



FEATURES THIS MONTH

- **Reconsidering Votes**
- **Insurance Worries**
- **Human Rights Tribunal Decisions**



1. RECONSIDERING VOTES

First, this article does not deal with Section 51 of the *Act* which is a process whereby votes at AGMs/SGMs are subject to possible reconsideration by the owners. Nevertheless, a copy of that section is attached for reference and we have highlighted in bold some key points for you to remember. As said above, however, this section is not the point of this article.

At AGMs/SGMs we have all experienced the situation where a $\frac{3}{4}$ vote narrowly misses the target and there is great consternation by the owners, often resulting in further discussion and suggestions that the vote was rushed, that people did not understand what they were voting on, etc. We also hear that, if a point is clarified or possibly amended, the vote might pass. So the question is whether or not a vote can be reconsidered at this point or is it a closed issue?

In one strata corporation a few years ago, we ran into this situation and held a re-vote at the (same) AGM. An owner objected and brought a legal action against the strata corporation and, rather than incur legal costs, the strata council convened another general meeting to vote on the issue. The council obtained a legal opinion which said essentially that, once a vote is taken, that is it. To re-vote on the same resolution would require "proper notice", i.e., 18 days, etc. It could not be done at the original meeting.

VCS does not agree with such a strict interpretation of the *Act* and, with all due respect to the lawyer, it was only his opinion and not law. We will have to wait, one day, for a ruling from a Court.

As in the case of amending resolutions at AGMs/SGMs, we agree that a substantive change (even if called a "clarification") at a meeting cannot be voted upon. Another meeting has to be held. We do believe, however, that if there is apparent confusion when the vote is called, it is acceptable to call another vote. We have all witnessed the "stunned" looks of owners on learning that a $\frac{3}{4}$ vote failed and it is common to hear them profess that they really did not know what they were voting on. This frequently occurs after a lengthy, contentious debate with "everyone talking at the same time". It is, therefore, our view that it is acceptable to hold the vote again, but what is the process?

The question then arises should the decision to reconsider be by a majority vote, a two-thirds vote or a $\frac{3}{4}$ vote and this is difficult as the *Strata Property Act* provides no direction. We think that it is definitely not a majority vote. Could it be a two thirds vote since that is the threshold dictated by Robert's Rules of Order? While there may be some comfort in relying on such a widely known and respected authority as Robert's, the problem is that Robert's is not prescribed in the *Act* or any strata corporation bylaws, and we generally only use 5% of Robert's as a convenience. The other 95% is not in our heads. (It's like that old song "You're the cream in my coffee, you're the ..." Who knows the rest of the lyrics? Very few people, right?) The point is that we rely on Robert's when it suits us, but not when we are uninformed and that is very problematic. We believe, therefore, that strata corporations should not rely on the Robert's 2/3 dictum for reconsidering $\frac{3}{4}$ vote resolutions.

What VCS proposes, therefore, is that strata corporation general meetings mirror other provisions of the *Strata Property Act* when it comes to reconsidering votes. For example, amendments to $\frac{3}{4}$ vote resolutions can only be done by a $\frac{3}{4}$ vote. Section 50 (2) of the *Act* states:

(2) *Despite section 45 (3), during an annual or special general meeting, amendments may be made to the proposed wording of a resolution requiring a 3/4 vote if the amendments*

(a) do not substantially change the resolution, and

(b) are approved by a 3/4 vote before the vote on the resolution.

Section 45 (3) states:

(3) The notice of the annual or special general meeting must include a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a 3/4 vote or unanimous vote.

In other words, it seems that the *Act* allows a vote to be held again if valid amendments are made to a proposed $\frac{3}{4}$ vote. The way is cleared to overcome the requirement that notice is required, as stated in 45 (3), by saying despite what it says in 45 (3) you can move forward again as long as you do not substantially change the resolution and as long as the new motion to amend receives a $\frac{3}{4}$ vote before the main motion is voted on.

