

# Bill 40: *The Condominium Act and Amendments Respecting Condominium Conversions*

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## I. INTRODUCTION

On 16 May, 2011, late in the 5<sup>th</sup> session of the 39<sup>th</sup> legislature of Manitoba, the NDP government tabled Bill-40,<sup>1</sup> a major overhaul to the province's then 42-year old *Condominium Act*.<sup>2</sup> The process before reaching first reading appears to have been a thorough consultation with stakeholders: first in the form of a working group that drafted a *Discussion Paper*, then in the solicitation of feedback in response to the proposed changes in the *Discussion Paper*.<sup>3</sup> However, once the bill reached the

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<sup>1</sup> Substantial amendments were also made to *The Residential Tenancies Act*, *The City of Winnipeg Charter*, and *The Municipal Act* by Bill-40. The crux of these other amendments were the adoption of an opt-in scheme that would allow municipalities and the city of Winnipeg to adopt a scheme of regulations that would require projects for the conversion of rental properties into condominiums to obtain municipal approval. I have not addressed this aspect of Bill-40, except in passing. It is unclear at this point if any municipalities are going to exercise this new power. Bill 40, *The Condominium Act and Amendments Respecting Condominium Conversions (Various Acts Amended)*, 5<sup>th</sup> Sess. 39<sup>th</sup> Leg, Manitoba, 2011 (assented to 16 June, 2011), CCSM 2011, c 170 [Act]. Will also be referred to as "Bill-40", "the Act", "the new Act".

<sup>2</sup> *The Condominium Act*, CCSM 1985, C170 [Old Act].

<sup>3</sup> Manitoba, Manitoba Family Services and Consumer Affairs, *Discussion Paper: Proposed New Condominium Act* (2010) at 8 online: Government of Manitoba Digital

legislature it was *fait accompli*; a mere 10 days after second reading the bill had received royal assent and awaited proclamation.

This paper will begin by outlining the perceived shortcoming of the old *Condominium Act*, briefly examine the consultation process that the government undertook with stakeholders before updating it, and finally take stock of the substantive changes made by Bill-40 and examine the legislative process that ultimately brought it to fruition.

## II. WHY CHANGE IT?

There could be little disputing that Condominium law in Manitoba was due for some legislative review. Although there had been amendments through the years, the *Condominium Act* was 42 years old when Bill-40 was tabled. Drastic changes have occurred during that period of time. As a segment of the Winnipeg housing market, condominiums constituted approximately 12% in 2009, and that number is rising.<sup>4</sup> Winnipeg, like most other Canadian cities, is experiencing a condominium boom.

The causes for the condominium boom are a source of debate. Some have sought to point the finger at Manitoba's Rent Control regulations that have arguably made it undesirable for landlords to invest in apartment housing, and prompted a wave of conversion (apartment to condominium) projects. For the purposes of this paper, the conversion boom ought to be kept in mind, not to adjudicate the merits of the rent-control debate, but because some of the more interesting sections of the new *Condominium Act* seem to have been drafted with the intention of addressing condominiums corporations in the period immediately following a conversion project. Another (less politically controversial) cause for the condo-market's rapid growth is the popularity of condominiums with the retiring baby-boomer generation.

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<<http://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=17542&md=1>>[*Discussion Paper*].

<sup>4</sup> Tracey Thompson, "Consumers Lining up for Condominiums" *Winnipeg Free Press* (September 20, 2009), online: *Winnipeg Free Press* <http://homes.winnipegfreepress.com/winnipeg-real-estate-articles/new-homes/AROUND-THE-MARKET-Consumers-lining-up-for-condominiums/id-1071/>.

But regardless of the cause, more and more Manitobans are choosing condominiums for their housing. With the increasing number of condominium corporations governed by the *Act*, deficiencies were inevitably going to be exposed. The following sections will examine some of these alleged deficiencies.

### **A. Condo Plan Documents: Lack of Engineering Approval and Thresholds for Change**

Condominium corporations are required to register a plan with the Manitoba Land Titles Office that sets out the land survey as well as structural and architectural plans. Under the old *Act*, plans could not be registered without certification by an architect,<sup>5</sup> and a land surveyor.<sup>6</sup> Unlike some other jurisdictions<sup>7</sup>, Manitoba does not require that an engineer certify condo plan documents.

There was also a frustrating inflexibility in the old *Act* when it required amendments to Plan documents to have the approval of 80% of unit-owner voting rights pursuant to section 6(3). There is of course real substance to the concern that these things shouldn't be too easy to change, but the threshold was identified as worthy of consideration. One easily imaginable problematic scenario might be a registered plan containing a simple typographical error. Under the old *Act* the unit-owners would have to obtain written permission from 80% of unit-owners to correct it. Most people would find such a requirement unduly onerous in these circumstances. Besides seeking to create a work-around for typographical errors, it was also worthwhile to examine whether all the information required by statute to be included in the plan and declaration documents was appropriate. If certain things were likely to require occasional amending, they might be better placed in the bylaws of the corporation, which tend to have a much easier amending formula.

