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Condo Alert!

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Top 10 condo law cases of 2010

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Inside this Issue:

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Ontario's courts and tribunals were busy this past year with condominium matters. We reported on over 35 decisions on our microblog over the course of 2010. Here are our picks for the top 10 cases of the year.

10. Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No. 1930

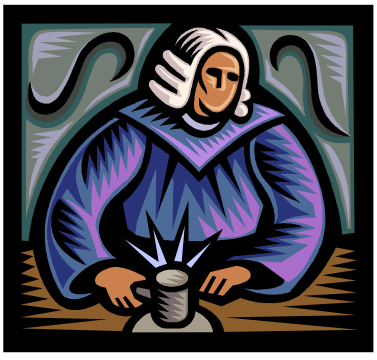
The Ontario Court of Appeal held that a condo corporation cannot use Condo Act s.112 to terminate an agreement for the corporation to purchase the superintendents' unit from a developer where the obligation to enter into such an agreement is set out in the declaration. It was found that the Act treats *declarations* differently from agreements entered into by the condo and that the ordinary language and scheme of the Act suggested that s.112 only applies to agreements and not to declarations. This blew away the condo's arguments under s. 7(5) of the Act. This is a game-changing decision that can drastically affect a condo corporation's finances. New condo buyers must be extraordinarily careful in reviewing the disclosure materials and draft declaration before signing on the dotted line. *Caveat emptor* -- Buyer beware.

9. Essex Condominium Corporation No. 89 v. Glengarda Residences Ltd.

In another case dealing with disclosure, the Ontario Court of Appeal overturned a trial judge's ruling that the developer failed to adequately disclose that the HVAC system serving the shared facilities was leased. The Court of Appeal then set aside the trial judge's award of damages made under Condo Act 1990, s.52 (replaced by Condo Act 1998, s.133). While the disclosure statement did not reveal the terms of the lease, interest rate or cost of the equipment, it clearly revealed that the equipment was leased and gave what turned out to be a fairly accurate estimate of the cost. This was held to be sufficient disclosure that the HVAC equipment was not owned by the condo corporation. The Court of Appeal also upheld the earlier case of Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd., which is the leading case on false and misleading statements under the Condo Act.

8. McFlow v. Simcoe Condominium Corporation No. 27.

A mortgagee's bid to remove and replace the court-appointed administrator of a deeply troubled condo corporation was denied. The administrator was appointed a year earlier at the behest of that same mortgagee and while things were moving slowly, there was demonstrable improvement and no evidence of mismanagement as before. The test for removing a court-appointed administrator of a condominium is the same as the test for appointing one under Condo Act, s.131.



7. Jia v. Toronto Standard Condominium Corporation No 1479, 2010 ONSC 3433

A Toronto condo was found liable and ordered to pay $50K for assault and battery when its superintendent physically ejected a "trespasser." There is nothing new about the concept of employers being vicariously liable for the acts and omissions of their employees, but the brutal assault in this case is noteworthy.

6. East of Bay (2003) Development Corp. v. MPAC

Assessing property for tax purposes is a lot like making sausages – you probably don't want to see how it's done. In this case brought by the condo developer to set aside MPAC's assessment for the first two years of the condo's existence and for a refund of all taxes paid, the court slapped MPAC for its "questionable" two-

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Benefits of a Condo Privacy Policy

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI

A carefully-drafted Privacy Policy can alleviate some of the most egregious conflicts which often occur at a condo – issues ranging from inappropriate requisitions, defamatory or misleading statements, grounds upon which to refuse access or copying of records and expanded board rights of confidentiality – not to mention protection of residents' personal information.

PIPEDA ~ For the most part, condominiums do not use owners' and residents' personal information in the context of a "commercial activity", which is the trigger to assess whether or not an organization is governed by the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). However, some condos may provide owners' personal contact information to commercial service providers, such as telecommunications or smart metering companies. Moreover, most owners and residents would expect that the board, managers and employees of a condo would protect their personal information in much the same fashion as is required by the PIPEDA Privacy Policies in effect at their workplaces. GMA's Privacy Policy addresses all of the PIPEDA issues customized for a condominium's purposes, but also addresses a number of other troublesome issues.

