



MONTHLY INFORMATION BULLETIN

FEATURES THIS MONTH

1. Insurance Update
2. New Legislation To Worry About

1. INSURANCE UPDATE

This bulletin is not intended to be the final word on insurance for 2004; however, it does contain important information for you to consider.

As stated in our previous memorandum, VCS authorized Stewarts Insurance to act as the broker to obtain quotes from the insurance market. More importantly, the principal objective of this exercise was to find a market. We are not suggesting that "blank cheques" are available and that pricing is not important but, given what we know today about the current insurance market, we must recognize that just securing coverage is first on the priority list.

In any event, Stewarts went to the market and sixteen underwriters were asked to make submissions. By November 25th, eight firms did and the remaining eight indicated that they would make submissions. (By the time you receive this bulletin, we will likely have a complete response.)

The initial eight have been able to provide 95% of the coverage required so, at this time (November 30th) Stewarts is short by only 5% but they are confident that this gap will be filled.

Stewarts will be presenting VCS with a final package by mid-December (ie. 12th) including specific details and pricing. At this time we are told that pricing will be in the order of 25% increase for fire resistive properties and 50% increase for wood frame. Richmond strata properties will likely see an additional 25%. These are broad averages and should not be construed as firm estimates or promises. Each property is evaluated, assessed and costed individually based on a range of criteria and using "cents per hundred" premiums. We anticipate that for most properties (except Richmond) earthquake deductibles will be 10%. (Richmond may be 15%)

Another variation will be for strata corporations that are deemed to be "leaky condo" - not exactly a precise legal term but certainly a well known concept. For such strata corporations, premiums and water deductibles will be higher than other similar properties. (The message here is "fix your buildings" if you want insurance.)

Also, heads up "heritage buildings". In order to obtain earthquake coverage, proof of seismic upgrading will have to be provided. If seismic upgrading was not done, you very likely will not be insured for earthquake damage after December 31st.

Not all, but most, strata corporations managed by VCS have their policies with Pro Technical Insurance and these expire at midnight December 31st. As of November 30th, Pro Technical has not provided any submissions or advice concerning renewal. We do not know for sure but we can only guess that they will not be providing renewal terms. Of course, if they do, we will certainly compare their proposal with the ones we are receiving from Stewarts Insurance.

One last word: "Whew!" Despite the somewhat negative tone of this report, we are thankful that we will be getting insurance coverage for December 31st. Rumour on the street is that many strata corporations will not be able to get insurance at all by the end of the year. Most strata councils (non VCS), and other management firms to some extent, have not been on top of this file and are about to find out shortly that there may be no one available to provide coverage.



2. NEW LEGISLATION TO WORRY ABOUT

TO OUR STRATA COUNCILS: IT IS VERY IMPORTANT THAT YOU READ THE FOLLOWING MATERIAL.

On January 1, 2004 new legislation will impact your strata corporation. Please do not assume that just because you are a non-profit organization this legislation does not apply to you. It does.

You will find the following material to be lengthy and somewhat difficult to grasp "all in one sitting"; nevertheless, it is vital that you read it completely and have a good understanding of its content.

Although VCS is your property management company and most records referred to in the legislation are maintained by VCS, do not take the position that the problem here "is VCS' not ours". VCS is not the strata corporation: VCS is only the agent on your behalf. VCS has to comply with the legislation as a private company. Your strata corporation must comply also.

PRIVACY LEGISLATION ALERT

As you may be aware from commentary in the media, as of January 1, 2004 new legislation designed to enhance protection of the privacy of personal information will come into effect in British Columbia. This will affect all strata corporations directly and it is, therefore, important that you both understand the legislation and take appropriate steps to ensure compliance with its requirements.

<p>NOTE: This is an Information Bulletin provided to our clients as a courtesy. It is based on our own internal review and analysis of the legislation, but does not purport to be or offer legal advice.</p>

In a nutshell.

This legislation has been deemed necessary in light of the mass collection and dissemination of information that computer data banks and the internet have made commonplace and increasingly invasive and offensive. The basic intention of the law is to generally prohibit the collection, use



and/or disclosure by organizations of all types (including strata corporations and their councils, as well as strata management companies), of personal information about an identifiable individual without the consent of that individual, subject to a number of exceptions and qualifications. These are discussed in some detail below.

By way of example, the type of personal information applicable to strata corporations that we believe to be covered by the new legislation includes such things as (a) financial information contained in pre-authorized checking applications or elsewhere, (b) owner/tenant names, email addresses and home phone numbers and addresses and (c) owner/tenant family, employment, health related/medical information.

The legislation also requires administrative steps and policies to be implemented to ensure compliance with the law. This includes appointing one or more individuals within each strata corporation to take responsibility for all matters related to the requirements of the new privacy law.

NEXT, THE DETAILS

The legislation.

