate transactions and condominium issues, and providing legal opinions on various aspects of real property law. Harry has represented numerous subdivision and condominium developers throughout Ontario, from simple stand-alone residential projects to complex mixed-use, multi phased and leasehold condominium projects. Harry is qualified as an expert witness before the Ontario Superior Court of Justice, and frequently provides opinions on real estate conveyancing and condominium issues.

LEGAL PANEL

LEOR MARGULIES

Partner, Robins Appleby LLP.

A STEP-BY-STEP GUIDE TO TARION WARRANTY CORPORATION'S UNAVOIDABLE DELAY PROCESS, AND HOW TO DEAL WITH MULTIPLE UNAVOIDABLE DELAY EVENTS.

Leor Margulies has been a leader in the construction lending and development fields for over 40 years. He was awarded the 2021 Ontario Bar Association Award of Excellence in Real Estate.

As head of the Commercial Real Estate and Development Group, Leor heads up a team that represents financial institutions such as BMO, RBC, Laurentian Bank, Meridian Credit Union, MarshallZehr Group Inc. and Atrium Mortgage Investment Corporation on all forms of commercial and construction real estate lending. His lending team has structured and closed various complex, syndicated, and A/B structured loans that have helped developers build and sell numerous commercial and residential projects.

He also leads a group that specializes in land and housing development representing both established and newer real estate developers and builders, such as HIP Development Group, the Sorbara Group, Sean Mason Homes, Adi Development Group, Aspen Ridge Homes and others, assisting them with Tarion related matters, project launches, construction agreements, and structuring real estate ownership vehicles. Within the housing development practice, he leads the condominium group, assisting in the construction, marketing, and sales of a range of condominiums, from common elements condominium projects to multi-residential/commercial ones and mixed use projects.

Leor and his condominium group have helped structure and sell many major multi-phase and mixed use condominium projects such as Elad's Emerald City, Great Gulf's 76-storey iconic One Bloor, and the Bazis' twin green towers of Emerald Park.

He led the Robins Appleby team 30 years ago in the completion of the transfers of the bulk of the developed and undeveloped portlands owned by the Toronto Port Authority (formerly the Toronto Harbour Commissioners) to TEDCO. This was a city agency responsible for managing and developing the Toronto port area for over 25 years until full control was ceded to Waterfront Toronto and CreateTO. Leor and Robins Appleby represented TEDCO during that time period, on the many development initiatives of the Portlands, including the construction and leasing of the Corus building and the lease arrangements on the Pinewood Studios.

He is also an ardent supporter of the residential construction industry, sitting on the BILD Board and Executive since 1999. He has served on numerous BILD/OHBA committees, many with strong interactions with Tarion and HCRA where he has developed excellent working relationships. He continues to be an ardent advocate for the residential land development and house construction industries in the GTA

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LANDPRO CONFERENCE 2024

TIPS ON NAVIGATING THE TARION UNAVOIDABLE DELAY PROCESS

Presented By:

Leor Margulies

April 3, 2024

Robins Appleby LLP | 2600-120 Adelaide St. W., Toronto, ON M5H 1T1 | T. 416.868.1080 | F. 416.868.0306
www.robapp.com
@robinsappleby

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What I hope to Talk About in the Next 10 Minutes

1. What is Section 5 of the HCRA Addendum designed for?
2. What is Section 5 of the HCRA Addendum not designed for?
3. What events constitute an Unavoidable Delay?
4. What events do not constitute Unavoidable Delays?

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(cont.)

5. What to know about the First Notice.

6. What to know about the Second Notice.

7. Multiple Unavoidable Delays

8. Practical tips.

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1. Section 5. What is it Designed For?

- An event with a clear beginning
- An event that has clear direct impacts
- Definition of “Unavoidable Delay”:
  - “An event which delays Occupancy which is ……”
- Definition of “Unavoidable Delay Period”:
  - Starts on issuance of First Notice / Concludes on date Unavoidable Delay ends

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2. Section 5. What is it Not Designed for?

- Pandemoniums or events that don't have a clear beginning
- Events which are very difficult to determine the impact or which have a continuing impact
- Event that does not have a clear end or a definable remobilization period
- Multiple events that overlap and make it impossible to determine impacts of the Unavoidable Delays

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3. What Events Constitute An Unavoidable Delay?

- Definition is very restrictive
- Includes both the event and its direct impact

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3. What Events Constitute An Unavoidable Delay?(cont.)

- Only events covered are below:
  - Strikes
  - Explosions
  - Fire
  - Flood
  - Act of God
  - Civil insurrection
  - Act of war
  - Act of terrorism
  - pandemic

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4. What Events Do Not Constitute Unavoidable Delays?

- Labour disputes that do not constitute strikes
- Events that listed but are within the control of or due to fault of the builder:
  - What about negligent trades?
- Unforeseen labour / supply shortages that are industry wide
- Governmental or utility delays that could not be foreseen even in this over-regulated world

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5. What to Know about the First Notice

When to Send?

- Start of the event and determination of impact
- 20 days starts from combination of the two

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6. What to Know About the Second Notice

- Must send within 20 days of knowing of the end of the Unavoidable Delay
- Can’t send too early
- Can’t send too late
- Difficult of knowing when it has or will end
- 20 days of knowing or ought to have known of the end of the Unavoidable Delay the Notice must be sent
- Can it be sent prospectively

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6. What to Know about the Second Notice (cont.)

- Tarion position is 20 days runs from end of Unavoidable Delay, subject to exceptional circumstances

- Requirements must be strictly met

- Relief from requirement for end date of Unavoidable Delay
  - 5000933 Ontario Inc. v. Mahmood et al

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7. Multiple Unavoidable Delays

- A real quagmire which has not been resolved
- See April 2022 Tarion Q&A on Strikes
- System of artificial creation of provisional dates creates confusion
- Need 1 combined end date and not a series of provisional ones

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8. Practical Tips

(1) Adhere as best you can to the strict wording of Section 5

(2) Maintain constant communication with Purchasers right up to the new Critical Dates – it may help mistakes

(3) Ensure trades are qualified and have reasonable supervision

(4) When faced with warrantable delay closing claims for Unavoidable Delay issues, consider negotiating a non-chargeability result

(5) Support BILD and OHBA re: Ongoing Revisions to Addendum especially Unavoidable Delay

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Leor Margulies
Partner
120 Adelaide Street West
Suite 2600
Toronto, Ontario M5H 1T1
T: (416) 360-3372
E: lmargulies@robapp.com

LANDPRO CONFERENCE 2024

TIPS ON NAVIGATING THE TARION UNAVOIDABLE DELAY PROCESS AND DEALING WITH MULTIPLE UNAVOIDABLE DELAY EVENTS

By: LEOR MARGULIES
Real Estate Group Co-Head
Robins Appleby LLP

INDEX

INTRODUCTION

The COVID-19 pandemic, combined with strikes and other unavoidable delay events over the last four years has put the Unavoidable Delay provisions in the Addendum under a microscope and stretched the efforts of developers and lawyers to come to grip with a process that was never equipped for either a pandemic of multiple events. This paper is not intended to provide a full explanation of the Unavoidable Delay process. It is meant to highlight some of the experiences of the writer in navigating the process and hopefully leave the attendees of the LandPro Conference with some guidance when faced with similar situations to the writer. This paper is not intended to be relied upon for legal advice. Any legal advice should be obtained from your own solicitor (or by retaining the writer!).

1. <u>The Basic Premise of Section 5 and Tarion's Position</u>

Section 5 of the Addendum is a very short section relating to Unavoidable Delays. Tarion, in interpreting the section on applications from purchasers who are claiming delayed closing compensation, takes a very strict view of the requirements and rarely allows any deviation or flexibility to the wording in the sections.

More importantly, the purchaser when filing a delay closing compensation claim is not really required to present their case as to why they are entitled to compensation as a result of a failure to meet the requirements under Section 5 of the Addendum. The purchaser merely has to make the claim (without any basis or evidence) and then it is up to the developer to fully substantiate that it has complied in all respects with the requirements under Section 5. Tarion makes its own full investigation and probably similar to other conciliations, acts both as an adviser of the purchaser in making the assessment of the facts, and then renders its decision. It is like you are presumed guilty until you establish otherwise.

To be fair, however, Tarion does not render its decision lightly in these situations, and based on the writer's experience, offers the developer opportunities to address concerns or questions that it has and provide explanations to the initial review completed by the examiner. I have found that Tarion is very fair in giving the developer the opportunity to address questions and come back with further evidence or address specific interpretations that were raised in the course of its examination. At the end of the day, however, Tarion generally renders its decision based on a very strict interpretation of the provisions. Therefore, strict adherence to the wording of this section, as difficult as it may be when dealing either with the pandemic or multiple Unavoidable Delay Events, is the watchword.

2. First Notice

The First Notice under Section 5(b) which starts the process of the Unavoidable Delay, has generally not been an issue in the conciliations that I have been involved in or the cases that I have reviewed. A couple of things to keep in mind:

(a) The First Notice must go out within twenty (20) days of the Vendor knowing or ought to reasonably have known that an Unavoidable Delay has commenced. Many people think that the 20 days starts ticking when the actual event occurs. i.e. a strike, a flood, or the start of a pandemic. That is not the case. There are 2 components to an Unavoidable Delay Event. One is the actual event which has to qualify as an Unavoidable Delay under the Addendum definition. Secondly, there has to be an impact or a real potential impact on the home or condominium being built by the Unavoidable Delay. For instance, let's say the framers go on strike and as a result, the bricklayers all decided to go to Italy for the summer. However, at the time the framers go on strike, framing may have finished on your project, but you are unaware of the potential loss of bricklayers. When it becomes apparent that there is going to be a delay in your project because of the bricklayers leaving

due to the framing strike, you should have twenty (20) days from when that determination has been made to send out the notice, not when the strike arose. Similarly, for the pandemic, it was not on March 11th when the WHO announced that there was a pandemic that starts the Unavoidable Delay Period for everyone. It was only when a builder could reasonably determine that there was an impact on the completion of the home or condominium as a result of the pandemic that the 20 day clock should start ticking to notify purchasers.

It should be noted that even if the notice was sent out 2 months after the pandemic was announced, the start date of the Unavoidable Delay Period would be the date that the First Notice is sent.

3. Second Notice

The Second Notice ending the Unavoidable Delay Event under Section 5(c) is the more problematic one. The first problem is determining the total extent of the delay which includes the actual event. i.e. a strike of 6 weeks or a flood of 2 days plus the remobilization period, which is the impact of the event on the completion schedule of the home or condominium unit. That is always the most challenging. It is always the best guess of the developer as to when the remobilization will be completed so that the Unavoidable Delay Event ends and a calculation can be made of the total Unavoidable Delay.

4. When Does the 20 Days Start Running to End to Send the Second Notice?

Section 5(b) talks about sending the Second Notice within 20 days of when the Vendor knew or ought to have known that the Unavoidable Delay had ended. How does he know when it ends until it has ended? In most cases, it is very difficult to determine when it has ended until it has or nearly ended or normalized. Tarion's position is that unless there are

exceptional circumstances, the 20 day clock starts running from the day that the Unavoidable Delay Period ends. For instance, if you decide that it ended on July 25, 2023, you have 20 days thereafter to send out your notice. I was involved in a multiple Unavoidable Delay Event situation which was a nightmare involving a strike, a flood and COVID-19. Calculating all of the impacts on different parts of the building was a huge logistical challenge. In the end, the Second Notice was sent out 21 days after date that we fixed as the end of the Unavoidable Delay Period. Initially, Tarion took the position that the vendor was out of time, but when I explained to them the difficulties in determining the impacts of all of the delays and coupled with evidence that an informal notice was sent to the purchasers on July 29, 2023, five (5) days after the end of the Unavoidable Delay Period, advising purchasers that the end was near and actually even giving them proposed firm occupancy dates, Tarion ruled that 21 days following the end of the Unavoidable Delay Period was appropriate under the circumstances. My view is that there should be no hard and fast rule. The 20 days from the end of the Unavoidable Delay Period is strictly a guideline and every case should be looked at separately. The 20 days starts when the vendor knew or ought to have known that the event had ended. It will often only be determined retrospectively and not prospectively. This, however, is not Tarion's general position.

5. Impact of the Pandemic

How do you determine a remobilization period for the pandemic? We know when it starts. i.e. when WHO or some other government agency declares a pandemic emergency. In some case, the emergencies can subside and things get normalized. Then we get a second wave like Omicron. This could constitute a new Unavoidable Delay for builders who may have reinstated their critical dates and then suffered a second time with the rise of Omicron. I had a situation like that and ended up sending out First Notices twice, the

first one with March 11, 2020 pandemic and the second with the Omicron event which started in December 2020. The second wave was, in my view, a distinct situation from the first wave in our view.

The problem really is how do you know when the pandemic impact has ended? There is no remobilization. There is only an assessment of when the impacts are over or nearly over and the builder is comfortable that he can now predict his construction schedule based on existing supply chains and labour supply. And remember, you must send the Second Notice 20 days after the date you determine the pandemic impact has concluded.

Many builders could not really get comfortable with the supply chain timing and simply fixed their dates anywhere from 30-90 days prior to closing. Many of those fixing them initially at 90 days, later changed them to 60 or 30 days afterwards because even at the last minute, the supply chain impacted their completion of the units such as kitchens or appliances, etc.

As a result, many Second Notices relating to the pandemic are sent out years after the First Notice. How do you know when the 20 days starts? i.e. When is the pandemic's impact over? With all due respect, the current definition doesn't really work and a new one is required.

In any event, for all delayed closing compensation claims and in particular for COVID-19 related claims, vendors will need to have detailed records of all the impacts over the time period during which they are claiming a delay. It will not be enough to simply say there were municipal delays or supply chain issues. You will need specific direct examples of where the supply chain was severely impacted compared to the normal situation. This will be a very challenging process for any builder involved in a delayed closing compensation claim where COVID-19 is the Unavoidable Delay Event.

6. Ashcroft Homes v. Tarion Warranty Corporation 2023 ONSC 6527 – What Not To Do

In this case, there was a fire in the condominium and ultimately, the total delay was 869 days. Numerous letters went out changing potential firm occupancy dates but in the end, the result was 2 ½ years of delays.

The Second Notice that went out unfortunately, did not specify an end to the date when the Unavoidable Delay Period had ended which is specifically required under Section 5(b). Moreover, the Second Notice specifically said that the "Unavoidable Delay is ongoing". So the letter did not even end the Unavoidable Delay Period. Interestingly, the fact that the end date of the Unavoidable Delay was not included was not necessarily fatal, even though it is required under the Addendum. There is reference to a case called "5000933 Ontario Inc. v. Mahmood et al, 2022 ONSC 4726 Affirmed on Appeal 2023 ONSCA 58". The Court of Appeal in that case found that even though there was no specific end date, the purchaser, based on the facts that were given, could easily calculate when the Unavoidable Delay Period had ended so that they could then determine whether or not they had a delayed closing compensation claim. The Court of Appeal has, therefore, ruled that you don't necessarily have to put in a specific end date, but you have to provide enough information to make it straight-forward for the purchaser to calculate that end date. Clearly, the better practice is to put in an end date. In the Ashcroft case, there was no ability for the purchaser to calculate the end date of the fire event, based on the information in the notice and in any event, the notice said that the Unavoidable Delay was still ongoing.

This case was also interesting because Tarion had taken the position that the vendor had not provided sufficient evidence to show that the delay was not caused directly by the event without contribution by the applicant. The vendor had completed the Tarion Statutory Declaration form by saying that "the aggregate period of delay caused by the impacts of the fire was 869 days and further that the delay was caused by the pandemic".

The vendor's position was that it had completed the form and did not have to do anything further. Tarion pointed out that the form contemplated attaching "evidence" in support of impacts set out above as set out in Section 4 of the form. The Court held that it is not sufficient just to fill out the form but you have to provide sufficient backup. Tarion will be fastidious in looking at the material backup to determine if there is valid reasons that are supporting the delays as noted earlier.

7. Multiple Unavoidable Delay Events

This is one of the most challenging situations that lawyers and developers faced this go around because of the impact of strikes and the pandemic. I had a file that involved a third Unavoidable Delay, being a flood that occurred 1 month before closing in a mid-rise condominium that started on the 18th floor and caused significant damage prior to occupancy. Then the strike occurred 2 months later and COVID-19 supply issues impacted on the ability to rebuild. Talk about bad things coming in 3s!

The current Addendum does not really work for multiple events. Tarion was forced to follow the strict letter of Section 5 and treat each one separately, having a beginning and a hypothetical end, irrespective that the end of some Unavoidable Delays would be totally artificial and difficult to separate from the other concurrent Unavoidable Delay Events. Nonetheless, you have to send out a First Notice at the start of each one and a Second Notice at the end of each one within 20 days of the end of the Unavoidable Delay Event. Based on some conciliations that I have been involved with as a result of multiple notices, certain lessons were learned:

(a) You cannot send a Second Notice out for the end of an Unavoidable Delay Event that occurred first when all Unavoidable Delays have concluded. You have to do it within twenty (20) days of the artificial date that you will come up with as to when

the first Unavoidable Delay Event ended. You may not really know what the date is and you have to come up with some artificial date because of the other impacts, but if you wait until the last date of all the Unavoidable Delay Events and then provide a provisional critical firm occupancy date in the past, it will be rejected. Each notice still has to provide for a provisional firm occupancy date ten (10) days after the notice is given prospectively and long before the other Unavoidable Delay impacts are really known.

(b) Unavoidable Delays can overlap and each Unavoidable Delay has its own start date. Delay periods can run on top of each other. Tarion has made it clear that you pick the number of days that you need from the maximum but don't have to use the total. That is clear from the conciliation decisions that I have seen. This is a reasonable way of interpreting Section 5, although some lawyers have taken the position that you simply add the total number of days of the Unavoidable Delay Period and have no flexibility of reducing them based on the strict wording. If there is an overlap of 2 Unavoidable Delays, you cannot double count the delays. The second Unavoidable Delay Event delay period can only be added from the new provisional date of the first Unavoidable Delay. All of this is totally artificial and tortuous. Addendum revisions to this process are necessary.

(c) For an Unavoidable Delay Event when you have multiple events, the Second Notice for the first Unavoidable Delay has to go out within twenty (20) days of the end of that date and you have to pick critical dates that are prospective.

(d) Example:

Event 1: Start Date	Jan. 1, 2022	Event 2: Start Date:	March 2, 2022
End Date	March 31, 2022	End Date:	June 1, 2022
Total Delay	90 days	Total Delay:	91 days
Original Firm Occupancy Date:	Feb. 2, 2022	Revised Existing Firm Occ. Date:	June2/22 (based on Event 1)
New Firm Occupancy Date:	June 2, 2022	New Firm Occ. Date:	Sept 1/22

NOTE: You must prove that the overlapping period of delay for both Events (March 1-31, 2022) separately delayed the Firm Occupancy Date, if you want to use the full Unavoidable Delay period for both events.

8. Final Tips

(a) Maintaining substantial evidence and backup for the impact of the delays as this is critical if challenged by a delayed closing compensation claim;

(b) Adhere to the deadlines stipulated in Section 5 and the requirements. There may be some latitude, but very little. According to Tarion, in most cases, the Second Notice should go out no later than twenty (20) days following the end of the Unavoidable Delay Period;

(c) If the vendor has been in constant contact with the purchasers to keep them apprised and in particular, when the Unavoidable Delays are ending, Tarion will take that into consideration when evaluating exceptional circumstances that should benefit the vendor;

(d) Remember that the Unavoidable Delay starts when the event occurs and its impact is known or reasonably could be expected to be known but the Unavoidable Dela Period. starts when the First Notice is sent. The two are not necessarily

concurrent. Certainly, vendors should be conservative in that evaluation, but they shouldn't jump the minute that an event occurs and there is no reasonable expectation that it would impact on the project. On the other hand, if you send the First Notice early and then is withdrawn because there is no impact by the Unavoidable Delay Event, the original Critical Dates continue;

(e) Be extra careful when dealing with multiple events. The start dates can overlap and the total number of days can overlap. Always set out dates prospectively and not retrospectively. Send out Second Notices within twenty (20) days of the end of each Unavoidable Delay Event with the provisional Firm Occupancy Date no earlier than ten (10) days after the Second Notice is sent out; and

(f) Where the delays are very extensive, as in COVID-19 they will be, expect Tarion to be extremely vigilant in looking at the basis for the length of the delay, whether it is a fire, a flood, or pandemic. Keeping purchasers advised regularly of the status of construction will help put the builder in a better light when delayed closing compensation claims arise.

O. & O.E.

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Condominium Form
(Tentative Occupancy Date)

Property _____

Statement of Critical Dates

Delayed Occupancy Warranty

This Statement of Critical Dates forms part of the Addendum to which it is attached, which in turn forms part of the agreement of purchase and sale between the Vendor and the Purchaser relating to the Property. **The Vendor must complete all blanks set out below. Both the Vendor and Purchaser must sign this page.**

NOTE TO HOME BUYERS: ***Home buyers are encouraged to refer to the Home Construction Regulatory Authority's website www.hcraontario.ca to confirm a vendor's licence status prior to purchase as well as to review advice about buying a new home. Please visit Tarion's website: www.tarion.com for important information about all of Tarion's warranties including the Delayed Occupancy Warranty, the Pre-Delivery Inspection and other matters of interest to new home buyers. The Warranty Information Sheet, which accompanies your purchase agreement and has important information, is strongly recommended as essential reading for all home buyers. The website features a calculator which will assist you in confirming the various Critical Dates related to the occupancy of your home.***

VENDOR _____
Full Name(s)

PURCHASER _____
Full Name(s)

1. Critical Dates

The **First Tentative Occupancy Date**, which is the date that the Vendor anticipates the home will be completed and ready to move in, is: the ___day of _____, 20___.

The Vendor can delay Occupancy on one or more occasions by setting a subsequent **Tentative Occupancy Date**, in accordance with section 1 of the Addendum by giving proper written notice as set out in section 1.

By no later than 30 days after the Roof Assembly Date (as defined in section 12), with at least 90 days prior written notice, the Vendor shall set either (i) a **Final Tentative Occupancy Date**; or (ii) a **Firm Occupancy Date**.

For purchase agreements signed after the Roof Assembly Date, the First Tentative Occupancy Date is inapplicable and the Vendor shall instead elect and set either a Final Tentative Occupancy Date or Firm Occupancy Date.

the ___day of _____, 20___.
Final Tentative Occupancy Date

or

the ___day of _____, 20___.
Firm Occupancy Date

If the Vendor sets a Final Tentative Occupancy Date but cannot provide Occupancy by the Final Tentative Occupancy Date, then the Vendor shall set a **Firm Occupancy Date** that is no later than 120 days after the Final Tentative Occupancy Date, with proper written notice as set out in section 1 below.

If the Vendor cannot provide Occupancy by the Firm Occupancy Date, then the Purchaser is entitled to delayed occupancy compensation (see section 7 of the Addendum) and the Vendor must set a Delayed Occupancy Date which cannot be later than the Outside Occupancy Date.

The **Outside Occupancy Date**, which is the latest date by which the Vendor agrees to provide Occupancy, is: the ___day of _____, 20___.

2. Notice Period for an Occupancy Delay

Changing an Occupancy date requires proper written notice. The Vendor, without the Purchaser's consent, may delay Occupancy one or more times in accordance with section 1 of the Addendum and no later than the Outside Occupancy Date. Notice of a delay beyond the First Tentative Occupancy Date must be given no later than: the ___day of _____, 20___.
(i.e., at least **90 days** before the First Tentative Occupancy Date), or **else** the First Tentative Occupancy Date automatically becomes the Firm Occupancy Date.

3. Purchaser's Termination Period

If the home is not complete by the Outside Occupancy Date, then the Purchaser can terminate the transaction during a period of **30 days** thereafter (the "**Purchaser's Termination Period**"), which period, unless extended by mutual agreement, will end on: the ___day of _____, 20___.
If the Purchaser terminates the transaction during the Purchaser's Termination Period, then the Purchaser is entitled to delayed occupancy compensation and to a full refund of all monies paid plus interest (*see sections 7, 10 and 11 of the Addendum*).

Note: Any time a Critical Date is set or changed as permitted in the Addendum, other Critical Dates may change as well. At any given time the parties must refer to: the most recent revised Statement of Critical Dates; or agreement or written notice that sets a Critical Date, and calculate revised Critical Dates using the formulas contained in the Addendum. Critical Dates can also change if there are unavoidable delays (see section 5 of the Addendum).

Acknowledged this ____ day of _____, 20____.

VENDOR: _____ PURCHASER: _____

_____ _____

Addendum to Agreement of Purchase and Sale
Delayed Occupancy Warranty

This addendum, including the accompanying Statement of Critical Dates (the "**Addendum**"), forms part of the agreement of purchase and sale (the "**Purchase Agreement**") between the Vendor and the Purchaser relating to the Property. This Addendum is to be used for a transaction where the home is a condominium unit (that is not a vacant land condominium unit). This Addendum contains important provisions that are part of the delayed occupancy warranty provided by the Vendor in accordance with the *Ontario New Home Warranties Plan Act* (the "ONHWP Act"). If there are any differences between the provisions in the Addendum and the Purchase Agreement, then the Addendum provisions shall prevail. **PRIOR TO SIGNING THE PURCHASE AGREEMENT OR ANY AMENDMENT TO IT, THE PURCHASER SHOULD SEEK ADVICE FROM A LAWYER WITH RESPECT TO THE PURCHASE AGREEMENT OR AMENDING AGREEMENT, THE ADDENDUM AND THE DELAYED OCCUPANCY WARRANTY.**

Tarion recommends that Purchasers register on Tarion's **MyHome** on-line portal and visit Tarion's website – **tarion.com**, to better understand their rights and obligations under the statutory warranties.

The Vendor shall complete all blanks set out below.

VENDOR _____
Full Name(s)

_____ _____
HCRA Licence Number | Address

_____ _____
Phone | City | Province | Postal Code

_____ _____
Fax | Email*

PURCHASER _____
Full Name(s)

_____
Address | City | Province | Postal Code

_____
Phone

_____ _____
Fax | Email*

PROPERTY DESCRIPTION

_____
Municipal Address

_____
City | Province | Postal Code

_____
Short Legal Description

_____

INFORMATION REGARDING THE PROPERTY

The Vendor confirms that:

(a) The Vendor has obtained Formal Zoning Approval for the Building. O Yes O No
If no, the Vendor shall give written notice to the Purchaser within 10 days after the date that Formal Zoning Approval for the Building is obtained.

(b) Commencement of Construction: O has occurred; or O is expected to occur by the _____ day of _____, 20____.

The Vendor shall give written notice to the Purchaser within 10 days after the actual date of Commencement of Construction.

***Note: Since important notices will be sent to this address, it is essential that you ensure that a reliable email address is provided and that your computer settings permit receipt of notices from the other party.**

SETTING AND CHANGING CRITICAL DATES

1. Setting Tentative Occupancy Dates and the Firm Occupancy Date

(a) **Completing Construction Without Delay**: The Vendor shall take all reasonable steps to complete construction of the Building subject to all prescribed requirements, to provide Occupancy of the home without delay, and, to register without delay the declaration and description in respect of the Building.

(b) **First Tentative Occupancy Date**: The Vendor shall identify the First Tentative Occupancy Date in the Statement of Critical Dates attached to this Addendum at the time the Purchase Agreement is signed.

(c) **Subsequent Tentative Occupancy Dates**: The Vendor may, in accordance with this section, extend the First Tentative Occupancy Date on one or more occasions, by setting a subsequent Tentative Occupancy Date. The Vendor shall give written notice of any subsequent Tentative Occupancy Date to the Purchaser at least 90 days before the existing Tentative Occupancy Date (which in this Addendum may include the First Tentative Occupancy Date), or else the existing Tentative Occupancy Date shall for all purposes be the Firm Occupancy Date. A subsequent Tentative Occupancy Date can be any Business Day on or before the Outside Occupancy Date.

(d) **Final Tentative Occupancy Date**: By no later than 30 days after the Roof Assembly Date, the Vendor shall by written notice to the Purchaser set either (i) a Final Tentative Occupancy Date; or (ii) a Firm Occupancy Date. If the Vendor does not do so, the existing Tentative Occupancy Date shall for all purposes be the Firm Occupancy Date. The Vendor shall give written notice of the Final Tentative Occupancy Date or Firm Occupancy Date, as the case may be, to the Purchaser at least 90 days before the existing Tentative Occupancy Date, or else the existing Tentative Occupancy Date shall for all purposes be the Firm Occupancy Date. The Final Tentative Occupancy Date or Firm Occupancy Date, as the case may be, can be any Business Day on or before the Outside Occupancy Date. For new Purchase Agreements signed after the Roof Assembly Date, the Vendor shall insert in the Statement of Critical Dates of the Purchase Agreement either: a Final Tentative Occupancy Date; or a Firm Occupancy Date

(e) **Firm Occupancy Date**: If the Vendor has set a Final Tentative Occupancy Date but cannot provide Occupancy by the Final Tentative Occupancy Date then the Vendor shall set a Firm Occupancy Date that is no later than 120 days after the Final Tentative Occupancy Date. The Vendor shall give written notice of the Firm Occupancy Date to the Purchaser at least 90 days before the Final Tentative Occupancy Date, or else the Final Tentative Occupancy Date shall for all purposes be the Firm Occupancy Date. The Firm Occupancy Date can be any Business Day on or before the Outside Occupancy Date.

(f) **Notice**: Any notice given by the Vendor under paragraph (c), (d) or (e) must set out the stipulated Critical Date, as applicable.

2. Changing the Firm Occupancy Date – Three Ways

(a) The Firm Occupancy Date, once set or deemed to be set in accordance with section 1, can be changed only:
  (i) by the Vendor setting a Delayed Occupancy Date in accordance with section 3;
  (ii) by the mutual written agreement of the Vendor and Purchaser in accordance with section 4; or
  (iii) as the result of an Unavoidable Delay of which proper written notice is given in accordance with section 5.

(b) If a new Firm Occupancy Date is set in accordance with section 4 or 5, then the new date is the "Firm Occupancy Date" for all purposes in this Addendum.

3. Changing the Firm Occupancy Date – By Setting a Delayed Occupancy Date

(a) If the Vendor cannot provide Occupancy on the Firm Occupancy Date and sections 4 and 5 do not apply, the Vendor shall select and give written notice to the Purchaser of a Delayed Occupancy Date in accordance with this section, and delayed occupancy compensation is payable in accordance with section 7.

(b) The Delayed Occupancy Date may be any Business Day after the date the Purchaser receives written notice of the Delayed Occupancy Date but not later than the Outside Occupancy Date.