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<sup>5</sup> *Supra* note 2 at s 6(1).

<sup>6</sup> *Ibid* at s 6(2).

<sup>7</sup> See e.g. *Condominium Act*, SO 1998, c 19 at s 8 (1)(e) [*Ontario Condo Act*].

## B. Sale of Units: The Two Day Cooling Off Period and Material Changes

The sale of a condominium unit is subject to a 48-hour ‘cooling off’ period. Once an offer has been accepted, the seller is required to promptly disclose the condo documents pursuant to section 8 of the old Act. The buyer then has 48 hours to review the disclosure documents, during which time they can rescind the contract without any penalty. The purchaser cannot waive this statutory right. There are sound policy reasons to have at least some statutory rescission period for condominium units. Condominiums require a unique financial disclosure for an informed purchase. The balance in the reserve fund, whether the corporation is subject to litigation, and the projected future expenses of the corporation are all essential information for potential purchasers to make an informed decision.

Most jurisdictions in Canada make some provision for a cooling-off period, but the length varies. Ontario<sup>8</sup> and Alberta provide ten days;<sup>9</sup> Nova Scotia provided five days,<sup>10</sup> but recently amended it to ten days.<sup>11</sup> Since Manitoba’s rescission period was on the low end of the spectrum it was a worthy target for some scrutiny.

Another concern arising out of the sale of condominium units and the accompanying disclosure is the possibility of material changes before closing. This is more likely to be a problem when units have not yet been built. A developer may promise a swimming pool within the common elements, a bathtub made of gold, or underground heated parking, and then, after selling some of the units, attempt to scale back some of their yet to be fulfilled representations. Although relief could be sought in the common law for this scenario, other jurisdictions have seen fit to codify the definition of a material change, and grant the purchaser a right of rescission in these circumstances.<sup>12</sup> If Manitoba was to undertake a comprehensive review of Condominium law, it was incumbent upon the

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<sup>8</sup> *Supra* note 6 at s 73 (2).

<sup>9</sup> *Condominium Property Act*, RSA 2000, c C-22, s 13.

<sup>10</sup> Nova Scotia, Service Nova Scotia and Municipal Relations, *Condominium Act Review: A Discussion Paper* (2009) at 13. Online: Government of Nova Scotia <[http://www.gov.ns.ca/snsnr/condoact/pdf/Condo\\_Act\\_Discussion\\_Paper.pdf](http://www.gov.ns.ca/snsnr/condoact/pdf/Condo_Act_Discussion_Paper.pdf)>.

<sup>11</sup> N.S. Reg. 230/2011, s 75(1)(c).

<sup>12</sup> See e.g. *Ontario Condo Act* *supra* note 8 at s 74 (1).

province to consider the benefits of a codified right of rescission for cases where a material change has occurred before closing in the new law.

### C. The Declarant Board

When a condominium corporation is first set up, the declarant (i.e. the developer) is the owner of all of the units, and until a majority of the units are sold, the developer will be in control of the condo board. Developers are often inclined to set condo fees extremely low during this period so as to entice purchasers.<sup>13</sup> The developer is also free to draft bylaws that exempt themselves from paying the fees of unsold units.<sup>14</sup> The process of selling all the units, or even a majority, can take years. In these situations a corporation will suffer financially from the lack of condo fee revenue. Furthermore, a minority of unit-owners (those with the most long-term stake in the financial health of the corporation) can find themselves unable to address their financial difficulties by raising their own condo fees, because the declarant's majority will oppose changing the low condo-fee that they see as a major selling feature. A vicious cycle can ensue, and there is little that the Act can offer in relief for the unfortunate minority as they wait for the declarant to relinquish control. Some jurisdictions have adopted statutory provisions to protect unit-owners during the reign of the declarant board.<sup>15</sup>

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<sup>13</sup> One article on this phenomenon: "In today's pre-construction condo market, developers will set maintenance fees artificially low, sometimes as low as \$0.40 per square foot. While the developer is responsible for any budget shortfall in the first year of the condominium corporation's operations, it's in years two, three and four that the condo board and its residents start to realize how ridiculous \$0.40 per square foot was. There are horror stories throughout the industry. At 22 Wellesley St., a chic, new tower, the fees increased 37 per cent in the first year, and they almost doubled within the first four years." David Fleming, "What You Need to Know About Condo Fees" *The Grid*, (September 30, 2011) online: The Grid <<http://www.thegridto.com/life/real-estate/what-you-need-to-know-about-condo-fees/>>. It is worth mentioning that before the new Act comes into force in Manitoba, there isn't a protection in place for deficits in the first year.

