



## **Ask an Expert: Selling your Leaky Condominium - Are you giving away your right to possible repair cost recovery?**

By

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*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.  
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**ASK AN EXPERT: SELLING YOUR LEAKY CONDOMINIUM ---  
ARE YOU GIVING AWAY YOUR RIGHT TO  
POSSIBLE REPAIR COST RECOVERY?**

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When it comes to buying and selling “leaky condos” most people discuss the liabilities. What buyers and sellers should also consider are the possible assets. Potential assets of a leaky condo include refunds on repair assessments, PST rebates and litigation settlements. The key word is potential, since there is no guarantee that the strata corporation or the individual owners will receive any of these monies. Evaluating the potential of actually receiving these monies is critical before marketing your condominium.

It is generally perceived that the best time to sell your leaky condominium is after it and the development it is in, have been fully repaired. Most buyers are reluctant to purchase a condominium that has not been fully repaired and those few buyers that will, usually demand a price reduction in excess of the anticipated cost of the repairs. However, you may not be in a position to wait until all repairs are completed to sell your home. Even if the repairs are completed, you may have to sell your home before all claims against other parties are resolved.

**The Contract:** The way to deal with the issues that arise when selling your condominium before all repair issues and litigation are fully and finally resolved, is to insert express provisions in your Contract of Purchase and Sale (the “Contract”) and not simply rely on oral agreements or understandings. Sellers and buyers should work with knowledgeable realtors and lawyers to draft appropriate clauses dealing with these complicated issues.

**No Representations and Warranties:** When selling your condominium, you want to limit your exposure to liability to a buyer. The standard Contract used in most residential transactions in B.C., does not provide any representations or warranties as to the state of repair of the property being sold or the quality of any repairs. However since you or your realtor may have advised a buyer as to the condition of the property when negotiating the Contract, it is preferable that the Contract expressly provide that you are making no representations or warranties as to the condition of the building or the nature of any repairs and that it is up to the buyer to satisfy themselves as to the condition of the property and repairs. Such a clause should be inserted in the Contract in addition to clause 18 of the Contract that limits oral representations. This will put the buyer on notice that the onus is on them evaluate the condition of the strata unit and the development. It protects you from a potential action for breach of any oral warranty or representation that may have been given. Extra care must also be taken when completing any Property Condition Disclosure Statement to make sure you do not inadvertently provide additional representations.

**Future Special Levies for Additional Repairs or Litigation Costs:** The Contract should also expressly provide who is responsible for any future strata fee assessments or special levies for repairs or litigation expenses, including assessments levied after the Contract is entered into but before the transaction completes. The Contract should also deal with who pays levies assessed before closing,

but not due until after closing. Section 109 of the *Strata Property Act* provides that a buyer would be liable in such a case, if the Contract does not expressly say otherwise.

**Who gets the Proceeds from any Litigation, PST Rebates or Special Assessment Refunds:**

Generally any damages, PST rebates or refunds of special assessment monies would be given to the registered owner at the time of the distribution of such monies. If you have sold your strata unit, you will not be entitled to this money even if you were the one who funded the repairs and the litigation costs unless you have provided in the Contract that as between you and your buyer, you are entitled to the proceeds. How you can try to recover future litigation settlements, PST rebates or repair refunds in the Contract is discussed below.

**Ongoing Litigation:** The strata corporation carries out most leaky condo litigation on behalf of all of the strata lot owners. Thus any decision to commence, continue or settle the litigation is usually made collectively through the strata corporation. Typically this will require a  $\frac{3}{4}$  vote in favour of any particular action. If your Contract provides that as seller, you are to benefit from any potential litigation settlement, there is generally little interest on the buyer's part to approve ongoing litigation, particularly if they have to fund the litigation through their strata fees or future assessments.