(c) The Vendor shall give written notice to the Purchaser of the Delayed Occupancy Date as soon as the Vendor knows that it will be unable to provide Occupancy on the Firm Occupancy Date, and in any event at least 10 days before the Firm Occupancy Date, failing which delayed occupancy compensation is payable from the date that is 10 days before the Firm Occupancy Date, in accordance with paragraph 7(c). If notice of a new Delayed Occupancy Date is not given by the Vendor before the Firm Occupancy Date, then the new Delayed Occupancy Date shall be deemed to be the date which is 90 days after the Firm Occupancy Date.

(d) After the Delayed Occupancy Date is set, if the Vendor cannot provide Occupancy on the Delayed Occupancy Date, the Vendor shall select and give written notice to the Purchaser of a new Delayed Occupancy Date, unless the delay arises due to Unavoidable Delay under section 5 or is mutually agreed upon under section 4, in which case the requirements of those sections must be met. Paragraphs (b) and (c) above apply with respect to the setting of the new Delayed Occupancy Date.

(e) Nothing in this section affects the right of the Purchaser or Vendor to terminate the Purchase Agreement on the bases set out in section 10.

4. Changing Critical Dates – By Mutual Agreement

(a) This Addendum sets out a framework for setting, extending and/or accelerating Critical Dates, which cannot be altered contractually except as set out in this section 4. Any amendment not in accordance with this section is voidable at the option of the Purchaser. For greater certainty, this Addendum does not restrict any extensions of the Closing date (i.e., title transfer date) where Occupancy of the home has already been g ven to the Purchaser.

(b) The Vendor and Purchaser may at any time, after signing the Purchase Agreement, mutually agree in writing to accelerate or extend any of the Critical Dates. Any amendment which accelerates or extends any of the Critical Dates must include the following provisions:

(i) the Purchaser and Vendor agree that the amendment is entirely voluntary – the Purchaser has no obligation to sign the amendment and each understands that this purchase transaction will still be valid if the Purchaser does not sign this amendment;
(ii) the amendment includes a revised Statement of Critical Dates which replaces the previous Statement of Critical Dates;
(iii) the Purchaser acknowledges that the amendment may affect delayed occupancy compensation payable; and
(iv) if the change involves extending either the Firm Occupancy Date or the Delayed Occupancy Date, then the amending agreement shall:

i. disclose to the Purchaser that the signing of the amendment may result in the loss of delayed occupancy compensation as described in section 7;
ii. unless there is an express waiver of compensation, describe in reasonable detail the cash amount, goods, services, or other consideration which the Purchaser accepts as compensation; and
iii. contain a statement by the Purchaser that the Purchaser waives compensation or accepts the compensation referred to in clause ii above, in either case, in full satisfaction of any delayed occupancy compensation payable by the Vendor for the period up to the new Firm Occupancy Date or Delayed Occupancy Date.

If the Purchaser for his or her own purposes requests a change of the Firm Occupancy Date or the Delayed Occupancy Date, then subparagraphs (b)(i), (iii) and (iv) above shall not apply.

(c) A Vendor is permitted to include a provision in the Purchase Agreement allowing the Vendor a one-time unilateral right to extend a Firm Occupancy Date or Delayed Occupancy Date, as the case may be, for one (1) Business Day to avoid the necessity of tender where a Purchaser is not ready to complete the transaction on the Firm Occupancy Date or Delayed Occupancy Date, as the case may be. Delayed occupancy compensation will not be payable for such period and the Vendor may not impose any penalty or interest charge upon the Purchaser with respect to such extension.

(d) The Vendor and Purchaser may agree in the Purchase Agreement to any unilateral extension or acceleration rights that are for the benefit of the Purchaser.

5. Extending Dates – Due to Unavoidable Delay

(a) If Unavoidable Delay occurs, the Vendor may extend Critical Dates by no more than the length of the Unavoidable Delay Period, without the approval of the Purchaser and without the requirement to pay delayed occupancy compensation in connection with the Unavoidable Delay, provided the requirements of this section are met.

(b) If the Vendor wishes to extend Critical Dates on account of Unavoidable Delay, the Vendor shall provide written notice to the Purchaser setting out a brief description of the Unavoidable Delay, and an estimate of the duration of the delay. Once the Vendor knows or ought reasonably to know that an Unavoidable Delay has commenced, the Vendor shall provide written notice to the Purchaser by the earlier of: 20 days thereafter; and the next Critical Date.

(c) As soon as reasonably possible, and no later than 20 days after the Vendor knows or ought reasonably to know that an Unavoidable Delay has concluded, the Vendor shall provide written notice to the Purchaser setting out a brief description of the Unavoidable Delay, identifying the date of its conclusion, and setting new Critical Dates. The new Critical Dates are calculated by adding to the then next Critical Date the number of days of the Unavoidable Delay Period (the other Critical Dates changing accordingly), provided that the Firm Occupancy Date or Delayed Occupancy Date, as the case may be, must be at least 10 days after the day of giving notice unless the parties agree otherwise. Either the Vendor or the Purchaser may request in writing an earlier Firm Occupancy Date or Delayed Occupancy Date, and the other party's consent to the earlier date shall not be unreasonably withheld.

(d) If the Vendor fails to give written notice of the conclusion of the Unavoidable Delay in the manner required by paragraph (c) above, then the notice is ineffective, the existing Critical Dates are unchanged, and any delayed occupancy compensation payable under section 7 is payable from the existing Firm Occupancy Date.

(e) Any notice setting new Critical Dates given by the Vendor under this section shall include an updated revised Statement of Critical Dates.

EARLY TERMINATION CONDITIONS

6. Early Termination Conditions

(a) The Vendor and Purchaser may include conditions in the Purchase Agreement that, if not satisfied, give rise to early termination of the Purchase Agreement, but only in the limited way described in this section.

(b) The Vendor is not permitted to include any conditions in the Purchase Agreement other than: the types of Early Termination Conditions listed in Schedule A; and/or the conditions referred to in paragraphs (i), (j) and (k) below. Any other condition included in a Purchase Agreement for the benefit of the Vendor that is not expressly permitted under Schedule A or paragraphs (i), (j) and (k) below is deemed null and void and is not enforceable by the Vendor, but does not affect the validity of the balance of the Purchase Agreement.

(c) The Vendor confirms that this Purchase Agreement is subject to Early Termination Conditions that, if not satisfied (or waived, if applicable), may result in the termination of the Purchase Agreement. O Yes O No

(d) If the answer in (c) above is "Yes", then the Early Termination Conditions are as follows. The obligation of each of the Purchaser and Vendor to complete this purchase and sale transaction is subject to satisfaction (or waiver, if applicable) of the following conditions and any such conditions set out in an appendix headed "Early Termination Conditions":

Condition #1 (if applicable)
Description of the Early Termination Condition:

The Approving Authority (as that term is defined in Schedule A) is: _____

The date by which Condition #1 is to be satisfied is the _____day of_____, 20 _____.

Condition #2 (if applicable)
Description of the Early Termination Condition:

The Approving Authority (as that term is defined in Schedule A) is: _____

The date by which Condition #2 is to be satisfied is the _____day of _____, 20_____.

The date for satisfaction of any Early Termination Condition may be changed by mutual agreement provided in all cases it is set at least 90 days before the First Tentative Occupancy Date, and will be deemed to be 90 days before the First Tentative Occupancy Date if no date is specified or if the date specified is later than 90 days before the First Tentative Occupancy Date. This time limitation does not apply to the condition in subparagraph 1(b)(iv) of Schedule A which must be satisfied or waived by the Vendor within 60 days following the later of: (A) the signing of the Purchase Agreement; and (B) the satisfaction or waiver by the Purchaser of a Purchaser financing condition permitted under paragraph (k) below.

Note: The parties must add additional pages as an appendix to this Addendum if there are additional Early Termination Conditions.

(e) There are no Early Termination Conditions applicable to this Purchase Agreement other than those identified in subparagraph (d) above and any appendix listing additional Early Termination Conditions.

(f) The Vendor agrees to take all commercially reasonable steps within its power to satisfy the Early Termination Conditions identified in subparagraph (d) above.

(g) For conditions under paragraph 1(a) of Schedule A the following applies:

(i) conditions in paragraph 1(a) of Schedule A may not be waived by either party;
(ii) the Vendor shall provide written notice not later than five (5) Business Days after the date specified for satisfaction of a condition that: (A) the condition has been satisfied; or (B) the condition has not been satisfied (together with reasonable details and backup materials) and that as a result the Purchase Agreement is terminated; and
(iii) if notice is not provided as required by subparagraph (ii) above then the condition is deemed not satisfied and the Purchase Agreement is terminated.

(h) For conditions under paragraph 1(b) of Schedule A the following applies:

(i) conditions in paragraph 1(b) of Schedule A may be waived by the Vendor;
(ii) the Vendor shall provide written notice on or before the date specified for satisfaction of the condition that: (A) the condition has been satisfied or waived; or (B) the condition has not been satisfied nor waived, and that as a result the Purchase Agreement is terminated; and
(iii) if notice is not provided as required by subparagraph (ii) above then the condition is deemed satisfied or waived and the Purchase Agreement will continue to be binding on both parties.

(i) The Purchase Agreement may be conditional until Closing (transfer to the Purchaser of title to the home), upon compliance with the subdivision control provisions (section 50) of the *Planning Act* and, if applicable, registration of the declaration and description for the Building under the *Condominium Act, 1998*, which compliance shall be obtained by the Vendor at its sole expense, on or before Closing.

(j) The Purchaser is cautioned that there may be other conditions in the Purchase Agreement that allow the Vendor to terminate the Purchase Agreement due to the fault of the Purchaser.

(k) The Purchase Agreement may include any condition that is for the sole benefit of the Purchaser and that is agreed to by the Vendor (e.g., the sale of an existing dwelling, Purchaser financing or a basement walkout). The Purchase Agreement may specify that the Purchaser has a right to terminate the Purchase Agreement if any such condition is not met, and may set out the terms on which termination by the Purchaser may be effected.

MAKING A COMPENSATION CLAIM

7. Delayed Occupancy Compensation

(a) The Vendor warrants to the Purchaser that, if Occupancy is delayed beyond the Firm Occupancy Date (other than by mutual agreement or as a result of Unavoidable Delay as permitted under sections 4 and 5), then the Vendor shall compensate the Purchaser up to a total amount of $7,500, which amount includes: (i) payment to the Purchaser of a set amount of $150 a day for living expenses for each day of delay until the Occupancy Date or the date of termination of the Purchase Agreement, as applicable under paragraph (b) below; and (ii) any other expenses (supported by receipts) incurred by the Purchaser due to the delay.

(b) Delayed occupancy compensation is payable only if: (i) Occupancy and Closing occurs; or (ii) the Purchase Agreement is terminated or deemed to have been terminated under paragraph 10(b) of this Addendum. Delayed occupancy compensation is payable only if the Purchaser's claim is made to Tarion in writing within one (1) year after Occupancy, or after termination of the Purchase Agreement, as the case may be, and otherwise in accordance with this Addendum. Compensation claims are subject to any further conditions set out in the ONHWP Act.

(c) If the Vendor gives written notice of a Delayed Occupancy Date to the Purchaser less than 10 days before the Firm Occupancy Date, contrary to the requirements of paragraph 3(c), then delayed occupancy compensation is payable from the date that is 10 days before the Firm Occupancy Date.

(d) Living expenses are direct living costs such as for accommodation and meals. Receipts are not required in support of a claim for living expenses, as a set daily amount of $150 per day is payable. The Purchaser must provide receipts in support of any claim for other delayed occupancy compensation, such as for moving and storage costs. Submission of false receipts disentitles the Purchaser to any delayed occupancy compensation in connection with a claim.

(e) If delayed occupancy compensation is payable, the Purchaser may make a claim to the Vendor for that compensation after Occupancy or after termination of the Purchase Agreement, as the case may be, and shall include all receipts (apart from living expenses) which evidence any part of the Purchaser's claim. The Vendor shall assess the Purchaser's claim by determining the amount of delayed occupancy compensation payable based on the rules set out in section 7 and the receipts provided by the Purchaser, and the Vendor shall promptly provide that assessment information to the Purchaser. The Purchaser and the Vendor shall use reasonable efforts to settle the claim and when the claim is settled, the Vendor shall prepare an acknowledgement signed by both parties which:

  (i) includes the Vendor's assessment of the delayed occupancy compensation payable;
  (ii) describes in reasonable detail the cash amount, goods, services, or other consideration which the Purchaser accepts as compensation (the "Compensation"), if any; and
  (iii) contains a statement by the Purchaser that the Purchaser accepts the Compensation in full satisfaction of any delayed occupancy compensation payable by the Vendor.

(f) If the Vendor and Purchaser cannot agree as contemplated in paragraph 7(e), then to make a claim to Tarion the Purchaser must file a claim with Tarion in writing within one (1) year after Occupancy. A claim may also be made and the same rules apply if the sale transaction is terminated under paragraph 10(b), in which case, the deadline for a claim is one (1) year after termination.

(g) If delayed occupancy compensation is payable, the Vendor shall either pay the compensation as soon as the proper amount is determined; or pay such amount with interest (at the prescribed rate as specified in subsection 19(1) of O.Reg. 48/01 of the *Condominium Act, 1998*), from the Occupancy Date to the date of Closing, such amount to be an adjustment to the balance due on the day of Closing.

8. Adjustments to Purchase Price

Only the items set out in Schedule B (or an amendment to Schedule B), shall be the subject of adjustment or change to the purchase price or the balance due on Closing. The Vendor agrees that it shall not charge as an adjustment or readjustment to the purchase price of the home, any reimbursement for a sum paid or payable by the Vendor to a third party unless the sum is ultimately paid to the third party either before or after Closing. If the Vendor charges an amount in contravention of the preceding sentence, the Vendor shall forthwith readjust with the Purchaser. This section shall not: restrict or prohibit payments for items disclosed in Part I of Schedule B which have a fixed fee; nor shall it restrict or prohibit the parties from agreeing on how to allocate as between them, any rebates, refunds or incentives provided by the federal government, a provincial or municipal government or an agency of any such government, before or after Closing.

MISCELLANEOUS

9. Ontario Building Code – Conditions of Occupancy

(a) On or before the Occupancy Date, the Vendor shall deliver to the Purchaser:
  (i) an Occupancy Permit (as defined in paragraph (d)) for the home; or
  (ii) if an Occupancy Permit is not required under the Building Code, a signed written confirmation by the Vendor that all conditions of occupancy under the Building Code have been fulfilled and Occupancy is permitted under the Building Code.

(b) Notwithstanding the requirements of paragraph (a), to the extent that the Purchaser and the Vendor agree that the Purchaser shall be responsible for one or more prerequisites to obtaining permission for Occupancy under the Building Code, (the "Purchaser Occupancy Obligations"):
  (i) the Purchaser shall not be entitled to delayed occupancy compensation if the reason for the delay is that the Purchaser Occupancy Obligations have not been completed;
  (ii) the Vendor shall deliver to the Purchaser, upon fulfilling all prerequisites to obtaining permission for Occupancy under the Building Code (other than the Purchaser Occupancy Obligations), a signed written confirmation that the Vendor has fulfilled such prerequisites; and
  (iii) if the Purchaser and Vendor have agreed that such prerequisites (other than the Purchaser Occupancy Obligations) are to be fulfilled prior to Occupancy, then the Vendor shall provide the signed written confirmation required by subparagraph (ii) on or before the Occupancy Date.

(c) If the Vendor cannot satisfy the requirements of paragraph (a) or subparagraph (b)(ii), the Vendor shall set a Delayed Occupancy Date (or new Delayed Occupancy Date) on a date that the Vendor reasonably expects to have satisfied the requirements of paragraph (a) or subparagraph (b)(ii), as the case may be. In setting the Delayed Occupancy Date (or new Delayed Occupancy Date), the Vendor shall comply with the requirements of section 3, and delayed occupancy compensation shall be payable in accordance with section 7. Despite the foregoing, delayed occupancy compensation shall not be payable for a delay under this paragraph (c) if the inability to satisfy the requirements of subparagraph (b)(ii) is because the Purchaser has failed to satisfy the Purchaser Occupancy Obligations.

(d) For the purposes of this section, an "Occupancy Permit" means any written or electronic document, however styled, whether final, provisional or temporary, provided by the chief building official (as defined in the *Building Code Act*) or a person designated by the chief building official, that evidences that permission to occupy the home under the Building Code has been granted.

10. Termination of the Purchase Agreement

(a) The Vendor and the Purchaser may terminate the Purchase Agreement by mutual written agreement. Such written mutual agreement may specify how monies paid by the Purchaser, including deposit(s) and monies for upgrades and extras are to be allocated if not repaid in full.

(b) If for any reason (other than breach of contract by the Purchaser) Occupancy has not been given to the Purchaser by the Outside Occupancy Date, then the Purchaser has 30 days to terminate the Purchase Agreement by written notice to the Vendor. If the Purchaser does not provide written notice of termination within such 30-day period, then the Purchase Agreement shall continue to be binding on both parties and the Delayed Occupancy Date shall be the date set under paragraph 3(c), regardless of whether such date is beyond the Outside Occupancy Date.

(c) If: calendar dates for the applicable Critical Dates are not inserted in the Statement of Critical Dates; or if any date for Occupancy is expressed in the Purchase Agreement or in any other document to be subject to change depending upon the happening of an event (other than as permitted in this Addendum), then the Purchaser may terminate the Purchase Agreement by written notice to the Vendor.

(d) The Purchase Agreement may be terminated in accordance with the provisions of section 6.

(e) Nothing in this Addendum derogates from any right of termination that either the Purchaser or the Vendor may have at law or in equity on the basis of, for example, frustration of contract or fundamental breach of contract.

(f) Except as permitted in this section, the Purchase Agreement may not be terminated by reason of the Vendor's delay in providing Occupancy alone.

11. Refund of Monies Paid on Termination

(a) If the Purchase Agreement is terminated (other than as a result of breach of contract by the Purchaser), then unless there is agreement to the contrary under paragraph 10(a), the Vendor shall refund all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras, within 10 days of such termination, with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser. The Purchaser cannot be compelled by the Vendor to execute a release of the Vendor as a prerequisite to obtaining the refund of monies payable as a result of termination of the Purchase Agreement under this paragraph, although the Purchaser may be required to sign a written acknowledgement confirming the amount of monies refunded and termination of the purchase transaction. Nothing in this Addendum prevents the Vendor and Purchaser from entering into such other termination agreement and/or release as may be agreed to by the parties.

(b) The rate of interest payable on the Purchaser's monies shall be calculated in accordance with the *Condominium Act, 1998*.

(c) Notwithstanding paragraphs(a) and (b) above, if either party initiates legal proceedings to contest termination of the Purchase Agreement or the refund of monies paid by the Purchaser, and obtains a legal determination, such amounts and interest shall be payable as determined in those proceedings.

12. Definitions

"Building" means the condominium building or buildings contemplated by the Purchase Agreement, in which the Property is located or is proposed to be located.

"Business Day" means any day other than: Saturday; Sunday; New Year's Day; Family Day; Good Friday; Easter Monday; Victoria Day; Canada Day; Civic Holiday; Labour Day; Thanksgiving Day; Remembrance Day; Christmas Day; Boxing Day; and any special holiday proclaimed by the Governor General or the Lieutenant Governor; and where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is

not a Business Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are not Business Days; and where Christmas Day falls on a Friday, the following Monday is not a Business Day.
"Closing" means completion of the sale of the home, including transfer of title to the home to the Purchaser.
"Commencement of Construction" means the commencement of construction of foundation components or elements (such as footings, rafts or piles) for the Building.
"Critical Dates" means the First Tentative Occupancy Date, any subsequent Tentative Occupancy Date, the Final Tentative Occupancy Date, the Firm Occupancy Date, the Delayed Occupancy Date, the Outside Occupancy Date and the last day of the Purchaser's Termination Period.
"Delayed Occupancy Date" means the date, set in accordance with section 3, on which the Vendor agrees to provide Occupancy, in the event the Vendor cannot provide Occupancy on the Firm Occupancy Date.
"Early Termination Conditions" means the types of conditions listed in Schedule A.
"Final Tentative Occupancy Date" means the last Tentative Occupancy Date that may be set in accordance with paragraph 1(d).
"Firm Occupancy Date" means the firm date on which the Vendor agrees to provide Occupancy as set in accordance with this Addendum.
"First Tentative Occupancy Date" means the date on which the Vendor, at the time of signing the Purchase Agreement, anticipates that the home will be complete and ready for Occupancy, as set out in the Statement of Critical Dates.
"Formal Zoning Approval" occurs when the zoning by-law required for the Building has been approved by all relevant governmental authorities having jurisdiction, and the period for appealing the approvals has elapsed and/or any appeals have been dismissed or the approval affirmed.
"Occupancy" means the right to use or occupy the home in accordance with the Purchase Agreement.
"Occupancy Date" means the date the Purchaser is given Occupancy.
"Outside Occupancy Date" means the latest date that the Vendor agrees to provide Occupancy to the Purchaser, as confirmed in the Statement of Critical Dates.
"Property" or **"home"** means the home being acquired by the Purchaser from the Vendor, and its interest in the related common elements.
"Purchaser's Termination Period" means the 30-day period during which the Purchaser may terminate the Purchase Agreement for delay, in accordance with paragraph 10(b).
"Roof Assembly Date" means the date upon which the roof slab, or roof trusses and sheathing, as the case may be, are completed. For single units in a multi-unit block, whether or not vertically stacked, (e.g., townhouses or row houses), the roof refers to the roof of the block of homes unless the unit in question has a roof which is in all respects functionally independent from and not physically connected to any portion of the roof of any other unit(s), in which case the roof refers to the roof of the applicable unit. For multi-story, vertically stacked units, (e.g. typical high rise) roof refers to the roof of the Building.
"Statement of Critical Dates" means the Statement of Critical Dates attached to and forming part of this Addendum (in form to be determined by Tarion from time to time), and, if applicable, as amended in accordance with this Addendum.
"The ONHWP Act" means the *Ontario New Home Warranties Plan Act* including regulations, as amended from time to time.
"Unavoidable Delay" means an event which delays Occupancy which is a strike, fire, explosion, flood, act of God, civil insurrection, act of war, act of terrorism or pandemic, plus any period of delay directly caused by the event, which are beyond the reasonable control of the Vendor and are not caused or contributed to by the fault of the Vendor.
"Unavoidable Delay Period" means the number of days between the Purchaser's receipt of written notice of the commencement of the Unavoidable Delay, as required by paragraph 5(b), and the date on which the Unavoidable Delay concludes.

13. Addendum Prevails

The Addendum forms part of the Purchase Agreement. The Vendor and Purchaser agree that they shall not include any provision in the Purchase Agreement or any amendment to the Purchase Agreement or any other document (or indirectly do so through replacement of the Purchase Agreement) that derogates from, conflicts with or is inconsistent with the provisions of this Addendum, except where this Addendum expressly permits the parties to agree or consent to an alternative arrangement. The provisions of this Addendum prevail over any such provision.

14. Time Periods, and How Notice Must Be Sent

(a) Any written notice required under this Addendum may be given personally or sent by email, fax, courier or registered mail to the Purchaser or the Vendor at the address/contact numbers identified on page 2 or replacement address/contact numbers as provided in paragraph (c) below. Notices may also be sent to the solicitor for each party if necessary contact information is provided, but notices in all events must be sent to the Purchaser and Vendor, as applicable. If email addresses are set out on page 2 of this Addendum, then the parties agree that notices may be sent by email to such addresses, subject to paragraph (c) below.
(b) Written notice given by one of the means identified in paragraph (a) is deemed to be given and received: on the date of delivery or transmission, if given personally or sent by email or fax (or the next Business Day if the date of delivery or transmission is not a Business Day); on the second Business Day following the date of sending by courier; or on the fifth Business Day following the date of sending, if sent by registered mail. If a postal stoppage or interruption occurs, notices shall not be sent by registered mail, and any notice sent by registered mail within 5

Business Days prior to the commencement of the postal stoppage or interruption must be re-sent by another means in order to be effective. For purposes of this section 14, Business Day includes Remembrance Day, if it falls on a day other than Saturday or Sunday, and Easter Monday.

(c) If either party wishes to receive written notice under this Addendum at an address/contact number other than those identified on page 2 of this Addendum, then the party shall send written notice of the change of address, fax number, or email address to the other party in accordance with paragraph (b) above.

(d) Time periods within which or following which any act is to be done shall be calculated by excluding the day of delivery or transmission and including the day on which the period ends.

(e) Time periods shall be calculated using calendar days including Business Days but subject to paragraphs (f), (g) and (h) below.

(f) Where the time for making a claim under this Addendum expires on a day that is not a Business Day, the claim may be made on the next Business Day.

(g) Prior notice periods that begin on a day that is not a Business Day shall begin on the next earlier Business Day, except that notices may be sent and/or received on Remembrance Day, if it falls on a day other than Saturday or Sunday, or Easter Monday.

(h) Every Critical Date must occur on a Business Day. If the Vendor sets a Critical Date that occurs on a date other than a Business Day, the Critical Date is deemed to be the next Business Day.

(i) Words in the singular include the plural and words in the plural include the singular.

(j) Gender-specific terms include both sexes and include corporations.

15. Disputes Regarding Termination

(a) The Vendor and Purchaser agree that disputes arising between them relating to termination of the Purchase Agreement under section 11 shall be submitted to arbitration in accordance with the *Arbitration Act, 1991* (Ontario) and subsection 17(4) of the ONHWP Act.

(b) The parties agree that the arbitrator shall have the power and discretion on motion by the Vendor or Purchaser or any other interested party, or of the arbitrator's own motion, to consolidate multiple arbitration proceedings on the basis that they raise one or more common issues of fact or law that can more efficiently be addressed in a single proceeding. The arbitrator has the power and discretion to prescribe whatever procedures are useful or necessary to adjudicate the common issues in the consolidated proceedings in the most just and expeditious manner possible. The *Arbitration Act, 1991* (Ontario) applies to any consolidation of multiple arbitration proceedings.

(c) The Vendor shall pay the costs of the arbitration proceedings and the Purchaser's reasonable legal expenses in connection with the proceedings unless the arbitrator for just cause orders otherwise.

(d) The parties agree to cooperate so that the arbitration proceedings are conducted as expeditiously as possible, and agree that the arbitrator may impose such time limits or other procedural requirements, consistent with the requirements of the *Arbitration Act, 1991* (Ontario), as may be required to complete the proceedings as quickly as reasonably possible.

(e) The arbitrator may grant any form of relief permitted by the *Arbitration Act, 1991* (Ontario), whether or not the arbitrator concludes that the Purchase Agreement may properly be terminated.

SCHEDULE A

Types of Permitted Early Termination Conditions

1. The Vendor of a condominium home is permitted to make the Purchase Agreement conditional as follows:

(a) upon receipt of Approval from an Approving Authority for:
- (i) a change to the official plan, other governmental development plan or zoning by-law (including a minor variance);
- (ii) a consent to creation of a lot(s) or part-lot(s);
- (iii) a certificate of water potability or other measure relating to domestic water supply to the home;
- (iv) a certificate of approval of septic system or other measure relating to waste disposal from the home;
- (v) completion of hard services for the property or surrounding area (i.e., roads, rail crossings, water lines, sewage lines, other utilities);
- (vi) allocation of domestic water or storm or sanitary sewage capacity;
- (vii) easements or similar rights serving the property or surrounding area;
- (viii) site plan agreements, density agreements, shared facilities agreements or other development agreements with Approving Authorities or nearby landowners, and/or any development Approvals required from an Approving Authority; and/or
- (ix) site plans, plans, elevations and/or specifications under architectural controls imposed by an Approving Authority.

The above-noted conditions are for the benefit of both the Vendor and the Purchaser and cannot be waived by either party.

(b) upon:
- (i) receipt by the Vendor of confirmation that sales of condominium dwelling units have exceeded a specified threshold by a specified date;
- (ii) receipt by the Vendor of confirmation that financing for the project on terms satisfactory to the Vendor has been arranged by a specified date;
- (iii) receipt of Approval from an Approving Authority for a basement walkout; and/or
- (iv) confirmation by the Vendor that it is satisfied the Purchaser has the financial resources to complete the transaction.

The above-noted conditions are for the benefit of the Vendor and may be waived by the Vendor in its sole discretion.

2. The following definitions apply in this Schedule:

"Approval" means an approval, consent or permission (in final form not subject to appeal) from an Approving Authority and may include completion of necessary agreements (i.e., site plan agreement) to allow lawful access to and use and occupancy of the property for its intended residential purpose.
"Approving Authority" means a government (federal, provincial or municipal), governmental agency, Crown corporation, or quasi-governmental authority (a privately operated organization exercising authority delegated by legislation or a government).

3. Each condition must:

(a) be set out separately;
(b) be reasonably specific as to the type of Approval which is needed for the transaction; and
(c) identify the Approving Authority by reference to the level of government and/or the identity of the governmental agency, Crown corporation or quasi-governmental authority.

4. For greater certainty, the Vendor is not permitted to make the Purchase Agreement conditional upon:

(a) receipt of a building permit;
(b) receipt of an occupancy permit; and/or
(c) completion of the home.

SCHEDULE B

Adjustments to Purchase Price or Balance Due on Closing

PART I Stipulated Amounts/Adjustments

These are additional charges, fees or other anticipated adjustments to the final purchase price or balance due on Closing, the dollar value of which is stipulated in the Purchase Agreement and set out below.

[Draft Note: List items with any necessary cross-references to text in the Purchase Agreement.]

PART II All Other Adjustments – to be determined in accordance with the terms of the Purchase Agreement

These are additional charges, fees or other anticipated adjustments to the final purchase price or balance due on Closing which will be determined after signing the Purchase Agreement, all in accordance with the terms of the Purchase Agreement.

[Draft Note: List items with any necessary cross-references to text in the Purchase Agreement.]

TARION
BUILDING CONFIDENCE

Updated: July 7, 2022

Q&A on COVID-19 Pandemic: Unavoidable Delay & Critical Dates*

***Important Note:** *The following questions and answers are intended for general guidance and do not constitute legal or other professional advice. The reader is advised to seek legal advice from their own legal counsel to address their particular circumstances.*

1. Why can't Tarion simply grant a standard-length delay for everybody?

There are about 50,000 new homes built each year and although many, if not most, may be affected by the pandemic the effects may be dramatically different for different homes. Some new homes may not be affected at all and others may be greatly affected. As the pandemic raises great uncertainties, it would be unfair to move all closing dates by an arbitrary period of time. Additionally, Tarion does not have the legal authority to do so. Any extensions must be worked out between the parties to the sale contract.

The pandemic will have different impacts on the delivery dates of different homes depending on a number of factors. For example:

- The stage of construction.
- What, if any, trades, suppliers, employees, governmental approvals are affected, including government site closure orders.
- How quickly the labour, supplier and/or governmental approvals return to normal.
- Problems related to disrupted trades/supply chains.
- Potential that trade backlogs in turn cause backlogs for government inspections.
- Possible impact of trade delays and backlog delays pushing back construction into unseasonable weather.
- Whether the foregoing impacts arise, then subside and then arise again in the same or some other way.