<sup>14</sup> *Supra* note 3 at 12.

<sup>15</sup> See e.g. *Supra* note 13.

## D. Governance by the Board

It had been suggested that condo boards are unduly constrained from effectively governing under the old Act.<sup>16</sup> As mentioned earlier, some of the objects dealt with in plans and declarations might be better suited to the bylaws, which are more easily amendable. But even the process of changing the bylaws can be a thorny problem for boards. Although Winnipeg's condo market growth is trifling when compared to Toronto or Vancouver, speculation is a reality<sup>17</sup>. Speculators (especially those who do not occupy their units) have tended to be uninterested in the day-to-day governance of the corporation, and occasionally situations arise where absenteeism by the unit-owners (for whatever reason) at general and special meetings has crippled a corporation's ability to muster quorum. This has prompted some to propose lowering the quorum thresholds to empower active unit-owners and their boards to effectively govern.

As for what types of objects ought to be covered by the bylaws (as opposed to the more immutable declaration and plan), some have suggested, among others: activities related to leasing of units, number of directors, the remuneration, duties and functions of employees of the corporation, and rules governing the sale of units.<sup>18</sup> During a comprehensive legislative overhaul, the balance of powers between declarations, plans, and bylaws were a worthy target for examination.

A final issue of board governance worth mentioning is the problem of enforcement. Although boards are charged with enforcing rules and bylaws, their only recourse was placing a lien on a unit for unpaid fees or assessments. Occasionally this was even further weakened because a

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<sup>16</sup> *Supra* note 3 at 10.

<sup>17</sup> I have seen no figures for the local market, and no official statistics for larger markets, but estimates by the Canadian Real Estate Association in 2011 suggested that 45-60% of new units in Toronto were purchased by speculators: Ben Rabidoux "CREA Releases Home Sales Data; New Report Highlights Speculation in Toronto Condo Market" *The Economic Analyst* (May 17, 2011) online: [The Economic Analyst <http://www.theeconomicanalyst.com:content:crea-releases-home-sales-data-new-report-highlights-speculation-toronto-condo-market>](http://www.theeconomicanalyst.com:content:crea-releases-home-sales-data-new-report-highlights-speculation-toronto-condo-market). It may be an ominous comparison, but estimates were about the same at the height of the Florida condominium bubble in 2005: Terry Pristin, "Square Feet: Landlords Cashing Out as Condo Fever Spreads" *The New York Times*. (May 18, 2005) online: [New York Times <http://query.nytimes.com/gst/fullpage.html?res=9B03E5DD1639F93BA25756C0A9639C8B63&pagewanted=1>](http://query.nytimes.com/gst/fullpage.html?res=9B03E5DD1639F93BA25756C0A9639C8B63&pagewanted=1).

<sup>18</sup> *Supra* Note 3 at 12-13.

condominium corporation's lien ranked lower in priority than other types of creditors.<sup>19</sup> It has been pondered whether boards ought to have the power to levy fines against unit-owners who violate the bylaws and rules.<sup>20</sup> If this power was to be conferred it would have to be carefully constructed with some reasonable guidelines, and presumably some type of appeal process would need to be in place.

### **E. Reserve Funds: How Much is Enough?**

Reserve funds are essential for a condominium corporation. Common expenses are an inherent part of a condo corporation, but some of these expenses occur only sporadically. These types of expenses (things like a new roof, a new boiler, or a major upgrade to the electrical system) tend to be relatively large, and the unit-owners are responsible for them. If the owners don't have a reserve fund in place, they may be subject to a cash-call or a special assessment. The popular Canadian website [www.condoinformation.ca](http://www.condoinformation.ca) maintains a special section 'Special Assessment Horror Stories' that attests to this highly unpleasant, yet not uncommon, occurrence for condo unit-owners.<sup>21</sup> The preferable option for unit-owners is to avoid a special assessment and make sufficient monthly contributions to a reserve fund that will be sufficient to absorb these expenses. The size of the reserve fund is a usually a key criteria for purchasers considering a unit in an established condominium corporation.<sup>22</sup>

The old Act required condominium corporations to maintain reserve funds<sup>23</sup> but had virtually no provisions beyond that.<sup>24</sup> So theoretically, a board could set aside \$1, and discharge the requirement under the letter of the law. Although the practical incentives in setting up a robust reserve fund should eventually compel the board to do so, there can be an especially problematic time in the early days of a condominium

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<sup>19</sup> *Ibid* at 14-15.

<sup>20</sup> *Ibid* at 15.