Federal legislation, called the Personal Information Protection and Electronic Documents Act (the "PIPEDA"), has been in place since January 1, 2001, and is being implemented in three stages. In the first phase it applied essentially to federal businesses and organizations (such as government ministries, banks, airlines and railways) and provincially regulated organizations that sold personal information across provincial or national boundaries. It did not at that time include "personal health information", which became part of the scheme in the second phase of implementation, as of January 1, 2002. The last phase will begin as of January 1, 2004, and strata corporations in B.C. will become bound by it, unless and until the provincial government implements alternate legislation that the federal Governor in Council deems to be substantially similar.

Indeed, the B.C. Legislature has drafted and approved related legislation, which too will become effective as of January 1, 2004. It is called the Personal Information Protection Act (the "PIPA"). It has not yet been declared "substantially similar" by the federal Governor in Council; however, we still do not know for sure if strata corporations in B.C. will be subject to the PIPEDA or the PIPA as of January 1, 2004. We are assuming that it will be the latter, and on that basis we have prepared the analysis set out below for your consideration and attention.

Overview.

The stated purpose of the PIPA is "to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances." The primary way in which this objective is sought to be achieved is by requiring an individual to consent as a condition precedent to the collection, use or disclosure of personal information about him/her. Such consent can be express, implied or legislated.

What is "Personal Information"?

To be safe, strata corporations should start from the point of view that every bit of information about an identifiable individual in its possession is private and to be held in confidence, unless that individual consents to its collection, use and/or disclosure. This general principal is limited, however, by a number of provisions in the PIPA. First, some types of personal information are excluded from the definition of that term. Second, collection, use and/or disclosure is allowed without express consent in some cases.

(a) And now the fine print.

"Personal information" is defined in section 1 of the PIPA to mean "information about an identifiable individual and includes employee personal information but does not include (a) contact information, or (b) work product information."

"Employee personal information" is in turn defined to mean "personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between an organization and that individual, but does not include personal information that is not about an individual's employment." Note that "employment" includes unpaid volunteer work relationships. So, if your strata corporation has any employees or any volunteers about whom such information is collected, from January 1, 2004 onwards you must not use or disclose that information except as allowed by the PIPA. Similarly, you must not collect such information thereafter without complying with the PIPA.

"Contact information" means "information to enable an individual at a place of business to be contacted and includes the name, position or title, business telephone number, business address, business email or business fax number of the individual." In other words, residential contact information, is "personal information" and therefore subject to the restrictions contained in the PIPA. It is our understanding, however, that personal contact information contained in public phone books or online directory services will likely be excluded by Regulation, though no Regulations to the PIPA have yet been enacted.

"Work product information" is "information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information." It appears that it is highly unlikely that this part of the definition would in practice have any direct relevance to strata corporations, whose only employee would typically be a resident caretaker, unless his/her functions were in some unusual circumstances to include assembling such information.

Please also note that the PIPA expressly excludes from the application of that Act the collection, use or disclosure of personal information in certain situations (e.g., where done for the personal or domestic purposes of the individual doing it, or if it is done for journalistic, artistic or literary purposes) and of certain types (e.g., personal information in a court document or in a note, communication or draft decision of the decision maker in an administrative proceeding).

Consent - when is it required and how must it be given?

The general principal under the PIPA is that consent is required before personal information covered by that Act can be collected, used or disclosed, subject to the exceptions noted below.

Where actual and express consent is required, it is effective only if the organization collecting the personal information has provided the individual (a) with true and clear particulars of the purpose for such collection and (b) if asked to do so, with the position, name or title and the contact information for an officer or employee of the organization who is able to answer the individual's questions about the collection.

(a) Deemed or implied consent.

If the purpose for the collection, use or disclosure would be considered to be obvious to a reasonable person and it was voluntarily provided for that purpose (e.g., for the purpose of obtaining coverage under an insurance, pension or benefit plan) the individual is deemed to have consented. Likewise, consent is deemed to have been given for the purposes of the PIPA if a clearly worded notice, with a reasonable opportunity to decline (which is not exercised), is given of the intended purposes and those purposes are reasonable having regard to the sensitivity of the information.

(b) Legislated exceptions.

The PIPA expressly exempts from the requirement to get prior consent, the collection, use or disclosure of personal information that is available to the public from a source prescribed [by Regulation]. As noted above, no Regulations have been passed yet, but we understand that one Regulation now being finalized will basically track the related Regulation under the PIPEDA, which reads "personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorized by law, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the registry." If so, information available to the public from the Land Titles Office (such as registered mortgages and liens filed pursuant to section 116 of the Strata Property Act (the "SPA") or the Superintendent of Real Estate will fall within this exclusion (except to the extent that such information is collected, used or disclosed for a different purpose).