2. When do I need to send out my First Notice?

The World Health Organization declared a global pandemic. However, determining the date upon which the pandemic could reasonably be viewed as affecting the construction schedule of a home must be determined on a case-by-case basis.

It is the vendor who is in the best position to make this determination.

When the vendor has made a determination that disruptions related to the pandemic (e.g., labour or supply disruptions; and/or disruptions to governmental approvals) are likely to or will have an impact upon the construction schedule of the home, then according to the terms of the Addendum, the First Notice should be sent to the purchaser within 20 days thereafter.

3. What if I am not sure whether the pandemic will affect the home?

You should err on the side of caution and send out a First Notice if there is any reasonable chance the home will be affected. If the adverse effects do not materialize then you do not have to add any delay extensions to the closing. However, if the closing date is coming up soon, it is important that the purchasers not be left wondering if the original Firm Closing Date still stands even though a First Notice has been sent.

In addition – once a First Notice is sent advising of a delay, a Second Notice should be sent once you have a firm new closing date – and at minimum the new date should be at least 10 days from the Second Notice is sent --- please review **Question 11** below.

4. What steps do I take as the direct impacts of the pandemic are nearing an end?

As the direct impacts of the pandemic are nearing an end, the vendor should consider what other after-effects the pandemic might have and what additional delays (apart from the direct impacts of the pandemic itself) may occur in connection with each home under construction.

In some cases, the after-effects may be minimal; in other cases, they may be significant. It may take a few weeks to assess this. As a "rule of thumb", Tarion would see 30 days as a fair time period to work out what you see as the reasonable and likely additional overall delay associated with the pandemic and its after-effects.

5. How do I calculate the total Unavoidable Delay Period?

The time period that can be added to Critical Dates is known as the *Unavoidable Delay Period*. The Unavoidable Delay Period is made up of <u>two parts</u>. These are:

1. The period of the direct impacts of the pandemic itself upon the time for delivery of the home; <u>plus</u>

2. the Remobilization Period. This relates to after-effects -- any additional delay that occurs because of the pandemic (e.g., delay in trades returning to work, having to reschedule sequence of trades).

Direct Impacts + **Remobilization Period** = **Unavoidable Delay Period**

6. When do I send out the Second Notice?

First, the vendor needs to assess the full Unavoidable Delay Period as noted in **Question 5** above.

Vendors should not send out the Second Notice until they have made an assessment of the full timing impact.

Only once you have assessed these after-effects – the Remobilization Period – are you required to send out the Second Notice.

The timing of the Second Notice should not be governed by whether the pandemic itself continues or whether the government's emergency order is still in place. As previously stated, the pandemic is the Unavoidable Delay event and it is the impacts of the pandemic on the delivery of the home (including the remobilization period) which determine when the Second Notice can go out. For example, if the vendor has made the assessment of the impacts and believes the impediments to closing are removed, it is permissible to send out the Second Notice -- even if the emergency order has not yet been lifted -- so long as the order itself does not prevent or impact the delivery of the home.

The Second Notice will advise the homeowner of the delay period being added to the construction schedule (the combined number of days covering: (i) the period of the pandemic; plus, (ii) the Remobilization Period).

Note that the new closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise). See **Question 11** below.

7. Can I simply reset my Critical Dates, (e.g., go back to a First Tentative Closing Date even though I was at a Second Tentative Closing Date)?

No. The Unavoidable Delay provisions of the Addendum do not permit a builder to start the Critical Dates framework over again.

If you are at the point where you had set a Second Tentative Closing Date, then you cannot go back to a First Tentative Closing Date. What you can do is take the cumulative total of the delay – for example, if A is the # of days attributable to impacts during the pandemic, and B is the # of days of the Remobilization Period, then
A + B = C, which is the Unavoidable Delay Period. You then can add C (# of days of the Unavoidable Delay Period) to your Second Tentative Closing Date and all remaining Critical Dates. The usual Addendum sequence will then work in the same way from those extended dates.

8. If I underestimate the cumulative total of the delay due to a pandemic, can I simply send another set of Notices?

The law in this circumstance is untested, but the following is Tarion's best guidance on the subject. In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the Addendum so long as the vendor meets certain requirements. More detail about these possible requirements can be found at **Question 19** below.

If the Vendor is not able to provide the necessary information, or cannot satisfy the possible requirements, then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be a consequence.

In all circumstances, vendors should properly monitor the length of the impacts of the pandemic, take the time to figure out the anticipated additional delay (Remobilization Period) and then send the Second Notice once you have a reasonable level of comfort that the extra time you have added on to the construction schedule will be sufficient. Do not send out the Second Notice until you are ready. You must take this exercise seriously and act prudently but reasonably in assessing the extra time needed.

Note that the new closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise). See **Question 11** below.

If vendors underestimate the total delay and are not able to meet the newly set Critical Dates, a homeowner may be entitled to make a delay compensation claim.

9. Are builders able to extend the Early Termination Condition Dates due to Unavoidable Delay?

The Addendum allows builders to delay "*Critical Dates*" by no more than the length of the Unavoidable Delay Period if the requirements of the Addendum are met. But the date for satisfaction of Early Termination Conditions is **not** a *Critical Date*.

The mechanism for extending the date for satisfaction of Early Termination Conditions is by mutual agreement. There is no express right on the part of the vendor to unilaterally extend a date for satisfaction of an Early Termination Condition.

10. May I request help from Tarion to complete the Second Notice and the Unavoidable Delay Calculation?

We ask that you review the *Information Sheet for New Home Builders: COVID-19 Pandemic – Possible Effects on Construction Schedules for New Homes* along with the Sample Notice, Exhibit 2.

The Addendum allows the builder to extend Critical Dates by the Unavoidable Delay Period, which includes the period directly impacted by the pandemic, and any period of delay due to after-effects arising from to the pandemic (Remobilization Period). The determinations for each stage of the process for extending Critical Dates due to Unavoidable Delay must be done on a case-by-case basis.

Tarion can give general guidance through advisories, postings and webinars but cannot give legal advice. Builders must assess their individual situation to determine if there is an unavoidable delay period and how long it will be. As such, it will be important that builders carefully carry out the steps for the unavoidable delay process and work with their own legal counsel to ensure each step and calculation is correct and follows the rules in the Addendum.

11. I am a builder with a home which has a Firm Closing date set for June 30. I now anticipate that an occupancy permit will not be available for closing because certain supplies (e.g. toilets) will not be available and inspections by municipal officials will not be available, in each case these are impacts from the COVID19 pandemic beyond my reasonable control. Can you provide suggestions for how I might address this situation?

First and foremost, stay in touch with your purchasers -- they also need to plan their affairs if the closing is to be delayed and it is best practice to keep in regular communication with them.

Second, you should try to obtain the best documentation that you can with respect to the reasons for the delay. This could include an email or message from the municipality confirming that they are not doing the inspections, and a note or document from your supplier that they are unable to provide the critical items due delays relating to the pandemic (for example, you should document that you tried but were unsuccessful in finding an alternate supplier of the toilet). This documentation will be good to have for your own records and if there is a dispute at a later date.

Third, you should promptly send the "First Notice" of a delay as set out in section 5 of the Addendum. The First Notice should be sent within 20 days of when you know, or ought reasonably to know, that there will be a delay. In this example, the 20-day period will end a few days before the original closing date. We believe every effort should be made to give the notice as soon as possible in these circumstances for the benefit of the purchaser.

It will be important to follow the rules in the Addendum and you should consult the *Information Sheet for Builders: COVID-19 Pandemic - Possible Effects on Construction Schedules for New Homes* found on Tarion's website.

Once the impacts of the pandemic are over, and the resulting delays are known, therefore making it possible for a new date for the delivery of the home to be determined, two things should happen:

1. Contact the purchaser and work out a new Firm Closing Date that works for both parties.
    a. Recognize that the purchaser may need some time to ramp up mortgage financing and make arrangements for moving and vacating their current accommodation.
    b. If the builder is going to engage the unavoidable delay period provisions of the Addendum, good faith execution of the Addendum and purchase agreement would hold that the purchaser is not forced to close on short notice.

2. Send out the Second Notice required for section 5 of the Addendum.
    a. The Second Notice must have a revised Statement of Critical Dates which also references the new Firm Closing date and if necessary, provides an extended Outside Closing Date.

    b. The Firm Closing Date should be set either; by the vendor at a reasonable time after the Second Notice; or a new date is discussed and agreed upon by the purchaser.

c. Note that the new Firm Closing date set out in the Second Notice must be at least 10 days out from the date the Second Notice is sent (unless the parties agree otherwise) – this is set out in section 5 (c) of the Addendum.

   i. As a further note, Tarion considers the 10 days to be the minimum set out in the contract – but what a 'reasonable time' is dependent on the circumstances. For example, it is possible that 30 days' notice could be considered reasonable in some situations in order to give a homebuyer time to organize their affairs and not be taken by surprise. '30 days' is, however, not expressly mentioned in the Addendum. We encourage vendors to be flexible and work with purchasers to provide the amount of notice that is practical and fair in the circumstances bearing in mind the unique challenges created by the pandemic.

An alternative approach is to postpone the closing (set a new Firm Closing Date) by mutual agreement. It is very important that any mutual agreement to extend the Firm Closing Date comply with the requirements of section 4 of the Addendum. This approach may have a downside if the delay goes on longer than anticipated. Further extensions using the unavoidable delay provision may not be available (the window for sending a First Notice may close) and a further mutual agreement in accordance with section 4 of the Addendum may be necessary. In all events you need to work closely with your lawyer.

If the proper steps are not followed with regard to providing notice to homeowners, delay compensation may be a consequence.

12. I am a builder with a home which has a Firm Closing Date set for June 30. I amnot sure if the final inspections and occupancy permit will be available for closing. How long should I wait before taking steps to move the Firm Closing Date? And then if the inspection is able to be completed quickly thereafter, say by July 5, can I close right away without having provided a Second Notice?

As a general consideration, determining the date upon which the impacts of the pandemic could reasonably be viewed as affecting the construction schedule of a home will have to be done on a case-by-case basis; and, it is the vendor who is in the best position to do so. Once the vendor knows, or ought reasonably to know, that delays due to disruptions related to the pandemic (e.g., labour or supply disruptions; and/or disruptions to municipal approvals) are likely to or will have an impact upon the construction schedule of the home, then according to the terms of the Addendum, the First Notice is to be sent out. The timing is 20 days after the possibility of delay is recognized OR the next Critical Date – whichever is earlier

In this example, the 20-day period will end a few days before the original closing date. We believe every effort should be made to give the notice as soon as possible in these circumstances for the benefit of the purchaser.

The Addendum does not directly speak to this situation where the closing date is so near. The Addendum does however have an underlying premise (and principles of contract interpretation and good faith execution of a contract holds) that closings should not surprise the purchaser or be re-scheduled on short notice. Purchasers must have time to arrange their affairs, including alternate accommodation, storage of belongings, and arranging mortgage financing, once a new Firm Closing Date is known.

The Addendum also does not directly deal with the possibility that the pandemic impact which is stopping the closing (the inspection) may not happen when anticipated, but then may happen quickly and without notice. The Addendum contemplates sending a Second Notice once you reasonably know when the New Firm Closing Date can be reset.

The Addendum provides that the New Firm Closing Date has to be at least 10 days from when the Second Notice is sent (in order to provide a minimum amount of time for the Purchasers to get their affairs in order). Please see **Question 11** above.

Vendors should consider the following when faced with this scenario:

1. As soon as you are aware that the final inspection may occur, you can send a Second Notice with new Critical Dates by following the rules set out in the Addendum (for example, you send your First Notice of delay on October 8; then on November 15 you learn the inspection will happen in the first week of December; so you send the Second Notice with a new Firm Closing Date in mid- November – note the new closing date needs to be at least 10 days after the Second Notice).

   When the inspection occurs and the home can be legally occupied, you could work out a mutual agreement with the homeowner to move the Firm Closing Date forward if that makes sense for both parties. It is very important, however, that any mutual agreement to move the Firm Closing Date forward comply with the requirements of section 4 of the Addendum; and legal advice should be sought.

   Note that the Addendum does provide that consent to move a closing date earlier is a unilateral right of either party. But if one party asks the other party must not unreasonably withhold their consent. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.

2. It is also important for vendors to follow through with both the First and Second Notice to properly fulfill the unavoidable delay provisions. Simply sending a First Notice as a pre-emptive step, and then not sending a Second Notice to a purchaser because, for example, they manage to obtain a permit or resolve a dispute with a trade etc. may leave purchasers in an unfair state of uncertainty depending on the timing and content of communications. This approach by a vendor may mismanage the purchaser's expectations and may not be a reasonable approach during the pandemic. In our view, sending a second notice is best practice once the first notice has been sent (to the close the loop effectively), and in any event an effort should be made to give at least 10 days advance notice of closing. Please also review the answer to **Question 20** below which raises similar issues.

13. In the current circumstances of the ongoing COVID-19 pandemic, can you provide guidance as to how the Statement of Critical Dates would be addressed for new sales?

At the outset, a vendor of a new home is required to complete the Statement of Critical Dates and include dates in required fields which are a good faith estimate of the anticipated dates. In the current circumstances, there will be difficulty knowing with precision how long COVID-19 related delays may last and to what extent they may impact closing dates for new sales.

In the circumstances of the COVID-19 pandemic, vendors should consider using the "tentative" forms of addendum which provide more flexibility for moving Critical Dates.

Ultimately, vendors must consider all of the information available to them in setting the proposed closing dates, including the current pandemic. This may result in setting the Critical Dates much further out than they previously would have.

For condominiums,

Vendors are expected to include a good faith estimate of the First Tentative Occupancy Date, which is the date the vendor anticipates the home will be completed and ready to move-in. In the present circumstances, that date may need to be evaluated carefully by the vendor and set at a time which is much further out then would otherwise be the case.

The Outside Occupancy Date should be set further out than might otherwise be the case, as the purchaser will have a 30-day period in which they can terminate the purchase agreement.

If the project has not started construction, then vendors should consider setting the First Tentative Occupancy Date and the Outside Occupancy Date later than might otherwise be

the case, to take into account delays that may occur as a result of both direct and indirect impacts, of the pandemic assuming the worst case scenario.

Vendors thereafter will be entitled to set subsequent Tentative Occupancy dates with no restriction other than the Outside Occupancy Date and the Roof Assembly Date (after which a Final Tentative Occupancy Date or Firm Occupancy Date is to be provided).

One approach could be to set the dates in good faith using your best judgement as noted above, but to send a First Notice under section 5 of the Addendum (Extending dates due to Unavoidable Delay) simultaneously -- pointing out that the pandemic may adversely affect delivery of the home by the First Tentative Occupancy Date. The First Notice must be supported by reasonable evidence that there are impacts which are expected to delay the completion of the project It will be important to follow the rules in the Addendum for unavoidable delay and the vendor should consult the *Information Sheet for Builders: COVID-19 Pandemic-Possible Effects on Construction Schedules for New Homes* found on Tarion's website.

Please note, however, best practice would be to explain to the purchaser prior to signing of the purchase agreement that this notice will be forthcoming. In other words, explain as plainly as you can to the prospective purchaser the difficulties and challenges around setting the closing date, and explain the reason why you are providing the First Notice of delay at the same time as the agreement is being provided.

For freehold homes,

Vendors are expected to include a good faith estimate of the First Tentative Closing Date, which is the date the vendor anticipates the home will be completed and ready to move-in. In the present circumstances, that date may need to be evaluated carefully by the vendor and a time set that is much further out than would otherwise be the case.

The Outside Closing Date should be set at a date further out than might otherwise be the case, as the purchaser will have a 30 period in which they can terminate the purchase agreement.

If the project has not started construction then vendors should consider setting the First Tentative Closing Date and the Outside Closing Date much later than might otherwise be the case, to take into account delays that may occur as a result of direct and indirect impacts of the pandemic assuming the worst case scenario.

Vendors thereafter will be entitled to set a Second Tentative Closing Date giving a 120-day extension and, if necessary, a Firm Closing Date allowing for another up to 120-day extension. Given that the vendor can only extend closing dates by a maximum of 240 days, there is a greater risk of setting the First Tentative Closing Date too early. Therefore,

consider the possible or likely delays due to the pandemic carefully before setting the First Tentative Closing Date

One approach could be to set the dates in good faith using your best judgement as noted above, but to send a First Notice under section 5 of the Addendum (Extending dates due to Unavoidable Delay) simultaneously -- pointing out that the pandemic may adversely affect delivery of the home by the First Tentative Closing Date. The First Notice must be supported by reasonable evidence that there are impacts which are expected to delay the completion of the project. It will be important to follow the rules in the Addendum for unavoidable delay and the reader should consult the *Information Sheet for Builders: COVID-19 Pandemic-Possible Effects on Construction Schedules for New Homes* found on Tarion's website.

Please note, however, best practice would be to explain to the purchaser prior to signing of the purchase agreement that this notice will be forthcoming. In other words, explain as plainly as you can to the prospective purchaser the difficulties and challenges around setting the closing date, and explain the reason why you are providing the First Notice of delay at the same time as the agreement is being provided.

14. I am a builder of a townhouse condominium project. At present, I have set a Tentative Occupancy Date. I have also sent out a First Notice under section 5 (Extending Dates due to Unavoidable Delay) under the Addendum arising from expected delays due to impacts of the COVID-19 pandemic. I have now reached Roof Assembly Date as defined in the Addendum. In these circumstances, when would I need to send the notice setting the Final Tentative Occupancy Date?

Having sent the First Notice, you should send out the Second Notice under the unavoidable delay provisions when appropriate to do so. It will be important to follow the rules in the Addendum for unavoidable delay and the reader should consult the *Information Sheet for Builders: COVID-19 Pandemic -- Possible Effects on Construction Schedules for New Homes* found on Tarion's website. You would set the Final Tentative Occupancy Date and communicate it to your purchasers in the Second Notice as well as in the Revised Statement of Critical Dates accompanying the Second Notice.

15. A home was originally set to close on the Firm Closing Date of June 30th and the builder sent the First Notice of unavoidable delay on March 30th. If the builderplans to keep the June 30th closing date, when do they need to provide the Second Notice to the purchaser in order to close on June 30th?

First, it is Tarion's view that having given the First Notice advising of a delay, the builder should provide a Second Notice advising when closing will happen. 10-days' notice must be

given after the Second Notice (This is set out in s. 5 (c) of the Addendum.). So, in the example, the Second Notice should be sent by November 20th or before.

Tarion's guidance is that providing at least 10-days' notice to the purchaser in this situation is the best way to proceed, or else working to obtain a mutual agreement with the purchaser to the new date. **See Question 20 below.**

16. **With all the uncertainties, what happens if a builder sends a Second Notice with a revised Firm Closing Date, and there's an additional change in, for example the COVID-19 governmental mandates for construction? E.g. city inspectors decide to cease operations, changes to essential service list related to construction. Can a builder send another First Notice?**

The law in this circumstance is untested, but the following is Tarion's best guidance on the subject. In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the Addendum so long as the vendor meets certain requirements. These possible requirements are discussed at **Question 19** below.

If the Vendor is not able to provide the necessary information, or cannot satisfy the possible requirements, all as described at **Question 19** then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be a consequence.

Alternatively, the builder may be able to extend under the regular requirements if they still have 90 days to provide the notice to the purchaser and if the current critical date is a First Tentative or Second Tentative. It is vitally important that builders are certain that they have fully assessed the direct and indirect impacts of the pandemic as well as the aftereffects, sometimes called the additional Remobilization Period before sending out the Second Notice and do not send it too soon.

If vendors underestimate the total delay and are not able to meet the newly set Firm Closing Date, a homeowner may be entitled to make a delay compensation claim.

17. **Can I send unavoidable delay notices via an email bulk messaging service? What are the rules surrounding how an email notice should be sent?**

If you are contemplating whether to use a bulk email service to send unavoidable delay notices, there are a few things to consider. First, you must make sure that you and the Purchaser have agreed to send/receive notices by email and that you have a valid email address for the purchaser. Review the Addendum to find the methods for which you have both agreed to send/receive notices.

You must also ensure the email is properly sent, and document that it was received. Consider that it is common for email providers to recognize bulk email messages as junk mail and either block or filter them out, so there is a heightened risk that using a bulk email service will mean your purchasers don't receive the notice.

In general, when using email, consider using delivery receipts and/or read receipts to document that the email was sent AND received. You must follow up on any bounce back, 'unable to deliver', or other potentially undelivered messages to ensure the Purchaser does in fact receive the email notice. Be sure to keep records of the email sent to each purchaser and any confirmation that it was received.

Vendors and Purchasers should also review the sections of the Addendum on 'time periods and how notices must be sent' to properly comply with its provisions. For example, notices (however sent) in all events must be sent to the Purchaser. Notices may also be sent to the Purchaser's lawyer if permitted in the purchase agreement and contact information for the lawyer is provided.

18. What happens to the Critical Dates between the time the First Notice is sent out, and the time before I send out my Second Notice?

As stated in **Question 7**, the Unavoidable Delay provisions of the Addendum do not permit the Builder to start the Critical Dates framework over again. When a First Notice is sent out, the builder should look at the next Critical Date. It is that next Critical Date, and further subsequent Critical Dates, that have been temporarily delayed through a properly delivered and complete First Notice.

When a Second Notice is sent out, it should only reset the Critical Dates that followed the date when the First Notice went out e.g. the Outside Closing date. The dates before the First Notice was sent cannot be revised. The extensions to critical dates cannot exceed the total period of the *Unavoidable Delay Period*.

19. What should I do if I already sent out a Second Notice and new impacts arise as a result of the pandemic or a further surge or wave of the pandemic and these impacts will cause additional delay in delivery of the home?

In a circumstance where a Second Notice has already been sent, but there are new and unanticipated impacts from the pandemic, or a subsequent surge or wave of the pandemic, then it may be possible for vendors to re-engage the Unavoidable Delay provisions of the

Addendum so long as the vendor meets certain requirements. The law in this circumstance is untested, but the following is Tarion's best guidance on the subject.

Vendors may be able to re-engage the Unavoidable Delay provisions in connection with delays caused by new impacts of the pandemic or a subsequent surge or wave of the pandemic, but the requirements to permit re-engagement may well include:

i. The vendor must have taken all reasonable mitigation measures to avoid delay (the delays must be beyond the reasonable control of the vendor);

ii. The vendor must not have contributed in any way to the delay; and

iii. The vendor is claiming "delay" in respect of the new impacts and no other collateral purpose e.g. the vendor is trying to avoid paying more to complete the home on time.

Re-engaging the Unavoidable Delay provisions will require the vendor to provide the purchaser and Tarion with detailed information/evidence addressing specifically why the delay was not reasonably foreseeable/avoidable. For example, it will be difficult to argue that it is beyond the reasonable control of the Vendor to have run short on kitchen cabinets if the shortage was foreseeable and could have been addressed by sourcing from elsewhere. If pressure treated wood is scarce, but available at a higher price, that is not a delay due to an impact beyond the vendors control - the Vendor, we expect, would have to bear the burden of the higher price. By now, all vendors know that the pandemic may last for months or years, and they should be and should have been taking appropriate steps to avoid or mitigate any further delays.

If the Vendor is not able to provide this level of detailed information, or cannot satisfy the considerations mentioned above, then Tarion is likely to consider any purported subsequent First Notice as invalid and delay compensation may be consequence.

An alternative approach to sending a subsequent First and Second Notice, is to postpone the closing (set a new Firm Closing Date) by mutual agreement. It is very important that any mutual agreement to extend the Firm Closing Date comply with the requirements of section 4 of the Addendum. This approach may have a downside if the delay goes on longer than anticipated. Further extensions using the Unavoidable Delay provisions may not be available (the circumstances for sending a First Notice at that time may not exist) and a further mutual agreement in accordance with section 4 of the Addendum may be necessary. In all events you need to work closely with your lawyer.

20. I have an upcoming closing with a Firm Closing Date of June 30, 2021. Because ofthe pandemic, I sent out a First Notice under the unavoidable delay provisions of the Addendum on February 15, 2021. My concern is that there are only a few weeks left to closing and I have reason to believe my municipal occupancy inspection may be delayed due to the impacts of the pandemic. Do I have to give the purchaser a Second Notice in order to close on the original Firm Closing Date? And in all events, how much prior notice do I need to give to the purchaser that I propose to close on the original Firm Closing Date?

The current pandemic is an unprecedented circumstance and we recognize that the unavoidable delay framework under the Addendum does not always give simple clear answers to every possible scenario. Tarion attempts to provide context and guidance on how those provisions might be interpreted but cannot give legal advice. To the extent that you and your legal counsel believe the rights and obligations under the Addendum are different, you are free to act on that advice. That being said, our best guidance is as follows:

- In Tarion's view, the Addendum requires two notices to be provided in this situation: the first informs the purchaser of the delay, the second informs them of the new closing date. The second notice is required in our view because the Addendum says in section 5(c) that after sending the first notice "As soon as reasonably possible, and no later than 20 days after the vendor knows or ought reasonably to know that an Unavoidable Delay has occurred, the vendor shall provide written notice to the purchaser setting out… [the Second Notice]". We see the use of the word 'shall' in this context as making the sending of a Second Notice mandatory.

- The Addendum does speak to the minimum notice to be given when setting the new closing date in the Second Notice – it cannot be less than 10 days from when the Second Notice is given. This is also set out in s. 5 (c) of the Addendum.

- The idea here is straightforward in our view: the vendor should tell the purchaser that there may be a delay as soon as possible after they learn of that situation – this is the First Notice. Then as soon as the vendor knows when they can close again, they should tell the purchaser so – and when they do that, they should set a new closing date but give the purchaser a minimum of 10 days to re-organize. In our view, this is consistent with the intention of the Addendum and its consumer protection context.

In some situations, purchasers may want to close with less than 10 days' notice. In this case, the closing can be moved forward by mutual agreement (the vendor needs to document this properly and should consult a lawyer). The language of the Addendum provides that either party (the vendor or the purchaser) may request that the closing date be moved earlier and that the parties should not "unreasonably" withhold their consent to such a request. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.

In Tarion's view, the best way for a vendor to ensure they are in compliance with the intention of the addendum and are acting in good faith in respect to the transaction is to follow the above process. In summary, that is to:

1) Issue a First Notice
2) Issue a Second Notice, providing at least 10 days' time before the new closing; and
3) if the parties wish to move the closing earlier, they can do so by written mutual agreement.

Potential consequences to not providing proper notice

Tarion considers both the following circumstances to be contrary to the words and intention of the addendum: (i) not issuing a Second Notice and then closing on the original closing date without clear written agreement with the purchaser; or (ii) issuing a Second Notice but failing to give 10 days' notice. As the addendum does not expressly speak to any financial consequences for such actions, Tarion would not require payment of delay compensation in these circumstances. Such non-compliance would, however, raise vendor/builder conduct or compliance issue in scenarios where there are concerns that a purchaser has been treated unfairly or did not receive reasonable notice to get prepared for closing. Therefore, vendors should always provide their purchasers with at least 10 days' notice, or clearly document the communication to the purchaser, demonstrating the purchaser was aware of and in agreement with the reinstatement of the original closing date or alternate closing date.

Each closing scenario is unique and there is unfortunately no blanket answer to how each could be looked upon, which is why we strongly recommend that at least 10 days are provided and you work closely with your lawyer.

21. The home I am constructing has been adversely impacted by the pandemic and as a result I have sent out a first notice to the purchaser that there will be delays due to the pandemic. Those impacts are continuing and as such I have not yet sent out a second notice.

In addition to delay caused by the pandemic, there is now a strike which is also going to have effects that will delay completion and delivery of the home. How should I handle this (i.e., do I sent out another first notice for delays caused by the strike)?

Tarion's best guidance is that you should treat each of the unavoidable delay events (pandemic, strike) separately.

For example, do not try to claim delays that are due to the strike as being delays due to the pandemic. Continue to treat the unavoidable delay due to the impacts of the pandemic on its own and continue to monitor and catalog the delays due to the impacts of the pandemic. Follow guidance available on the COVID-19 builder resource page on Tarion's website and in particular this advisory on unavoidable delays.

If a strike has occurred which will also cause delays, you should send out a separate First Notice to the purchaser which will reference the strike as a separate reason for further delays. For a strike it is important to send out the First Notice in accordance with the rules set out in the Addendum, catalogue the delays and why they are due to the strike.

Monitor and document separately the delays due to the pandemic versus those due to the strike. You should consider any pandemic and strike-related delays as being on a separate track. The next step is to determine when you should send out a Second Notice for each track. As each notice is tied to its own unavoidable delay event, each second notice does not need to go out at the same time. You may for example find the strike delays end earlier than the pandemic-related delays, and that you can set revised critical dates due to the strike delay. However, those revised dates would be provisional dates as they are still subject to the delays that you can show are continuing due to the pandemic. As a best practice, the provisional nature of the revised dates should be communicated to the purchaser. Alternately, it may be the pandemic delays cease before the strike delays and a similar approach would apply.

When all the delays are over, you can set new revised Critical Dates that reflect both the impacts of the pandemic and of the strike.

22. When I send out my Second Notice, can I send a revised Statement of Critical Dates that moves the Critical Dates by an amount less than the total Unavoidable Delay Period?

The Addendum has an underlying premise (and the principles of contract interpretation and good faith execution of a contract holds) that closings should not surprise the purchaser or

be re-scheduled on short notice. Purchasers must have time to arrange their affairs, including alternate accommodation, storage of belongings, and arranging mortgage financing once a new Firm Closing Date is known.

In Tarion's view, the Addendum requires two notices to be provided in respect of an Unavoidable Delay: the first informs the purchaser of the delay, the second informs them of the new critical dates as extended by the delay. The Second Notice is required in our view because the Addendum says in section 5(c) that after sending the First Notice "As soon as reasonably possible, and no later than 20 days after the vendor knows or ought reasonably to know that an Unavoidable Delay has occurred, the vendor shall provide written notice to the purchaser setting out… [the Second Notice]". We see the use of the word 'shall' in this context as making the sending of a Second Notice mandatory.