<sup>21</sup> *Horror Stories about Special Assessments*, online: Condo Information Centre <<http://www.condoinformation.ca/feedback/horror-stories-special-assessments>>.

<sup>22</sup> Publications and Reports, *Condominium Buyers' Guide* (2009) at 22-23 online: Canada Mortgage and Housing Corporation <<https://www03.cmhc-schl.gc.ca/catalog/productDetail.cfm?cat=1&itm=3&lang=en&fr=1337800379812>>.

<sup>23</sup> *Supra* note 2 at s 26 (1).

<sup>24</sup> The only requirement (beyond simply having one) was that if a reserve fund study had been undertaken, it had to be included in the disclosure to potential purchasers.

corporation when the developer who still owns some units in the building has markedly different aspirations from those unit-owners who intend to reside in their units for the long-term. A similar problem also tends to arise in older buildings that are converted. A landlord may choose to delay what will be a large common expense, convert the building into condos, and pass along hidden liabilities to the future owner. Some type of protection, such as requiring boards and declarants to commission regular reserve fund studies, has been contemplated as a smart evolution of the statute.<sup>25</sup>

## F. Dispute Resolution: Options and Clarity

Obviously the life of a condo corporation is fraught with possibilities for conflict. There are inevitably a number of distinct stakeholder groups in every condo-corporation: the unit-owners and residents (not necessarily the same people), the board, the property manager, the developer and real estate brokers, occasionally even employees. And of course underlying every condo corporation is the simple tinderbox of many people living in close proximity with each other. Conflicts of all kinds, and between all kinds of parties, can and do arise.

Given the near certainty of some disputes, it is somewhat surprising that the old Act excluded the applicability of *The Arbitration Act* to its slim section on dispute resolution.<sup>26</sup> Under the old regime, parties to a dispute could agree to submit it to a “final and binding” arbitration.<sup>27</sup> If they could not agree on the arbitrator, the minister responsible for Residential Tenancies could be called upon to appoint one.<sup>28</sup> Notably missing from the dispute resolution section—and perhaps a clue to how dated the Act had become—were any provisions for mediation.<sup>29</sup> Given the growing popularity of mediation and alternative dispute resolution, it might be

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<sup>25</sup> *Supra* note 3 at 22.

<sup>26</sup> *Supra* note 2 at s 25 (9)—Although there are limited exceptions to this at s. 16 (4) and s. 21 (7) pertaining to situations where the corporation—having voted by an 80% majority to sell off or make substantial changes to common property—is compelled to purchase the unit of a dissenter. Where price cannot be agreed upon, the parties must refer it to an arbitrator under *The Arbitration Act*.

<sup>27</sup> *Ibid* at s 25 (3).

<sup>28</sup> *Ibid* at s 25 (2).

<sup>29</sup> *Ibid* at s 13.1 (7) (Although there were provisions for the mediation of disputes involving renters facing eviction from a unit).



wise to look at the possibilities of incorporating mediation into Condominium dispute resolution provisions.

### III. - THE CONSULTATION PROCESS

In September of 2010, the Manitoba department of Family Services and Consumer Affairs released a *Discussion Paper: Proposed New Condominium Act*, and invited submissions from stakeholders.<sup>30</sup> The paper was developed by a working group comprised of unit-owners, property managers, lenders, lawyers, engineers, architects and real estate brokers that consulted with the Minister of Family Services and Consumer Affairs.<sup>31</sup> A brief article ran in the *Winnipeg Free Press* notifying the public to the consultation process<sup>32</sup>. Interested parties had until the end of October to make their submissions.

According to Ian Anderson of the Manitoba Family Services and Consumer Affairs Department (who oversaw the consultation process), over 100 submissions were received.<sup>33</sup> These submissions could be divided into three basic categories: developers, boards, and unit-owners.<sup>34</sup> Another stakeholder that undoubtedly played a large role in proposing the changes was the Manitoba Chapter of the Canadian Condominium Institute, as they have played a key role in lobbying the government on this issue in the past.<sup>35</sup>

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<sup>30</sup> *Supra* note 3 at 1.

<sup>31</sup> *Ibid.*

<sup>32</sup> Staff Writer "New Condo Regulations Pondered". *Winnipeg Free Press* (September 15, 2012). online: Winnipeg Free Press  
<<http://www.winnipegfreepress.com/breakingnews/New-condo-regulations-pondered-102967074.html>>.

<sup>33</sup> Interview of Dean Anderson by Daniel Hildebrand (March 2012) by telephone

<sup>34</sup> *Ibid.* Because of privacy concerns a breakdown of the types of submissions and the content is unavailable for review).

<sup>35</sup> Robert Giesbrecht & Mickey Rosenberg, *Condominium Act Update*. (Winnipeg: Law Society of Manitoba, Legal Studies Department, 1998) at 1.

