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Condo Alert!

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Top 10 Condo Law Cases of 2014

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Happy New Year!

Our picks for the top 10 condo law cases of 2014 is an all-Ontario batch, with half being important Court of Appeal rulings. Some of them highlight the dire need for significant revision to our condo law.

10. ***TSCC 1908 v. Stefco Plumbing & Mechanical***
2014 ONCA 696

Expired condo lien rights cannot be revived. Unpaid common expenses are not damages that can be recovered with a compliance order (where 100% costs recovery is typically assured). If you snooze, you lose and must sue the owners for a liquidated debt as any other unsecured creditor and any shortfall should be paid by the person(s) who allowed the debt to age beyond the 90-day lien period. Condo corporations can minimize the odds of losing their first-place security over unpaid common expenses by working with a professional condo manager and enacting a collections policy.

9. ***Boily v. Carleton 145***
2014 ONCA 574

The Court of Appeal upheld a contempt order against board members who breached a court order but significantly reduced the penalty and the costs payable by those directors personally. While one of the court's motives in softening the penalty and costs award was presumably to avoid dissuading people from serving on condo boards, the ruling leaves this corporation (and its entire ownership) holding the bag for a lot of costs arising from a board run amok. Similarly, the individual unit owners who spearheaded this litigation to hold the board to account are likely financially devastated from their effort and the hollow result. No good deed goes unpunished.

8. ***Gordon v. YRCC 818***
2014 ONCA 549

The Court of Appeal upheld a condo by-law permitting the board to disqualify directors after an internal "ethics review." Some observers hail the approval of such by-law as a victory, but it may cause more problems than it solves. Allowing the majority of a condo board to unseat directors may periodically be helpful, but it strikes at the heart of condominium democracy and creates a real potential for abuse. While the ownership may recall and remove directors at a whim, boards holding their own "ethics review" must do so in accordance with procedural fairness, good faith and act reasonably, failing which the process is open to judicial review, thereby giving rise to needless litigation and cost. If the purpose of the by-law is to provide for swift, painless removal of bad-apple directors, it is defeated by the increased likelihood of a lawsuit and the prospect of a shining knight or whistle-blower being ousted by rogues. Just because it may be possible to implement such a process to remove directors doesn't mean it's a good idea.

7. ***TSCC 2095 v. West Harbour City (I) Residences Corp.***
2014 ONCA 724

The Court of Appeal affirmed the ruling (our No. 2 case of 2013) that developers can, when establishing condominium corporations, release themselves from warranties other than the statutory Tarion warranty, leaving purchasers with little recourse for shoddy construction. Since the Condo Act contains no prohibition against this shady practice (which, to be fair, is disclosed to purchasers but typically missed, ignored or misunderstood), our courts are powerless to protect consumers. Amending the Condo Act is the only way to address this gaping hole in our con-

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sumer protection regime. Meanwhile, buyers and their lawyers must beware and should steer clear of developments and developers that employ this questionable tactic.

6. ***Simcoe 272 v. Blue Shores Developments***
2014 ONSC 187

As if it was needed, this case is further proof of the firmly-entrenched concept that disclosure absolves developers from challenges on how the shared facilities are established and turned over to the condo corporations. Court found that the developer's delay in transferring shared facilities (as provided in the disclosure documents) was neither oppressive nor unfair. The moral of the case is that our condo law has no remedy for buyer's remorse on items that are fully disclosed, although in this case (unlike *TSCC 2095 v West Harbour City* above) it is not clear whether the purchasers suffered any actual prejudice, other than being forced to wait for the developer to unload its inventory of unsold units before turning over the shared facilities.

5. ***Hogan v. MTCC 595***
2014 ONSC 3503

An owners' requisition for a meeting that came in counterparts with the owners' names printed (rather than signed) was upheld as valid. The Condo Act must be construed liberally. The board was wrong to refuse holding an owners' meeting on the basis that the form of requisition did not strictly meet all technical requirements of the Condo Act. Even though inconvenient, it would have been no big deal for the board to call and hold the meeting so that democracy could be done.

4. ***Middlesex 232 v. Bodkin***
2014 ONSC 106

In this appeal from two 2013 decisions awarding legal costs against condo directors personally for using litigation at the corporation's cost in bad faith, the Divisional Court clarified the circumstances where condo directors can be held personally liable for costs of litigation and when directors can rely on advice given by professionals. The "straw man" test must be applied in cases where costs are sought personally against non-party directors who use litigation against unit owner owners in bad faith. Such costs will likely be awarded only rarely but will serve as an appropriate check against directors quashing owners' democratic rights.

3. ***Carriero v Carli***
2013 CanLII 88835
(Sm. Cl. Ct.)

After paying the condo corporation the legal costs of obtaining a compliance order securing the tenants' compliance with the "no pets" rule, the unit owner landlord sued his tenants in Small Claims Court and recovered some of those legal costs. The court reduced the award and scolded the owner for not acting sooner to remove the scofflaw tenants and for not challenging the legal costs claimed by the condo corporation, which the court found to be excessive. Landlords should get legal advice promptly when their condo corporation demands that they secure their tenants' compliance with the rules or eviction.

2. ***YCC 42 v. Gosal***
2014 ONSC 2035

This train-wreck of a condominium continues to generate jurisprudence and astonishment. This time, the fuss arises when the AGM chairperson, a lawyer, reversed the election results seven weeks after the meeting, upon receiving additional information about improper proxy tampering. The case has some interesting points on proxies, what courts ought to do when election results are challenged, and the role of the chair, including what a meeting chairperson should never do.

1. ***Orr (Rainville) v. MTCC 1056***
2014 ONCA 855

The trial decision in this behemoth case (which topped our Top 10 cases of 2011) focussed on the standard of care for lawyers assisting purchasers in buying condo units. The unit at issue in this case contained an unauthorized third floor with an interesting story. A central issue in the appeal was the liability for issuing the purchaser a faulty status certificate indicating (unnecessarily and incorrectly) that there were no violations of the declaration, which the court found to be a negligent misstatement. The condominium corporation was found liable to pay the unit owner damages arising from the negligently-issued certificate and the management firm (which issued the certificate on the corporation's behalf) was responsible to indemnify its client for those damages. The moral: Management firms that undertake to inspect for violations and that include unnecessary and incorrect wording in their status certificates place themselves at tremendous risk for a piddling $100 fee.

As we look ahead to the coming year, we remain hopeful to see a bold new Condominium Act that will effectively tackle the many challenges faced by condo boards, managers, unit owners and purchasers. When that time comes, we must be ready to lend our time, thoughts and voices to the legislative process to improve the final product. Stay tuned.

As always, follow me at @chrisjaglowitz for the latest condo law news.