Consent is also not required in respect of the collection of personal information which was collected before January 1, 2004. The use or disclosure of such information is still subject to the prior consent provisions of the PIPA, however, unless some other exception applies to it.

The PIPA also allows the collection, use and disclosure of personal information without consent in numerous other situations and circumstances, most of which will never be relevant to strata corporations. Some such situations that are potentially relevant, however, include where the collection, use or disclosure (a) is required or authorized by law (see also the paragraph below on the impact of the PIPA on the SPA), (b) is necessary in order to collect a debt owed to the strata corporation, (c) it is clearly in the interests of the individual and consent cannot be obtained in a timely way, or (d) the disclosure is to a lawyer representing the strata corporation.

(c) What does this all mean?

Good question. It at least means that the legislation is complicated and not easy to quickly understand. It also means that some care will, therefore, have to be taken to get advice from knowledgeable sources when questions arise about the applicability of the PIPA to a particular set of facts and circumstances.

(d) Withdrawal of consent.

For your purposes, consent can be withdrawn by an individual at any time upon giving the strata corporation reasonable notice, unless (a) to do so would frustrate the performance of a legal obligation (such as under s. 35 or 36 of the SPA perhaps - see below), or (b) collection, use or disclosure is permitted without consent under the PIPA. (See also the section on the Retention and Destruction of personal information below.)

On receipt of a withdrawal of consent, the strata corporation must inform the individual of the likely consequences of his/her withdrawing consent.

How does this impact the Strata Property Act?

As you will be aware, section 35 of the SPA specifically requires certain information (some of which will be "personal information" as of January 1, 2004) to be collected, and section 36 requires it to be used/disclosed in certain situations and circumstances. As noted above, personal information can be collected, used and disclosed without consent pursuant to the PIPA if it is "required or authorized by law." Nevertheless, the PIPA also stipulates that, "if a provision of this Act is inconsistent with a provision of another enactment, the provision of this Act prevails unless another Act expressly provides that the other enactment, or provision of it, applies despite this Act." There is no provision of the SPA that is expressly stated to be exempt from the PIPA, and at this late date we think it unlikely that any such qualifying language will appear in an amendment or Regulation before January 1, 2004. So, we must conclude, at least for the time being, that the PIPA limits to some extent the collection, use and/or disclosure of personal information otherwise required by sections 35 and 36 of the SPA.

One other point to note in this discussion, is the fact that the PIPA also says that in meeting its responsibilities under that Act, an organization must consider what a reasonable person would consider appropriate in the circumstances. That should give us some comfort since a reasonable person who is familiar with how condominiums operate, would likely conclude that the collection, use and disclosure of information by strata corporations pursuant to sections 35 and 36 of the SPA serves legitimate and important purposes which by and large do not conflict with the purposes of the PIPA. Nevertheless, we must all be cautious as we move forward, while we all try to get a handle on exactly how the new privacy milieu under the PIPA is going to be interpreted to apply to the condominium industry.

Administrative Requirements.

A number of administrative requirements are also included in the PIPA that apply to strata corporations (and all other organizations covered by the PIPA). In particular, a strata corporation must:

1. develop and follow policies and practices that enable it to comply with the PIPA;

2. develop a process to respond to complaints that may arise under the PIPA;
3. make available to the public on request information about the foregoing;
4. designate one or more individuals to be responsible for ensuring that the organization complies with the PIPA; and
5. make available to the public the position, name or title of each individual so designated, as well as contact particulars for each such individual.

Where consent to the collection, use or disclosure of personal information is considered to be required, a form of notice should be prepared which (a) clearly sets out the intended purpose of such collection, use or disclosure, (b) allows the individual a reasonable opportunity to decline, and (c) identifies the person(s) within the strata corporation who has been designated to ensure compliance with the PIPA, and his/her contact particulars.

(a) Accuracy.

Organizations covered by the PIPA, such as Strata Corporations, are required to make a reasonable effort to ensure that personal information collected by or on their behalfs is accurate and complete, if it is likely to be used by the organization to make a decision that affects the individual whom the information relates to, or if it is likely to be disclosed by the organization to another organization.

(b) Security.

Organizations are also required to make reasonable security arrangements to protect personal information in their custody or under their control, from unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

(c) Retention and Destruction.

Where collection, use or disclosure of personal information is permitted without consent under the PIPA, if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain the information for at least one year after using it, so that the individual has a reasonable opportunity to obtain access to it. Otherwise, or in any case after that, the organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that (a) the purpose for which it was collected is no longer being served by retention of the personal information, and (b) retention is no longer necessary for legal or business purposes. Of course this would have to be balanced against the document and information retention requirements of the SPA. For example, the SPA requires that any decision of an arbitrator or judge in a proceeding in which the strata corporation was a party, and any legal opinions obtained by the strata corporation (which could contain personal information about an individual, but would still be subject to regular solicitor-client privilege rules) must be retained by it permanently, while minutes of council and general meetings and Information Certificates issued under section 59 of the SPA must be retained for six years.