The Addendum references extending Critical Dates by both the amount of the Unavoidable Delay Period, but also by an amount that is no more than the length of Unavoidable Delay Period. Extending Critical Dates by less than the Unavoidable Delay Period has not been judicially considered. With that in mind, the answer to this question depends on the interpretation of the Addendum. Tarion's best guidance is as follows recognizing that an interpretation of the Addendum that reflects consumer protection is to be favoured:

a. The first scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is an earlier Critical Date (e.g., First/Second Tentative Closing/Occupancy Dates). If a shorter extension period does not prejudice the purchaser (e.g., unreasonably short notice of closing), then Tarion would expect that earlier delivery of the home would be seen as advantageous by both the purchaser and vendor. This could come up in a situation where the vendor wishes to make no changes to the original Statement of Critical Dates when sending out a Second Notice. However, making no change to the Original Statement of Critical Dates would only be applicable in circumstances where the next Critical Date is e.g. a First or Second Tentative/Occupancy Date. When these specific instances arise, the builder should be clear in their communications that they are not revising the original Statement of Critical Dates.

b. A second scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is the Firm Closing/Occupancy Date. In that case the guidance in paragraph a. above applies but there is an added element. Namely, the Addendum is clear – the revised Firm Closing/Occupancy Date cannot be less than 10 days from when the Second Notice is given. This is also set out in s. 5 (c) of the Addendum.

   i. In some situations, purchasers may want to close with less than 10 days' notice. In this case, the closing can be moved forward by mutual agreement (the vendor needs to document this properly and should consult a lawyer). The language of the Addendum provides that either party (the vendor or the purchaser) may request that the closing date be moved earlier and that the parties should not "unreasonably" withhold their consent to such a request. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.

   ii. In Tarion's view, the best way for a vendor to ensure they are following the intention of the Addendum and are acting in good faith in respect to the transaction is to follow the above process.

   iii. In summary:

      1) Issue a First Notice
      2) Issue a Second Notice, which provides at least 10 days' time before the new closing; and
      3) If the parties wish to move the Firm Closing Date, then a mutual agreement in accordance with the Addendum is available.

***Important Note:** *The questions and answers in this document are intended for general guidance and do not constitute legal or other professional advice. The reader is advised toseek legal advice from their own legal counsel to address their particular circumstances.*

TARION
BUILDING CONFIDENCE

Q&A on Strikes, Unavoidable Delay & Critical Dates

Strikes may affect a new home transaction in two ways. First, it may delay initial construction and therefore delivery of the home. Secondly, after the homeowner takes possession strikes may also affect the vendors ability to make timely repairs.

Extending the Time for Delivery of Homes

1. **Why can't Tarion simply grant a standard length delay for everybody?**

   There are over 50,000 new homes built each year and a great many of them won't be affected by the strikes. It would not be fair to these homeowners to have the closing arbitrarily extended. It would also be in contravention to the rules set out in the Ontario New Home Warranties Plan Act.

   The strikes will have different impacts on the delivery dates of different homes depending on a number of factors. For example:

   - The stage of construction.
   - How quickly the trades return to work.
   - The impact on trades that did not strike
   - Problems rescheduling the sequence of trades.
   - Possible impact on supply chains.
   - Potential that trade backlogs in turn cause backlogs for government inspections.
   - Possible impact of trade delays and backlog delays pushing back construction into unseasonal weather.

2. **Do I have to send out my Second Notice immediately after the strikes end?**

   - No. The trigger for sending out the Second Notice is <u>not</u> the end of the strike.

   - The time period that can be added to Critical Dates is known as the Unavoidable Delay Period. The Unavoidable Delay Period is made up of two parts. These are:

     - The period of the strike itself; <u>plus</u>
     - the Remobilization Period. This is any additional delay that occurs because of the strike (e.g., delay in trades returning to work, having to reschedule sequence of trades and so on).

   - Once the strike is over, you should consider what other impacts the strikes might have and what additional delays (apart from the strike itself) may occur in connection with each home you are building. In some cases, the effects may be minimal; in other cases, effects may be significant. It may take a few weeks

– 30 days if you need it - as a "rule of thumb" – to work out what you see as the reasonable and likely additional overall delay associated with the strike and its after-effects. Only once you have assessed these after-effects – the Remobilization Period – are you required to send out the Second Notice. The Second Notice will advise the homeowner of the delay period being tagged onto the construction schedule (the combined number of days covering the period of the strike plus the Remobilization Period) and the date of the conclusion of the Unavoidable Delay Period.

3. **What if there are multiple strikes, each beginning one after the other?**

   - You must send out a First Notice (and later a Second Notice) for each strike that could result in an extension.

   - If two or three strikes start within days of one another, you can collect them in the First Notice but be sure to mention all the strikes that will impact your closing dates.

   - If any subsequent strikes occur that have not been mentioned in previous notices to purchasers, you must send separate notices for these strikes if you wish to use them in your calculation of new closing dates.

4. **Can I simply reset my Critical Dates, (e.g., go back to a First Tentative Closing Date even though I was at a Second Tentative Closing Date)?**

   - No. The Unavoidable Delay provisions of the Addendum do not permit a new home vendor to start the Critical Dates framework over again. If you are at the point where you set a Second Tentative Closing Date, then you cannot go back to a First Tentative Closing Date. What you can do is take the cumulative total of the delay (e.g., 45 days of strike plus 55 days of Remobilization Period for a total of 100 days) and add that 100 days to your Second Tentative Closing Date and all remaining critical dates. The usual Addendum sequence will then work in the same way from those extended dates.

5. **If I underestimate the cumulative total of the delay due to a strike, can I simply send another set of Notices?**

   - No. The Unavoidable Delay provisions of the Addendum gives the builder a one-time opportunity to extend Critical Dates by the total period of the delay but does not provide for multiple opportunities to do this unless there are new strike events.

     That is why it is so important to monitor the length of the strike, take the time to figure out the anticipated additional delay (Remobilization Period) and then send

the Second Notice once you have a reasonable level of comfort that the extra time you have tacked on to the construction schedule will be sufficient. You should take this exercise seriously and act prudently but reasonably in assessing the extra time needed.

- If you do underestimate the total delay and are not able to meet the newly set Critical Dates, a purchaser/homeowner may be entitled to make a delay compensation claim.

6. **The home I am constructing has been adversely impacted by the pandemic and as a result I have sent out a first notice to the purchaser that there will be delays due to the pandemic. Those impacts are continuing and as such I have not yet sent out a second notice.**

   In addition to delay caused by the pandemic, there is now a strike which is also going to have effects that will delay completion and delivery of the home. How should I handle this (i.e., do I sent out another first notice for delays caused by the strike)?

   Tarion's best guidance is that you should treat each of the unavoidable delay events (pandemic, strike) separately.

   For example, do not try to claim delays that are due to the strike as being delays due to the pandemic. Continue to treat the unavoidable delay due to the impacts of the pandemic on its own and continue to monitor and catalog the delays due to the impacts of the pandemic. Follow guidance available on the COVID-19 builder resource page on Tarion's website and in particular this advisory on unavoidable delays.

   If a strike has occurred which will also cause delays, you should send out a separate First Notice to the purchaser which will reference the strike as a separate reason for further delays. For a strike it is important to send out the First Notice in accordance with the rules set out in the Addendum, catalogue the delays and why they are due to the strike. Monitor and document separately the delays due to the pandemic versus those due to the strike.

   You should consider any pandemic and strike-related delays as being on a separate track. The next step is to determine when you should send out a Second Notice for each track. As each notice is tied to its own unavoidable delay event, each second notice does not need to go out at the same time. You may for example find the strike delays end earlier than the pandemic-related delays, and that you can set revised critical dates due to the strike delay. However, those revised dates would be provisional dates as they are still subject to the delays that you can show are continuing due to the pandemic. As a best practice, the provisional nature of the revised dates should be communicated to the purchaser. Alternately, it may be the pandemic delays cease before the strike delays and a similar approach would apply.

When all the delays are over, you can set new revised Critical Dates that reflect both the impacts of the pandemic and of the strike.

Please be aware: In order to unilaterally change Critical Dates for strikes, vendors must follow the rules for Unavoidable Delay set out in the Addendum.

Extending Builder Repair Periods

1. **When should I be requesting the extension?**

   You can request the extension at any time prior to the expiration of the builder repair period that is affected. This includes the initial 120-day repair period, the 30-day repair period following a request for conciliation, and the 30-day post conciliation repair period for items assessed as warranted at the conciliation. Each extension request will be considered on a case-by-case basis.

2. **What is the process for notifying homeowners if they are affected by the strike?**

   You should advise your homeowners about the strike and indicate which warranty claim items you feel will be affected by the strike. If you plan to seek an extension from Tarion, you should advise them that the applicable builder period may be extended and that you will let them know if that happens.

3. **What should I do once the extension is granted by Tarion?**

   Once the extension is granted you will have to notify each homeowner individually and copy Tarion on the notification so that we can add it to the individual home or common element file for future reference. You will need to let the homeowner know that their request for conciliation timeframe will be moved forward until after the extension for those items affected by the extension. For items not impacted by the extension, they should request a conciliation, if they wish to do so, within the usual timeframe.

4. **How is the issue of strikes addressed when a conciliation is requested?**

   - Homeowner contacts Tarion to request a conciliation inspection.
   - If, for example, the inspection is scheduled for 10 items and two of them are strike related, the homeowner will know prior to the inspection that we will not be assessing the two strike-related items. They will be advised to contact us after the extension date if the builder has not resolved the items.
   - If any other item is warranted at the conciliation, then the conciliation is chargeable, unless an exception applies.

- For the strike-related items, the WSR will code the item as not assessed and indicate on the report that the builder was given an extension due to the industry strike. They will provide the date in the report as to when the homeowner can contact us for the re-inspection if the builder does not resolve the items.

5. If I can't get the work done because of the strike, how will this affect chargeability?

As mentioned above, each claim will be looked at on a case-by-case basis.

CITATION: Ashcroft Homes v. Tarion Warranty Corporation, 2023 ONSC 6527
DIVISIONAL COURT FILE NO.: DC-23-2805
DATE: 20231123

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J.A. Ramsay, Varpio and Leiper JJ.

BETWEEN:	)	
	)	
Ashcroft Homes - Capital Hall Inc.	)	*Alexander Bissonnette and Filip Szadurski* for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
Tarion Warranty Corporation	)	
	)	*David Outerbridge and Shalom Cumbo-Steinmetz* for the Respondent
Respondent	)	
	)	**HEARD at OTTAWA:** November 17, 2023 by videoconference.

THE COURT

[1] The Applicant, a builder and vendor, seeks judicial review of the decision of Tarion Corporation under s.14 of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, ordering it to pay $7,500 compensation to the purchaser for delayed occupancy. Tarion is the Respondent. The standard of review is reasonableness.

Evidence that was not before the decision-maker

[2] Tarion objects to the use of new information filed by the Applicant contained in portions of the affidavit of Manny DiFilippo sworn December 10, 2022. Mr. DiFilippo's affidavit includes evidence about the background of the epidemic and evidence concerning the impact of the dismissal of this application on the Applicant's business.

[3] The evidence about the pandemic is more than mere background. It could have been placed before Tarion if due diligence had been exercised. The evidence about the impact of Tarion's ruling on the Applicant's business is not relevant to whether the decision was reasonable. We would not have admitted it as fresh evidence.

[4] Our decision is based on the record before the decision-maker. It would not be in the interest of justice to allow the Applicant to expand the record. This is a review of the reasonableness of a decision. There is no complaint about the procedure followed by the decision-

maker. There has been no application to admit fresh evidence. The Applicant is not entitled to do the evidence over on review: *Lovell v. Ontario (Minister of Natural Resources and Forestry)*, 2022 ONSC 423 at paras. 5-7 (Div. Ct.).

Background

[5] The Applicant is a builder. On February 7, 2016, it entered into an agreement of purchase and sale with the purchaser for a condominium unit. The Applicant provided a "Statement of Critical Dates" as follows: March 1, 2018, for first tentative occupancy; August 31, 2020, as the outside occupancy date; and September 30, 2020, as the date of the purchaser's termination period.

[6] On April 30, 2018, there was a fire at the condominium complex. It required remediation.

[7] On May 10, 2018, the Applicant wrote to the purchaser about the fire and notified him that the fire would cause an unavoidable delay and estimated that it would add 120 days to the previous occupancy dates. Ultimately, the delay in completion lasted until July 14, 2021. The Applicant sent updates to the purchaser during this period as follows:

a. August 29, 2018 – a letter informing the purchaser about the significant smoke damage and estimating that completion would be in spring 2019 at the earliest.

b. April 15, 2019 – a letter advising that the remedial work for the smoke damage was done, the Applicant was working with its insurer, and estimating that completion would be between May and September 2020.

c. May 25, 2020 – a letter saying that the Applicant's construction department would be setting a completion and occupancy schedule within "the coming weeks".

d. August 10, 2020 – a letter mentioning the uncertainties caused by COVID-19 and outlining the progress to date, pushing the anticipated closing to summer 2021.

e. March 18, 2021 – an email with a letter attached revising the Statement of Critical Dates, including July 14, 2021, as the firm occupancy date. This is the key notice in question. The letter provided revised critical dates, including July 14, 2021 for occupation, although, as it said, "the unavoidable delay has yet to be declared over."

f. May 21, 2021 – a letter setting the final closing date as November 12, 2021.

[8] Section 14 (5.0.3) of the Act deals with compensation for delayed occupancy or closing. There is a delayed occupancy warranty provided for under O. Reg. 165/08. The Regulation requires that the Tarion addendum form part of the agreement of purchase and sale. The addendum says that the vendor must pay the purchaser $150 per day (up to $7,500) as delayed occupancy compensation, subject to certain exceptions. One such exception is where there is unavoidable delay and the vendor complies with the notice requirements.

[9] Unavoidable delay is defined in s. 5 of the addendum as "an event which delays Occupancy which is a strike, fire, explosion, flood, act of God, civil insurrection, act of war, act of terrorism

or pandemic, plus any period of delay directly caused by the event, which are beyond the reasonable control of the Vendor and are not caused or contributed to by the fault of the Vendor."

[10] The notice requirements which Tarion considered and applied in this claim read as follows:

> (b) If the Vendor wishes to extend Critical Dates on account of Unavoidable Delay, the Vendor shall provide written notice to the Purchaser setting out a brief description of the Unavoidable Delay, and an estimate of the duration of the delay. Once the Vendor knows or ought reasonably to know that an Unavoidable Delay has commenced, the Vendor shall provide written notice to the Purchaser by the earlier of: 20 days thereafter; and the next Critical Date.
>
> (c) As soon as reasonably possible, and no later than 20 days after the Vendor knows or ought reasonably to know that an Unavoidable Delay has concluded, the Vendor shall provide written notice to the Purchaser setting out a brief description of the Unavoidable Delay, identifying the date of its conclusion, and setting new Critical Dates.

[11] Here, the purchaser's occupancy was delayed by more than three years, ultimately taking place on July 14, 2021. After closing, the purchaser filed a delayed occupancy claim with Tarion. Tarion concluded that the notice was ineffective because it failed to provide a brief description of the unavoidable delay and failed to specify its end date.

Issues on Review

[12] The Applicant submits that the decision was not reasonable and raises the following three issues:

a. Was the decision reasonable in concluding that the March 2021 letter did not identify the concluding date for unavoidable delay?

b. Was the decision reasonable in concluding that the March 2021 letter did not provide a brief description of the unavoidable delay?

c. Did Tarion fetter its discretion by applying the plain requirements in the addendum in a rigid, arbitrary or incomplete manner?

[13] There is a fourth issue. Tarion held that the Applicant did not provide sufficient evidence to show that the delay was directly caused by the events and that the Applicant did not cause it or contribute to it. On this issue, the Applicant's position is that this finding was not necessary to the decision. That is, the decision was based only on the ineffectiveness of the notice. Furthermore, the evidence consisted of a statutory declaration that was filled out by the Applicant on a form supplied by Tarion. It is submitted that it was unreasonable for Tarion to find that it was not enough to fill out its own form.

Was the decision reasonable in concluding that the March 2021 letter did not identify the concluding date for unavoidable delay and did not provide a brief description of the unavoidable delay?

[14] The Act and the addendum exist to protect purchasers of new homes. Purchasers are at the potential mercy of unscrupulous builders and the legislature saw fit to provide purchasers with the ability to seek compensation from such a builder.

[15] The addendum contains a penalty clause whereby a buyer is entitled to $150 per day, up to a maximum sum of $7,500 in situations where the builder delays closing. The addendum also enables the builder to deduct unavoidable delay from the delay period, thereby reducing the builder's penalty – and the buyer's compensation - for a delayed closing. Section 5 of the addendum demands that the builder provide the purchaser with notice regarding the unavoidable delay so that purchasers can make decisions regarding whether they wish to file a claim.

[16] The Applicant's letter of March 18, 2021 did not fix an end date for the unavoidable delay. In fact, its letter states that the unavoidable delay is ongoing. In *5000933 Ontario Inc. v. Mahmood et al.*, 2022 ONSC 4726; affirmed 2023 ONCA 58, the court found that while the notices sent by the builder in question did not specify the exact date of termination of the unavoidable delay, the information provided enabled the purchaser to calculate the date when the unavoidable delay ended – thereby enabling the purchaser to determine whether it should engage the remedial provisions of the Act.

[17] In contrast, and contrary to the submissions of the Applicant's counsel, the March 18, 2021 letter provides no context from which the purchaser could calculate the termination date for the unavoidable delay. The letter states that the unavoidable delay "has yet to be declared over" but nonetheless provides the purchaser with critical dates including occupancy and closing dates. The Applicant did not indicate when remedial work from the fire was expected to be completed. The Applicant did not provide information of any sort (i.e., contractor completion dates, inspection dates, etc.) that might have permitted the buyer to calculate the end date of the unavoidable delay. This left the purchaser in a complete vacuum as to whether the purchaser could – or should – engage the addendum's remedial provisions.

[18] Based upon the March 18, 2021 notice and the builder's other communications (which we use as context to understand Tarion's decision), the only thing that a purchaser can determine with certainty is that the unavoidable delay would end sometime between March 19, 2021 and July 14, 2021. If the unavoidable delay ended on March 19, 2021, it appears that a purchaser could engage the addendum's remedial provisions.

[19] Tarion, in its decision, stated:

> Tarion has determined that the Vendor's second notice (March 15, 2021) does not comply with the requirements of Section 5(c) relating to the conclusion of the fire for the following reasons:
>
> The letter of March 15, 2021 does not provide a brief description of the Unavoidable Delay.

> The letter of March 15, 2021 states that the Unavoidable Delay has yet to be declared over and does not specify a date that the Unavoidable Delay concluded;
>
> The practical consequence of this non-compliance is that the March 15, 2021 letter does not allow the Purchaser to assess the length of the Unavoidable Delay Period, including whether the March 15, 2021 letter was provided within 20 days of the end of the Unavoidable Delay, as required.

[20] The Applicant's argument therefore fails because the builder did not provide the purchaser with any notice of the end date for unavoidable delay, whether explicit or constructive. The Applicant also did not specify the nature of that continuing unavoidable delay on March 18, 2021 (i.e., the contractors were late, the fire damage was more extensive, COVID made fixing the problem more difficult, etc.). In the complete absence of this notice information, Tarion's Decision was entirely reasonable.

Did Tarion fetter its discretion by applying the plain requirements in the Addendum in a rigid, arbitrary or incomplete manner?

[21] The Applicant submits that the addendum is not "law," but that Tarion applied it as if it were, in a "rigid, arbitrary or incomplete manner." The Applicant analogizes the addendum to the policy documents in issue that were created pursuant to statute in *Latimer v. Canada (Attorney General)*, 2010 FC 806 (CanLII) and in *Gordon v Canada (Attorney General)*, 2016 FC 643 and argues that this amounted to Tarion fettering its discretion in applying the relevant provisions to the facts before it.

[22] We disagree. The addendum is required by the Regulation to form part of every purchase agreement for a new home in Ontario. It is a mandatory contract prescribed by law.

[23] Tarion applied these requirements to the record before it. Tarion is responsible for the "administration of the Ontario New Home Warranties Plan." Tarion does not have discretion to ignore express requirements of the warranties, including the Delayed Occupancy Warranty. It was not unreasonable for Tarion to require strict compliance with the consumer protection elements of s. 5(c) of the addendum as to the effectiveness of notice. We conclude that Tarion did not fetter its discretion by applying the requirements of the addendum.

Was Tarion's decision that the Applicant had not provided sufficient evidence to show that the delay was not caused directly by the event, without contribution by the Applicant, decisive and reasonable?

[24] The Applicant filed a statutory declaration that was ambiguous as to the cause of the delay. In paragraph 3, the declarant says that the delay was caused by the fire and in paragraph 8, "The aggregate period of delay caused by the impacts of the fire" was 869 days. In paragraph 10, he declares that the delay was caused by "the pandemic." In its reasons, Tarion quoted the statutory declaration filed by the Applicant before it and said:

> The Applicant submitted documentary evidence to Tarion along with the completed Statutory Declaration and it included each notice and update issued to the purchaser in

> this report. The Vendor did not provide any evidence or documentation to rationalize what impacts occurred due to the fire and how the impacts delayed the occupancy of the new homes.

[25] The Corporation concluded:

> The Vendors' submissions to Tarion did not include sufficient evidence to support that the entire delay period between April 30, 2018 to July 14, 2021 was solely caused by the fire and not caused or contributed to by the fault of the Vendor.

[26] This is a finding of fact that was open to Tarion on the evidence. It is owed deference. Tarion was not obliged to accept the Applicant's unsupported assertion that the delay was entirely attributable to the fire and the pandemic. The reasoning in Tarion's decision is logical and transparent. The Corporation was not convinced by the unsupported assertion in the solemn declaration that the delay was unavoidable within the meaning of the addendum, therefore it awarded compensation.

[27] The Applicant points out that the statutory declaration was on a form provided by Tarion. Therefore, it was unreasonable for Tarion to have concluded that the information provided by the Applicant using that form was insufficient. We disagree. At paragraph 4 of the form, the Applicant was invited to attach evidence "in support of impacts set out [above]". It was reasonable for Tarion to expect such evidence and to take into account the absence of such evidence.

[28] We do not agree that the conclusion quoted above (at paragraph 25) was *obiter*. It was an alternate basis for the decision. It was also decisive standing alone. If Tarion was not satisfied that the delay was caused by the events, as opposed to the Applicant, compensation was payable whether the notice was effective or not.

Conclusion

[29] Tarion does not seek costs. The application is dismissed without costs.

J.A. Ramsay J.

Varpio J.

Leiper J.

Date: 23 November 2023

DIVISIONAL COURT FILE NO.: DC-23-2805
DATE: 20231123

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J.A. RAMSAY, VARPIO AND LEIPER JJ.

BETWEEN:

Ashcroft Homes v. Tarion Warranty Corporation

REASONS FOR JUDGMENT

THE COURT

Date of Release: November 23, 2023

CITATION: 5000933 Ontario Inc. v. Mahmood et al., 2022 ONSC 4726
COURT FILE NO.: CV-21-77517
DATE: 20220815

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 5000933 Ontario Inc., Applicant/Respondent in Counter-Application

AND:

Khalid Mahmood and Ume Kalsoom, Respondents/Applicants in Counter-Application

BEFORE: MacNeil J.

COUNSEL: *C. Neil* – Lawyer for the Applicant

O. Hoque – Lawyer for the Respondents

HEARD: April 26, 2022 (via Zoom videoconference)

REASONS FOR DECISION

Overview

[1] The Applicant, 5000933 Ontario Inc. ("5000933"), is a builder and vendor of new homes in a residential real estate development in Hamilton. It owns lands that are the subject of an uncompleted real estate transaction involving the Respondents, Khalid Mahmood ("Mr. Mahmood") and Ume Kalsoom ("Ms. Kalsoom"). 5000933 commenced this application seeking a declaration that the agreement of purchase and sale has been repudiated by Mr. Mahmood and that it is entitled to resell the lands, along with other related relief.

[2] Mr. Mahmood and Ms. Kalsoom are spouses. They oppose the application and have brought a counter-application seeking a declaration that the agreement of purchase and sale remains in full force and effect, a declaration that 5000933 is in breach of the agreement, and an order for specific performance. In the alternative, they seek damages for breach of contract, breach of the duty of good faith and negligent misrepresentation.

Background

[3] On or about September 2, 2020, Mr. Mahmood and Ms. Kalsoom signed an offer to purchase from 5000933 a new home to be built on Lot 1 in the Foothills of Winona development ("the Property") for the price of $849,900.00, with a proposed closing date of January 19, 2022.

[4] Mr. Mahmood and Ms. Kalsoom subsequently signed another offer, dated September 18, 2020, for the same purchase price but with a closing date of June 15, 2021. On September 29, 2020, this offer was amended to remove Ms. Kalsoom's name and to insert a new September 30, 2020 irrevocable date.

[5] On September 30, 2020, 5000933 accepted the September 29th offer made by Mr. Mahmood alone as purchaser ("the Agreement").

[6] The Agreement included the following terms:

a. The purchase price was $849,900.00.
b. The initial deposit was $20,000.00.
c. Upon the waiver of certain conditions by the purchaser, subsequent deposits of (i) 5% of the purchase price less the initial deposit; and (ii) 5% of the purchase price, were due.
d. The balance of the purchase price was due on the closing date, subject to adjustments set out in the Agreement.

[7] Since the Agreement involved the construction of a new home, the Tarion Statement of Critical Dates and Addendum ("the Tarion Addendum") formed part of the Agreement. It provided for a First Tentative Closing Date of June 15, 2021; a Second Tentative Closing Date that could be as late as October 13, 2021; a Firm Closing Date that could be as late as February 10, 2022; and an Outside Closing Date that could be as late as October 13, 2022. The Statement of Critical Dates also provided that Critical Dates could change, as per section 5 of the Tarion Addendum, if there were unavoidable delays.

[8] On October 10, 2020, the Agreement became binding and unconditional after the deemed waiver of the conditions.

[9] By letter dated March 9, 2021, 5000933 wrote to Mr. Mahmood advising that, as a result of unforeseen construction delays, the new dwelling would not be completed as of the scheduled Closing Date (First Tentative Closing Date) of June 15, 2021. It extended the Closing Date to July 30, 2021, pursuant to the Tarion Addendum and paragraph 2 of the Agreement.

[10] On March 29, 2021, as a result of upgrades requested by Mr. Mahmood, an Amendment to the Agreement was accepted by 5000933 and the purchase price was increased to $867,217.25.

[11] On April 23, 2021, 5000933 sent another letter to Mr. Mahmood advising that, as a result of unforeseen construction delays, the new dwelling would not be completed as of the scheduled Closing Date (Second Tentative Closing Date) of July 30, 2021. It stated that it was exercising its right to extend the Closing Date to August 27, 2021, pursuant to the Tarion Addendum and paragraph 2 of the Agreement.

[12] On August 6, 2021, the purchase price was increased to $879,837.88 following a further request by Mr. Mahmood for extras. He was required to pay a deposit of $4,968.63 regarding same and he provided a cheque, dated August 3, 2021, for this amount. Including this amount, Mr. Mahmood paid to 5000933 deposits totaling $89,958.63 representing approximately 10% of the final purchase price.

[13] By letter dated August 11, 2021, 5000933 notified Mr. Mahmood of an Unavoidable Delay, as defined in the Tarion Addendum, that it attributed to the ongoing COVID-19 pandemic which had resulted in a delay in the availability of kitchen cabinetry.

[14] By letter dated August 20, 2021, 5000933 notified Mr. Mahmood that the Unavoidable Delay had ended, advised that it calculated the Unavoidable Delay Period to be eight (8) days, and set a new Firm Closing Date of September 3, 2021. 5000933 enclosed a revised Statement of Critical Dates reflecting this updated Firm Closing Date.

[15] That same day, August 20, 2021, Mr. Mahmood requested by telephone an extension of the transaction's closing date to September 10, 2021. 5000933 agreed to close on September 10, 2021. No formal amendment to the Agreement was signed in that regard, however. Instead, the September 10, 2021 closing date was confirmed in emailed correspondence exchanged between the parties' representatives and lawyers.

[16] On September 8, 2021, Mr. Mahmood's lawyer wrote to the lawyer for 5000933 to ask for a further extension of the transaction's closing date to September 17, 2021. By way of emails exchanged on September 9 and 10, 2021, he was advised that 5000933 did not agree to this request and was insisting on the transaction closing on September 10, 2021.

[17] On September 8, 2021, 5000933 submitted by email to the City of Hamilton an occupancy permit application. The inspection took place on September 9, 2021 and an occupancy permit for the new dwelling was issued on September 10, 2021 ("the Occupancy Permit").

[18] On September 10, 2021, 5000933's lawyer sent a letter to Mr. Mahmood's lawyer confirming that the closing date was to be that day, that 5000933 was "ready, willing and able" to complete the transaction, and that its closing documents had been delivered. A copy of the Transfer of the Property as prepared in Teraview was enclosed. 5000933 stated that it

had "completed an effective tender of closing deliveries" for the transaction and, unless closing funds were received from Mr. Mahmood by 5:00 PM, he would be in fundamental breach of the Agreement. In that event, the letter indicated that 5000933 would be treating "the Sale Agreement as no longer binding upon it, retaining your client's deposits, and taking immediate steps to resell the Property and to claim damages from your client in respect of any additional losses suffered as a result of your client's said breach".

[19] At some point, an unsigned mortgage commitment letter, dated September 10, 2021, was provided by Mr. Mahmood's lawyer to 5000933's lawyer. This mortgage commitment letter did not refer to Mr. Mahmood, however, but only to Ms. Kalsoom who was not a party to the Agreement; it was for a four-month term and the party identified as the lender was an individual, not a financial institution. 5000933 disregarded the letter.

[20] Mr. Mahmood did not tender payment of the balance of the purchase price on September 10, 2021 and the transaction failed to close.

[21] On September 22, 2021, Mr. Mahmood and Ms. Kalsoom caused to be registered a Caution against title to the Property relying on the Agreement. On November 22, 2021, they purported to renew the Caution by registering a second one. These Cautions were removed from title pursuant to the Order of the Honourable Justice Goodman, dated December 20, 2021.

Issues

[22] The primary issues raised in the application and the counter-application are as follows:

a. Did 5000933 breach the Agreement?
b. Are the Respondents entitled to specific performance?
c. Alternatively, are the Respondents entitled to damages?
d. Are the Respondents entitled to a certificate of pending litigation?
e. Did Mr. Mahmood's failure to close the transaction entitle 5000933 to terminate the Agreement?
f. Is 5000933 able to remarket and relist the Property for sale?
g. Has Mr. Mahmood forfeited his deposit?

Analysis

(a) Did 5000933 breach the Agreement?

[23] It is the Respondents' position that 5000933 breached the Agreement by failing to set a closing date in accordance with the timeline stipulated in the Statement of Critical Dates and that it acted unilaterally by setting a closing date of August 27, 2021. They submit that, by

unilaterally choosing August 27, 2021, 5000933 did not provide a reasonable time for Mr. Mahmood to organize his affairs to complete the closing. The Respondents also argue that 5000933 arbitrarily chose Firm Closing Dates of August 27, September 3 and September 10, 2021 and that these were of no effect since they were not chosen in compliance with the Tarion Addendum. The Respondents submit that 5000933 could not insist on closing on September 10, 2021 as it had acted in bad faith in purporting to provide an extension to the Respondents to that date. It is the Respondents' position that when 5000933 became aware that the new dwelling was not going to be ready for delivery on July 30, 2021, it was required to set a Delayed Closing Date pursuant to section 3 of the Tarion Addendum. Because 5000933 did not do so, it was in breach of the Agreement as of July 30, 2021. The Respondents contend that subsection 3(c) of the Tarion Addendum operated to set a new Delayed Closing Date of October 28, 2021 which was 90 days after what they say was the "Firm Closing Date of July 30, 2021".