Therefore, consider what unfolds. A $\frac{3}{4}$ vote resolution is presented and fails to receive the $\frac{3}{4}$ vote required. An owner then stands up and says “*You know, I have a sense that if we just amended this slightly to overcome some of the objections I heard, I’ll bet this thing would fly*”. And a lot of people agree with him/her. The procedure at this point is for the meeting chairperson to say “*Let’s have a motion to reconsider the resolution with an amendment and we need a $\frac{3}{4}$ vote to do this.*”

The concept of having an “instant” $\frac{3}{4}$ vote resolution without the requisite notice is not unique in this context. The *Act* does, in fact, use it at another important area, i.e., approving budgets. At an AGM, if a budget fails to receive a majority vote, the *Act*, provides, at Section 104, the process for moving forward. Note:

Failure to approve budget

104 (1) If a budget is not approved at an annual general meeting, the strata corporation must within 30 days, or such longer period as approved by a resolution passed by a $\frac{3}{4}$ vote at the meeting, prepare a new budget and place it before a special general meeting for approval by a resolution passed by a majority vote.

Note, the corporation must, within 30 days, prepare a new budget and place it before a Special General Meeting. If the 30 days is insufficient, right there and then at the AGM the *Act* permits a period longer than 30 days if approved by a $\frac{3}{4}$ vote resolution at the meeting. It is remarkable, but clear, that a $\frac{3}{4}$ vote resolution can be “instant”, meaning that advance notice is not required.

So back to the topic at hand. You can reconsider votes at AGMs/SGMs if the changes/amendments are not substantive but VCS suggests you rely on the $\frac{3}{4}$ vote threshold. We find more comfort on relying on the *Strata Property Act* itself which absolutely and totally governs the strata corporation, rather than relying on the well-known but limited clichés of Robert’s Rules of Order.

Reconsideration of resolution passed by $\frac{3}{4}$ vote

(1) This section applies only if a resolution required to be passed by a $\frac{3}{4}$ vote is passed at an annual or special general meeting by persons holding less than 50% of the strata corporation’s votes.

- (2) The strata corporation must not take any action to implement a resolution referred to in subsection (1) for one week following the vote unless there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage.
- (3) Within the one week following the vote, persons holding at least 25% of the strata corporation's votes may, by written demand, require that the strata corporation hold a special general meeting to reconsider the resolution.
- (4) The demand must be signed by each person making it.
- (5) After receiving a demand for a special general meeting under subsection (3), the strata corporation must not take any action to implement the resolution unless there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage.
- (6) The strata corporation must hold the special general meeting within 4 weeks after the demand is given to the strata corporation.
- (7) The president of the council may call the special general meeting without holding a council meeting.
- (8) At the special general meeting, the resolution to be reconsidered is the first item on the agenda and must be dealt with before consideration of any other matter about which notice has been given.
- (9) Despite any other provision of this Act, the regulations or the bylaws, if a quorum is not present within 1/2 hour of the start of the special general meeting, the meeting must not proceed.
- (10) The resolution stands and may be implemented only if one of the following conditions is met:



- (a) a demand for reconsideration is not made under this section;
 - (b) the resolution is approved by a 3/4 vote at the special general meeting held under this section;
 - (c) the meeting held under this section does not proceed for lack of a quorum as set out in subsection (9).
- (11) The resolution may be presented for reconsideration under this section only once.

2. INSURANCE WORRIES

This may not be “breaking news” but the following excerpts from one of our client insurance policies is certainly a very good indicator of new insurance worries for you to ponder. Insofar as “leaky condo” issues, VCS continues to encourage clients to fix their buildings. As far as grow-ops are concerned, that is not an easy fix. In fact, it is very problematic to establish and verify the existence of such activities, but the net effect is the same. Your strata corporation will have losses that will not be covered by the insurance policy.

MOLD, FUNGUS, WET AND DRY ROT AND BACTERIA EXCLUSION ENDORSEMENT

Notwithstanding any provision to the contrary within this insurance or any endorsement thereto it is agreed that this policy does not insure any loss, damage or expense consisting of, caused by, contributed to, or aggravated by mold, moss, mildew, fungi, spores, bacterial infestation or any similar organism, wet or dry rot and extremes of temperature or humidity, whether directly or indirectly the result of a covered peril. This includes, but is not limited to, the cost for investigation, testing remediation services, extra expense or business interruption. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. If loss otherwise covered by this policy occurs and the cost of removal of debris is increased due to the presence of rust, mold, moss, fungus, bacterial infestation, wet or dry rot and extremes of temperature or humidity, this policy will only be liable for the costs of debris removal which would have been incurred had no such factors been present in, on or about the covered property to be removed.