## IV. THE SUBSTANTIVE CHANGES OF THE CONDOMINIUM ACT

Bill-40, as it was passed, incorporates many, but not all, of the suggestions that came out of the *Discussion Paper*. This section examines some of the most significant changes that were made in greater detail. For the sake of symmetry and length I have limited myself to examining only those changes with corresponding sections in Part II (*Why Change It?*) of this paper.

### A. Declarations

The provisions on declarations in the new Act are found at sections 12 and 13. The *Discussion Paper*'s suggestion that declarations be required to contain projections of future expenses did not survive into the tabled bill. The new Act ultimately retains all the previous requirements,<sup>36</sup> and adds several more, although in what is arguably an enlightened and non-draconian way. In support of this position, we can point to those additional requirements that must now be included, but only if they are applicable. Thus, for one example, if a condominium corporation seeks to impose leasing levies on unit-owners who rent out their units, it will have to be included in the declaration (or muster 80% approval to modify it later). If leasing levies are not on a corporation's radar there is no obligation to speak to them in the declaration. Other new requirements only apply to units sold prior to construction, or units that are part of a phased development.

### B. Plans

A requirement for an engineer to certify structural plans, required in some jurisdictions, was another *Discussion Paper* suggestion that did not come to fruition. The new Act maintains the *status quo*, requiring a land surveyor and an architect to certify plans as is appropriate. The previous Act required that an amendment to a condo plan receive 80% approval of

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<sup>36</sup> See e.g. Although the old provisions are still in the new Act, some of the wording has been slightly changed or augmented. For example: 5(1)(d) of the old Act: "the legal description of the land that is the subject of the declaration" is replaced with 13(1)(a) in the new Act: "the legal description of the land that is the subject of the declaration and, if available, the address of the land".

unit-owners.<sup>37</sup> The new Act allows for minor amendments to be exempt from the new section governing amendments to plans, and defines ‘minor amendments’ as those that do “not affect any person’s rights, obligations or interests and corrects a mathematical, clerical, typographical or printing error”.<sup>38</sup> The 80% threshold to change a declaration remains part of the new Act by virtue of the definition of ‘specified percentage’ in section 2, although condominium corporations may place a higher threshold in their declaration.<sup>39</sup>

### C. Sale of Units

Although some disclosure was already part of the old Act, the new Act provides for regulations to be introduced that could augment the disclosure requirements. Bill-40 also introduces what may be the most widely noticed change by extending the cooling-off period from two to seven days.<sup>40</sup> This will have the practical effect of granting all purchasers a weekend to review their documents. It is also a more realistic timeframe for the average purchaser to secure a lawyer’s review services. The major concern (although not often heard in Manitoba) with a longer rescission period is that it can be used to provide legal cover for purchasers who make offers with the intention of withdrawing if they can find a better deal before the period has elapsed.<sup>41</sup> This practice, while certainly something less than nefarious, is still a nuisance for the real estate market. Thus the settling on a seven-day rescission period appears to have balanced two competing concerns.

The new Act also grants a new right of cancellation to a buyer that was first suggested in the *Discussion Paper*: a purchaser’s right to cancel because of a material change that occurs after the conclusion of the cancellation period, but before a buyer’s date of possession. A ‘material change’ is defined by Bill 40 as occurring when:

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<sup>37</sup> *Supra* note 2 at s 6(3).

<sup>38</sup> *Supra* note 1 at s 25(1).

<sup>39</sup> *Ibid* at s 24(3)(a).

<sup>40</sup> *Ibid* at s 47(1).

<sup>41</sup> Chris Jaglowitz “What is a Phantom Buyer?” *Ontario Condo Law Blog* (December 6, 2010). online: Ontario Condo Law <<http://www.ontariocondolaw.com/2010/12/articles/buying-and-selling/what-is-a-phantom-buyer/>>.

(a) one or more differences arise between the information contained in the disclosure documents given under section 51 and the information would be required to be included in those documents if the change had occurred before they were given; and

(b) those differences, considered collectively, are so important to a decision to purchase that it would be reasonable for a buyer to cancel the agreement because of them.<sup>42</sup>

In the *Discussion Paper*, examples of legitimate changes that might trigger this section include a developer increasing the number of units or reducing the size of a common area.<sup>43</sup> As part of this new right of cancellation, a selling party will be required to inform a buyer of any material changes occurring before a date of possession.<sup>44</sup> Although they may constitute a major difference with the old Act, these sections do not necessarily change the law, as they are mostly a codification of contract law principles.