[24] 5000933 disputes that it breached the Agreement and submits that its extensions of the closing dates were in compliance with the Agreement and the Tarion Addendum.

Closing Dates

[25] Subparagraph 2(a) of the Agreement addresses delays in closing. It reads:

> 2. (a) Delays in Closing: The Vendor will construct (if not already constructed) and complete upon the property a dwelling ("the dwelling") of the type indicated above in accordance with the plans and specifications already examined by the Purchaser. If for any reason except the Vendor's wilful neglect the dwelling is not completed, utilities services are not operative, or the house has not been approved for occupancy where required by any municipal corporation, whether local or regional, having jurisdiction over the property (the "Municipality") on or before the Closing Date, the Purchaser agrees to grant, and hereby grants, such reasonable extension or extensions of time for completion of the foregoing as may be required by the Vendor, and the Closing Date shall be extended accordingly. ... Subject to the foregoing, if this Agreement is terminated in accordance with the provisions of Schedule "F" hereof (the "Tarion Addendum") as a result of the Vendor's inability to complete the dwelling for occupancy by the Closing Date, as same may be extended from time to time pursuant to the provisions of the Tarion Addendum, this Agreement shall be null and void and, save and except as specifically provided for in the Tarion Addendum, the Vendor shall not be liable to the Purchaser for any damages arising as a result thereof and shall have no further obligation hereunder. [Emphasis added.]

[26] Section 1 of the Tarion Addendum provides for the setting of critical dates, as follows:

1. Setting Tentative Closing Dates and the Firm Closing Date

(a) Completing Construction Without Delay: The Vendor shall take all reasonable steps to complete construction of the home on the Property and to Close without delay.

(b) First Tentative Closing Date: The Vendor shall identify the First Tentative Closing Date in the Statement of Critical Dates attached to the Addendum at the time the Purchase Agreement is signed.

(c) Second Tentative Closing Date: The Vendor may choose to set a Second Tentative Closing Date that is no later than 120 days after the First Tentative Closing Date. The Vendor shall give written notice of the Second Tentative Closing Date to the Purchaser at least 90 days before the First Tentative Closing Date, or else the First Tentative Closing Date shall for all purposes be the Firm Closing Date.

(d) Firm Closing Date: The Vendor shall set a Firm Closing Date, which can be no later than 120 days after the Second Tentative Closing Date or, if a Second Tentative Closing Date is not set, no later than 120 days after the First Tentative Closing Date. If the Vendor elects not to set a Second Tentative Closing Date, the Vendor shall give written notice of the Firm Closing Date to the Purchaser at least 90 days before the First Tentative Closing Date, or else the First Tentative Closing Date shall for all purposes be the Firm Closing Date. If the Vendor elects to set a Second Tentative Closing Date, the Vendor shall give written notice of the Firm Closing Date to the Purchaser at least 90 days before the Second Tentative Closing Date, or else the Second Tentative Closing Date shall for all purposes be the Firm Closing Date.

(e) Notice: Any notice given by the Vendor under paragraphs (c) and (d) above, must set out the stipulated Critical Date, as applicable. [Emphasis added.]

[27] Section 2 of the Statement of Critical Dates – Delayed Closing Warranty also states that the Vendor – without the Purchaser's consent – may delay Closing twice by up to 120 days each time by setting a Second Tentative Closing Date and then a Firm Closing Date in accordance with section 1 of the Addendum.

[28] Section 2 of the Tarion Addendum provides three ways by which the Firm Closing Date can be changed:

2. Changing the Firm Closing Date – Three Ways

(a) The Firm Closing Date, once set or deemed to be set in accordance with section 1, can be changed only:

(i) by the Vendor setting a Delayed Closing Date in accordance with section 3;
(ii) by the mutual written agreement of the Vendor and Purchaser in accordance with section 4; or
(iii) as the result of an Unavoidable Delay of which proper written notice is given in accordance with section 5.

(b) If a new Firm Closing Date is set in accordance with section 4 or 5, then the new date is the "Firm Closing Date" for all purposes in this Addendum.

[29] For the following reasons, I am satisfied that 5000933 did not breach the Agreement and/or the Tarion Addendum in changing the closing dates in the manner it did.

[30] First, July 30, 2021 was never identified by 5000933, nor was it deemed by virtue of subsection 1(d) of the Tarion Addendum, to be a Firm Closing Date. While 5000933's correspondence of March 9, 2021 served to extend the First Tentative Closing Date of June 15, 2021 to a closing date of July 30, 2021, the new date was not called a Firm Closing Date. And, in its subsequent correspondence of April 23, 2021, wherein 5000933 notified Mr. Mahmood that August 27, 2021 was to be the Closing Date, July 30, 2021 was clearly identified as the Second Tentative Closing Date only.

[31] Second, subparagraph 2(a) of the Agreement and subsections 1(c) and (d) of the Tarion Addendum permitted 5000933 to unilaterally set a Second Tentative Closing Date and then a Firm Closing Date. The setting of these Critical Dates by 5000933 fell within the prescribed timelines. In their factum, the Respondents admit that the Tarion Addendum allowed 5000933 to unilaterally give notice setting a Second Tentative Closing Date, and to unilaterally give notice setting a Firm Closing Date if it did not want the Firm Closing Date to occur on the Second Tentative Closing Date.

[32] Third, section 3 of the Tarion Addendum only applies if the Vendor cannot close on the Firm Closing Date and if section 4 (Changing Critical Dates – By Mutual Agreement) and section 5 (Extending Dates – Due to Unavoidable Delay) do not apply. Since 5000933 changed the Firm Closing Date as the result of an Unavoidable Delay in accordance with section 5, section 3 has no application.

Extension due to Unavoidable Delay

[33] It is the Respondents' position that 5000933 was not entitled to rely on the Unavoidable Delay provisions found in section 5 of the Tarion Addendum or, alternatively, its reliance was not in accordance with that section because 5000933's August 11, 2021 correspondence did not specify the date when the purported delay commenced, contrary to subsection 5(b); and its August 20, 2021 correspondence did not specify the date when the purported delay concluded, contrary to subsection 5(c). As a result, the Respondents argue that a calculation of the Unavoidable Delay Period was impossible and so these notices were ineffective. They contend that subsection 5(d) of the Tarion Addendum therefore applies and the existing Critical Dates are unchanged and any Delayed Closing Compensation payable under section 7 is payable from the existing Firm Closing Date of August 27, 2021.

[34] Subsection 2(a)(iii) of the Tarion Addendum permitted 5000933 to change the August 27, 2021 Firm Closing Date as the result of an Unavoidable Delay by way of proper written notice given in accordance with section 5. As set out below, I am satisfied that 5000933 complied with section 5.

[35] The term "Unavoidable Delay" is defined in section 12 of the Tarion Addendum to mean "an event which delays Closing which is a strike, fire, explosion, flood, act of God, civil insurrection, act of war, act of terrorism or pandemic, plus any period of delay directly caused by the event, which are beyond the reasonable control of the Vendor and are not caused or contributed to by the fault of the Vendor". I find that the COVID-19 pandemic and the resulting delay in the delivery of the kitchen cabinetry fall within this definition of Unavoidable Delay and so 5000933 could invoke section 5. The Respondents did not strenuously dispute that the COVID-19 pandemic satisfies this provision.

[36] Section 12 of the Tarion Addendum defines the term "Unavoidable Delay Period" to mean "the number of days between the Purchaser's receipt of written notice of the commencement of the Unavoidable Delay, as required by subparagraph 5(b), and the date on which the Unavoidable Delay concludes". The Tarion Addendum does not specify whether the calculation of dates is to be inclusive or exclusive.

[37] I am satisfied that 5000933's August 11, 2021 notice marked the commencement of the Unavoidable Delay in the circumstances, and that it provided a brief description of the reason for the delay and an estimate of its duration as required. While I agree with the Respondents that 5000933's August 20, 2021 notice could have more clearly identified the concluding date of the Unavoidable Delay, I am satisfied that the eight-day Unavoidable Delay Period was calculable from the notices delivered as the number of days falling between the dates of the notices themselves, exclusive of those dates. It is apparent that 5000933 then calculated the new Firm Closing Date to be September 3, 2021 by adding the

eight-day total to the former closing date of August 27, 2021, inclusively, in accordance with subsection 5(c). Thus, I find that 5000933's written notice setting the Firm Closing Date to September 3, 2021 was compliant with the provisions of the Tarion Addendum.

[38] In the event that I am wrong in this regard, I am of the view that the Ontario Court of Appeal's decision in *Ingarra v. 301099 Ontario Limited (Previn Court Homes)*, 2020 ONCA 103, is instructive. In that case, the vendor had appealed from the application judge's decision finding that it had repudiated the agreement of purchase and sale. One of the issues to be determined by the application judge was whether the agreement between the lawyers, made orally and through the exchange of faxes and emails, to extend the agreed upon firm closing date superseded the provisions set out in the Tarion Addendum. The application judge found that the parties did not have the contractual freedom to set a closing date outside of section 4 of the Addendum. On appeal, however, the Court of Appeal held that the parties were free to set a new closing date outside of the confines of the Tarion Addendum, holding (at para. 19):

> First, s. 4 of the Tarion Addendum does not render unenforceable non-compliant amendments. Despite stating that the Addendum sets out "a framework" for altering the Critical dates "which cannot be altered contractually except as set out in this section 4", the last sentence in s. 4(a) provides: "Any amendment not in accordance with this section is voidable at the option of the Purchaser" (emphasis added). A non-compliant amendment altering the closing date is not "invalid" as the application judge found. It is only voidable.

[39] In the present case, there was no evidence that Mr. Mahmood or his lawyer raised any concerns about how the eight-day Unavoidable Delay Period was calculated by 5000933 upon receipt of the August 20, 2021 notice. Mr. Mahmood also did not exercise his right to void the closing date of September 3, 2021 as set by 5000933 therein. Instead, he asked that it be further changed to September 10, 2021, to which 5000933 agreed.

[40] While the Respondents argue that there was no formal written agreement setting out the agreed-upon September 10, 2021 closing date, if Mr. Mahmood objected to the way in which this extension of the closing date was documented or believed it did not comply with section 4 of the Tarion Addendum, he could have voided the date: *Ingarra*, at paras. 19 and 22. He did not do so.

[41] Accordingly, in keeping with the Court of Appeal's holding in *Ingarra*, I find that the parties were free to agree to the new closing date of September 10, 2021 outside the framework of the Tarion Addendum, in the manner they did, and that it was enforceable as the new Firm Closing Date.

[42] While the Respondents argue that they were ready to close the transaction on or about September 17, 2021, there was no documentary evidence before me that Mr. Mahmood was in funds and ready to close on September 10, 2021 or thereafter. The mortgage commitment letter that was provided to 5000933 was in the name of his wife only, who was not a party to the Agreement, and it was unsigned. In the circumstances, it was of no value.

[43] With respect to the email sent by Mr. Mahmood's lawyer to the lawyer for 5000933 on September 17, 2021 purporting to set another new closing date of October 15, 2021, I find that this was of no import. The Respondents complain that 5000933 did not respond to their proposed October closing date but the evidence indicates there were some limited communications between the parties' lawyers subsequent to September 17, 2021. In any event, 5000933 had already clearly stated its position that, if the transaction did not close on September 10, 2021, which it did not, it would be treating the Agreement as no longer binding. Moreover, 5000933 had tendered on September 10, 2021 and so there was no obligation on it to consider any further closing dates beyond that point.

Occupancy Permit

[44] The Respondents argue that section 9 of the Tarion Addendum required 5000933 to have delivered an occupancy permit for the new dwelling as of the closing dates of August 27, 2021, and of September 3, 2021 when it purported to grant the extension of the closing date to September 10, 2021. They also submit that since 5000933 did not deliver an occupancy permit to Mr. Mahmood on September 10, 2021, it breached the Tarion Addendum. The Respondents rely on the application judge's decision at first instance in *Ingarra*, 2019 ONSC 3347, at para. 44, wherein she held that the unavailability of an occupancy permit "is a serious matter". They argue that a fair, liberal and purposive interpretation of the Tarion Addendum warrants a finding that 5000933 had an obligation to deliver, on or before closing, an occupancy permit. They submit that there is no dispute that 5000933 never delivered an occupancy permit. (Counsel for the Respondents also relied on the decision in *Amatuzio v. 650 Atwater Avenue Ltd.*, 2020 ONCA 9. But I find that case is distinguishable as it dealt with the purchase of a new condominium unit and, as a result, subsection 9(a) of the Tarion Addendum is worded slightly differently by requiring delivery of an occupancy permit "On or before the Occupancy Date" and not "On or before Closing" as in this case.)

[45] 5000933 disputes the Respondents' assertions that it breached section 9 of the Tarion Addendum and that it failed to obtain an occupancy permit in a timely manner. 5000933 submits that it had obtained the Occupancy Permit on September 10, 2021 and it was available for delivery if the transaction had closed that day.

[46] Section 9 of the Tarion Addendum sets out the conditions of closing as they relate to the *Ontario Building Code*. It reads, in part:

9. Ontario Building Code – Conditions of Closing

(a) On or before Closing, the Vendor shall deliver to the Purchaser:

(i) an Occupancy Permit (as defined in paragraph (d)) for the home; or

(ii) if an Occupancy Permit is not required under the Building Code, a signed written confirmation by the Vendor that all conditions of occupancy under the Building Code have been fulfilled and occupancy is permitted under the Building Code.

[47] Section 12 of the Tarion Addendum defines "Closing" to mean "the completion of the sale of the home including transfer of title to the home to the Purchaser" and provides that "Close" has a corresponding meaning. In this case, the transaction was not completed and title to the home was never transferred to the purchaser, Mr. Mahmood. Accordingly, there was no "Closing".

[48] Since there was no Closing, I find that there was no obligation on the part of 5000933 to have delivered the Occupancy Permit. Thus, there was no breach by 5000933 of section 9 of the Tarion Addendum.

(b) Are the Respondents entitled to specific performance?

[49] As a result of my rulings above, the Respondents have no reasonable claim to an interest in the Property and so they are not entitled to specific performance.

[50] I also accept 5000933's argument that Mr. Mahmood is contractually prohibited from obtaining specific performance as a remedy by virtue of subparagraph 5(e) of the Agreement which provides that the Purchaser has no interest whatsoever in the Property prior to closing and the Purchaser's only remedy for breach by the Vendor is a claim for return of the deposit monies, and no claim for specific performance or damages.

(c) Alternatively, are the Respondents entitled to damages?

[51] The Respondents claim damages for breach of contract, breach of the duty of good faith and negligent misrepresentation.

[52] Based on my rulings above that 5000933 did not breach the Agreement or the Tarion Addendum, no award of damages for breach of contract is warranted. Further, subparagraph 5(e) of the Agreement precludes a claim for damages.

[53] The Respondents have not identified any misrepresentations allegedly made by 5000933 nor have they adduced any evidence to support an argument that 5000933 breached a duty of good faith.

[54] Accordingly, I dismiss the Respondents' alternative claim for damages.

(d) Are the Respondents entitled to a certificate of pending litigation?

[55] In their counter-application, the Respondents seek an order granting them leave to register a certificate of pending litigation ("CPL") against the Property.

[56] Rule 42.01(1) of the *Rules of Civil Procedure* provides that a CPL under section 103 of the *Courts of Justice Act*, R.S.O. 1990, c. C43, may be issued by a registrar only under an order of the court.

[57] The Respondents did not put any caselaw before me regarding this issue. However, I accept and adopt the two-part test as described in *Rahbar v. Parvizi*, 2022 ONSC 1104, at para. 20, which provides: first, the court must determine whether the plaintiff has a triable claim to an interest in land; second, the court must consider all relevant factors between the parties, including whether damages would be a satisfactory remedy, and balance the interests of the parties in the exercise of discretion regarding whether to grant leave for the issuance of the CPL.

[58] In my view, as a result of my rulings above, the Respondents have no triable claim to an interest in the Property and so they fail to satisfy the first part of the test for a CPL: *1245519 Ontario Ltd. v. Rossi*, 2008 CanLII 6933 (ON SC), at para. 12. Accordingly, I decline to grant them leave to register a CPL.

(e) Did Mr. Mahmood's failure to close the transaction entitle 5000933 to terminate the Agreement?

[59] Based on the evidence provided, I find that Mr. Mahmood was in breach of the Agreement by failing to close on the agreed closing date of September 10, 2021: see *Mikhalenia v. Drakhshan*, 2015 ONSC 1048, at paras. 20-21; and *Azzarello v. Shawqi*, 2018 ONSC 5414, at paras. 32 and 45.

[60] In *Ingarra*, 2020 ONCA 103 (CanLII), at para. 21, the Court of Appeal held:

> Second, s. 10 of the Tarion Addendum addresses "Termination of the Purchase Agreement". Section 10(e) provides: "Nothing in this Addendum derogates from any right of termination that either the Purchaser or the Vendor may have at law or in equity on the basis of, for example, frustration of contract or fundamental breach of

contract." Since Mr. Ingarra was not in funds to close on the new agreed closing date, it was open to Previn Homes to terminate the agreement of purchase and sale. Doing so was not prohibited by the Tarion Addendum.

[61] I am of the view that the Court of Appeal's holding in *Ingarra* applies to the instant case. Since Mr. Mahmood did not close on the agreed closing date, 5000933 was entitled to terminate the Agreement, pursuant to s. 10(e) of the Tarion Addendum. (See also *Lakeshore Landmark Development Corp. v. Mondelez Canada Inc.*, 2016 ONSC 2313, at paras. 44-45.)

[62] I find that subparagraphs 11(a) and 12 of the Agreement also entitled 5000933 to terminate the Agreement upon Mr. Mahmood failing to pay the purchase price and close the transaction on September 10, 2021. The relevant portions of these provisions read:

> 11. (a) In the event that the Purchaser defaults in any of his obligations contained in this Agreement on or before Closing Date, and fails to remedy such default forthwith, then the Vendor, in addition to (and without prejudice to) any other rights or remedies this Agreement provides or which may otherwise be available to the Vendor at law or in equity, may, at its sole option, unilaterally suspend all of the Purchaser's rights, benefits and privileges contained herein (including without limitation, the right to make colour and finish selections with respect to the dwelling as hereinbefore provided or contemplated), and/or unilaterally declare this Agreement to be terminated and of no further force or effect, whereupon all deposit monies theretofore paid, together with all monies paid for any extras or changes to the property, shall be retained by the Vendor as its liquidated damages, and not as a penalty. . . .
>
> ...
>
> 12. This offer to be read with all changes of gender or number required by the context and when accepted, shall constitute a binding contract of purchase and sale, and time shall, in all respects, be of the essence. Default in payment of any amount payable pursuant to this Agreement on the date or within the time specified, shall constitute substantial default hereunder, and the Vendor shall have the right to terminate this Agreement and forfeit all deposit monies in full. . . . [Emphasis added.]

Registration of the Cautions

[63] On September 22, 2021, the Respondents registered a Caution of an Agreement of Purchase and Sale on title to the Property. 5000933 submits that Mr. Mahmood was prohibited from registering a caution without its written consent until the full amount of the purchase price

had been paid. It argues that the registration of the caution against the Property constituted a fundamental breach entitling 5000933 to terminate the Agreement, among other things.

[64] I am of the view that subparagraph 5(e) of the Agreement is clearly worded such that the Respondents' registration of a caution on title, prior to Mr. Mahmood fully paying the purchase price, constituted a fundamental breach of the contract. Since the purchase price was never fully paid, the Agreement could be terminated by 5000933 as a result.

(f) Is 5000933 able to remarket and relist the Property for sale?

[65] 5000933 has accepted Mr. Mahmood's repudiation of the Agreement. It wishes to resell the Property and mitigate and assess its damages, including carrying costs, legal costs, and remarketing costs. 5000933 seeks a declaration that it is able to proceed with relisting the Property for sale. It also seeks an order terminating paragraph 3 of the Order made by the Honourable Justice Goodman, dated December 10, 2021, wherein 5000933 was precluded from selling the lands pending further order of the court or an agreement between the parties ("the Non-Disposition Order").

[66] Where it has been determined that a purchaser has no reasonable claim to an interest in the land, the vendor is free to sell to another purchaser: *1245519 Ontario Ltd.*, at paras. 14-15.

[67] Given my rulings above, Mr. Mahmood has no reasonable claim to an interest in the Property. Therefore, I hold that the Non-Disposition Order is vacated and that 5000933 is at liberty to remarket and sell the Property to another purchaser.

(g) Has Mr. Mahmood forfeited his deposit?

[68] 5000933 seeks a declaration that the deposit monies paid by Mr. Mahmood are forfeited as a result of his repudiation of the Agreement.

[69] The court in *Azzarello v. Shawqi*, at paras. 58-59, discussed a vendor's entitlement to a deposit as follows:

> 58 In *De Palma v. Runnymede Iron & Steel Co.*, [1950] O.R. 1 (C.A.), at p. 8, the Court of Appeal held that where the sale of land does not close due to a default by the purchaser, the vendor is entitled to the deposit without having to prove actual damages. The purpose of the forfeiture of a deposit is compensation to the disappointed vendor "for the fact that his property was taken off the market for a time as well as for his loss of bargaining power resulting from the revelation of an amount that he would be prepared to accept": *Baker v. Wynter* (2006), 49 R.P.R. (4th) 134

(Ont. S.C.), at para. 35, citing *Leading Investments Ltd. v. New Forest Investments Ltd.*, [1986] S.C.R. 70 (S.C.C.), at pp. 86-87.

59 The court must decide whether the parties intended an advance payment to be partial payment or a deposit to be forfeited in the event of non-completion of the transaction: *Mikhalenia*, at para. 32. The use of the word "deposit" has been interpreted as indicating that the payment was intended to be forfeited in the event of a breach: *Mikhalenia*, at paras. 32, 35; *Iyer v. Pleasant Developments Inc.* (2006), 210 O.A.C. 90 (Div. Ct.), at para. 8.

[70] Subparagraphs 11(a) and 12 of the Agreement address the forfeiture of deposit monies and read, in part:

> 11. (a) In the event that the Purchaser defaults in any of his obligations contained in this Agreement on or before Closing Date, and fails to remedy such default forthwith, then the Vendor, in addition to (and without prejudice to) any other rights or remedies this Agreement provides or which may otherwise be available to the Vendor at law or in equity, may, at its sole option, ... unilaterally declare this Agreement to be terminated and of no further force or effect, whereupon all deposit monies theretofore paid, together with all monies paid for any extras or changes to the property, shall be retained by the Vendor as its liquidated damages, and not as a penalty. . . .
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> ...
>
> 12. . . . Default in payment of any amount payable pursuant to this Agreement on the date or within the time specified, shall constitute substantial default hereunder, and the Vendor shall have the right to terminate this Agreement and forfeit all deposit monies in full. Without prejudice to the Vendor's rights as to forfeiture of deposit money as aforesaid, and in addition thereto, the Vendor shall have the right to recover from the Purchaser all additional costs, losses and damages arising out of default on the part of the Purchaser pursuant to any provision contained in this Agreement. . . .

[71] 5000933 argues that Mr Mahmood's deposit can be forfeited without it proving any damages and relies on the Ontario Divisional Court decision in *Pleasant Developments Inc. v. Iyer and Ramachandran*, 2006 CanLII 10223 (ON SCDC), at paras. 6-8, in support of this position. In that case, the Divisional Court held that the law is clear that a deposit may be forfeited without proof of damages, even in a situation where the vendor resells at a purchase price high enough to compensate for any loss from the first sale. The use of the word "deposit" implies that the payment is intended for forfeiture upon the purchaser's breach. The Divisional Court also held that "[t]he common law position is that if the

agreement is silent and the purchaser defaults, the deposit, by its very nature is forfeited to the vendor" (para. 8). 5000933 argues that, unless an agreement indicates an intention that the deposit is not to be forfeited, a vendor has an implied right to retain it and that, where the agreement of purchase and sale was not completed by reason of a purchaser's default, a true deposit is lost. While 5000933 submits that Mr. Mahmood is not claiming or seeking relief from forfeiture in the Respondents' counter-application, 5000933 opposes such a claim if made on the basis that relief from forfeiture is not warranted in the circumstances. 5000933 argues that the deposit is not disproportionate to the purchase price and that courts have allowed parties to retain transaction deposits even when they may not have suffered damages from the failure to close: *Azzarello v. Shawqi*, at paras. 62-68; and *Pleasant Developments*, at paras. 11-16.

[72] I find that the monies paid by Mr. Mahmood were all described as deposits in the Agreement and in the amendment made to the Agreement, and that the provisions found in the Agreement are clear that the monies were intended to be a deposit to be forfeited in the event the transaction did not close due to the Purchaser's default.

[73] However, courts have held that even where an amount paid is characterized as a non-refundable deposit, if the amount of the deposit is out of all proportion to the losses suffered and it would be unconscionable for the vendor to retain the deposit, the court may order that it be returned: see *Dovbush v. Mouzitchka*, 2016 ONCA 381 (Ont. C.A.), at para. 31; *Azzarello v. Shawqi*, at paras. 62-65 and 68; *Pleasant Developments*, at paras. 12-14 and 16; and *1303943 Ontario Inc. v. Dajlan Troka (In Trust)*, 2019 ONCA 280, at para. 4.

[74] I am of the view that there is insufficient evidence before me to make a finding whether the deposit sum is out of proportion to any loss suffered by 5000933. As a result, I am unable to determine if keeping the deposit would result in a windfall for 5000933 or be unconscionable such that relief from forfeiture should be granted.

[75] 5000933 seeks an order for a summary hearing regarding damages following the resale of the Property. I direct such a hearing and adjourn the determination on the forfeiture of Mr. Mahmood's deposit monies to the Judge who hears that motion.

Disposition

[76] The Respondents' counter-application is dismissed.

[77] With respect to 5000933's application, for the foregoing reasons, I order as follows;

a. A declaration is made that the Agreement was terminated by virtue of the breach of Mr. Mahmood, as purchaser, in failing to close.

b. A declaration is made that 5000933, as vendor, is at liberty to remarket and relist the Property for sale.

c. The Non-Disposition Order is hereby vacated.

d. Following the resale of the Property, there shall be a summary hearing on the issue of 5000933's damages.

e. The issue of whether Mr. Mahmood's deposit is forfeited is hereby adjourned to be determined at the summary hearing directed in paragraph 77(d) above.

Costs

[78] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

a. By September 6th, 2022, the Applicant shall serve and file its written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

b. The Respondents shall serve and file their responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by September 20th, 2022; and

c. The Applicant's reply submissions, if any, are to be served and filed by September 27th, 2022 and are not to exceed two pages.

d. If no submissions are received by September 27th, 2022, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

B. MacNeil J.

MacNEIL J.

Released: August 15, 2022

COURT OF APPEAL FOR ONTARIO

CITATION: 5000933 Ontario Inc. v. Mahmood, 2023 ONCA 58
DATE: 20230125
DOCKET: COA-22-CV-0114

MacPherson, Hoy and Coroza JJ.A.

BETWEEN

5000933 Ontario Inc.

Applicant (Respondent)

and

Khalid Mahmood and Ume Kalsoom

Respondents (Appellants)

Obaidul Hoque and F.M. Sajid B. Hossain, for the appellants

Cameron D. Neil, for the respondent

Heard: January 23, 2023

On appeal from the order of Justice Byrdena MacNeil of the Superior Court of Justice, dated August 15, 2022, with reasons reported at 2022 ONSC 4726.

REASONS FOR DECISION

[1] The appellant Khalid Mahmood entered into an agreement of purchase and sale (the "Agreement") with the respondent to buy a new home to be built in a residential subdivision. Mr. Mahmood and his spouse, Ume Kalsoom, appealed the application judge's order declaring that Mr. Mahmood repudiated the

Agreement by failing to close and dismissing their counter-application for specific performance.

[2] At the conclusion of the hearing of this appeal, we dismissed the appeal, for reasons to follow. These are our reasons.

[3] Since the Agreement involved the construction of a new home, the Tarion Statement of Critical Dates and Addendum (the "Tarion Addendum") formed part of the Agreement. It provided for potential closing dates as follows: a "First Tentative Closing Date" of June 15, 2021; a "Second Tentative Closing Date" that could be as late as October 13, 2021; a "Firm Closing Date" that could be as late as February 10, 2022; and an "Outside Closing Date" that could be as late as October 13, 2022. It also provided that "Critical Dates" could change if there was an "Unavoidable Delay".

[4] The application judge held that the respondent had set a First Tentative Closing Date, a Second Tentative Closing Date, a Firm Closing Date, and extended the Firm Closing Date due to Unavoidable Delay in accordance with the Agreement to September 3, 2021. (But for the extension for Unavoidable Delay, the closing date would have been the Firm Closing Date of August 27, 2021.)

[5] The application judge further found that the respondent agreed to Mr. Mahmood's request to extend the closing date from September 3, 2021 to

September 10, 2021 and did not agree to the further extension requested by Mr. Mahmood, such that the closing date was September 10, 2021. Finally, the application judge found that Mr. Mahmood breached the Agreement by failing to close on September 10, 2021 and the respondent was entitled to terminate the Agreement. There is no dispute that the appellants did not have the funding needed to close on September 10, 2021.

[6] The appellants argued that the application judge committed three errors:

1. She erred in concluding that the respondent satisfied the requirements of the Agreement to extend the closing date beyond August 27, 2021 for Unavoidable Delay;
2. She did not conclude that the respondent's failure to deliver the occupancy permit to Mr Mahmood on or before September 10, 2021 barred it from terminating the Agreement; and
3. She did not find the respondent acted in bad faith by refusing to extend the closing date beyond September 10, 2021.

[7] There is no basis for this court to interfere with the application judge's order.

[8] The application judge specifically considered the requirements in the Agreement to change the Firm Closing Date as the result of an Unavoidable Delay and found that the COVID-19 pandemic and the resulting delay in the delivery of

the kitchen cabinetry relied upon by the respondent fell within the definition of "Unavoidable Delay" in the Agreement. She further found that the notice of Unavoidable Delay given by the respondent complied with the notice provisions in the Agreement.

[9] The application judge also found that the respondent was in possession of the occupancy permit on September 10, 2021 but did not have an obligation to deliver it to Mr. Mahmood. The Tarion Addendum incorporated the requirement of the *Ontario Building Code* that the respondent do so "[o]n or before Closing". The Tarion Addendum defines "Closing" to mean "the completion of the sale of the home including transfer of title to the home to the Purchaser". The application judge held that there was no "Closing" within the meaning of the Agreement and thus no breach by the respondent.