Records Exemptions ~ Section 55 (3) of the *Condominium Act, 1998* (the "Act") provides that an owner, a purchaser or mortgagee of a unit or their agent duly authorized in writing is entitled to examine the condo corporation's records at a reasonable time for all purposes reasonably related to the purposes of the Act. However, condominiums are required to protect the privacy of information pertaining to unit owners and their units, as envisioned by s. 55 (4) (c) of the Act. Additional exceptions apply to records relating to employees of the condominium (except for contracts of employment between employees and the condominium) and records relating to actual or pending litigation, or insurance investigations involving the condominium. Section 55 (5) of the Act provides that only an owner or an authorized agent can review her own records and only an owner, purchaser or mortgagee of a unit (or their agent) can examine unit records.

Confidentiality ~ A carefully-drafted Privacy Policy may also allow the board to address up-front confidentiality issues which would protect not only owners, but also residents and the condo corporation. Various types of normally-confidential information deserve protection in carefully-worded Privacy Policy provisions – *in camera* board discussions, redacted or unapproved draft board minutes, sensitive contract negotiations, tendered bids, contractors' proprietary, secret or personal information, defamatory, hateful or criminal statements, information required to protect health, safety and security interests or other information for which the condominium might be sued if disclosed.

"Reasonable Excuse" ~ Case law has generally upheld the "open book" concept applicable to a condominium corporation's information as if s. 55 (3) of the Act was the complete answer to allow an owner, purchaser, mortgagee or their agent to review and copy all records, except the three limited exceptions set out in s. 55 (4) of the Act. However, keep in mind s. 55 (8) of the Act allows the condominium a reasonable excuse to prevent an owner or his agent from examining or copying records. In our view, condo boards and managers have a duty to protect appropriate types of confidential information, and even more so if the corporation would abuse the rights of others or would subject itself to potential litigation. In each case, a board should assess whether it has a legitimate "reasonable excuse" to designate restricted information as being confidential. Boards must avoid using the confidentiality excuse to escape a political attack by a disgruntled owner, except where confidentiality is truly justified. GMA's Privacy Policy establishes an objective rationale and a non-discriminatory standard which, if properly followed, should help persuade a judge that the corporation had "reasonable excuse" in various circumstances.

"Purposes of the Act" ~ GMA's Privacy Policy also establishes a standardized system to reasonably solve a number of problems related to access to, copying of, use and dissemination of records. For example, the condominium's records must only be used for a purpose reasonably related to the purposes of the Act. Persons who request records can be required to explain that purpose before information is accessed (unless the purpose clearly relates to the purposes of the Act). The Privacy Policy prohibits distribution of the condominium's information to the media and other outsiders. The condominium's records should not be used to solicit the purchase, sale or leasing of units to third parties, or in order to circulate advertising, promotional or commercial information. Persons are prohibited from accessing or using records for overly-repeated, frivolous, vexatious or harassment purposes, nor should records be distributed or used in connection with any obscene, false, misleading, fraudulent, defamatory, hateful, malicious, bigoted or harassing statement, innuendo, question or rumor or in breach of any provision of the *Human Rights Code* or the *Criminal Code*.

Improper Requisitions and Defamation ~ GMA's Privacy Policy also establishes a process to respond to a requisitionist's request to obtain a copy of the s. 47 (2) record of owners' and mortgagees' names and addresses. We clarify the legal requirements pertaining to a proper requisition and requires requisitionists to rectify any legal deficiencies and remove defined disqualified information before the condominium will be required to mail the requisition to its unit owners. The Privacy Policy's standardized system requires the condominium corporation to mail a requisitionists' package to owners, once any statements properly deemed to be defamatory, hateful, in breach of human rights or obviously misleading, have been rectified. It is useful to educate owners with respect to defamation criteria so that they can identify a defamer and be aware of the defamer's liability for malicious defamatory statements.