#### **D. Transition from Declarant Board to the Unit Owner's Board**

The new Act contains a more comprehensive section pertaining to the initial board that is set up by the declarant's appointees, and the transition to the unit owner's board upon the sale of a majority of the units. As suggested by the *Discussion Paper* there is now a general duty for all board members (the declarant's appointee or otherwise) to "act honestly and in good faith with a view to the best interests of the corporation".<sup>45</sup> New provisions<sup>46</sup> will also make the declarant responsible to make up budget deficits that amass during the corporation's nascent period when the condo fees from unsold units are not accruing, or are being kept artificially low to entice purchasers.<sup>47</sup> There are a host of other provisions including the ability of 25% of unit-owners to force the declarant's board to hold a general meeting<sup>48</sup> and the unit owner's right to the appointment

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<sup>42</sup> *Supra* note 1 at s 47(2).

<sup>43</sup> *Supra* note 3 at 10.

<sup>44</sup> *Supra* note 1 at s 52(1).

<sup>45</sup> *Supra* note 1 at s 94(2)(a).

<sup>46</sup> *Ibid* at s 65(1).

<sup>47</sup> See e.g. *Supra* note 3 at 12.

<sup>48</sup> *Supra* note 1 at s 74(1).

of an independent auditor at the first general meeting.<sup>49</sup> The previous Act was did not have any comparable sections governing the declarant's board.

### **E. After the Transition: Day-to-Day Governance by the Unit Owner's Board**

The *Discussion Paper* advanced the premise that boards were too constricted from effectively discharging their duties. Particularly, it considered the requirement of 75% of those present at a general or special meeting to approve changes to bylaws. The new Act only requires a majority (unless on an issue that requires a higher threshold prescribed by either the Act or the particular condominium corporation's declaration), and has also lowered the requirement for quorum at meetings. Now only 33% of voting interests must be present for quorum present at a general meeting, provided that notice requirements are complied with.<sup>50</sup> This is likely intended to empower those condo corporations with large percentages of absentee or otherwise indifferent shareholders to maintain an effective decision-making process.

Boards will also have a new power to impose fines on unit-owners who fail to comply with the rules or bylaws. Section 218 contains detailed provisions for how this power can be exercised.<sup>51</sup> Bylaws must clearly stipulate the maximum fines for particular offences, and the frequency with which they can be levied. Underlying all of this is an obligation for boards to exercise this power reasonably.<sup>52</sup>

### **F. Reserve Funds**

The new Act provides for a regulation scheme on reserve funds. Condominium corporations will be required to regularly commission a reserve fund study to assess the appropriate reserve amount to maintain. The Board is now required to consider the most recent report annually when determining what level of reserve fund contributions to assess against the unit-owners.<sup>53</sup> This is a more modest step than the outright requirement that was proposed by the *Discussion Paper*. It is also less

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<sup>49</sup> *Ibid* at s 73(1).

<sup>50</sup> *Ibid* at s 117(1).

<sup>51</sup> *Ibid* at s 218.

<sup>52</sup> *Ibid* at s 218(5).

<sup>53</sup> *Ibid* at s 144(2).

formally onerous than the equivalent provisions in Ontario requiring a board to draft a plan for funding the corporation's reserve requirements within 120 days from the date that a mandated reserve fund study is received.<sup>54</sup> Although the board's draft plan may differ from the reserve fund study's recommendations, it must clearly highlight these differences when it submits the plan to unit-owners for approval.<sup>55</sup>

For Manitoba, Bill 40 does enact one recommendation as proposed by the *Discussion Paper* relating to the condo declarant and an initial reserve fund study. The declarant is now responsible to obtain an independent reserve fund study, and to include this information in the disclosure that is provided to the first buyers.<sup>56</sup>

## G. Dispute Resolution

The new Act includes a number of features designed to both facilitate more effective dispute resolution, and whenever possible, prevent disputes from arising in the first place. To this end, the new Act contains a mixture of provisions, ranging from the relatively minor to the more substantial. For an example of a highly specific but relatively minor provision, consider that under the new Act those unit-owners who find themselves banned from using a common recreational facility will have a right to a reasonable opportunity to meet with and be heard by the board.<sup>57</sup> Among these more expansive provisions is the reversal of the old Act's exclusion of the applicability of *The Arbitration Act*.<sup>58</sup> *The Arbitration Act* now applies to arbitrations conducted under the new Act.<sup>59</sup> There are also provisions that enable mediators to resolve disputes<sup>60</sup> as was suggested by the *Discussion Paper*, although mediation is always contingent upon each party's voluntary participation.<sup>61</sup>

Two other changes to dispute resolution mechanisms warrant mention. First, boards have been granted a new fine-levying power. Pursuant to this

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<sup>54</sup> *Supra* note 8 at s 94(8).

<sup>55</sup> *Ibid* at s 94(9).