[10] These conclusions were based on the application judge's interpretation of the Agreement and her findings of fact. Both are entitled to deference. The appellants point to no error of law – extricable or otherwise – or palpable and overriding error of fact or mixed fact and law that would permit this court to interfere with these conclusions.

[11] Finally, the application judge found that the appellants did not adduce any evidence to support their argument that the respondent breached a duty of good faith. We agree.

[12] Accordingly, the appeal is dismissed. The respondent is entitled to its costs of the appeal, fixed in the amount of $5,000, inclusive of HST and disbursements.

"J.C. MacPherson J.A."
"Alexandra Hoy J.A."
"S. Coroza J.A."

Q&A on Strikes, Unavoidable Delay & Critical Dates

Strikes may affect a new home transaction in two ways. First, it may delay initial construction and therefore delivery of the home. Secondly, after the homeowner takes possession strikes may also affect the vendors ability to make timely repairs.

Extending the Time for Delivery of Homes

1. **Why can't Tarion simply grant a standard length delay for everybody?**

   There are over 50,000 new homes built each year and a great many of them won't be affected by the strikes. It would not be fair to these homeowners to have the closing arbitrarily extended. It would also be in contravention to the rules set out in the Ontario New Home Warranties Plan Act.

   The strikes will have different impacts on the delivery dates of different homes depending on a number of factors. For example:

   - The stage of construction.
   - How quickly the trades return to work.
   - The impact on trades that did not strike
   - Problems rescheduling the sequence of trades.
   - Possible impact on supply chains.
   - Potential that trade backlogs in turn cause backlogs for government inspections.
   - Possible impact of trade delays and backlog delays pushing back construction into unseasonal weather.

2. **Do I have to send out my Second Notice immediately after the strikes end?**

   - No. The trigger for sending out the Second Notice is <u>not</u> the end of the strike.

   - The time period that can be added to Critical Dates is known as the Unavoidable Delay Period. The Unavoidable Delay Period is made up of two parts. These are:

     - The period of the strike itself; <u>plus</u>
     - the Remobilization Period. This is any additional delay that occurs because of the strike (e.g., delay in trades returning to work, having to reschedule sequence of trades and so on).

   - Once the strike is over, you should consider what other impacts the strikes might have and what additional delays (apart from the strike itself) may occur in connection with each home you are building. In some cases, the effects may be minimal; in other cases, effects may be significant. It may take a few weeks

– 30 days if you need it - as a “rule of thumb” – to work out what you see as the reasonable and likely additional overall delay associated with the strike and its after-effects. Only once you have assessed these after-effects – the Remobilization Period – are you required to send out the Second Notice. The Second Notice will advise the homeowner of the delay period being tagged onto the construction schedule (the combined number of days covering the period of the strike plus the Remobilization Period) and the date of the conclusion of the Unavoidable Delay Period.

3. **What if there are multiple strikes, each beginning one after the other?**

- You must send out a First Notice (and later a Second Notice) for each strike that could result in an extension.

- If two or three strikes start within days of one another, you can collect them in the First Notice but be sure to mention all the strikes that will impact your closing dates.

- If any subsequent strikes occur that have not been mentioned in previous notices to purchasers, you must send separate notices for these strikes if you wish to use them in your calculation of new closing dates.

4. **Can I simply reset my Critical Dates, (e.g., go back to a First Tentative Closing Date even though I was at a Second Tentative Closing Date)?**

- No. The Unavoidable Delay provisions of the Addendum do not permit a new home vendor to start the Critical Dates framework over again. If you are at the point where you set a Second Tentative Closing Date, then you cannot go back to a First Tentative Closing Date. What you can do is take the cumulative total of the delay (e.g., 45 days of strike plus 55 days of Remobilization Period for a total of 100 days) and add that 100 days to your Second Tentative Closing Date and all remaining critical dates. The usual Addendum sequence will then work in the same way from those extended dates.

5. **If I underestimate the cumulative total of the delay due to a strike, can I simply send another set of Notices?**

- No. The Unavoidable Delay provisions of the Addendum gives the builder a one-time opportunity to extend Critical Dates by the total period of the delay but does not provide for multiple opportunities to do this unless there are new strike events.

  That is why it is so important to monitor the length of the strike, take the time to figure out the anticipated additional delay (Remobilization Period) and then send

the Second Notice once you have a reasonable level of comfort that the extra time you have tacked on to the construction schedule will be sufficient. You should take this exercise seriously and act prudently but reasonably in assessing the extra time needed.

- If you do underestimate the total delay and are not able to meet the newly set Critical Dates, a purchaser/homeowner may be entitled to make a delay compensation claim.

6. **The home I am constructing has been adversely impacted by the pandemic and as a result I have sent out a first notice to the purchaser that there will be delays due to the pandemic. Those impacts are continuing and as such I have not yet sent out a second notice.**

   In addition to delay caused by the pandemic, there is now a strike which is also going to have effects that will delay completion and delivery of the home. How should I handle this (i.e., do I sent out another first notice for delays caused by the strike)?

   Tarion's best guidance is that you should treat each of the unavoidable delay events (pandemic, strike) separately.

   For example, do not try to claim delays that are due to the strike as being delays due to the pandemic. Continue to treat the unavoidable delay due to the impacts of the pandemic on its own and continue to monitor and catalog the delays due to the impacts of the pandemic. Follow guidance available on the COVID-19 builder resource page on Tarion's website and in particular this advisory on unavoidable delays.

   If a strike has occurred which will also cause delays, you should send out a separate First Notice to the purchaser which will reference the strike as a separate reason for further delays. For a strike it is important to send out the First Notice in accordance with the rules set out in the Addendum, catalogue the delays and why they are due to the strike. Monitor and document separately the delays due to the pandemic versus those due to the strike.

   You should consider any pandemic and strike-related delays as being on a separate track. The next step is to determine when you should send out a Second Notice for each track. As each notice is tied to its own unavoidable delay event, each second notice does not need to go out at the same time. You may for example find the strike delays end earlier than the pandemic-related delays, and that you can set revised critical dates due to the strike delay. However, those revised dates would be provisional dates as they are still subject to the delays that you can show are continuing due to the pandemic. As a best practice, the provisional nature of the revised dates should be communicated to the purchaser. Alternately, it may be the pandemic delays cease before the strike delays and a similar approach would apply.

When all the delays are over, you can set new revised Critical Dates that reflect both the impacts of the pandemic and of the strike.

Please be aware: In order to unilaterally change Critical Dates for strikes, vendors must follow the rules for Unavoidable Delay set out in the Addendum**.**

Extending Builder Repair Periods

1. **When should I be requesting the extension?**

   You can request the extension at any time prior to the expiration of the builder repair period that is affected. This includes the initial 120-day repair period, the 30-day repair period following a request for conciliation, and the 30-day post conciliation repair period for items assessed as warranted at the conciliation. Each extension request will be considered on a case-by-case basis.

2. **What is the process for notifying homeowners if they are affected by the strike?**

   You should advise your homeowners about the strike and indicate which warranty claim items you feel will be affected by the strike. If you plan to seek an extension from Tarion, you should advise them that the applicable builder period may be extended and that you will let them know if that happens.

3. **What should I do once the extension is granted by Tarion?**

   Once the extension is granted you will have to notify each homeowner individually and copy Tarion on the notification so that we can add it to the individual home or common element file for future reference. You will need to let the homeowner know that their request for conciliation timeframe will be moved forward until after the extension for those items affected by the extension. For items not impacted by the extension, they should request a conciliation, if they wish to do so, within the usual timeframe.

4. **How is the issue of strikes addressed when a conciliation is requested*?***

   - Homeowner contacts Tarion to request a conciliation inspection.
   - If, for example, the inspection is scheduled for 10 items and two of them are strike related, the homeowner will know prior to the inspection that we will not be assessing the two strike-related items. They will be advised to contact us after the extension date if the builder has not resolved the items.
   - If any other item is warranted at the conciliation, then the conciliation is chargeable, unless an exception applies.

- For the strike-related items, the WSR will code the item as not assessed and indicate on the report that the builder was given an extension due to the industry strike. They will provide the date in the report as to when the homeowner can contact us for the re-inspection if the builder does not resolve the items.

5. **If I can't get the work done because of the strike, how will this affect chargeability?**

   As mentioned above, each claim will be looked at on a case-by-case basis.

LEGAL PANEL

SARAH TURNEY

Partner, Fasken LLP.

WHETHER A POSTPONEMENT OF AN OUTSTANDING EASEMENT TO A NEWLY-CREATED MUNICIPAL EASEMENT IS NECESSARY AT LAW, AND WHETHER A NEWLY-CREATED SURFACE OR WALKWAY EASEMENT IN FAVOUR OF A MUNICIPALITY ALSO REQUIRES (AT LAW) THE CREATION OF A SUB-SURFACE EASEMENT IN FAVOUR OF THE MUNICIPALITY IN ORDER TO SUPPORT OR BUTTRESS SAME

Sarah Turney is an advocate specializing in real property, development and construction litigation. She works with clients to solve complex disputes arising from real property.

Sarah's litigation practice focuses on real property disputes. She advises clients on complex easement and title matters, boundary disputes, adverse possession claims, mortgage claims and commercial lease remedies. Sarah has developed specialized expertise and is able to provide efficient, strategic advice on a broad range of real property matters.

Sarah was recognized as a "Rising Star: Leading Lawyer under 40" by Lexpert in 2019. Winners of these highly competitive awards are selected by a distinguished advisory board. In selecting winners, the advisory board considers contributions to the firm, legal profession, and larger community.

Sarah's municipal and planning practice includes property tax assessment, zoning and other planning appeals and expropriation matters. Sarah advocates for clients before the Ontario Land Tribunal and the Assessment Review Board.

As a former program coordinator with the City of Ottawa, Sarah has experience with government relations and policy development at the municipal level.

LEGAL PANEL

PATRICK G. DUFFY
Partner, Stikeman Elliott LLP.

FRUSTRATION OF CONTRACTS AND FORCE MAJEURE CLAUSES, AND HOW COMMERCIAL LANDLORDS HAVE FARED IN THE POST-COVID PANDEMIC JURISPRUDENCE.

Patrick Duffy is a partner and Co-Head of the Projects & Infrastructure Group. His practice focuses on project development that includes municipal and planning law, environmental permitting and litigation, energy regulation, and Indigenous engagement. He is highly sought after for his considerable experience with environmental assessments and other regulatory approvals in a variety of sectors, including renewable and non-renewable electricity generation, electricity transmission, mining, transit and transportation, aggregate quarries, and waste management. Patrick also advises clients in responding to environmental inspections, investigations and prosecutions at both the provincial and federal levels.

Patrick is an experienced advocate and has appeared before the Supreme Court of Canada, the Federal Court of Canada, all levels of courts in Ontario and a variety of administrative tribunals, including regular appearances before the Ontario Energy Board and the Ontario Land Tribunal. He has acted for both provincial and municipal governments and many of his mandates involve administrative or public law issues, including issues related to public and Indigenous engagement.

Patrick is known for his strength in advising on the business interests of energy clients and handling the full gamut of regulatory proceedings in connection with the development of energy projects. He also has expertise in public procurement processes and has been involved in all stages in a number of sectors on both the customer and bidder side. He helps draft the terms of public procurements, assists proponents in responding to procurements, and represents proponents in procurement-related litigation.

Lesson 1

Don't Count on the Common Law to Come to the Rescue

The doctrine of frustration is a common law remedy available when an unforeseen event

- occurs after the formation of the contract
- arises without the fault of any party
- for which the parties made no express or implied provision in the contract, and
- renders performance of the contract "radically different" from that which was originally contemplated

Where a contract is frustrated, the court intervenes to relieve the parties of their obligations under the contract

There is a heavy burden on the party asserting that a contract has been frustrated

Lesson 1

Don't Count on the Common Law to Come to the Rescue

Braebury Development Corporation v. Gap (Canada) Inc., 2021 ONSC 6210

- The court rejected The Gap's argument that it was excused from paying rent while the government restrictions prevented it from operating
- The supervening event must not merely increase the burden of satisfying the contractual obligations; it must affect the nature, meaning, purpose, effect and consequences of the contract
- The Gap was not required to operate its retail store under the lease and its inability to do so cannot be said to have radically altered the lease's terms
- To frustrate a contract, the supervening event must be a permanent, as opposed to a temporary, setback
- No recourse to the doctrine of frustration where a force majeure clause covering the events at issue is present in the lease

Lesson 2

COVID-19 was an event of Force Majeure (at least initially)

Force majeure clauses are contractual provisions that allocate risk for future events that

- are not normal business risks, and
- will affect the ability of one party to perform its obligations under the contract

Force majeure clauses are interpreted with reference to both the contract as a whole and the particular words used in the clause

The term "force majeure" has no set or specialized meaning in the law; whether an event triggers force majeure depends on the nature of the event and the wording of the clause

The burden of proving that an force majeure clause applies is on the party seeking to rely on it; the party must prove that it acted reasonably and bring itself squarely within the clause

"An act of God clause or *force majeure* clause … generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill"

***Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, [1976] 1 SCR 580 at para 4**

Lesson 2

COVID-19 was an event of Force Majeure (at least initially)

The Ontario courts generally accepted COVID-19 as an event of force majeure

- Little dispute that government-ordered lockdowns at the outset constituted an event of force majeure
- The consensus began to dissolve as the lockdowns were replaced with a range of government mandates

The threshold for invoking force majeure became "increasingly high with courts and arbitral tribunals taking the view that the second and subsequent waves of COVID-19 (and the attendant recurring lockdowns and restrictions) are not sufficiently 'unforeseeable'"*

*** Ryan Hicks, "Trends in International Arbitration Technology, COVID-19 and third-party funding expected to fuel disputes in 2022: Freshfields' Top Trends in International Arbitration in 2022" (2022) 8 McGill Journal of Dispute Resolution 1**

Would the imposition of similar restrictions arising from a future pandemic be considered unforeseen?

"There is no dispute that the application judge was right in finding that the government lockdowns, as a result of COVID-19, triggered a *force majeure* event, as defined in the leases"

***Windsor-Essex Catholic District School Board v. 231846 Ontario Limited*, 2022 ONCA 235 at para. 4**

Lesson 3

COVID-19 did not relieve tenants from paying rent …

The Ontario courts ruled that, as an event of force majeure, the COVID-19 pandemic › relieved the landlord and tenants of various obligations under the lease › but, unless specifically provided for by the clause, it did not relieve a tenant from paying rent under the lease Force majeure clauses generally include wording that a tenant is not excused the payment of rent due under the Lease	*Hunt's Transport Limited v. Eagle Street Industrial GP Inc.*, 2020 ONSC 5768 *Durham Sports Barn Inc. Bankruptcy Proposal*, 2020 ONSC 5938 *Braebury Development Corporation v. Gap (Canada) Inc.*, 2021 ONSC 6210
A notable exception occurred in a situation where the clause provided rent should "fully abate" where the landlord could not provide access to the premises due to an event of force majeure	*Windsor-Essex Catholic District School Board v. 231846 Ontario Limited*, 2022 ONCA 235
There is an undercurrent in the decisions that it was not the courts' responsibility to "equitably" allocate the consequences of the pandemic as between landlord and tenant; the courts viewed this as the responsibility of the Legislature	*Hudson's Bay Company ULC v. Oxford Properties*, 2021 ONSC 4515

Lesson 4

… but it could result in a rent-free extension of the lease

Niagara Falls Shopping Centre Inc. v. LAF Canada Company, 2023 ONCA 159

- LA Fitness refused to pay rent when the government reimposed the lockdown on December 26, 2020
- Force majeure clause:
  - … performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event).
  - Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.
- Clause excused the landlord's failure to provide the tenant with the premises during the lockdown, but requires the landlord to provide the tenant with the leased premises for an equivalent period
- Tenant could not rely on the clause to avoid rent during the closure, but the tenant is not obliged to pay rent during the extension

Lesson 5

The terms of the lease will govern (so read that force majeure clause carefully)

- Each case turns on the specific language used in the force majeure clause – both in defining what constitutes an event of force majeure and the consequences of an event of force majeure
- Careful consideration should be given to the different circumstances in which a force majeure clause could apply and whether the consequences of an event of force majeure should be the same in all such circumstances
- *Windsor-Essex Catholic District School Board v. 231846 Ontario Limited,* 2022 ONCA 235
  - The clause stated that rent should "fully abate" where the landlord could not provide access
  - Likely intended for situations where the landlord could not physically provide the premises, but the clause did not make this distinction and the court applied it as written
- *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159
  - The clause stated the period for performance should be extended by the period of delay
  - This was a build-to-suit arrangement; likely intended to apply where the premises were not ready for occupancy by the tenant, but the clause did not make this distinction and the court applied it as written

For more information

Patrick Duffy
pduffy@stikeman.com

Stikeman Elliott

LEGAL PANEL

CRAIG GARBE

Partner, Bennett Jones LLP.

A STEP-BY-STEP GUIDE TO THE TERMINATION OF A CONDOMINIUM PURSUANT TO SECTION 124 OF THE CONDOMINIUM ACT 1998, S.O. 1998 AS AMENDED, FOR THE PURPOSES OF REDEVELOPING THE SITE, AND THE LEGACY EASEMENTS (IF ANY) THAT REMAIN ON TITLE.

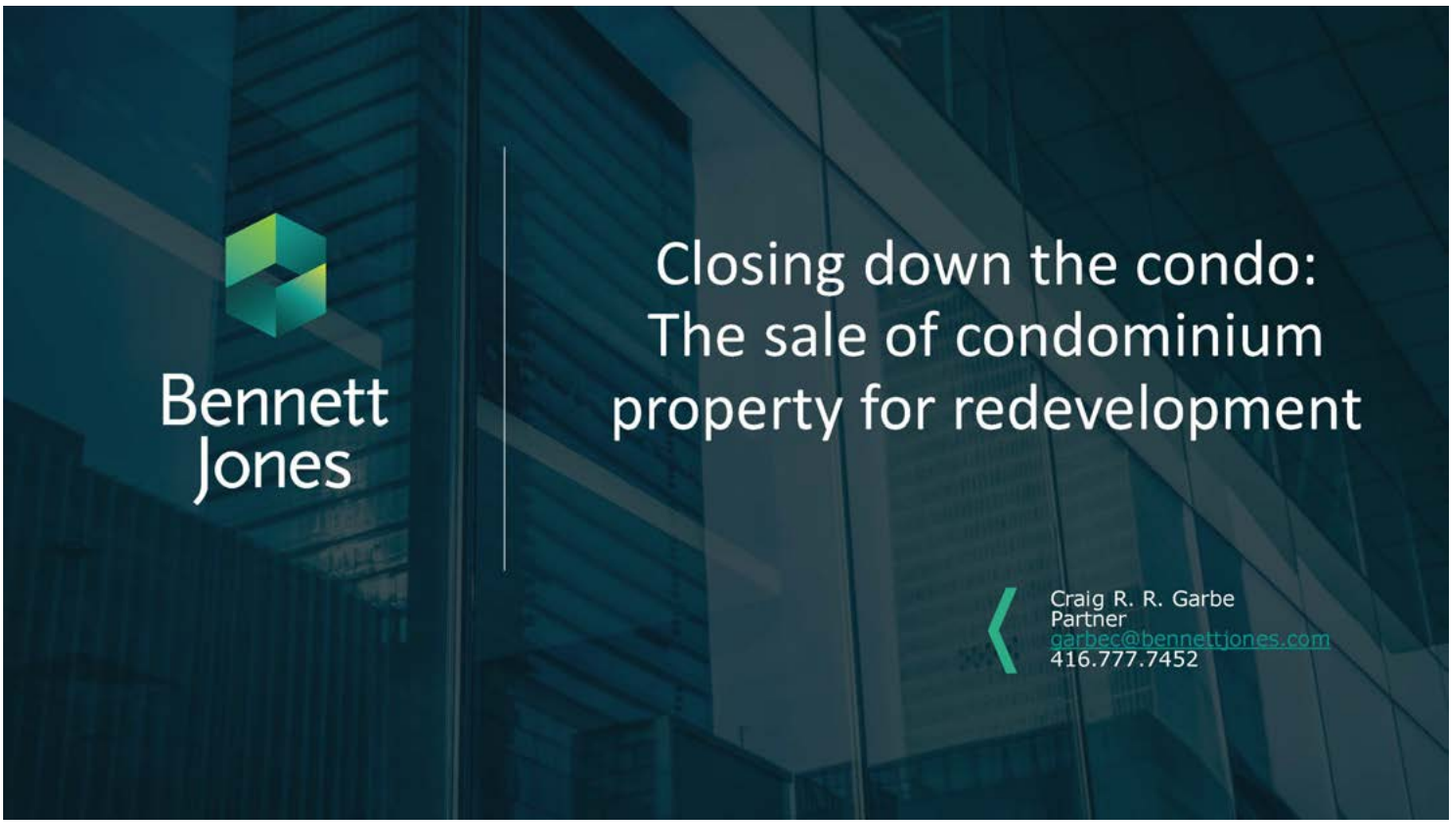
Craig Garbe is an experienced corporate and commercial lawyer with a focus on transactions related to commercial real estate. He acts for a number of investment funds, real estate investment trusts, lenders, and institutional investors on some of the largest acquisitions, dispositions, co-ownerships, financings, joint ventures, and development projects in the country. Craig has been recognized numerous times in Lexpert magazine, including for his representation of one of the joint acquisition purchasers of the Fairmont Royal York Hotel in Toronto, his role in acquisition and financing of the 68-storey Scotia Plaza in downtown Toronto, and his involvement in the $4.5-billion acquisition and plan of arrangement between H&R Real Estate Investment Trust, Primaris Retail Real Estate Investment Trust, KingSett Capital Inc., the Ontario Pension Board, and RioCan Real Estate Investment Trust.

Craig's client-focused approach brings a practical perspective to all types of joint venture developments and partnerships, with an emphasis on creating holding structures that balance both risks and opportunities, and Craig's years of experience dealing with complex title issues allow him to give pointed and pragmatic advice on any number of real property related matters. He assists clients in structuring innovative and efficient financing transactions, in organizing development projects, and in creating the agreements that govern complicated mixed-use projects and condominium properties.

Craig is also an accomplished casino and gaming regulatory lawyer, and has assisted clients across the country in negotiating the long-term operating agreements that govern their commercial casino gaming operations. Craig has acted for a number of proponents in Ontario Lottery and Gaming Corporation's Modernizing Land Based Gaming initiative, and regularly addresses gaming regulatory matters for clients in British Columbia, Alberta, and Ontario.

In addition to Craig's experience with financing, acquiring, and selling real property, he also counsels clients in respect of complex land transfer tax and structuring issues, regularly acts for both landlords and tenants in commercial leasing matters, and works with both lending and borrowing clients to complete significant offerings of commercial mortgage bonds.

Craig is a member of the Ontario Bar Association, the Canadian Bar Association, and the American Bar Association.



Condo termination options

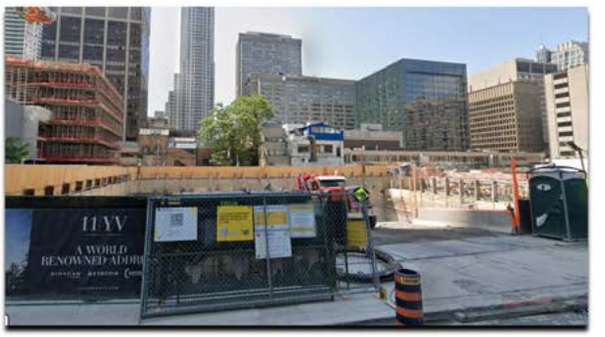
1. Buy/Sell units individually up to threshold (then terminate under s. 122 or sell under s. 124)
2. Apply to the court (court ordered termination, s. 128)
3. Buy/Sell the whole property at once (auto-terminated on sale under s. 124)

Beware of individual unit acquisitions

- *2475813 Nova Scotia Ltd. (aka Brett) v. Rodgers*
- *Romijay v. 11 Yorkville Partners*

Before

After



Where to begin?

- Condo board:
  - Do your homework (holdouts and tenancies)
  - Get authority (prelim vote and amendments)
  - Get counsel
  - Legal/title consent analysis
- Developer:
  - Get counsel
  - Legal/title consent analysis

Consent thresholds for sale of entire property: Across the Country*

Province	Owners	Encumbrancers
BC	80% (but it doesn't really matter because you need a court application anyway for >5 units)	
Alta	75% (of units)	75% (of encumbrancers)
ON	80% (of units)	80% (of encumbrancers)
NS	owners of 80% of common elements	N/A

- And what happens to dissenters?

*Not actually the country

Signing and the path to closing: Initial questions

- Who is selling?
- What is being sold?
- What will be discharged?
  - *"claims against the property being sold … created after the registration of the declaration … are extinguished"*
- What will remain?
  - *"claims against the land … that were created before the registration of the declaration … are as effective as if the declaration … had not been registered"*

LEGAL PANEL

DOUG BOURASSA

Partner, Torkin Manes LLP.

EXCULPATORY CLAUSES AND DISCRETIONARY CLAUSES IN REAL ESTATE CONTRACTS INVOLVING THE PURCHASE AND SALE OF LAND, AND WHAT BUILDERS AND DEVELOPERS NEED TO KNOW REGARDING SAME.

Doug is a partner in the litigation and real estate groups at Torkin Manes. An accomplished trial lawyer, he has conducted many trials in the Superior Court of Justice as lead counsel. Doug is equally experienced in appellate advocacy with numerous appellate level decisions to his name, both at the Divisional Court and the Court of Appeal level.

Doug is highly renowned for his experience in all aspects of commercial and residential mortgage remedies including power of sale, receivership proceedings, foreclosure, and judicial sales. He is often retained by private lenders to assist with complex subordinate mortgage disputes and enforcements. His experience in this area is unparalleled in the Province.

Doug is highly sought after by clients in all manner of real estate related disputes including ownership disputes, improvident sale allegations, contested closings, easements, rights-of-way and border disputes, commercial lease enforcement, and tenant disputes.

In addition to real estate related matters, Doug acts for his business clients on a wide range of commercial disputes. He has substantial experience in fraud related litigation, including the injunctive relief that often accompanies such disputes. Doug has experience with Mareva injunctions, Norwich orders, certificates of pending litigation, and other interim forms of relief to support his clients.

Doug is a skilled communicator and is a frequent speaker and author on litigation and real estate topics for the Law Society of Ontario, the Toronto Lawyers Association, the Ontario Bar Association, and various regional bar associations. Doug has authored and presented dozens of papers over the years, and is recognized throughout the Province for his unique and compelling speeches.

LANDPRO CONFERENCE 2024

PRESENTATION:

THE LIFECYCLE OF INSURANCE COVERAGE, FROM EXCAVATION TO CONDOMINIUM REGISTRATION AND TURNOVER.

Maurice Audet,
Senior Vice President and Senior Account Manager, AON Insurance.
Tom Gallinger,
Senior Vice President, Atrens-Counsel Insurance Brokers.

13

<< BACK

PRESENTATION

MAURICE AUDET

Senior Vice President and Senior Account Manager,
AON Insurance

THE LIFECYCLE OF INSURANCE COVERAGE, FROM EXCAVATION TO CONDOMINIUM REGISTRATION AND TURNOVER.

Maurice G. Audet stands as a prominent figure in the insurance industry, serving as the Senior Vice President and Senior Account Manager at Aon Reed Stenhouse Inc. With over three decades of experience at Aon, Maurice has cemented his expertise, particularly in the realms of construction and property development insurance. His current roles involve overseeing significant accounts within these sectors, showcasing his specialization in co-generation construction and real estate insurance. Maurice also plays a vital role as the regional resource leader for Risk Research and Solutions and holds the esteemed position of Principal Broker for Ontario Licensing.

His contributions to the industry are further exemplified through his active participation in various industry associations, including his past roles as President of the Toronto Insurance Conference and Director of the Insurance Brokers Association of Canada. Maurice's thought leadership is evident from his extensive involvement in industry seminars and conferences, covering topics from bonds, liens, and insurance to complex issues in commercial insurance. His authorship spans numerous articles and papers on a variety of insurance topics, significantly enriching the field's body of knowledge. Maurice's expertise has not only earned him a qualified expert witness status by the Supreme Courts of Ontario, Saskatchewan, and Quebec but has also established him as a trusted voice in the insurance community, continuously contributing to its evolution and responding to its challenges with innovative solutions.

Construction, Risk and Insurance

Coverage Details

Prepared by Maurice Audet
May, 2024

Table of Contents

Introduction

The concepts of “risk” and “insurance” are too often looked upon as being synonymous. In this paradigm, insurance is placed, and the risk of loss goes away. Yes, there is the fine print that removes coverage for all the small losses but the big claims, i.e., those caused by fire are always covered. Those other types of claims that are not covered, i.e., defective work and delays, they only apply to bad contractors. If only life were so simple. In truth, reality should be considered in terms similar to those used by Hamlet in his discussion with his friend Horatio:

> *There are more things in heaven and earth, Horatio,*
> *Than are dreamt of in your philosophy*
> —Hamlet, Act 1. scene 5, 195–167

And so it is with risk. The broadest of our insurance policies touch on only a small spectrum of the things that can wreak havoc with our best laid plans, but without risk there would be no reward. In possible recognition of this, Hamlet prefaced the lines quoted above with an imperative to embrace the unknown. Accordingly:

> *And therefore, as a stranger, give it welcome.*

Risk should be welcomed, assessed and addressed. But in doing so there are no safe shortcuts, and even with readily insurable risks, failing to properly analyze the “concept” of the project can readily result in the purchase of inadequate or irrelevant insurance and a failure to address the risks that are critical to the success of the project.

Insurance is sometimes looked upon not only as the ultimate safety net, but also as no more than a regrettably necessary irritant that deserves only a few minutes of the purchaser’s time. To some, purchasing insurance is considered analogous to purchasing a commodity. “Give me a kilogram of liability insurance, two kilograms of builders’ risk coverage, a dash of equipment coverage, and, oh yes, a few slices of auto insurance.” If it’s called insurance, it must be insurance. We have encountered clients who have stated that if the insurance discussions required more than fifteen minutes, they would find a better broker. We wish them well.

Similarly, we have encountered insurance brokers who are unable to look beyond the construction contract itself. To them, if they have followed the requirements of the insurance clause in the construction contract, their job is done. If the limits required are inadequate, that is not their problem. Similarly, they do not consider it their role to ask about other contracts that may influence the project. What about the insurance conditions in the loan agreement, the indemnity and insurance conditions in tie-back agreements, hoarding permits, air rights agreements, consultants’ agreements and the myriad of other agreements that may impact the project? Any proper due diligence must involve an analysis of all such agreements.

