



Slipping (and falling) in a Winter Wonderland



The winter season is upon us, and (not surprisingly), with this time of the year comes rapidly falling temperatures. As Canadians, we are used to this weather – but our winters can nevertheless be treacherous. In addition to hazards caused by poor visibility and winter driving conditions on our roads, icy driveways, sidewalks and parking lots become prime spots for slip and fall injuries.

While some enjoy taking walks in a winter wonderland, the vision of residents struggling to make their way across a slippery condominium parking lot in the middle of a snowstorm is probably not what the writers of the popular song had in mind. We have all been there – getting to your front door already makes you feel like you are competing in an Olympic event – and then, it happens. You fall. While a winter wipeout can be embarrassing (especially if it happens in front of an audience), it is no laughing matter if someone gets injured. But when a slip and fall incident happens at your condominium – who is responsible? You are an owner – but no one gave you

a shovel. So it can't be your fault, can it?

In Ontario, the Occupier's Liability Act, R.S.O. 1990, c. O.2 (the "OLA"), supersedes the common law and establishes the duty of care that occupiers owe to individ-

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uals who enter their premises. However, and perhaps not surprisingly, the rules pertaining to the liability of owners and occupiers of condominium corporations differ somewhat from those relating to more traditional types of dwellings, due to the unique nature of this ownership. A condominium corporation is a not-

for-profit entity that is governed by the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act") (in addition to its own declaration, by-laws, and rules), with the goal of controlling, managing and administering the property and the assets on behalf of the unit owners. A condominium corporation's affairs are managed by a Board of Directors, which has the task of ensuring that the condominium corporation carries out its duties in accordance with its statutory obligations. Although unit owners may sometimes be responsible to maintain and repair parts of the common elements (usually in relation to exclusive use common element areas), for the purposes of occupiers' liability, it is the condominium corporation that is deemed to be the occupier of the common elements (all areas that are not the units) under Section 26 of the Act.

As the occupier of the common elements, a condominium corporation has an affirmative duty under the OLA to "take such care as in all the circumstances of the case that

is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.” This duty of care applies whether the danger is caused by the condition of the premises or by an activity carried on at the premises. Section 117 of the Act also puts a duty

While the purpose of the OLA is to “promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe”, the courts have held that the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact scenario. So does this mean that the Board of Directors has to keep the common elements in perfect condition?

In the winter, poor conditions are the norm, and condominium corporations as occupiers of the sidewalk or parking lots cannot be expected to ensure perfect conditions at all times. The courts have held that the standard is one of reasonableness, and not of perfection. This is particularly

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important when condominium corporations are dealing with egregious weather conditions. There are many cases that recognize that ice is a natural hazard of Canadian winters—an expected risk that can never completely be prevented. Especially when considering the responsibilities of those tasked with the responsibility of maintaining a large premises, the courts have confirmed that a few slippery spots can reasonably be expected.

An occupier is, accordingly, not an insurer of an individual’s safety. It follows, therefore, that a condominium corporation’s duty to keep its premises reasonably safe does not absolve an individual of his own duty to take reasonable care. The “reasonable” aspect of the standard imposed by the OLA implies a requirement that an individual must take care for his own safety to some extent. If the care taken by an individual is unreasonable to ensure his own safety, then he will have a hard time demonstrating fault on the part of the condominium corporation.

However, this is in no way a full reprieve for the condominium corporation. A condominium corporation will not be let off the hook for injuries that occur from slip and fall accidents on its property simply because it is winter and some ice and snow are to be expected. The Supreme Court of Canada has held that “merely because a visitor, upon arrival at a premises, sees that there is a risk in using the premises cannot, in my opinion, relieve the occupier of the duty placed upon him by the statute.”



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So what can a Board of Directors do to ensure that their condominium corporation's premises is 'reasonably maintained'?

Generally, a condominium corporation should develop and implement a system of winter maintenance protocols to ensure that individuals will be kept reasonably safe on the common elements and should also have its agents and/or employees perform routine checks and inspections within reasonable time periods to ensure that the system is functioning properly. A condominium corporation should also maintain logs detailing all maintenance performed, as well as inspection times and locations.

Condominium corporations can also discharge their duty of care as occupiers by hiring a contractor to perform winter maintenance on the common elements and by hiring a property management firm to supervise the contractor. In the case of *Murkute*, the Court found that the condominium corporation had discharged its duty by having its contractor perform daily checks of the common element areas, including areas where that incident occurred, and applying ice melter on the premises where necessary. In doing so, the Court found that reasonable care was taken by that condominium corporation to see that its unit owners were reasonably safe in using its premises.

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While exposure for occupiers' liability is not a novel topic of discussion, and the courts have required occupiers of premises to be cognizant of hazards on their properties for some time, it is always important to remember that an occupier is not held to a standard of perfection while discharging the duty of care. If faced with a slip and fall claim, a Board of Directors can make a defence by arguing that the efforts taken by the condominium corporation were reasonable in the circumstances.

It will be important that the condominium corporation evidences the actions it takes to maintain its premises in the records and logs that it keeps, which can be used assist

in demonstrating that its system of maintenance was both reasonable and fully operational on the date of the incident. A plaintiff will have to establish that the condominium corporation did not have a rational maintenance policy in place, or that the corporation failed to discharge that policy. Where a unit owner's behaviour contributed to the incident, a defence of contributory negligence can also be raised.

While the basic duty of care and the standards outlined above may not apply to all situations, and a determination as to what is "reasonable" will be specific to each situation, ultimately, a condominium corporation can help to avoid liability by taking active steps to ensure its premises are kept that much safer.

In closing, here are some tips to help you stay safe at your condominium corporation this winter:

- Drive slowly;
- Slow down and take small steps;
- Use handrails when climbing stairs;
- Wear shoes or boots with good traction;
- Stick to areas that have been cleared and treated when possible;
- Keep hands out of pockets to help you stay balanced (and to avoid a broken wrist); and, finally:
- Stay indoors! 



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