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Condo Alert!

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Top 10 Condo Law Cases of 2011

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Editor: Andrea Krywonis, with assistance from Mandy Liao

As one of our annual traditions, it is time to unveil our picks for the top 10 cases of the year gone by. 2011 brought us a bumper crop of condo-related cases by Ontario courts and tribunals, with almost 50 reported decisions.

Here are our selections:

10. **YRCC 890 v. RPS Resource Property Services**, 2010 ONSC 3371

News of several condo frauds broke in 2011 but there was only one reported court decision on the topic, for a fraud between 2003 and 2005. The management firm "borrowed" money from one condo to finance its own operations and those of its other condo clients and then repaid the money before year-end so as to avoid detection by the condo's auditors. The plot unravelled when the condo changed managers and the fraudster was short $370,000 at year-end. The management firm and its principal were liable for breach of contract, breach of trust and conversion and were ordered to repay the $370,000. The condo's claim against its bank was dismissed.

9. **YCC 26 v. Ramadani**, 2011 ONSC 6726

The court granted a compliance order requiring the removal of a dog accused of peeing on a balcony. Despite the owner's arguments, the condo was found to have acted reasonably in demanding the dog's removal. Condominium boards and managers must act reasonably in enforcing condo rules and what is "reasonable" will be decided on a case by case basis, but courts will not substitute their own opinion for that of the board or manager. Justice Strathy gives a good overview of the current law related to condo rule enforcement and his decision stands for the proposition that unit owners who think that a condominium must prove an owner's wrongdoing beyond a reasonable doubt before taking steps against them are just fooling themselves and needlessly risking their financial security. The case also confirms that the court has a broad discretion in fashioning an appropriate remedy which minimally affects the unit owner but which effectively solves the problem.

8. **McFlow Capital v. SCC 27**, 2011 ONSC 7389

The number of condominiums under court administration has grown over the past year, as has the number of reported decisions dealing with appointment of administrators and related issues. In this case, a motion for directions in an ongoing case that was named #8 in our top 10 list last year, the court gives useful guidance as to the materials that must be prepared and filed when condo administrators seek approval of the reports of their activities and the accounts for their fees and their lawyers' fees. This is a good read for anyone trying to understand how a court-appointed administrator should report their activities and fees and the principles behind a court's approval of those reports and accounts.

7. Three-way tie: **Walji v. YCC 455**, 2011 HRTO 1365, **Parkinson v. CCC 43**, 2011 HRTO 1209 and **Dai v. MTCC 971**, 2011 HRTO 876

Here's proof that the Ontario Human Rights Tribunal has become an increasingly popular venue for frustrated condo unit owners to bring grievances against condo boards and property managers. These are just three cases among a whole bunch of complaints that were summarily dismissed as not disclosing an actionable human rights violation or as having no prospect of success. The first case relates to statements by a board member that the owner's unit smelled of urine. The second case alleged harassment when the condo required unit owners to remove protective weather stripping from their unit doors. The third case was brought by a married woman offended by the condo president addressing her as "Miss." While these three cases were dismissed, the unit owners who brought them felt sufficiently aggrieved by shoddy treatment by the board or management. Condos can and should avoid these kinds of proceedings by treating their owners respectfully and managing disputes more proactively.

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6. **Jakobek v. TSCC 1626**, 2011 HRTO 1901

Just because complaints to the Human Rights Tribunal are often unmeritorious doesn't mean they can be ignored. In this case, the condo corporation and its management firm failed to provide a meaningful response and did not participate at the hearing of a unit owner's complaint related to the condo's refusal to accommodate a disabled person. After hearing the unit owner's evidence (no one from the condo attended), the Tribunal smacked the condominium and its management firm with a $5,000 fine, ordered the condo to amend its bylaws to permit parking mobility-assisting scooters in the garage and ordered the condo and its manager to read up on the duty to accommodate. Condo corporations that don't actively respond to and manage HRTO proceedings are playing with fire.