As mentioned above, insurance addresses only a small part of real-world risks. Unavailability of labour, escalating material and equipment costs, long waiting lists for some kinds of equipment due to international demand, unexpected weather conditions—each can create delays that adversely affect a project and the costs of these delays are effectively not insurable. Other scenarios, such as catastrophic losses at the supplier’s plant or that have impacted the infrastructure in the suppliers region are at best only partly insurable. Finally, a financial crisis can impact all the parties involved in a project. Other than what can be covered by performance bonds, this is not an insurable issue.

In the following pages we will look at various forms of risk and the insurance policies that exist to minimize their impact. We will also look at how these policies can be improved. In Hamlet, the ultimate question was “To be or not to be.” From our perspective, there is only one choice and that is “to be.” A proper assessment of project-related risks, be they insured or not, is not a guarantee to that end. It does, however, greatly improve the odds.

Risks

At the risk of oversimplifying the issues, I have broken down the types of risks into four categories. These are:

- Financial risks
- Project risks
- Location risks
- Contractually allocated risks

Financial Risks

A very significant portion of the financial risks that can impact a project is completely outside of the realm of insurance. These risks are not, however, outside of the scope of a risk analysis. Notwithstanding, world events can prove unpredictable. In today's world, projects are being delayed or cancelled due to the failure of financial institutions and the credit crunch resulting from world events such as the Russian invasion of the Ukraine, supply chain issues, labour shortages due to pandemics, the har dening of the insurance market, and in the recent past to the subprime mortgage crisis.

From the owners' perspective, in addition to the risk of losing financing, there is the risk of default by contractors, suppliers and ultimately, the default of purchasers or tenants or the willingness of customers to buy. The risk of contractor or supplier default can be addressed through the purchase of performance bonds. The other risks are open.

From the contractors' perspective, the risk of the owners' default is uninsurable. The risk of subcontractor or supplier default is coverable, in part, by performance bonds.

For both the owner and the contractor the risk of cost overruns is always present. Cost overruns may be partially covered by liquidated damages clauses, and performance bonds help, but only in the case of a contractor default. For the most part there is no insurance coverage.

Inadequate insurance can result in the default of the owner or the contractor. A large uninsured claim either on the project in question or another project can result in a default. Except to the extent that the contractor is bonded, there would be no recourse against an insurance product.

The main protection against financial risks is proper due diligence, and this includes developing and implementing an adequate insurance program, pre-qualifying who we contract with, and adequate contractor and supplier default coverage. Due diligence in pre-qualifying both the project, its proponents and its facilitators is by far the most effective weapon in our arsenal against the consequences of unbridled risk.

Project Risks

Regardless of where a project is located there are risks that are common to virtually all construction. These risks include collapse, fire, explosion, vandalism, theft, water damage, vehicle and aircraft impact, faulty workmanship, faulty design, faulty materials, windstorm, lightning, earth movement, extremes of temperature and climatic conditions, strikes, damage to goods in transit, unexpected delays due to accident investigations, shortage of skilled supervisors and workers, building permit delays, scheduling issues, contract disputes, etc. This list is not exhaustive. In addition, there are risks of consequential loss resulting from delays in completion. Such delays can result from incidents at the project site, from accidents to key equipment in transit and from incidents affecting key suppliers.

In addition, there are risks associated with injuries to others and damage to the property of others that arise out of the project. For example, the collapse of scaffolding, formwork or a crane can result in serious injuries to passers-by and site staff, damage to adjoining buildings and businesses, and the closing of streets around the accident. In one incident several years ago, a fire on a construction site spread to adjoining buildings with the result that most of the adjoining block was destroyed. This included the total loss of a large bank building. Needless to say, the project was delayed, and the resulting litigation and judgements virtually exhausted the contractor's substantial liability insurance limits. Inadequate shoring has resulted in damage to adjoining streets, buildings and surrounding utilities. These incidents result in payments to the owners of the affected property and result in significant delays in the project while the problems are investigated and corrected.

Design errors can result in damage to adjoining property as well as physical damage and delays to the project and can result in injuries and deaths.

Where a project involves a significant excavation there are issues involving water management and treatment.

Projects involve noise, vibration, dust and possibly the release of other contaminants.

Some of the risks described above are readily insurable, others are problematic and still others are not addressed by insurance.

Location Risks

The location of a project, and the location of the manufacturers of key equipment required for the project, result in location -specific risks. This may manifest itself in an increased transit exposure, in the need to use boats and/or barges and the need to use airplanes or helicopters. Again, due to the location there may be a need of a marshalling yard or for off -site storage. In addition, if the key equipment is manufactured at a location that is subject to risks of natural disaster, an earthquake could result in destruction of the manufacturing plant or in damage to the infrastructure required for shipping. This could result in significant and very expensive delays.

If the project is located in a foreign country there may be political risks, risks of currency inconvertibility and/or fluctuation, valuation problems created by rampant inflation, employers' liability risks and kidnap and ransom risks. There are undoubted ly other risks as well.

If the project is located in an environmentally sensitive area, delays may be caused by protesters, government hearings, the development of a disaster recovery plan and the availability of financial resources and/or insurance to cover the cost of remediation .

The location may be close to archaeological sites. Who is responsible for delays resulting from finding a burial ground or other historically important artifacts?

Most production plants need an adequate and stable water source. Is there adequate available water in the area to address either the need for process water, cooling water or water for fire protection? Who is responsible for providing adequate water to the plant?

In some recent projects, each of the above has been encountered. In most cases the owner/developer has attempted to transfer these risks to the contractor. For many of these risks there is no available insurance.

Contractual Risks

Construction contracts allocate risk. They invariably contain several types of risk transfer mechanisms. These include, indemnity agreements, hold harmless clauses, limitation of liability clauses, insurance clauses and force majeure clauses. In a complex project the risks may be allocated in part to the owner, to the contractor and to the design consultants. The risk is then further allocated through the insurance clauses and through various covenants that allocate the responsibility to purchase insurance. It is not unusual to find an apparent conflict between the indemnity provisions and the insurance covenants. In most cases, these apparent conflicts are more apparent than real in that the insurance is purchased by one party for the benefit of several of the parties, with the result that the insurance monies serve as the resource pool needed to backstop the indemnities.

Without a proper understanding of the contractual allocation of risk, placing the required insurance is, at best, problematic. For other risks, insurance is not available. Contractors assuming such risks should be aware of the risks and their consequences, and if the risks must be assumed, they should be subject to rigorous review, priced accordingly, and subject to a program of risk management and loss prevention.

On larger projects the financing is often contingent on the developer and the financial institution accepting no risk whatsoever. This is then reflected in the construction contract. This type of contract is a minefield for unwary contractors and must be d ealt with using the utmost care. The questions that the contractor should ask include the following:

- In a worst-case scenario, does the assumption of risk threaten the viability of the contractor?
- Does insurance adequately cover the risk?
- Does the contract provide adequate return for the risk assumed?
- What deductibles would the insurance companies require?
- Does the specified equipment require unusual deductibles during testing and commissioning?
- Are there any unlimited loss exposures such as risk of consequential loss?
- What happens if the insurance is cancelled midway through the project?
- What happens if the insurance company becomes insolvent?
- Do we fully understand the risks?
- Under what laws will contract disputes be adjudicated?

Under no circumstances are we proposing that if there are risks that the contract should be avoided. Our suggestion is simply that the risks should be understood and that the contract be priced accordingly. In a recent seminar, one speaker cautioned owners that contractors could gain windfall profits by over-charging for assumed risks. If the worst case does not develop, it was argued, the contractor appears to have gained a windfall. But if the worst case had developed the risk loading would have been inadequate to shelter the contractor from a significant loss. A windfall on one or on several projects may do no more than provide the resources to survive the one project that goes tremendously badly. The speaker was recommending language that would allow the owner to claw back the “risk premium” if the risk did not materialize. There was no suggestion that the owner should come to the table to assist the contractor if the risk proved greater than the contractor could handle.

Some Forms of Available Insurance

There are a variety of insurance products that are designed for construction projects. Some of the coverages, for the small to medium project, are more theoretical than available. For example, force majeure insurance and cost overrun insurance is theoretically available but due to cost and the size of deductibles if the coverage is available at all, coverage is for all practical purposes unavailable. Similarly, alternatives to surety bonding such as subcontractor default insurance is only available on large projects or for contractors involved in many significant projects.

For the average Canadian project, in addition to surety bonding, there are basically six common types of insurance that are either required or desirable. These are:

- Builders' risk insurance including delayed start-up/soft costs
- General liability insurance or wrap-up liability insurance
- Boiler and machinery insurance including delayed start-up/soft costs
- Design professionals' errors and omissions insurance
- Contractors' equipment insurance
- Automobile insurance

Three other types of coverage that may become necessary are:

- Environmental impairment liability insurance
- Marine cargo insurance, including delayed start-up
- Terrorism insurance

If the project is in the United States:

- Workers' compensation insurance
- Employers' liability insurance

Other regions of the world:

- Kidnap and ransom insurance
- Political risk insurance

For the purpose of this paper, we have limited our discussion to the principal project coverages appropriate to a Canadian-based project. In addition, we have not addressed contractor-specific coverages such as contractors' equipment and automobile insurance.

Builders' Risk Insurance

A builders' risk policy is basically a property insurance policy that has been designed to provide insurance coverage to property that is being constructed or renovated. In most cases, the policy form is a standard insurance company designed form that is intended to be used by that company on all types of construction. Like all generic forms, the standard builders' risk wording can be massaged to fit most construction situations, but as an unmodified form it fails to address a wide range of risks that are common to most construction projects. In addition, an insurance policy is not complete without proper information describing the scope of the project and listing the parties to be insured by the policy. The following illustrates some of the issues that we must consider in developing an acceptable policy:

- The definition of insured may be inadequate.
- Transit risks are not covered unless specifically added. Most insurers will not provide delayed start-up coverage on transit risks.
- Off-premises risks are not covered unless specifically added.
- Coverage ceases as soon as there is occupancy for purposes other than habitation or office exposures.
- There is no coverage for property that is waterborne.
- There is no coverage for property transported by aircraft.
- Flood coverage must be added by endorsement.
- Earthquake and earth movement coverage must be added by endorsement.
- The faulty workmanship, material and design exclusion is unacceptably all-encompassing.
- The debris removal coverage is limited to removal of debris from the work site. If debris extended off the insured premises, there is no coverage for removal of that debris. Also beware of inadequate sublimits.
- Property supplied by the owner must be specifically addressed.
- There is no testing or commissioning coverage unless added by endorsement.
- There is no soft costs or delayed start-up coverage unless added by endorsement.
- If architects or engineers are added as insureds, coverage for "resultant damage" from a design error is voidable if the design professional is given a waiver of liability by any insured.
- Choice of jurisdiction — what law applies?

The standard Insurance Bureau of Canada builders' risk insurance policy does not address all the requirements of standard construction contracts. Many of Canada's insurance companies are willing to modify the standard forms; others will allow manuscripted policies (i.e., policy wordings that have been designed specifically to address several of the weaknesses described above). Other insurers are unwilling to make any changes to their policy forms. The end result is an insurance policy that is unsuited for the purpose for which it has been sold. On larger projects, and on overseas projects, far better policy wordings are available.

What is the significance of the deficiencies described above? The following illustrates some of the problems.

Definition of Insured

The construction contract determines who is intended to be insured by the various policies. The CCDC II contract requires the contractor to purchase and maintain builders' risk insurance in the names of the contractor, the owner and the owner's consultant and all subcontractors. For liability insurance, only the contractor, the owner and the owner's consultant are required to be named. If the contract is not modified by supplementary general conditions, then naming these parties as insureds satisfies the contract. If the consultant is not named in the builders' risk policy and, following an insured loss, the insurance company seeks recovery against the consultant, the contractor is in breach of the covenant to insure, and he or she will be responsible for any damages suffered by the consultant. Most of the case law dealing with covenants to insure is American, however, there is a growing body of Canadian precedents as well.

CCDC II is often modified to amend the insurance clause. The owner may assume the obligation to insure. Also, the contract may be amended to require a "wrap-up" form of liability coverage, that is, instead of insuring only the owner, the contractor and the consultant, coverage is expanded to cover all subcontractors and subconsultants as well. There should be no problem in complying with these requirements; however, they must be communicated to the insurance broker. If the insurance broker is advised that the contract is a CCDC II contract and is not advised of the supplementary general conditions, the wrong type of policy will be provided. A case in point involved the construction of a high rise building in downtown Toronto. The contract was a CCDC II 1994 contract, but it had been amended in two ways. First, the owner took over responsibility to procure the insurance. Second, the insurance provisions were amended to require a wrap-up form for both the builders' risk and liability insurance policies. The owner's insurance broker missed the wrap-up requirement. During construction the mechanical contractor made a mistake that resulted in $400,000 of water damage to other parts of the project. The policy did not cover the mechanical contractor. The builders' risk insurer proceeded to settle the claim and intended to subrogate against the mechanical contractor. The mechanical contractor threatened to sue the general contractor who threatened to sue the owner. When the insurance company was presented with the insurance clause in the construction contract, it initially claimed that the account had been misrepresented in that it had rated its policy based on the belief that it could subrogate against subcontractors. In the end, the claim was paid, and no action was taken against the mechanical contractor. Nonetheless, a great deal of aggravation could have been avoided had the insurance policy tracked the language of the construction contract.

Transit Risks

The standard policy wording provides for transit coverage if that coverage is specifically purchased. Unfortunately, too often this risk is misunderstood with the result that either no coverage is purchased or only a token limit of insurance is purchased. On a small project the risk is minimal. But, as the size of the project grows the possibility that equipment will be delivered to the site and that the delivery will be at the risk of the contractor increases. The liability of a common carrier is limited to $4.40 per kilogram unless full value of the shipment is declared. The cost of shipping increases when the full value is declared.

Even if the equipment is shipped at the suppliers risk there remains the risk of consequential loss resulting from damage to the equipment. There is no coverage for a claim for a delay in completion

caused by damage to equipment in transit if that risk is not covered by the policy. Projects have been delayed as a result of loss of key equipment in transit and, the equipment does not have to have a large value to cause a significant loss. Consider the loss of the life safety panel used in a high-rise building. Without an operating system, no occupancy permit will be issued.

Builders' risk insurers are generally not comfortable providing delayed start-up coverage on property in transit. The marine insurance market is more flexible in providing this coverage.

Off-Premises Risk

It is common, on larger projects, for contractors to use marshalling yards if there is inadequate space at the project site. If coverage for such off-site locations is not specifically included in the standard builders' risk form, there is no coverage for losses resulting at such a site.

Also, suppliers of sophisticated equipment will often require the purchaser to assume the risk of loss once equipment is ready for shipment. Sometimes shipment is delayed because the project is not ready to accept delivery.

Occupancy

Under the standard policy form coverage ceases for the entire project as soon as the premises are occupied for purposes other than habitational or office purposes. It is not uncommon in today's mixed-use projects for the underground parking to be operational long before the total project is completed. Also, we often find bank branches, convenience stores or even health clubs open to the public long before the top floors are completed. Each of these occupancies would void coverage.

In addition, it is very common to find construction contracts drafted so as to permit occupancy by the owner before the work is completed. If the builders' risk policy does not track the wording of the contract, there could be significant uninsured risks.

Waterborne

For most projects the "waterborne" exclusion is of little significance. However, for projects near to or above water there may be a significant risk. Work on bridges, sewer outfalls from water treatment plants and water intake pipes may require working from barges or boats. Projects in remote areas may require the use of barges or boats to transport material and equipment to the work site. Coverage can usually be readily purchased, but these risks must be specifically addressed.

Airborne

Damage to property that is airborne is not covered by a standard builders' risk policy. Yet, even in an urban area, aircraft may be required to install equipment. A helicopter was required to install the top portion of the CN Tower in Toronto. One client used a helicopter to install air conditioning equipment onto the roof of one of the Toronto-Dominion Centre towers, and another client used a helicopter to install equipment onto a building in Ottawa. Installing air conditioning equipment on malls, car plant roofs and other large structures often requires the use of helicopters because crane booms cannot reach the required location. In addition, construction projects in remote areas may be accessible only by aircraft.

Flood Coverage

Standard policies do not provide coverage for damage caused by flood. Depending on the definition of flood, the exclusion may apply only to damage caused by the overflow of bodies of water. The exclusion may be broader and exclude damage caused by the accu mulation of rainwater or other surface water. Sub-surface water can also be a problem. If dewatering pumps fail and an excavation is damaged by subsurface water, is the damage caused by flood? The issue will ultimately be determined by the facts of the cas e and by the wording of the policy. Nonetheless, we would far prefer to be arguing only over which deductible is applicable rather than arguing as to whether or not there is coverage.

Earthquake and Earth Movement

Southern Ontario is not a significant earthquake zone; however, the Ottawa Valley, Montr éal and southern British Columbia are definite earthquake zones. Many earthquake exclusions are structured to exclude not only earthquake damage, but also damage caused by other earth movements such as landslides, mudflows and any damage caused by movement of land. Examples of such damage are not hard to find. Whenever we excavate, we remove the lateral support for the adjoining land. If the shoring system proves inadequ ate for the ground conditions, we can expect the shoring to move. A case in point was the Bankers Hall project in Calgary. Due to unusual sub -surface conditions, the soldier pile and lagging method of shoring proved inadequate, and the shoring failed. This type of loss is far more common than we would like to believe.

Faulty Workmanship, Material and Design Exclusion

The intent of the standard faulty workmanship material and design exclusion is to exclude only the cost of correcting the faulty workmanship, material or design. Resultant damage to insured property caused by a peril not otherwise excluded is supposed to b e insured. To most people who understand English, this is exactly what the exclusion states. Unfortunately, our courts have failed to appreciate this intent. As a result, the exclusion has become all encompassing and has been applied in countless cases to exclude coverage for all damage to the structure that has incorporated the flaw. Resultant damage has been eloquently described by one Alberta judge as being " something else ". This is so even though the rating manuals used by insurance companies show a specific additional premium charged for the resultant damage exception to the exclusion. Alternate wordings are available. The Insurance Bureau of Canada has introduced a CCDC endorsement that introduces an alternate wording. The form number is IBC 4047. Unfo rtunately, not all insurance companies are willing to provide this coverage. If the coverage is not provided, and the contract is a CCDC contract, the party placing the insurance is in breach of contract.

Modern innovations in policy wordings include LEG 2 and LEG 3 as well as DE IV and DE V faulty workmanship material and design exclusions. LEG 2 and DE IV provide a broad resultant damage coverage. LEG 3 and DE V extend coverage to the cost of correcting a defect in workmanship material or design —subject to qualification. These improved wordings usually have a premium charge and a deductible increase, but they do provide an additional layer of certainty.

Debris Removal

Under the standard form, debris removal coverage is limited to the cost of removing debris of the insured property from the project site. In the event of a collapse of a large structure it is quite probable that the debris will fall not only on the project site but on adjoining sidewalks, roadways and other adjoining property as well. Who pays to clean up this debris? Property insurance companies often argue that the cost of removing such debris is covered by liability insurance policies. Liability insurance companies respond that they are only responsible to pay such costs if their insured is legally liable for the accident causing the loss. Clearly, this risk is best dealt with in a property insurance policy. If we insure property in transit or property at a marshalling yard, there would appear to be no coverage for debris removal at all from these locations. The policy wording needs to be amended.

One final word on debris removal. There is often no separate limit for this part of the coverage. If a catastrophic loss were to occur when the project was nearly complete, there may be inadequate limits to cover both the cost of rebuilding and the cost of debris removal. This type of situation is infrequent, and from experience I can attest to it being very difficult to sell additional policy limits to cover this contingency. The risk of inadequate coverage does, however, exist.

Property Supplied by the Owner

Builders' risk policies usually cover the contract price of the project. There are provisions to increase this limit to cover property supplied by the owner that does not form a part of the contract price and the policy limit is increased accordingly. If the policy is not amended to provide such coverage, there is no coverage. Yet, the construction contract will usually make the contractor responsible for loss of such property. This whole issue can become quite complicated when contractors are faced with a major renovation project. In such cases it is usually desirable to insure not just the renovation work, but also the existing structure as well under the builders' risk policy.

Architects and Engineers

When architects and engineers are added as insureds, insurers invariably impose an additional exclusion. This takes the form of a limitation on the subrogation clause. The basic subrogation clause waives subrogation against any insured and allows the insured to waive its rights of action against others as long as the waiver is entered into prior to the loss. When architects or engineers are added as insureds, this clause is modified so that the insurance company retains its subrogation rights against these design professionals for design risks and prohibits the insured from waiving its rights against them. However, most design professionals will not undertake work on a project unless they are able to limit their liability. This limitation may be to a specific amount, to the amount of their fees or to the amount of collectable professional liability insurance. Granted, these limitations of liability are not a waiver of the insurer's subrogation rights, but they do limit the amount collectable. It can be argued that limiting the liability to a reasonable sum of collectable insurance does not impair the insurance company's rights in that without the insurance, the subrogation rights are more illusory than real. Most architectural and engineering firms are not well capitalized. As such, other than the insurance, the assets are limited to accounts receivables, drafting tables, computers and coloured pencils. Whatever the case, this is an area that is fraught with uncertainty, and it is an uncertainty that the insurance

industry to date will not address. Having said this, we cannot find a case where this limitation has actually resulted in a denial of coverage.

Soft Costs and Delayed Opening Insurance

All insurance projects have a soft cost and possibly a delayed opening exposure. If construction is delayed the owner faces a number of additional costs. These include legal costs, additional interest on loans, rental agents and salesmen commissions, adver tising costs, taxes, supervision costs, additional insurance costs and possibly a loss of rent or profit. These types of loss are excluded by standard policies. Coverage can be added by endorsement. It must be stressed that this type of coverage should not be treated as a frill that deserves only a cursory consideration and a token sum insured. This area of insurance should be given the same consideration that should be given to all aspects of the insurance program.

Commissioning and Testing

On a very simple project, the extent of commissioning and testing may be not much more than turning on the taps and flipping the electrical switches. If the lights go on and the toilets work, they have passed the test. In more sophisticated projects there will be milestone tests that will have to be achieved. Elevator motors may have to be tested for a specified number of hours. Transformers may be accepted only after a number of days of uninterrupted use. On yet more sophisticated projects, production machines must be tested and commissioned. During these tests the equipment may suffer an electrical or a mechanical breakdown. In standard builders' risk wordings both electrical and mechanical breakdown losses are excluded. So are losses caused by latent defects and by faulty workmanship, material and design. Each of these exclusions needs to be deleted during the commissioning and testing period. Coverage for this has to be specifically added and there is invariably a charge as well as a deductible. These can be substantial when sophisticated equipment is at risk.

Choice of Jurisdiction

Insurance policy wordings are not interpreted as having the same scope of coverage in all jurisdictions. For example, courts in Pennsylvania and North Carolina and in several other American states, may not accept coverage that is accepted in most Canadian jurisdictions, and in most U.S. jurisdictions. New York courts treat late reporting on its own as evidence that the insurance company has been prejudiced. In some states, the natural consequences of a negligent act are deemed not caused by an accident or an occurrence, and, historically, in British Columbia coverage for damage caused by construction defects have too often been summarily dismissed. This issue has now been resolved by the Supreme Court of Canada. Choice of jurisdiction clauses can sometimes be negotiated into an insurance policy. The problem is finding a jurisdiction that has no unexpected downside. However, even with a choice of jurisdiction clause, insurance companies have been known to appeal to a favoured jurisdiction on the basis that no one should be allowed to dictate to a judge as to whether or not he or she has the right to try a case. This type of appeal is more common in the U.S. and on international projects, and it has been known to work.

A Canadian contractor working in Canada for a U.S. corporation may find that any action on the contract must be brought in the owner's backyard. The cost of litigation in a foreign jurisdiction is high. In addition, a foreigner may not be well received by a jury of his adversary's peers.

Commercial General Liability and Wrap-up Liability Insurance

We are often asked to outline the differences between a commercial general liability policy and a wrap-up liability policy. A simple answer is that the commercial general liability policy covers all of a contractor's work, whereas a wrap-up policy is project specific. In addition, the commercial general liability policy covers one main insured whereas the wrap-up policy covers the owner, the general contractor, consultants, and all subcontractors and subconsultants involved in a particular project. There are also wrap-up policies that cover an ongoing series of projects. These are referred to as "rolling wrap-ups".

There are, however, other differences. First, a wrap-up policy nearly always contains an exclusion for damage to the project itself during the construction phase. A commercial general liability policy has no such exclusion. For example, if a subcontractor makes a mistake and causes damage to the structure, there is no coverage for any of that damage under a wrap-up liability policy unless the damage takes place during the completed operations period of coverage. Much more will be said about this later. A commercial general liability policy would provide coverage if the damage to the structure consisted of damage to work performed by other contractors. In the case of a project covered by a wrap-up policy, the only coverage available for damage to the structure itself is to be found in the builders' risk policy. Once again, we shall see later that this is somewhat of an oversimplification. However, in a project covered by a wrap-up policy, unless the contractor purchases additional coverage, the only coverage is that provided by the builders' risk policy. For most situations this is adequate, particularly if delayed start-up coverage has been purchased. But there are limitations.

A commercial general liability policy provides coverage for "loss of use of tangible property not physically injured or destroyed, caused by an occurrence". If a subcontractor's work that is defective is damaged by an occurrence, which in turn results in a delay in completing the project, the commercial general liability policy should respond for the loss. The issue here is somewhat contentious in that insurance companies are quick to argue that a loss of use claim is for loss of use of the defective work and not of the project and is accordingly not covered. There are two problems with this argument. First, if we strictly apply the insurance company argument, we are faced with an insuring agreement that provides illusory coverage. Second, when we read the bulletins issued by the very same insurance companies that are so fond of denying coverage for this type of loss, we find that the examples they use to describe the intent of the coverage completely supports coverage. For example, in the old St. Paul Fire & Marine Insurance Company standard commercial general liability policy form, the intent of the coverage is outlined by examples within the policy wording itself. One such example reads somewhat as follows:

- If you supply a motor to a factory and that motor simply does not work and the plant has to be shut down because its conveyor system no longer works there is no coverage because there has been no occurrence. But if the shaft of the motor breaks because of a defect and the plant is shut down we will pay for the resulting loss of use of the plant.

In Canada, the Supreme Court has been helpful in defining coverage.

In a wrap-up liability policy this coverage is lost because there is no coverage at all for any claim involving damage to the project until the project is completed.

A second difference is found in the coverage provided for completed operations. The completed operations coverage in the wrap-up policy does not commence until a specific part of the project is put to its intended use. Some insurers argue that it is when the entire project is completed. As a result, the excavation contractor, the forming contractor, the mechanical contractor, the electrical contractor, the waterproofing contractor and the roofing contractor, as well as others, may have completed their work months before the entire project is completed. As such, they have been deprived of the benefit of the completed operations coverage during this period of time. Just what coverage have they lost? The commercial general liability policy limits the application of the work product exclusion for completed operations risks. The exclusion does not apply after the work has been completed for damage to work performed by another contractor nor if the damage arises out of another contractor's work. Under a wrap-up policy this coverage becomes problematic until the work has been put to its intended use by someone other than another contractor. To protect itself, a contractor should continue is CGL coverage even though there is a wrap up in place. This is readily doable, and the rate charged against receipts involving a wrap up is lower than the normal rate charged to the contractor. All this needs to be negotiated.

The completed operations coverage under a wrap-up policy is limited to between one year and three years. Two years is quite common. After this period of time has passed there is no further coverage provided by the policy. Yet the contractor's risk of loss arising from the project does not cease after two years. In an Alberta decision, *Edmonton Flying Club*, the damage occurred nearly 30 years after a defective furnace was installed. The court found the contractor liable on the basis that the defect was not readily discoverable; consequently, the statute of limitations had tolled. In *Winnipeg Condominium Corporation* the defect was discovered 10 to 15 years after the work was completed. The action against the contractor was allowed to proceed. In Ontario, recent legislation limits the contractors liable for defects in construction to 15 years. So, based on this, how comfortable are we with two years of coverage? This issue is more apparent than real because the contractors routinely purchase ongoing completed operations coverage in their own CGL policies.

Finally, wrap-up policies are non-standard. This has its good points and its bad points. One significant bad point is to be found in the failure to perform exclusion. The failure to perform exclusion has been replaced in the current commercial general liability policy form with the impaired property exclusion. However, many of the wrap-up forms track the older wording. In these wordings there is coverage for loss caused by failure to perform if the insured's work has suffered physical damage after it has been put to its intended use "by anyone other than an insured". As the owner is generally an insured under a wrap-up policy, the wording of this exclusion effectively voids the coverage. Removing reference to "anyone other than an insured" can usually correct this limitation.

A second bad point is found in some of the wordings that do not contain language making the wrap-up policy primary to any other liability policy. This allows the wrap-up insurer to seek contribution from the policies purchased by the contractors. This limitation can be corrected.

So, given the limitations of wrap-up policies, why are they used? First, they permit the owner to purchase a common form and limit of coverage for all parties involved in the project. This may seem to provide little benefit; however, smaller contractors often purchase inadequate limits. Contractors in distress have been known to purchase substandard insurance. In other cases, distressed contractors have allowed their insurance policies to lapse. Some owners find comfort in the completed operations coverage provided by the wrap-up. They look upon this coverage as the security behind the contractors' warranty.

Another benefit to both the owner and the contractor is that in the event of a claim from a third party for injuries or damage arising out of the project, a wrap-up policy streamlines the claims settling process. The entire process of finger pointing in trying to establish which of the many contractors was ultimately responsible for the injury or damage is gone. The one insurer now covers all the parties and rather than expend time and money trying to determine who was to blame, the insurance company's energy can be directed exclusively to defending against or negotiating settlement of the claims. To some, this makes claims negotiating more difficult because they find it easier to extract settlements when there are several possible defendants. The divide and conquer approach is preferred by some in that it is easier to negotiate a number of smaller settlements, particularly when the legal costs faced by each of the many contractors may well exceed the value of their portion of the settlement. Be this as it may, from the perspective of the owners and the contractors, settling claims because it is expedient is scorned.

From the contractors' perspective, the limitations in the wrap-up policy can be addressed by purchasing "difference in conditions" and "difference in limits" coverage in their own liability insurance program. This does require additional premium and it does require specific amendments to the contractors' umbrella liability insurance program. Umbrella policies generally contain an exclusion that is known as the "contractors' limitation exclusion". This exclusion removes from coverage liability arising out of any project covered under a wrap-up policy. Most insurance companies that underwrite contractors will delete this exclusion, but on a recent renewal, we had to replace an insurance company because they would not agree to remove this limitation.

The ongoing completed operations exposure is dealt with in the contractor's ongoing insurance program. Except for exceptional circumstances, a contractor's commercial general liability policy automatically provides coverage for liability arising out of the contractor's completed work. The current policy covers liability arising out of all past completed work if the accident or occurrence takes place during the current policy's term. However, if to save money the contractor has excluded projects covered by wrap-up policies from his own ongoing commercial general liability policy, he or she may find themselves without any coverage for any claim for damages arising out of the completed work on that project.