You should also note, that as the units in the building are sold, the new buyers who did not fund the repairs will over time come to dominate the strata corporation and they may be more reluctant to vote to fund ongoing litigation particularly if they do not get the litigation proceeds. Thus even if you do get a buyer who is willing to assign you the litigation proceeds and their vote, you should not count on receiving any litigation proceeds. You should therefore not let a buyer over sell you as to the value of letting you have any settlement proceeds as they may be illusory.

If the buyer agrees to assign the litigation proceeds to you, you can provide in the Contract, that your buyer will vote in favour of any litigation at any strata meeting. You can also provide in the Contract that they will grant you a proxy to allow you to exercise their vote on litigation matters at any strata meeting. Proxies can be revoked however, and thus they do not resolve the issue entirely.

If further assessments are required to fund the litigation, the buyer will want you to fund those assessments if you want to be entitled to any settlement proceeds. The buyer will usually want to provide that if you do not pay the assessments, any settlement proceeds are payable to the buyer. Provision can be made for you to fund the litigation by placing the monies in a lawyer's trust account. Care must be taken to ensure that the terms upon which the monies are held in trust are detailed (Is it to be an interest bearing account; who gets the interest; how long will the monies be held; what triggers their release; what if the assessments exceed the monies placed in trust; etc.). .

If your buyer is not willing to assign the settlement proceeds to you, you should use this refusal as a reason to bargain for a higher sale price, and you should expressly agree in the Contract to assign any litigation proceeds that you may be entitled to, to the buyer.

**Assignment Agreements:** If you want to recover damages recovered by the strata corporation, you will have to provide in the Contract, that as between you and your buyer, you are entitled to the proceeds of any successful litigation. In addition to providing for the assignment of the settlement proceeds in the Contract, you should have your conveyancing lawyer prepare a specific assignment of settlement proceeds agreement (the "Assignment Agreement"). Ideally the strata corporation will be made a party to the Assignment Agreement as well, but at a minimum you will have to provide

the strata corporation with notice of such Assignment Agreement. Your lawyer may also recommend that you file a notice of the Assignment Agreement in the Personal Property Security Registry, so as to give the world notice of the assignment of the settlement proceeds.

Unless the strata corporation is made a party to the Assignment Agreement, it will only bind you and your buyer however. It will not bind any person who buys from your buyer. As litigation often goes on for years, a strata unit may change hands several times before the litigation is finally resolved and proceeds received. You can provide in the Assignment Agreement that your buyer will cause the people who buy from them to enter into a similar Assignment Agreement that confirms that the settlement proceeds will be paid to you. However if your buyer fails to get their buyer to enter into such an Assignment Agreement you probably will not be entitled to claim the settlement proceeds, though you may have an action against your buyer.

**PST Rebates:** The Homeowner Protection Office administers the PST Relief Grant Program on behalf of the Province. The strata council applies for the rebate on behalf of the owners and the rebate is paid directly to the strata corporation. If you have paid the strata fees that funded the repairs, it seems fair that you should be entitled to your proportionate share of the rebate. The rebate will generally be paid to the owner of the strata lot at the time the rebate is received by the strata corporation, though strata corporations sometimes resolve to pay the PST rebate into the contingency reserve. If you and the buyer agree, the Assignment Agreement can also provide that the PST rebate is to be paid to you by the strata corporation. This would not bind the strata corporation however if the owners resolve to pay the monies into the contingency reserve, unless the strata corporation is a party to the Assignment Agreement.

**Refunds on Repair Special Assessments:** Some strata corporations may have chosen to assess more than the anticipated cost of repairs in case other hidden problems are discovered once the repairs are in process. Although rare there is also the possibility that the cost of the work is less than originally budgeted. In these cases, the Assignment Agreement could also address the refund of excess special assessment monies.

**Choose your professional advisors carefully and ensure that you discuss these issues before you put your home up for sale. Don't wait until the offer is in front of you, since you might feel pressured to respond without adequately protecting your interests.**

**The information set out above is general information only and whenever dealing with the sale of your home you should seek professional advice on your specific transaction.**

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