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stage property tax assessment process for new condo units. The fact that MPAC was understaffed and unable to cope with a deluge of new condos on the market was no justification for using a two-stage assessment not expressly permitted by the *Assessment Act, s.33(1)*.

5. Metropolitan Toronto Condominium Corporation No. 675 v. Unit Owners, (unreported)

A condo corporation successfully obtained a court order to amend its declaration to unitize and sell an unused superintendent's suite despite opposition by at least one unit owner. While it's good to see a court stepping up to fill the void where needed, it's troubling that a court might override the requirement in the Condo Act for a large majority of unit owners to democratically approve amendments to the declaration, which could include drastic plans to unitize and sell off common elements, a difficult and controversial decision. It is not clear what percentage of owners supported the amendment in this case as there are few facts set out in the court's endorsement or the case comment by the condo's counsel. This type of scenario is arguably addressed more appropriately by a change to the Condo Act rather than judicial intervention.

4. Nipissing Condominium Corporation No. 4 v. Kilfoyl

The Ontario Court of Appeal affirmed that single family occupancy restrictions in a condominium declaration do not violate the *Ontario Human Rights Code*. While the court's reasons were sparse, this troubling issue is now definitively answered. We can tell that the Ontario Human Rights Tribunal is listening because they relied on the court's decision in throwing out a human rights complaint made by that same unit owner on the same issue.

3. TIE Between: Metropolitan Toronto Condominium Corporation No. 985 v. Vanduzer *and* Kilfoyl v. Nipissing Condominium Corporation No. 4 (re costs)

In cases where unit owners are responsible to fully indemnify their condo corporation for the legal costs of enforcing the declaration, by-laws and rules under Condo Act, s. 134(5), the court can order that the lawyers' accounts be assessed. By so doing, the court can ensure that cases are not "overlawyered."

2. Weinberg v. Metropolitan Toronto Condominium Corporation No. 1019

The Ontario Human Rights Tribunal dismissed a unit owner's complaint about the condo's enforcement of a "no pets clause" where an arbitrator appointed under the Condo Act had already considered the complainant's disability and ordered the dog's removal. The case reminds us that every litigant has only one "kick at the can." An arbitrator's ruling on an issue cannot be revisited by another tribunal. Similarly, in Atkinson v. Essex Condominium Corp. No. 5, 2010, the Human Rights Tribunal ordered a unit owner's complaint over a "no pets" clause to be deferred pending the outcome of the condominium corporation's concurrent enforcement application to the Superior Court. Multiplicity of proceedings should be avoided.