<sup>56</sup> *Supra* note 1 at s 50(1).

<sup>57</sup> *Ibid* at s 216(3).

<sup>58</sup> *Supra* note 2 at s 25.

<sup>59</sup> *Ibid* at s 222(3).

<sup>60</sup> *Ibid* at s 221.

<sup>61</sup> The possibility of making mediation mandatory for certain types of disputes was also explored in the *Discussion Paper*. *Supra* note 3 at 20.

power is a statutory scheme for an appeal process to the Director of Residential Tenancies for those unit-owners disputing these fines.<sup>62</sup> Secondly: 25% of unit-owners may now force a special meeting when they dispute a decision taken by the board.<sup>63</sup> Although the latter is a new statutory provision it will have virtually no practical impact as the same right was already contained in the bylaws of practically every condominium corporation in Manitoba.

## H. Conclusion

The changes made by the new *Act* do not appear to be simply cut and pasted from other jurisdictions. Nor are they a wholesale adoption of the proposals of the *Discussion Paper*. It can be presumed that this is because some of the submissions made during the consultation period played some role in shaping the bill that arrived in the legislature in the spring of 2011.

## V. THE CONDOMINIUM ACT IN THE LEGISLATURE

During its journey through the legislature, after being tabled at first reading on May 16<sup>th</sup>, 2011 Bill-40 had three substantial instances where the various political parties and the public offered commentary: second reading, committee, and third reading. The process was relatively cordial and non-adversarial, although there were some complaints by the opposition concerning the rushed process for such a large bill that was introduced late in the session. The only major criticism of Bill 40—advanced by the *Winnipeg Realtors Association* presentation to committee—was not picked up by the opposition.

### A. Second Reading

On June 6, 2011, Bill 40 had its second reading in the legislature. Although the government had little to say beyond formally tabling the bill, representatives of both opposition parties spoke on the bill. Blaine Pedersen gave the official opposition's speech on Bill-40. His speech lamented that in spite of the bill's complexity and length, it was only being introduced in the twilight of the session:

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<sup>62</sup> *Supra* note 1 at s 218(8).

<sup>63</sup> *Ibid* at s 114(1).

Cooling-off periods extends (sic) from 48 hours to seven days, and this in regards to people buying condos to inspect what they have—what they are potentially buying, and ironic that they're—the cooling-off period goes from 48 hours to seven days and yet we've got less than eight days to analyze this entire bill. So, obviously there's not quite the same due diligence that's going to happen within this Chamber.<sup>64</sup>

Mr. Pedersen repeated this criticism throughout the speech: although the bill looked good on the surface, it was hard to say with certainty because of the short timeframe given for the legislature to study it. Jon Gerrard spoke briefly on behalf of the Liberal Party, saying only that he would defer making major comments until after the committee stage.

## B. Committee

On June 8, 2011, Bill 40 was considered by the *Standing Committee on Social and Economic Development*. There were two presentations, one by the *Winnipeg Realtors Association (WRA)*, and one by John Petrinka, a self-described activist and lobbyist who made his comments as a private citizen.<sup>65</sup> His comments appear to have been directed at perceived unfairness in the way rent-control regulations are enforced. Mr. Petrinka's earnest but somewhat unfocussed comments serve as a good reminder that despite the technical and sometimes impenetrable nature of housing legislation, they can occasionally prompt intense emotional responses. This type of legislation ultimately reaches right into something that is at the very core of people's well-being.

The WRA presentation was made by Mel Boivert and Peter Squire, both members of an internal *Civic and Legislative Committee*. Peter Squires additionally held the title of MLS market analyst. Insofar as the new *Condominium Act* was concerned the presenters had little to say about it. They acknowledged being involved in the drafting process, and endorsed the changes with no reservations. The crux of their presentation was aimed at criticizing the amendments to the other acts to create a scheme regulating conversions. Much of their argument was based on a position paper published by the WRA in March 2011 "*Manitoba's Rental Housing*

<sup>64</sup> Manitoba, Legislative Assembly, *Debates and Proceedings* 39<sup>th</sup> Leg, 5<sup>th</sup> Sess, No 57 (6 June 2011) at 2597 (Blaine Pedersen).

<sup>65</sup> Manitoba Legislative Assembly, *Standing Committee on Social and Economic Development*, vol LXIII no 3 (8 June 2011) at 45. (John Petrinka)



*Shortage: A Discussion Paper Highlighting Challenges and Solutions*". The solution to the rental shortage, according to the paper is multifaceted, but their first recommendation was reforming Manitoba's rent control regulations.<sup>66</sup> The major point made by the presentation was that the amendments to the other acts on conversions were a stop-gap measure, tiptoeing around the real cause of the problem. It is somewhat surprising that the opposition, particularly the Progressive Conservatives, did not pick up on this criticism in any of the legislative debates.

