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Condo Alert!

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Top 10 Condo Law Cases of 2013

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Owing to a very busy and ice-storm-filled holiday season, we neglected to release our annual top 10 condo law cases before year-end. *Mea culpa!*

In response to popular demand, here are our picks, presented in no particular order. All of these have at least one lesson that can and should be picked up by the ongoing Condo Act Review being undertaken by the Ontario Government. A new condo act that deals with some of the persistent problems we see in our daily practice and in some of the cases cited below would be welcomed!

10. ***Owners of Strata Plan LMS 2768 v. Jordison***
2013 BCCA 484

This is British Columbia's first case of a court-ordered sale of an owner's unit for bad behavior. While this concept is hardly new in Ontario, the reasons of the BC Court of Appeal are noteworthy for the eloquent and compelling argument shattering the old adage that "a man's home is his castle" if he lives in a condominium. Let the word go forth that condos are no longer castles.

9. ***PCC 98 v. Pereira***
2013 ONSC 7340

Although our courts have repeatedly ruled that forced sale of units is a remedy of last resort, too many condos still make the attempt too early. In this compliance application, the court was satisfied that the unit owner's bad behaviours breached the "dangerous activities" provision in s. 117 of the Condo Act. But after noting that the owner ultimately complied with many of the complaints and since the behaviour fell short of that in comparable cases, the court found that the extraordinary remedy of a forced sale was not yet warranted, and gave a simple order for compliance with the rules and a warning that more severe remedies might be given for future bad behaviour. Condo recovered the bulk of its legal costs of over $37K.

8. ***GSCC 50 v. GSCC 46***
2013 ONSC 122

In this shared facilities dispute over allocation of utilities costs, one of the two feuding condos skipped mediation and arbitration and started a lawsuit to recover its overpayment of the utilities costs, arguing that the non-paying condo was unjustly enriched. The court stayed that lawsuit pending completion of mediation and arbitration which is mandatory as per s.132 of the Condo Act and cannot be bypassed even if both sides agreed, per s. 176. Court also pointed out that an arbitrator has the necessary power under s. 31 of the *Arbitration Act, 1991* to decide a case like this and to grant the remedies that the plaintiff condo was requesting in its lawsuit. Moral: Don't skip mediation and arbitration to start your shared facilities litigation.

7. ***Caster v. HCC 377***
2013 HRTO 111

A unit owner alleged he was unfairly treated, stigmatized and caused to incur expense as a result of the condo responding to a bedbug infestation. The Human Rights Tribunal had to decide whether a bedbug infestation could be considered a "disability" within the Human Rights Code and, if so, whether the unit owner was treated in a discriminatory manner. The Tribunal found that while bed bugs can cause bumps, bites and other bodily injury which could fall under the definition of disability, having a bedbug infestation in and of itself could not be considered a disability in these circumstances. The fact that an otherwise healthy person (or a person with a disability unrelated to bed bug infestation) has potential to spread insect infestation in his or her home by transporting bed bugs on his or her clothes or possessions to another location is not a basis upon which a person can be properly regarded as having a "disability" under the Code. Complaint dismissed.

6. ***Davis v. PCC 22***
2013 ONSC 3367

A unit owner challenged the results of a vote for removal and replacement of directors at a requisition meeting on the basis that the chairperson improperly permitted owners to vote who were over 30 days in arrears of common expenses, contrary to s. 49(1) of the Condo Act. The court analyzed each instance and deter-

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mined that while some owners should not have been entitled to vote, there were too few improper votes to affect the election results. The court also confirmed the premise that a chairperson's interest in the outcome of a meeting does not impugn the integrity of the process. The application was dismissed. As for costs, the court declined to order costs against the unit owner as she had raised legitimate questions about the propriety of the voting process and the condo could have kept better records that might have avoided the situation altogether.

5. ***MTCC 1067 v. L. Chung Development Co. Ltd.***
2012 ONCA 845

A condo's lawsuit against its former directors (all representatives of the condo's declarant) was dismissed for being commenced outside the 2-year limitation period. In determining when the corporation became aware of its claim (and when the limitation period began to run), the court found that the corporation had obtained all the information needed to discover its claim when a purchaser of the developer's remaining units (who knew about the underlying facts and damages) closed his purchase and then joined the condo board. Court held that the knowledge of that single director was imputed to the entire board. Another reason this case makes our list is that it delves into the ugly, murky issue of whether limitations periods for claims against developers run while a condo board is controlled by the developer. Given that the factual matrix in this case was a dog's breakfast, neither the lower court nor the court of appeal addressed that issue squarely but left it (like a stinking pile waiting to be accidentally stepped in) to be decided another day by a different condominium dispute.

4. ***City of Mississauga v. PSCC 833***
2013 ONCJ 593

If you don't know the reason why condo corporations and unit owners should never complain to the building department about their shoddily-built condominium, here it is. After receiving complaints from a purchaser, the City inspected this townhouse condo and found unauthorized alterations made by the developer that did not comport with the approved plans and drawings and with the *Building Code*. The City issued work orders against the developer and the condo corporation, then laid charges. After a trial, the condo was acquitted of failing to comply with a building inspector's order. The court was satisfied that the corporation had taken all reasonable steps in the circumstances to avoid committing the offences. The court recognized the operation of the Condo Act made the condominium corporation an "involuntary defendant." We say: Shame on the City for prosecuting this condo corporation, whose owners had already been victimized by a lousy developer.

3. ***Dyke v. MTCC 972***
2013 ONSC 463

A unit owner successfully applied for an oppression remedy to address her condominium corporation's failure to enforce its noise transmission rules. The court concluded the board acted in a way that unfairly disregarded the interests of the complaining unit owner by failing to enforce the corporation's rules and then for engaging in unfair prejudicial conduct by harassing the unit owner for making complaints. The court awarded that unit owner $40K for damages and $20K in legal costs.

2. ***TSCC 2095 v. West Harbour City (I) Residences Corp.***
2013 ONSC 5987

The court denied this condominium corporation's challenge of one of its own bylaws passed by its developer-controlled board to ratify an agreement to limit the developer's liability for construction deficiencies. Given that the offending by-law and underlying agreement were disclosed to purchasers and then registered on title, they were upheld. The logic, of course, is that purchasers who have a problem with their condominium not being able to sue its developer for shoddy construction could choose not to purchase units there. This case is yet another brilliant example of a developer's questionable tactic being upheld merely because the impugned provision was disclosed. Some consumers are less than aware of disclosure implications and would eagerly trade away their condo's right to sue if given free granite countertops in exchange. A legislated prohibition on these practices is the only way to protect the public.

1. ***Diamantopoulos v. MTCC 594***
2013 ONSC 5988

Unit owners applied to arbitrate a long list of trifling disputes with their condo corporation. The court dismissed the application after finding that "the issues raised by the applicants are so minor and incidental to management of the condominium that I conclude they are too insignificant to merit mediation or litigation. The conflicts are, to use the old legal phrase, *de minimis."* In awarding the condo costs of only $2,500 (when $5,800 was claimed), the court noted that the corporation had fanned the flames by insisting that the matter be dealt with at court rather than mediation and for failing to recognize that the issues were too small as to be allowed to proceed this far.