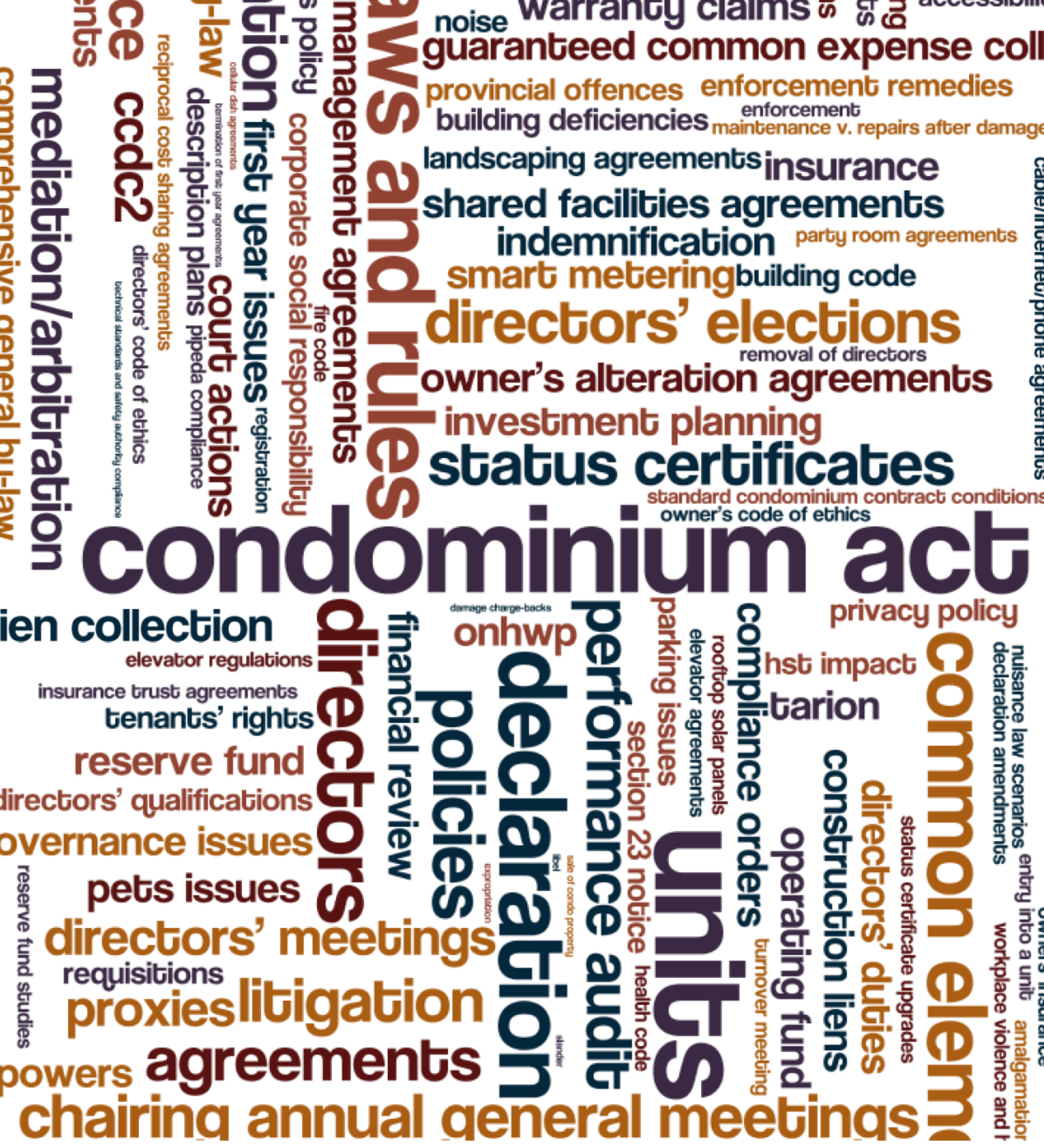
1. Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh

This was unquestionably the top newsmaker of 2010. After hearing evidence of a condo unit owner's bizarre behaviour including verbal assaults, besetting and menacing others with a dog, the Court found the unit owner to be "incorrigible, unmanageable" and ordered her to sell her unit. This appears to be only the fifth Ontario case where a sale order was given. The rarity of such orders was underlined in another 2010 case called Condominium Corporation No. 8110264 v. Farkas, where the Alberta Court of Appeal ruled that evicting condo unit owners is an extraordinary remedy, to be granted only when other incremental remedies fail.

BONUS: Lahrkamp v. Metropolitan Toronto Condominium Corporation No. 932, (unreported)

As another installment of a long-running dispute between a unit owner and his condo corporation, an October 2010 decision of the Ontario Small Claims Court explores the issue of owners' right to inspect records under Condo Act, s.55. The court rejected the argument that every request for records must be accompanied by a reason for the requested records, but held that the right of a corporation to refuse records may be appropriate where the actual motivation behind the request is being challenged, or the burden and expense to the corporation is a serious issue. Each request must be considered on its own merits.

Editor: Andrea Krywonis, with assistance from Syed Ahmed



Let *us* sort it out.

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