Some Problem Areas

Standard liability insurance policies, like stand ard builders' risk p olicies, are designed to address some hypothetical project. The real world is seldom as accommodating as a standard form requires. The following illustrate issues that need to be addressed:

- Who is to be insured?
- What is the scope of coverage for additional insureds? Is vicarious liability coverage all that is required? This is seldom the case.
- Are there any unusual contractual exposures?
- Does the project require the use of watercraft?
- Does the project require the use of aircraft?
- Does the project involve work at an airport?
- Are design professionals to be added as insureds?
- Is there any shoring, underpinning, or removal of structural support?

- Is there any excavation work?
- Is there any blasting?
- Is there any pile driving?
- Is there any demolition work?
- Is the work unusually hazardous, i.e., should high limits be considered?
- Broad form completed operations/subcontractor exception.
- Broad form property damage coverage.
- Asbestos exclusions.
- Pollution exclusions.
- Mould exclusions.
- Health hazard exclusions.
- Silica exclusions.
- Non-standard exclusions.
- Choice of jurisdiction.

Who is to be Insured?

The simple answer to this question is that the parties insured are those specified in the construction contract. Reality sometimes creates complexity. A standard contract may specify that the insured is to be the owner, the owner 's consultant and the general contractor. If we look only to the insurance section of the contract, this may be what we will find. If we look at the entire contract, specifically any appendices of supplementary con ditions, we may find that the insured has been extended to include all subcontractors and subconsultants.

On a simple project, this may be adequate, but there are usually several other contracts that bear on the project. For example, the city, municipality or region may require “additional insured” status as a condition to providing permits. There may be tie -back agreements that require naming the adjoining property owner as an insured. If cranes will be swinging over neighbouring properties, there will be additional insurance requirements. If there are connections to other properties or to the subway, there will be insurance requirements in those contracts. Suppliers of key equipment, particularly if they will be involved in the installation and/or the maintenance of the equipment, will have insurance clauses in their contracts.

On a recent project the following contracts contained insurance -specific conditions:

- Engineering, procurement and construction contract .
- Gas purchase contract .
- Loan agreement .
- Land lease .
- Steam host agreement .
- Ontario Power Authority agreement .
- Ontario Power Generation interconnect agreement .

- Seaway agreement (access to cooling water).
- Seaway agreement (easement).
- Key supplier agreements.
- Extended warranty/maintenance agreements.
- Equipment rental agreements.

Note: Projects in remote areas require food and living facilities as well as security. Our courts have ruled that the providers of these services do not qualify as "subcontractors". Consequently, they are not automatically covered under the construction insurance policies.

What is the Scope of Coverage Required for Additional Insureds?

There is a perception within the insurance industry that there is a logical and distinct difference in the coverage provided to an "additional insured" on the one hand and "additional named insured" on the other. The difference in coverage was argued to be that an additional insured was covered only for his or her vicarious liability arising out of the named insured's work or operations, while a named insured was covered for his or her own independent negligent act s. This apparent distinction may have been based on the concept of privity of contract, however, in *Fraser River Pile & Dredge Ltd., [1999] 3 S.C.R.* , the Supreme Court of Canada ruled that the law of privity, with respect to insurance policies, had changed. Whatever the origin of the perceived distinction between the rights of "additional insureds" compared to those of "additional named insureds", this distinction has received little support from our courts.

A second misconception is that a named insured has the authority to cancel or amend the insurance policy to which he or she has been added, and that once added to an insurance policy as a "named insured", the named insured becomes liable, along with any ot her named insured to pay any outstanding premiums and deductibles. To be fair, there are a few judgements that have so held, but they are in the minority. Nonetheless, they do exist. This issue has been addressed in modern commercial general labiality poli cies. Based upon the express language of these policies, only the "first named insured' is obliged to pay the premiums and the deductibles, and only the "first named insured" can cancel or amend the policy. So far so good, but the modern commercial general liability policy provides that only the first named insured is notified of cancellation or of changes reducing coverage. Any additional insured who wishes to be so notified must negotiate this provision separately.

Modern commercial general liability policies do not define the term "additional named insured". The only defined insured parties are the "first named insured" and " insureds". With the exception of the qualifications mentioned above, the scope of coverage is largely the same for all insured parties. To be fair, there are some coverages available to the named insured that are not available to additional insureds .

Does this mean that there are no pitfalls to anyone resulting from adding a party as an "additional insured"? The correct answer is that there can be pitfalls. The intent of the coverage should be specified in the language adding the additional insured. By defining the scope of the coverage provided there should be no misunderstanding when a claim occurs.

One small example serves to highlight this issue. We often see inappropriate language used when defining the scope of the coverage for additional insureds on wrap -up policies. In this type of policy each insured expects to be protected for liability arising out of its own negligence. Yet, we sometimes

see the additional insured clause limiting coverage to liability arising out of the operations of "the insured" or out of the operations of the "first named insured". This language may be appropriate when adding a party to their own commercial general liability policy, but it fails to comply with the contractual requirements specifying wrap-up coverage.

Are There Any Unusual Contractual Exposures?

One of the principal functions of a contract is to allocate risk. The risks that are allocated include the risks associated with the negligence of the many contracting parties. The allocation may be as simple as making the negligent party fully responsible for the consequence of his or her actions. The contract may allocate risks, regardless of fault. A properly written contract can successfully transfer liability from the negligent party to a non-negligent party, but to successfully do this the language of the contract must be specific as to its intent.

A contractor may assume all risk of loss until the project has been turned over to the owner. This would include losses caused by flood, windstorm, forest fires, earthquake, loss of equipment and materials in transit. In each case, the contractor may not have been negligent but he or she has assumed the risk.

It may be asked why anyone would agree to indemnify for the other's own negligence? Suffice it to say that this is not unusual in leases and construction contracts. It is often easier for one contracting party to insure a specific exposure than it is for another. For example, design professionals always limit their liability; contractors working on large structures would not be able, economically, to purchase adequate liability insurance to cover the risk of destruction of the structure; suppliers of sophisticated equipment limit their liability to the cost of repairing or replacing the equipment. Suppliers completely exclude any risk of consequential loss. These residual losses may be allocated to the contractor and he or she may, in turn allocate these risks to subcontractors. Insurance may be available depending on the nature of the failure of the equipment.

Having said all of this, there is little benefit in transferring risk to a party that does not have the assets to respond to the manifestation of the risk. Insurance more often than not provides the assets required. And, as mentioned above, insurance may be more readily available to one contracting party than to another.

Does the Project Require the Use of Watercraft?

Standard commercial general liability policies limit coverage for injury or damage arising out of the use of non-owned watercraft to watercraft less than eight metres in length. Clearly, if there is the need for watercraft on a project the exposure must be specifically addressed. Though some manuscript policies and some wrap-up policies extend the watercraft coverage to vessels up to 500 tons, the policy may not provide coverage for the removal of wrecks nor for the pollution risk that may result from the sinking of a barge or other large marine vessel. Proper marine insurance should be considered.

Does the Project Require the Use of Aircraft?

As mentioned in the builders' risks section, helicopters and other types of aircraft may be required for a project. In such cases proper aviation insurance must be purchased. The policy limit should address the specific exposure. For example, a helicopter lift in downtown Toronto can result in a much larger incident than a similar lift in an isolated location. In a downtown location, many people could be injured if

the lift is dropped or if the helicopter should crash. Similarly, the risk of property damage is much greater.

The use of drones may be covered under a CGL but if not, coverage is readily available in the aviation insurance market.

Does the Project Involve Work at an Airport?

Commercial general liability policies contain a nearly absolute exclusion for work at airports. This exclusion is often misunderstood and thought to apply only to those who actually operate the airport itself. This is not the case. The exclusion applies eq ually to “all operations usual or incidental thereto”. In short, anything pertaining to the operation of an airport is excluded. Many insurers are willing to modify the exclusion so that it applies only to “air side work”. This is a minimum that should be done. This would provide contractors working in terminal buildings, parking structures and access roads with the coverage they need. For those working airside, the issue is quite different.

Coverage can be purchased for airside work. For modest limits the premium is modest. However, when we consider the potential for catastrophic losses resulting from airside work, the cost of adequate limits can be prohibitive. This is a problem that is reco gnized by most airport operators. Many such operators purchase and maintain a wrap -up liability insurance program for all airside work. This policy provides very substantial limits, and it protects the contractor while working airside and provides coverage for a further period of time for completed operations. The question that is left unanswered is who protects the contractor from completed operations exposures once the wrap -up policy expires? And, if the airport operator does not provide a wrap -up policy for contractors, how does the contractor adequately protect him or herself? The answer is quite simple. If the contractor has not purchased insurance for the risk, the contractor has no coverage.

Are Design Professionals to be Added as Insured?

Neither the commercial general liability policy nor the wrap -up policy provides professional liability coverage. At best, the policy will be silent on the issue, and at worst, there will be an exclusion for liability arising out of the rendering or failure to render any professional service. This wording may be foll owed by a list of professional services that are specifically excluded. Even if there is no exclusion, there may be no coverage. For coverage to exist there must be injury or damage caused by an occurrence. There will also be an exclusion for damage to work performed by the insured when such damage arises out of the work. Finally, if the design is simply not suited for its intended purpose there is no “physical injury to tangible property” as is r equired for coverage. General liability policies are not intended to be substitutes for a professional liability policy.

Is There Any Shoring, Underpinning or Removal of Structural Support?

Recently, I was asked to review the facts surrounding the collapse of a building under renovation. The building collapsed when the contractor demolished a bearing wall without having properly shored the building. The policy in question absolutely excluded coverage for the loss. From the material provided it is not clear if the insurance broker was unaware that shoring would be required to perform the work. No effort was made to remove the offending exclusion. There are two messages in this illustration. Fir st, an

insurance broker must properly analyze the project risks in order to provide the proper insurance. Second, owners should place more emphasis on quality than on price.

A general contractor who subcontracts the work involving shoring, underpinning and removal of structural support is covered under many forms of standard policies. However, if the contractor has assumed liability for the subcontractors work the exclusions must be removed. Similarly, if a wrap-up policy is purchased there must be no exclusion for this risk. As to the subcontractor, the exclusion must be removed.

Is There Any Excavating?

The same exclusion that removes coverage for shoring and underpinning also excludes coverage for damage to underground property. If the contractor has subcontracted this exposure (and we are not dealing with a wrap -up policy) the contractor may be protected. If the insured is doing the work itself, the exclusion must be deleted.

Is There Any Blasting or Pile Driving?

The shock waves from blasting and the vibrations from pile driving can cause significant damage. Again, if the work is subcontracted the general contractor may be covered. The subcontractor must have these exclusions deleted from his insurance policy. If there is a wrap -up policy in force, there should be no such exclusion.

Is There Any Demolition Work?

We have alluded to this risk under “removal of structural support”. The issue goes beyond this, however. On one project, the demolition contractor provided a certificate of insurance to the general contractor and added the general as an additional insured. All appeared to be in order until we had occasion to review the sub contractors insurance policy. The policy excluded coverage for liability arising out of the use of a wrecking ball. Our project required the use of a wrecking ball. The policy was amended.

Is the Work Unusually Hazardous? Should Higher Limits be Considered?

One question with which we often struggle is what liability limits are adequate for the project. Invariably, our response is similar to that of Oliver Twist, i.e. , “Please Sir, May I have some more?” In order to give any meaningful response to the question of adequate limits, we have to look at three issues. First, what can we expect as a judgment for crippling injuries to one person today? Second, how many people can we reasonably expect to cripple in one accident? In Canada today we can expect a judgment in the range of $8 million to $ 25 million dollars for crippling injuries to one individual with a reasonable earning capacity. Third, if we are working on a high -rise building in the Toronto downtown core and we drop a crane across the intersection of Queen Street and Bay Street at rush hour or at lunch time we could easily hit eight or more people. As such, limits under $50 million are inadequate and limits in excess of $100 million should be considered. If we are building on a greenfield site where virtually all on -site personnel are cov ered by workers’ compensati on, a limit of $10 million to $25 million may be adequate. My personal preference would be $25 million. The reason for this is that not everyone who goes onto the site is covered by workers’ compens ation. Corporate executives may opt out of workers ’

compensation and office workers such as lawyers and insurance brokers are not covered by workers' compensation. Limits under $15 million are inadequate in any situation.

What About the Property Damage Risks?

Large liability losses are not restricted to bodily injury claims. A fire on a construction site in Minneapolis spread to adjoining property. The ensuing damage was in excess of $50 million. The fire at the Alexis Nihon Plaza in Montréal allegedly spread through openings between floors that were made during renovations. The loss was in excess of $50 million. The fire in a Philadelphia high-rise that resulted in property damage well in excess of $100 million was the result of renovation work.

Broad Form Completed Operation/Subcontractor Exception

Broad form completed operations coverage, or at least what has become known as the subcontractor exception to the work product exclusion, has become a standard coverage in most commercial general liability policies. Not all policies are standard, and this is particularly so with wrap-up forms. The importance of this coverage to the general contractor is that it limits the work product exclusion once the work has been completed. The exclusion applies only to damage to work performed by the insured arising out of his or her work. The exclusion specifically does not apply to damage arising out of a subcontractors work, nor does it apply to damage to a subcontractor's work. The coverage has been controversial but any effort by insurance companies to subvert the coverage they designed and sold and still charge money for, should be fought. In Canada, this should no longer be an issue but in a recent claim, counsel for the insurer produced a legal opinion that failed to refer to any Canadian case law subsequent to 2005. The lawyer's arguments were completely nullified by a 2009 Supreme Court of Canada ruling. The background information is beyond the scope of this paper, but I have written comprehensively on this topic. Copies of these papers are available.

Broad Form Property Damage

This coverage is also standard in most policies. The broad form property damage coverage is intended to apply during construction and has no application once construction is complete. The significance of the broad form coverage is that it was designed to limit the scope of the "care, custody and control" exclusion that existed in much older wordings. Before the broad form wording was introduced insurance companies tried to deny claims on construction sites on the basis that the project as a whole was in the care, custody and control of the contractor. The broad form wording limited the scope of the prior exclusion so that all that was excluded was the "particular part" of the property that was being worked upon. Unfortunately, our courts have been receptive to the argument that the "particular part" is the whole thing. Insurance companies provided bulletins explaining the intent of this coverage when it was introduced. This material has now been presented to our courts and based on those decisions; common sense should prevail.

Regardless of how our courts may look at this coverage, a CGL or wrap-up policy is not intended to be a substitute for a well-structured builders' risk policy.

Asbestos Exclusion

This exclusion is found in nearly all CGL and umbrella liability insurance policies and in wrap -up liability policies. The exclusion means exactly what it says. There is no coverage for bodily injury or property damage arising out of the use of, the removal of or the existence of asbestos or of asbestos containing products. For new construction today this exclusion is quite inconsequential. But, in a renovation project there could be asbestos coating on pipe, asbestos in floor and in ceiling tiles and there could be asbestos fire insulation. If any of these products are found special contractors and insurance is required.

Health Hazard Exclusion

This exclusion is not standard in all policies, but it is often used in conjunction with the asbestos exclusion. Effectively, this exclusion removes coverage for liability arising out of any product or condition that is carcinogenic or that creates a health hazard simply by its presence. The wording of this exclusion should be reviewed carefully. At worst, the exclusion can remove coverage for any loss resulting in an incident that is hazardous to health.

Mould

This exclusion has become standard in most CGL, umbrella and liability policies. Coverage can be purchased in conjunction with environmental impairment liability insurance.

Silica

This exclusion has become standard in many CGL policies. The risk can be addressed by an environmental impairment liability policy.

Pollution Exclusion

When most of us think of pollution we think of contaminated landfill sites, of smokestacks belching toxic smoke, of contaminated rivers and of the haze that surrounds large cities. The pollution exclusion addresses these conditions and much more. The pollution exclusion removes coverage for bodily injury or property damage resulting from the re lease into the atmosphere, onto land or into water any pollutant or irritant. A pollutant is described as any solid, liquid, gas or thermal irritant.

Courts in the United States have ruled that the pollution exclusion applies to fumes from water proofing compounds, floor sealants, soap suds, glue, paint, contact cement, carbon monoxide, carbon dioxide, ammonia from a blueprint machine, mercury from a th ermometer, fuel oil, gasoline, sewage , sediment , as well as a wide range of industrial and chemical waste. In the case of the blueprint machine, the thermometer and some of the fuel oil and gasoline spills, the cause of the release was a sudden and discret e event. In the carbon monoxide cases, the release was caused by the malfunction of a heating system. And in the case of the sewage spill, the cause was a construction mishap. In roughly one half of the cases the courts ruled that the pollution exclusion d id not apply because its intent was to exclude coverage for industrial polluters. In the other half the courts ruled that the exclusion fully applied. As a result of the apparent abuse of the pollution exclusion, the ISO, the insurance industries trade association in the United States, developed several endorsements to clarify the intent of the exclusion. Carbon monoxide escaping from heating equipment was no longer excluded. Pollutants such as paint,

glue, contact cement, waterproofing compounds and roofing compounds to be used in the projects were deemed not to be pollutants when being used for their intended purpose. Finally, if a contractor caused a release of a pollutant as a result of severing a fuel line or an ammonia line while working at a customer's premises, they did not lose the limited coverage that they otherwise enjoyed simply because the owner was added as an insured.

There are basically three distinct types of pollution exclusion. The first is absolute. The policy provides absolutely no coverage for any injury or damaged caused by the release of a pollutant. The second, and far more common form is often referred to as being absolute, but it contains a number of exceptions. The exceptions to the exclusion are as follows:

- Heat, smoke or fumes from a hostile fire;
- Products and completed operations risks; or
- Where the pollutant is not brought to the premises by any insured (note: if the owner of the premises is added as an insured coverage is, by definition, lost) and the premises were not used for the handling, storage or treatment of waste by anyone.

Notwithstanding these exceptions, no coverage is provided for expenses incurred due to government-ordered cleanup costs.

The third form, known in the industry as IBC 2336 (formerly 2313), extends coverage to situations that are accidental, but coverage applies only if the release is discovered within 120 hours of the commencement of the release and further if the release is reported to the insurance company within 120 hours of discovery. There is no coverage if the release occurs at a location used for the handling, storage or treatment of waste and no coverage is provided for expenses incurred due to government ordered cleanup costs.

An alternative is a form of environmental impairment insurance known as contractors' pollution liability insurance. This policy does provide coverage for government ordered cleanup as well as for damages resulting from bodily injury or property damage.

Non-Standard Exclusions

The potential scope of these exclusions is as broad as the imagination. There are exclusions that limit the coverage to liability arising out of the insured's premises. There are exclusions limiting coverage to construction of one -story buildings. There ar e exclusions for liability arising out of the grading of land, out of structural work, out of excavating and arising out of snow removal work. There are endorsements that address all manner of specific risks. In all cases, without reviewing the policy word ing, there is no way of knowing what may be lurking by way of a non -standard exclusion. The problem created by non - standard exclusions is far more prevalent in the United States than in Canada, but the risk is real.

Boiler and Machinery Insurance

Boiler and machinery insurance is fairly well understood outside of the construction insurance field. In the field of construction insurance, however, many insurance brokers consider the coverage unnecessary. They are incorrect. As we mentioned in our discussion of builders' risk insurance, there are a number of standard builders' risk exclusions that specifically remove the boiler and machinery perils from the policy. These exclusions include the fallowing:

- Latent defect.
- Faulty workmanship, material and design.
- Mechanical breakdown.
- Electrical breakdown.

A boiler and machinery policy covers against the sudden and accidental breakdown of an insured object. Insured objects include boilers, pressure vessels, motors, miscellaneous electrical apparatus, transformers, reciprocating engines, gears, etc. Coverage applies once an object has been connected, tested and accepted by the owner. Clearly, during construction of a building at some point the electrical system is operational, the heating and ventilation system is operational, if there is a transformer, it is operational and elevator motors are operational. Each of these can suffer a sudden and accidental breakdown, and in each case coverage would be excluded by the exclusions mentioned above. The only way to provide coverage is to either delete all of the aforementioned exclusions or provide a properly written boiler and machinery insurance policy.

Granted, the boiler and machinery policy provides coverage only once the equipment has been contractually accepted by the owner. But the term owner does not refer to the building owner but to the owner of the machinery at any given time. At some point during construction the owner is either the general contractor or the mechanical contractor. Once either of these owners has contractually accepted the equipment, it is covered against sudden and accidental breakdown.

Some brokers believe that a better approach is to delete the mechanical and electrical breakdown exclusions. Though this is a step in the right direction, it leaves intact the latent defect and the faulty workmanship material and design exclusions. When dealing with new equipment, this series of exclusions will prove fatal to almost any claim to electrical or mechanical equipment. There is case law to this effect.

To this point we have not mentioned the manufacturer's warranty. It is not the intent that the boiler and machinery policy replace the manufacturer's warranty. On the contrary, that warranty should be primary. Warranties, however, contain exclusions. For example, they exclude any consequential loss. Also, the warranty usually provides for repair or replacement at the manufacturer's premises. The cost of removal, reinstallation and the cost of transit remains with the purchaser. Finally, was the damage caused by a defect in the equipment or by a problem with the installation? The warranty covers only a defect in manufacturing.

The boiler and machinery policy will provide coverage once the equipment has been tested and commissioned and been contractually accepted. This policy is not a substitute for the testing and commissioning coverage discussed under the builders' risk section. Testing and commissioning coverage can be provided by the boiler and machinery policy, but in our opinion, this coverage is best provided for under a properly written builders' risk policy.

Design Professionals' Errors and Omissions Insurance

Most design professionals purchase some form of errors and omissions insurance. In Ontario, architects must purchase a minimum of $250,000 of coverage. Many design professionals purchase no more than $500,000 of coverage. A fairly normal limit is $2 million , and a robust limit is $5 million . Unfortunately, even these modest limits are misleading. Errors and omissions insurance is subject to an annual aggregate. Every dollar paid out in claims reduces the amount of insurance available for the next claim during that policy year. In addition, the coverage is written on a claims -made form. What this means is that the insurance policy that will respond to a claim is the policy that is in force when the claim is first made against the design professional. Consequently, the only policy available to pay for claims that are made against the insured today, regardless of when the damage occurred, is the current policy. As such, though there is an insurance policy and though it purports to have a limit of $250,000, $500 ,000 or $1 million , the actual amount available to pay a claim that occurs tomorrow may well have been reduced to zero by claims from other projects, including prior projects, and including incidents from prior years that have only now come to light.

There are two ways of insuring that the stated policy limits are available to pay claims arising out of a current project. The first is to have each consultant purchase project -specific limits. The second way is to purchase a project -specific policy covering all the consultants under one policy for a limit that is adequate for the risk. If a separate project -specific policy is purchased there are a few important considerations. First, this type of policy often contains a retroactive date. This date is criti cal because coverage applies only to professional acts that take place after this date. In the case of a construction project that date should be the date that the first design is started. If a later date is chosen there is a very large potential gap in co verage.

A second important consideration is whether or not to include the owner or the contractor as an insured. As a general rule, underwriters will not agree to add owners or contractors to a professional liability policy. There have been exceptions but more oft en than not the answer is no. If the owner or the contractor contributes to the design work, they can sometimes be added. But some policies contain a limitation that does not allow for coverage for an action by one insured against another. In such a case, by adding the owner or contractor, coverage has been effectively nullified. Though this may sound somewhat fanciful it is exactly what happened a few years ago on a project in Ontario. The insurance company was quick to avail itself of its defenses to cove rage. There was a similar case in Qu ébec. In both cases the claims were settled prior to trial.

Once we have an acceptable policy wording, we are not necessarily home free. What are the terms of the consultant's contract? If the contract limits the consultant's liability to anything less than the available insurance, the best -structured insurance policy will prove to be of limited value.

A contractor can purchase contractors' professional liability insur ance that would provide protection against his or her vicarious risk arising out of the work of design professionals.

Environmental Impairment Liability Insurance

Environmental impairment liability (EIL) insurance is often considered as insurance against traditional environmental risks such as industrial pollution and as providing coverage for active polluters. This may have once been the case, but modern environmental impairment insurance policies do much more than this. For construction risks there are basically two types of policies. These are contractors' pollution liability and pollution legal liability policies. The coverage provided by each complement that provided by the other.

The contractors' pollution liability policy cover pollution incidents caused by or aggravated by the contractor. For example, there are many products on a project site that are contaminants when released into the environment. These include fuel oil, water proofing materials, adhesives, paint, transformer oil, as well as other materials. A fuel oil leak on a recent project resulted in potential clean up costs in the several million dollars range. Other risks include aggravating a pre-existing condition; a release of contaminated ground water; inadequate dust control and mould. The contractors' pollution liability policy responds to claims alleging that the contractor's negligence caused the damage. Costs incurred as a result of discovering pre-existing contamination would not be covered.

With respect to the coverage for mould, insurers generally require that the contractor implements and maintains a suitable mould prevention program.

Pollution legal liability coverage responds for the cost of cleaning contaminants from the project site when the existence of the contaminant was unknown or when the site becomes contaminated after the commencement of work. During the excavation for a project in Toronto the contractor encountered barrels of contaminants that had been buried many years earlier. There was no record of the site having been used as a dump site and an environmental survey had not disclosed the existence of contaminants. This was an unexpected discovery of a contaminated site. The cost of cleanup would be covered by a properly written pollution legal liability policy. Similarly, if contaminants migrated onto the site from adjoining properties, this policy would cover the cost of cleanup.

All of that said, if a site is found to be severely contaminated, it is unlikely that any form of environmental liability coverage will be available.

Surety Bonding

There are several types of surety bonds that are used in construction in North America. These include:

- Bid bonds
- Performance bonds
- Labour and material payment bonds
- Lien bonds

Though bonds provide financial security to the recipient, the bonds described above are not a pay-on-demand instrument. The holder of the bond must prove that there has been a default before the bonding company will respond. The bonding company has all the responsibilities of the contractor, but it also has all the contractor's rights. If the contractor defaults because the owner has not paid the contractor or if the default arises out of conditions that are within the direct control of the holder of the bond, the bonding company can avoid liability. In addition, bonding is unlike insurance in that the contractor is personally liable to repay the bonding company in the event that the bonding company incurs any expenses on behalf of the contractor. If, however, the bonding company pays out when there is no default, it will have prejudiced the contractor's indemnity and it will be unable to recover against the contractor. As such, unless there is a clear-cut default, the bonding company will not respond.

The unwillingness of bonding companies to become involved until there is an absolute default has proven frustrating for owners and contractors alike. This has resulted in the development of alternate approaches to surety. Subcontractor defect coverage, a product for general contractors, is like an insurance policy in that it permits the general contractor to declare the default and collect under the policy. In doing so, the contractor does not have to be concerned about prejudicing its rights under the bond.

Subcontractor defect coverage is subject to deductibles, but it also costs less than traditional bonds. This permits the general contractor to build in a profit margin for himself when he charges the owner for the coverage. This "profit" can be used to cover the deductible in the event of a contractor default.

The "profit" referred to above will be largely an illusion if there are claims, as the deductible will erode any profits. In order to benefit from this coverage, a contractor must implement a rigorous subcontractor pre-qualification process. A combination of the benefit of rigorous prequalification standards and the ability to quickly remove a non-performing contractor both improves the quality of the work and minimizes delays caused by contractor default.

By the very nature of the deductible provisions, this product requires a significant spread of risk. As such, it is available only to larger contractors.

Workers' Compensation

In Canada, workers' compensation is provided through provincial government agencies. By law, an employee covered by workers' compensation may not seek recovery against his or her employer nor against anyone who is also covered by the same section of the Wo rkers' Compensation Act.

Contractors should be cautious when employing sole practitioner trade contractors because the individuals are not required to obtain workers' compensation coverage. If they have not purchased coverage, they retain their right to sue. This can add an unexpe cted additional risk when a contractor or owner believes that they are protected from all suits. Owners and contractors are within their rights to insist that anyone on a job site be covered by workers' compensation but enforcing such a rule does require s ome administrative effort.

Notwithstanding, some corporate structures may open the door for an action. By law, an employee cannot sue his or he employer nor can he sue anyone else covered by the same section of the Workers' Compensation Act. Developers will often set up separate com panies for each of the projects they undertake, however, all of their employees are employed by only one of the companies. As such, all of the other corporate entities are not registered as employers with the workers' compensation boa rd. This may open a do or to an action against the non -registered entities for injuries that occur on their projects. Cases involving this scenario are now in litigation. The defense to the injured party's action is that the workers' compensation immunity is the corporate family and not just to the individual entity. We await the results.

Similarly, government agencies are covered by a separate section of the Workers ' Compensation Act . As a result, government work does open the door to suits by injured workers against the party covered under a separate section of the act.

In the event the immunity is not found, coverage is provided under the CGL policy because the injured party is not an employee of the corporate entity being sued.

Conclusion

Properly insuring a construction project requires skill, time and cooperation. The insurance broker must understand both insurance and construction, and they must be willing to take the time to discuss the project with their client so that they fully appreciate the risks that will be encountered. The client has to be willing to take the time to explain the project. The construction contract must be reviewed, and this should be done before the project is bid and before the contract is entered into. Similarly, when an insurance claim occurs, the insurance policy is the dominant instrument. The only thing that matters is what is actually specified as being covered in the insurance policy itself. Intent does play a role, but it is the language of the contract that holds all of the aces.

All of this may seem so obvious that it should be taken for granted and need not be mentioned. Unfortunately, too often we look at a contract and consider the clauses to be no more than formalities. There are no formalities. Each clause in a contract has meaning. If that meaning is to be addressed, it must be done before the contract has been signed. Similarly, the time to discover if insurance is available and at what cost, is before we before the contract has been signed.

About Aon

Aon plc (NYSE: AON) exists to shape decisions for the better —to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries and sovereignties with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

PRESENTATION

TOM GALLINGER

Senior Vice President, Atrens-Counsel
Insurance Brokers.

THE LIFECYCLE OF INSURANCE COVERAGE, FROM EXCAVATION TO CONDOMINIUM REGISTRATION AND TURNOVER.

Tom Gallinger is the Vice President of Atrens-Counsel Insurance Brokers, a brokerage that specializes in managing insurance programs for condominiums, unit owners and property management professionals. Tom has been in the insurance industry for 14 years in various underwriting, brokering and management roles. As a specialist in Commercial and

Condominium insurance, Tom strives to deliver a high level of service by managing the long-term insurance needs of his clients. In his career with Atrens-Counsel, Tom has done a number of educational presentations for various industry associations and groups aimed at unit owners, boards, and property managers. Tom holds an honours bachelor's degree in business, his Fellowship Chartered Insurance Professional (FCIP), as well as his Canadian Risk Management (CRM) designations.

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