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## Landlords Launch Class Action Over Elevator Brake Expenses

On December 5, 2006, the Technical Standards and Safety Authority (TSSA) of Ontario issued a Director's Safety Order requiring the replacement of all Thyssen Krupp Northern Elevator sheave brakes. The owners of affected buildings have incurred tens of millions of dollars in expenses. The results of this order continue to ripple through the real estate industry in Ontario and have a variety of impacts depending upon the real estate class being considered.

A sheave brake is an emergency stop device intended to stop an elevator if it over speeds in the up direction or moves in an uncontrolled manner with the doors opened. In 2004 TSSA received failure reports of several sheave brakes manufactured by Thyssen Krupp. An investigation followed which determined that while Thyssen Krupp Northern Elevator sheave brakes could operate at a minimum, they were extremely sensitive and subject to several factors that significantly affected their reliability. Consequently, the TSSA director issued a safety order on July 27, 2006 requiring that "all elevating devices that incorporate a Thyssen Krupp Northern Elevator traction sheave brake known as the "sheave jammer" shall be replaced or retrofitted by August 1, 2007". The director later revised the order to clarify that retrofitting was no longer an option and that all such brakes had to be replaced by August 1, 2007.

To replace one sheave jammer cost approximately ten to fifteen thousand dollars and approximately two thousand elevating devices in Ontario were subject to the regulatory order. Although all owners will bear that cost, the results are unequal across the various types of real estate owners.

Generally, landlords of investment/commercial buildings have attempted to pass through the cost of the work on the elevators to their tenants pursuant to the operating cost recovery clauses contained in commercial leases. Commercial leases vary in the treatment of structural repairs, with stronger tenants often having leases that make the cost of structural repairs that of the landlord, and such tenants may have resisted the charge back.

The position of rental apartment buildings owned by non-profit or public entities is the most painful of all of the owner groups as there is no ability to pass on the cost and the cost ultimately gets borne by the public.

The owners of investment apartment buildings were negatively impacted by the fact that the TSSA decision was made subsequent to the passing of the Residential Tenancies Act, [2006]. An expenditure for elevator retrofit receives a smaller annual allowance under the Residential Tenancies Act than under the former Tenant Protection Act. The five per cent gross up for management and administration is no longer available and the interest rate used is the five year rate rather than the one per

### **Gardiner Roberts LLP**

*Barrister & Solicitors*  
*Scotia Plaza*  
*40 King St. West*  
*Suite 3100*  
*Toronto, ON*  
*M5H 3Y2*

*Tel: 416-865-6600*  
*Fax: 416-865-6636*

[www.gardiner-roberts.com](http://www.gardiner-roberts.com)



This article was prepared by Victoria Stuart. Ms. Stuart is a partner in our real estate department and can be reached at 416-865-6663 or [vstuart@gardiner-roberts.com](mailto:vstuart@gardiner-roberts.com)



cent plus the five year rate as in the former legislation. Additionally, after the end of the weighted useful life period, the landlord must reduce the rents for any tenants that were affected by the rent increase decision who still reside in the same apartment.

In 2008 a class action law suit was commenced against Thyssen Krupp Elevator (Canada) Ltd. The plaintiff is bringing the action on its own behalf and on behalf of all persons in Ontario who "own an elevating device that is or was fitted with a traction motor brake, known as a sheave jammer or sheave brake, manufactured, sold, or installed by the defendants, or any of them, and that is required to be replaced or was replaced, as required by the TSSA safety orders". The class action has not yet been certified.

In the late spring, the Tarion Warranty Corporation indicated that the failure of the sheave brakes may constitute a major structural defect as the failure of an elevator materially and adversely makes the use of a building unsuitable for the purpose for which it was intended. Therefore, there is a possibility for condominium corporations which were registered within the last seven years, and who have warranties under the Ontario New Home Warranty Plan Act, to make a claim for the cost of the brake repairs through Tarion. The determination by Tarion that the brake repair is a warrantable item divides the condominium class of owners into three potential classes. Firstly, there is a condominium that was registered outside of the seven year window for which there is no ability to make a claim. Secondly, there is a condominium where possession was taken within two years of making the warranty claim in which case the claim will be the responsibility of the builder. Thirdly, a condominium where possession was taken from years three to seven prior to the making of the warranty claim will be the responsibility of Tarion. It remains to be seen whether Tarion will then attempt recovery from the class action law suit, or whether it will commence its own action against Thyssen Krupp.

The compliance with the TSSA order has now been achieved generally by the real estate industry, but the repercussions of the costs continue.

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