The government introduced one amendment at committee that made a specific type of mandated insurance (covering construction cost inflation) required "to the extent that the coverage is available at a reasonable cost".<sup>67</sup> The Minister of Family Services and Consumer Affairs, Gord Mackintosh, explained that the amendment was in response to a submission received from the insurance industry that the coverage—though currently offered—may not always be available at a reasonable cost, particularly for older buildings.<sup>68</sup> The minister was asked by Blaine Pedersen how 'reasonable' would be defined, and he responded: "[I]t's a decision that the condo board has to make, recognizing that it has an interest—or it has a requirement that is a duty to the condo owners. So reasonableness really is that kind of a test."<sup>69</sup> With the exception of the aforementioned amendment and brief exchange between Mr. Pedersen and Mr. Mackintosh, Bill 40's clause-by-clause consideration was unexceptional and it moved towards third reading.

### C. Third Reading

On June 15, 2011, Bill-40 was adopted by the legislature. There were speeches by the government house leader, Jennifer Howard, and by Jon Gerrard, leader of the Liberal Party. A Progressive Conservative Party

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<sup>66</sup> Winnipeg Realtors Association, *Winnipeg's Rental Housing Shortage: A Discussion Paper Highlighting Challenges and Solutions*. (Winnipeg, 2011) at 9-10. Online: Winnipeg Realtor's Association  
<<http://www.winnipegrealtors.ca/Resources/DocumentList/2>>.

<sup>67</sup> *Supra* note 64 at 72. (Gord Mackintosh).

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

representative, Blaine Pedersen, spoke briefly, and only to indicate that his party would support passage.<sup>70</sup>

Jennifer Howard's speech was—as would be expected—padded with the exultant rhetoric of government. She highlighted four points that we can assume were perceived as politically savvy by the government. First, she highlighted the fact that interested citizens (particular condominium owners) were “involved very much in the drafting of the legislation”.<sup>71</sup> Second, she classified the bill as serving the government's policy of consumer protection, and highlighted the augmented disclosure requirements. Third, she claimed that the new scheme that allowed municipalities and the city of Winnipeg to regulate condo conversions was “another step to achieve the balance in accommodation and housing in this city”.<sup>72</sup> She made mention of the many MLAs who are regularly contacted by disgruntled renters going through the frustrating experience of eviction when their building is converted. Unsurprisingly the government would want to be seen as addressing the problem. Finally she pointed out the sheer size of the bill (“too big for the stapler to go through”)<sup>73</sup> and commended technocrats and drafters on what was a complex bill, and beyond the interest and expertise of most MLAs, let alone ordinary citizens.

Jon Gerrard's speech was brief and emphasized that on balance the legislation was needed and constituted an improvement. He then expressed concern that the bill insufficiently addressed the problem of owner-occupancy, which he asserted was “... very important [to] good management”.<sup>74</sup> The speech did not specify what measures he thought should have been taken. In some ways this concern was surprising given the commonly expressed concern pertained to condos and condo conversions overwhelming the stock of rental housing in Winnipeg. After Jon Gerrard's brief comments, Bill-40 was unanimously adopted.

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<sup>70</sup> Manitoba Legislative Assembly, *Debates and Proceedings*, vol LXIII no 63 (15 June 2011) at 2914. (Jennifer Howard).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* at 2914.

<sup>74</sup> *Ibid* at 2915. (Jon Gerrard)

### D. Aftermath

On June 16, 2011, Bill 40 received Royal Assent, and was to come into force on a date to be fixed by proclamation. On September 17, 2011, a small portion of the bill, namely those sections amending other Acts (*The Residential Tenancies Act*, *The Municipal Act*; *The City of Winnipeg Charter*)<sup>75</sup> was proclaimed and did come into force on November 7, 2011. The new *Condominium Act* remains unproclaimed as of June of 2012.

## VI. CONCLUSION

The new *Condominium Act* was probably not weighing on many voters' minds when they went to the polls to vote in the provincial elections on October 4, 2011. Outside of a small but steadily growing minority of the population, the bill has almost no relevance or applicability. Furthermore, the Act itself is quite technical, of no obvious partisan bent, and does not carry any substantial public expenditures with it—hardly a recipe for either legislative fireworks or vigorous scrutiny and debate. Although its late introduction in the session rightfully raised some opposition eyebrows, it was ultimately just too boring for much to be made of it.

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<sup>75</sup> Proclamation, M. Gaz. 2011. I. 505. S. 2-5 of Schedule B and all of Schedules C, D and E. These were the provisions enabling municipalities and the city of Winnipeg to enact a legislative scheme requiring condo-conversion projects to first receive municipal approval.