5. **Pantoliano v. MTCC 570**, 2011 HRTO 738

This was a human rights complaint by a unit owner over condo pool rules that set separate swim hours for kids, prohibited children under age 2 from using the pool and completely banned diapered individuals (baby or adult). The Tribunal confirmed that age restrictions in recreational facilities at condominium complexes are discriminatory on the basis of family status and consequently struck down the offending rules and awarded the complaining unit owner $10,000 as damages injury to her dignity, feelings and self-respect in response to a hostile environment created by the board during the proceedings. This case reminds us that the concept of adult-only buildings is utterly dead in Ontario.

4. **WNCC 168 v. Webb**, 2011 ONSC 2365

In what is probably only the fifth case of its kind, the Ontario Superior Court granted the extraordinary remedy of forcing a unit owner to sell and vacate a condo unit. In this case, featuring a very brief decision, the court cited years of aggression, violence, threats, vandalism by the unit owner as justification for the remedy. What's noteworthy is that this case, like the *Korolekh* decision of 2010, appears to have been decided on its first appearance, but for an even more modest cost. This case is a good example of how an efficient, economical and effective compliance application can deal with anti-social behaviour by problem unit owners. More like these will follow.

3. **Pate v. Sinclair**, 2011 ONSC 3997

Condo resale agreements often include a condition allowing the purchasers to back out of the deal if their lawyer is not happy with the status certificate issued by the condo corporation. At issue in this simple discovery motion in a lawsuit over an aborted condo purchase was whether purchasers must answer questions about their lawyer finding the status certificate to be unsatisfactory. In a nutshell, while a lawyer's opinion and advice to purchasers would normally be protected by lawyer-client privilege, the privilege related to the opinion itself was waived by the purchasers when they pleaded in their defence that they relied on the lawyer's opinion in terminating the transaction. Any advice given by the lawyer as to whether the agreement could legally be terminated would be protected by privilege, but issues surrounding the purchasers' instructions to their lawyer to terminate the transaction and the issue of "whether" the lawyer gave any advice are not protected and questions about those aspects must be answered. This case is a gem for real estate litigators who will get busier when the local real estate market corrects and purchasers seek to nix their deals. The case also reminds purchasers relying on this clause that they cannot use it in a capricious manner or in bad faith.

2. **Schneeberg v. Talon International Development Inc**., 2011 ONCA 687

In a case related to the new Trump Tower in Toronto, the Ontario Court of Appeal agreed that a purchaser was entitled to terminate his new condo purchase agreement because the developer failed to provide occupancy and close the transaction on the specific closing date set out in the agreement. After a good overview of the law of contract interpretation, the court said that "[t]he proper functioning of the complex and rapidly growing condominium industry depends on agreements that set out all rights and obligations of the parties in a clear fashion." Purchasers at other projects shouldn't get too excited, however, because the wording of the contract in this case had a gaping hole through which the lucky purchaser beat a hasty retreat when the project got delayed and the economy turned south. "The Donald" likely isn't very happy with the lawyers who drafted the agreement for this project.

1. **Orr v. MTCC 1056**, 2011 CanLII 66010 (ONSC)

Weighing in at 422 paragraphs on 75 pages, it's only fitting that this behemoth decision, the product of 12 years of litigation ending in 40 gruelling days of trial, makes the top of our list. At issue in the case was an unauthorized third floor built into the common elements by a previous owner who sold the unit to a purchaser who believed that the third floor was part of her unit. To briefly summarize the result, the court dismissed the purchaser's claim for an order legitimizing the third floor, granted the condo's request for an order requiring the purchaser to close up the third floor, and awarded damages against the purchaser's lawyers for negligence in failing to check the floor plans and tell the purchaser that the third floor was not part of the unit. This single case is worth an entire series of smaller articles on a large number of issues, chief among them being the higher standard by which lawyers will be held in handling condo purchase transactions. The effects of the case are only beginning to manifest themselves in the real estate bar and will likely give rise to an increase in costs for consumers. Rumour has it that this case has been appealed, making it possible that our Court of Appeal might comment on some of the more salient legal issues, so there will likely be more that we can write about in the future.

We regularly report on condo-related decisions. Follow @ChrisJaglowitz on Twitter and watch our blog (www.ontariocondolaw.com) and microblog to receive frequent updates during the year.

All the best for 2012 from all of us at GMA!