DRUG ACTIVITY DAMAGE EXCLUSION

This policy does not insure any loss or damage, whether direct or indirect, to any premises in which there is any activity relating to either the growing, cultivation, harvesting, manufacturing, distribution or sale of any non-prescription controlled substance or substances enumerated in Schedule (Section 2) of the federal Controlled Drugs and Substances Act Narcotic Control



Regulations C.R.C., c. 1041 (as amended from time to time), whether or not the Insured is aware of such activity.

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3. HUMAN RIGHTS TRIBUNAL DECISIONS IMPACT STRATA CORPORATIONS

by Adrienne M. Murray, McCormack & Company Law Corporation

Recently the BC Human Rights Tribunal (the "Tribunal") considered two complaints relating to activities within strata corporations. The decisions have a significant impact on how strata corporations should apply their bylaws in specific situations.

The Tribunal is responsible for dealing with complaints made under the Human Rights Code. The Tribunal's job is to resolve human rights complaints either by helping the parties to resolve the complaint or by holding a hearing and making a decision. The Tribunal operates like a Court, but is less formal.

The Human Rights Code contains provisions prohibiting discrimination in relation to the purchase of property, tenancy, employment, accommodations, and the provision of services. The Code prohibits discrimination on a number of grounds, including, race, colour, ancestry, religion, family or marital status and physical or mental disability.

Section 10 of the Human Rights Code prohibits discrimination in relation to tenancies. It has been accepted, for some time, that the Human Rights Code applies to strata corporations to prevent discrimination against tenants. However, until recently, it was not entirely clear whether the Human Rights Code could be applied to the activities of a strata corporation as they related to owners.

In the recent decision of the Tribunal in *Konieczna v. The Owners, Strata Plan NW 2489* the Tribunal considered whether section 8 of the Human Rights Code applied to the activities of a strata corporation.

In *Konieczna* the Tribunal considered a complaint by Mrs. Konieczna that the strata corporation had discriminated against her on the basis of a physical disability. Mrs. Konieczna had allergies that were caused by and aggravated by the presence of carpet. The strata corporation had passed a bylaw that only permitted wall to wall carpeting. Mrs. Konieczna had requested that she be permitted to install hardwood flooring, but, because of the bylaw, her request was denied. Mrs.

Konieczna then complained to the Tribunal that the bylaw discriminated against her on the basis of her physical disability.

The first issue for the Tribunal was whether section 8 applied to strata corporations. Section 8(1) of the Human Rights Code provides:

- 8(1)** A person must not, without a bona fide and reasonable justification,
- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

Before the Tribunal could apply section 8 of the Human Rights Code it had to establish that there was an “accommodation, service or facility” and that the accommodation, service or facility was “customarily available to the public”.

The Tribunal determined that a strata corporation provides a “service”, as contemplated by the Human Rights Code, by enforcing bylaws and providing management services relating to the upkeep, development and maintenance of the property. The Tribunal then considered whether the service was “customarily available to the public”. The Tribunal determined that the “public” were those individuals provided with the services of the strata corporation. As a result, all owners in a strata corporation were the “public” for the purposes of the Human Rights Code.

The Tribunal accepted that Ms. Konieczna had a disability. Mrs. Konieczna had provided letters from specialists who confirmed her severe allergies and asthma.

The Tribunal then considered whether there had been discrimination. The Strata Corporation argued that the bylaw requiring carpeting was a neutral bylaw and because it applied to all owners within the strata corporation it did not discriminate against Mrs. Konieczna. The Tribunal

however determined whether discrimination had occurred by considering whether the bylaw imposed a burden on someone with a disability which is not imposed on other members of the strata corporation. In other words, discrimination occurs if the decision or bylaw affects someone with a disability differently than other owners. The Tribunal concluded that, because of her health problems, by preventing Mrs. Konieczna from installing hardwood floors, the bylaw imposed a burden on Mrs. Konieczna that was not imposed on other owners. As a consequence, the Tribunal found that the strata corporation had discriminated against Mrs. Konieczna. The Tribunal ordered the strata corporation to cease discriminating against Mrs. Konieczna and awarded her \$3,500 as compensation.