Access to Personal Information.

Subject to the exceptions noted immediately below, on the request of an individual, an organization must provide the individual with (a) his/her personal information under the control of the organization, (b) information about the ways in which that information has been and is being used, and (c) the names of the individuals and organizations to whom that information has been disclosed. The exceptions that we think might be applicable to strata corporations are (i) where the information is subject to solicitor-client privilege, (ii) the information was collected without consent as allowed by the PIPA, for purposes of an investigation and the investigation and associated proceedings and appeals have not been completed, (iii) the information was collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration pursuant to the SPA, (iv) if the disclosure could reasonably be expected to threaten the safety or physical or mental health of another individual, and (v) if the disclosure would reveal personal information about another individual.

Written Application.

A person who wishes to gain access to his/her personal information or to ask an organization to correct an error or omission in the personal information about that person under its control, must do so in writing. Generally speaking, the organization must respond not later than 30 days after receiving the request, though that deadline can be extended in certain situations. The request can be partly or wholly refused in some instances, which will therefore require assessment on a case-by-case basis as requests are received.

Fees cannot be charged for access to employee personal information, but a "minimal" fee may be charged for other personal information. In the latter case, a written estimate must be given in advance and a deposit for all or part of the fee may be required.

Employee Personal Information.

An organization may collect, use and disclose employee personal information without consent (a) if the collection, use or disclosure, as the case may be, is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual, and the organization first gives the employee notice of its intention to collect, use or disclose such information and the purpose for doing so; or (b) if, among other exceptions (most of which are not likely to ever be relevant to strata corporations), the collection is required or authorized by law.

Administration of the PIPA.

The commissioner appointed under the provincial Freedom of Information and Protection of Privacy Act is assigned the responsibility for overseeing compliance with the PIPA. Individuals can make a complaint to the commissioner or ask for a review of a decision made or action taken/not taken by an organization in respect of personal information of that individual, and the commissioner can himself/herself initiate a review or audit to ensure compliance with the PIPA if satisfied that there are reasonable grounds to believe that an organization is not complying with the PIPA.

If an order is made under the PIPA against an organization by the commissioner, once all rights of appeal have lapsed, an individual affected can bring an action against the organization for damages for actual harm suffered as a result of the conduct.

Fines of up to \$100,000 can be levied by the commissioner against an organization in limited circumstances of certain more extreme types of non-compliance and high-handed behaviour.

What are the Practical Implications of the PIPA for you?

1. First, you should do an information inventory to identify what types of "personal information" you have already collected and will in the future collect, use or disclose regarding strata corporation owners, tenants and employees.
2. Next, you should think about the purposes for which you have collected/will collect, use and disclose such information, ensure that those purposes are allowed by the PIPA, and make sure that you do not go beyond those purposes.
3. Then you must determine if consent is needed in any such case, and if it is, get such consent.
4. Finally, you should set up policies and procedures that will help to ensure that you comply with the PIPA requirements applicable, including designating one or more individuals (a "Privacy Officer") to be responsible for these matters and educating present and future council members about the PIPA.

When in doubt.

It is of course impractical for us to try in this memorandum to identify all the situations, circumstances and ways in which the PIPA might apply to any actual or hypothetical strata corporation. As indicated above, there are many variables that will apply and must be considered in each individual case. Further, because no Regulations have been passed as of the date of the mailing out of this notification and we of course have no judicial precedents to guide us in situations where the law seems gray, questions will have to be reviewed and considered on a case-by-case basis.

As noted at the outset of this memorandum, it seems fair to say at this time, however, at least that such things as (a) financial information contained in pre-authorized checking applications or elsewhere, (b) owner/tenant names, email addresses and home phone numbers and addresses and (c) owner/tenant family, employment, health related/medical information, should all be considered to fall within the intended scope of the PIPA and therefore treated with confidence. strata corporations can no longer open their files indiscriminately to owners/tenants who might have had a right to such access before January 1, 2004. Also, greater care will now have to be taken before disclosing information to third parties, since the legitimate needs and rights of owners to have access to certain information about other owners/tenants will not always extend to third parties, such as lenders and real estate agents.

When in doubt, ask your legal advisors for assistance.

**As if you didn't already have enough to worry about and do!**

This new legislation has obviously created a whole new level of obligations for strata corporations, councils and property management firms to deal with and, inevitably, there will come additional costs to ensure full and timely compliance. At this time (November 30, 2003) VCS has not established any fee structure to provide these additional services. To be frank, we do not know how much time will be required. The obligations to be fulfilled on your behalf are substantial but we need experience to evaluate the workload. Let's get started with compliance for now and deal with fees later.