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Your castle isn't always a fortress

It has often been said that a man's home is his castle, but is it really?

Just how much privacy is a citizen entitled to enjoy in his or her home, and what rights does the state or anyone else have to interfere with the peace and security of the home?

The concept of the home as a castle dates back to 1604 in Britain. The British court, in what's known as Semayne's case, established the principle "that the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose..."

In modern times, however, there are many occasions when an individual's privacy rights must give way to the greater public interest.

These issues were at the core of a case involving condominium units on Skymark Dr. in Toronto. It reached the Ontario Court of Appeal earlier this year.

Back in May 2004, the condominium corporation commissioned a study of possible mould contamination in the heating and air conditioning fan coil units in each suite.

The expert's report confirmed that there was mould in the units and recommended three possible alternatives for removing the contamination.

Acting on the report, the condominium board advised residents in the building that they were each responsible for remediating their own fan coil units, and that they would have to comply with the protocol set by the corporation's engineers.

Some months later, the corporation advised owners that it had approved an authorized contractor to do the work in each suite.

Four unit owners chose not to use the authorized contractor and had work done to their own fan coil units at a cost of about $100 each, as opposed to about $1,500 if done by the corporation's contractor.

The remediation done for the four dissenting owners was completed to what is called the New York Protocol Level 1. The corporation insisted that a Level 5 remediation be performed in each unit, and brought a court action against the dissenters for an order permitting it to enter their units to carry out what it determined was the necessary repairs or maintenance.

At the initial hearing, the condominium corporation argued that it had the authority to enter the units under section 19 of the Condominium Act.

That section provides that, upon giving reasonable notice, the corporation or a person authorized by it may enter a unit at any reasonable time to perform the objects and duties of the corporation, or to exercise its powers.

The act also states that owners may not carry on any activity or permit a condition to exist which could cause damage or injury to others, and that a court can enforce compliance with the rules, bylaws or declaration of a condominium corporation.

The judge at the hearing dismissed the condominium's application for an order allowing it to enter the units, and ruled that the corporation had acted unreasonably by failing to consider less expensive alternatives. The condominium corporation appealed.

In June 2006, the Ontario Court of Appeal weighed the rights and obligations of the unit owners and the condominium corporation, and dismissed the condominium's appeal. In this case, the owners' homes were their castles.

The Condominium Act is only one example of a situation where a government or private body has the right to interfere with the privacy and sanctity of a citizen's "castle."

In virtually all new construction of homes and condominiums these days, it is customary for the builder or developer to retain a binding right to re-enter the owner's private property for any of a number of reasons.

Purchasers of new homes and condominium units are covered by the Tarion warranty, which guarantees them against specific construction defects for periods of one, two and seven years depending on the nature of the defect.

As a result, it is necessary for builders to have the right to re-enter each property to comply with the Tarion warranty, whether the owner agrees with the re-entry or not.

In the case of freehold homes, the right of re-entry extends not only to the structure of the house, but also to the surface of the surrounding land. Grading and drainage of water runoff are important issues in new subdivisions, and the municipality may require a builder to enter on to the private property of each owner and regrade the slope of the land so that water will run away from the new houses and not toward them.

A number of statutes allow municipal inspectors to enter the private homes of citizens, with and sometimes without a court order, to inspect and ensure compliance with regulations governing such matters as health, zoning, building code and fire safety.

Our Constitution guarantees citizens the right to be secure from unreasonable searches and seizures. In some cases, however, police may legally enter private dwellings to make an arrest without a search warrant.

They also have the right to invade the privacy of a home without ever setting foot inside: In 2004, the Supreme Court of Canada in the Walter Tessling case ruled that an infrared aerial search for the heat signatures of marijuana grow-ops does not intrude on a homeowner's privacy rights.

"Few things are as important to our way of life," Justice Ian Binnie wrote, "as the amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization."

But he added that gathering of the heat distribution information by the police did not offer an insight into Tessling's private life, and its disclosure scarcely affected his "dignity, integrity and autonomy."

The only real castle in the Toronto area is Casa Loma, built by Sir Henry Pellatt in the early part of the last century. Even Sir Henry couldn't keep his castle when he ran into financial problems and the city took it over for unpaid taxes.

In that case, the man's castle was no longer his home.

In the 21st century, a man's or woman's home is less a castle and fortress and more and more subject to intrusion by the state and other private interests.