The case of *Williams v. Strata Plan LMS 768* considers a further issue in relation to the matter of discrimination by a strata corporation against an owner. In *Williams* the strata corporation disconnected the entry mechanism that permitted the front door to the building to be opened from a strata lot during certain hours. If an owner wished to permit someone to enter after 8:00 p.m., after the guest buzzed the strata lot, the owner was required to go down to the front door and physically unlock the door and admit the visitor, rather than just use a buzzer in the suite to unlock the door. The change was made because of a fear of home invasions and because there had been a forced entry into the building and various acts of vandalism on the exterior of the building.

Mrs. Williams was elderly and suffered from a variety of health problems including congestive heart failure. Mrs. Williams had been hospitalized on an emergency basis on more than one occasion. By preventing Mrs. Williams from unlocking the front door from her suite, Mrs. Williams was prevented from allowing access to ambulance and other medical assistance in the case of an emergency. Mrs. Williams and her daughters complained to the Council and suggested three different security companies that would provide free estimates and suggestions for alternate security arrangements. Mrs. Williams' daughter also attempted to leave a key to the building with the local ambulance service, however, they refused to accept the key. The Tribunal found that Mrs. Williams and her daughters had taken 12 alternative steps to solve the problem.

The Tribunal found that there was no question that Mrs. Williams had a disability and that the decision of the strata corporation to disconnect the entry system discriminated against Mrs.

Williams because it imposed a burden on her, because of her disability, that it was not imposed on other owners.

The further issue that the Tribunal considered was whether, as permitted by section 8 of the Human Rights Code, there was a bona fide and reasonable justification for the discrimination. The Tribunal questioned whether the strata corporation's failure to accommodate Mrs. Williams was reasonably necessary in order to achieve building security. The Tribunal stated that to be "reasonably necessary" the strata corporation must show that their decision incorporated every possible accommodation to the point of undue hardship, whether the hardship takes the form of impossibility, serious risk or excessive cost. In other words, the question for the Tribunal was whether the strata corporation could meet its goal of enhancing building security and still accommodate Mrs. Williams without incurring undue hardship.

The Tribunal found that both parties must search for accommodation. However, in the case of Mrs. Williams, the Tribunal found that she had made several suggestions, all of which were rejected by the strata corporation.

The Tribunal considered the issue of safety as an aspect of undue hardship and indicated that accommodation may not be required if the safety of the owners would be put at risk by accommodating Mrs. Williams. However, the Tribunal found that the policy of disconnecting the door buzzer would not have prevented the break-ins or a home invasion.

The Tribunal stated that costs were also an aspect of undue hardship. Presumably, if the disconnected door buzzer was necessary for safety and the only method of accommodating Mrs. Williams was prohibitively expensive, the Tribunal would permit the disconnected door buzzer. However, in the case of Mrs. Williams, the Tribunal found that there was insufficient evidence to establish that the cost of accommodation would be prohibitive.

The Tribunal ordered the strata corporation to cease discriminating against Mrs. Williams and to pay \$1,500 compensation to Mrs. Williams.

The cases are significant for strata corporations because they now establish that the bylaws and decisions of a strata corporation will be subject to the scrutiny of the Tribunal if an owner can establish discrimination on any of the grounds set out in section 8 of the Human Rights Code.

Strata corporations must take complaints of discrimination seriously. Where discrimination is occurring, the strata corporation must be willing to work with the owner to accommodate his or her needs. However, whether or not there is discrimination may not be easy for a strata council to establish. Although strata councils must accommodate owners in cases where there is discrimination, strata councils must also ensure that claiming discrimination does not become a convenient way for owners to avoid compliance with bylaws that they do not like. In cases where owners complain that there has been discrimination, strata councils may wish to obtain legal advice about issues such as whether the discrimination has been established and, if so, whether the discrimination is justifiable, before the strata council permits the owner to breach a bylaw, or accommodates the owner's request.

Adrienne Murray is a lawyer with McCormack & Company Law Corporation, located at 520 - 789 West Pender Street, Vancouver, B.C., V6C 1H2. She was called to the Bar in B.C. in 1992. Her expertise and preferred area of practice is strata property law. Prior to joining McCormack & Company Ms. Murray was the Deputy Superintendent of Real Estate, in which capacity she assisted the drafters of the Strata Property Act. She can be reached at 604-688-0930.

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