



## FEATURES THIS MONTH

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## 1. THE INSURANCE PREMIUM YO-YO

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Not all, but most of the insurance policy renewals this past December 31<sup>st</sup>, for the year 2005, were at equal or reduced premiums. Of course, that is good for you but it seems that our earlier predictions, as evidenced in your 2005 budgets, were overstated. In most strata corporations, there will be a surplus in that budget line item at the end of 2005. (NO, you cannot move the surplus to another budget line item.) Recent media reports tell us that the insurance industry has been making huge profits.

For those of you who have been on your strata councils for five or more years you will, no doubt, recall the fluctuations in annual premiums some of which were without any rhyme or reason. Believe it or not, despite 911 and other disasters, today's premiums are generally less than they were seven years ago. Go figure, eh? The yo-yo protocol.

So without wanting to throw cold water on the current stable premiums, we do want to alert you to the possibility of increases over the next five years. There will be the usual assortment of natural disasters and (hopefully not) some "man-made" disasters caused by terrorists. For B.C. strata corporations, there is one new factor which may give rise to increased insurance premiums: The 2010 Olympics.

Over the next five years there will be a construction boom. We are already experiencing labour shortages as the B.C. economy (particularly in the lower mainland) continues to "boom" and expand. This expansion, which is expected to be constant over the next five years, will create higher costs of construction. One can turn to simple supply/demand economic theories or other more complex models to come to this conclusion but it seems there is widespread agreement that construction costs will escalate.

Every year, your strata corporation receives a valuation appraisal. The *Strata Property Act* states at Section 149 (4) that:

*"The property insurance must*

*(a) be on the basis of full replacement value, and*



*(b) insure against major perils, as set out in the regulations, and any other perils specified in the bylaws."*

In order to insure for replacement value, your strata corporation obtains a valuation appraisal. These appraisals take into consideration a wide variety of factors including new building codes, cost for materials and, naturally, cost for labour. With the pressures that will be exerted on the building industry over the next five years you can be sure that these costs, especially the labour factor, will increase significantly. The result will likely be higher appraisal values. In other words, if your strata corporation is valued (appraised) at a higher amount, you will pay more for insurance premiums even if the insurance "rates per \$100" do not increase.

Plan on it.



## 2. THE EFFECT OF GROW OPS ON YOUR INSURANCE PREMIUMS

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We bring to your attention an interesting article dealing with the impact of grow-ops within your strata corporation on your insurance premiums, coverages and deductibles. This article originally appeared in the B.C. Broker Magazine, and is reprinted with the kind permission of its author Robert Simpson. Please note that since it was published the following exclusion has been put into place in respect of all policies of insurance placed through BFL Stewarts for condos managed by VCS:

"This policy does not insure loss or damage to buildings and/or structures, and their contents, used in whole or part for the cultivation, harvesting, processing, manufacture, distribution or sale of marijuana or any product derived from or containing marijuana or any substance falling within the Schedules of the Controlled Drugs and Substances Act, whether or not the insured is aware of such use of the property."

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### 3. INSIDER KNOWLEDGE – BE CAREFUL

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You have no doubt seen or read various news stories about company directors being charged under securities legislation with using “insider knowledge” to enhance or protect their personal fortunes. The Martha Stewart case is a good example. The principle of insider knowledge can be extended to the role you play as a council member.

In the course of your mandate you will be exposed to information about your strata corporation which, sometimes, may not be very nice. Here is an example, a story, which illustrates the point. A strata council (not one managed by VCS) obtains an engineering report about a certain aspect of the building. The report outlined a major problem and estimated a repair bill of over \$1,000,000. The strata council was, naturally, horrified, and chose not to divulge this information in the council meeting minutes. Instead, they asked the engineering company to re-issue the report and remove the reference to the actual estimated cost. Did the strata council act improperly? Are members of council exposing themselves to any personal liability for covering up a known and predictable future expense? If someone purchased a strata lot not knowing this information, could that person have a legitimate cause of action against the strata corporation and the individual council members?

There is more to this particular story. One of the council members leaked the information from the report to a relative who also owned a strata lot in the same building. The relative immediately listed the property and sold it promptly in the recent hot real estate market. Any liabilities here?

When the *Strata Property Act* was written (and implemented in 2000) it contained new provisions dealing with “council member’s standard of care” and “disclosure of conflict of interest”. These concepts and statutory direction were not contained within the previous *Condominium Act of B.C.* For the purpose of brevity, we will not recite Section 32 Disclosure of conflict of interest but note that it deals specifically and only with “contracts or transactions”. The Act defines neither term. We all know what a contract is but it may not be so clear as to what we each perceive as a “transaction”. Generally, however, we suggest that council receiving an engineering report is not a transaction in which the council member “has an interest” as intended by this Section. We, therefore, take the position that Section 32 is unreliable in the context of this article.

What about Section 31, Council member's standard of care, which reads as follows:

31 In exercising the powers and performing the duties of the strata corporation, each council member must

- (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
- (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

Can the content of this statutory direction be relied upon to make a case against a council member who uses insider knowledge to leak the contents of a disturbing report which financially impacts all owners? We do not know. In our view, and it is only our view, this section does not have sufficiently sharp teeth to achieve the protection that this article alludes to for current or future owners. Conversely, a court may well say that acting "honestly" is a clearly defined concept and leaking a report fails the grade. There have not been many cases in this area although we do refer you to *Cope v. Morton*, a B.C. Supreme Court case, decided on November 1, 2004 (Victoria Registry No. 02/4766). In this case, the former council member who was sued (as an owner) was found to have known more about a probable expense than he disclosed to the purchaser of his strata lot at a later date. The particular circumstances of this case may be too narrow to suggest that the outcome is a precedent, but it does suggest to us that the courts will likely scrutinize council conduct very closely as similar events surface in the years to come.

Will you end up sharing space with Martha Stewart? Not likely. But will you expose yourself to litigation, legal costs and penalties? Probably.

## 4. THE LATEST ON REPAIR LEVIES AND SECTIONS

*By Mari Worfolk<sub>1</sub>*

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The recent decision in *The Owners, Strata Plan LMS 1934 v. Westminster Savings Credit Union* ("Edgepark Manor") is the latest chapter in the long-running saga - who has to pay for repairs to a building envelope? It adds a new layer of analysis to the issue by going outside the four corners of the *Strata Property Act* and considering "equitable principles" - the legal term for "What is fair".

The strata corporation's buildings were constructed in three phases. Phase 1 had only commercial units, while Phases 2 and 3 had both commercial and residential strata lots. The three phases are built on top of a single underground parking garage. The commercial lots are concrete framed, while the residential lots, built on top of the commercial ones, are wood framed.

The original Disclosure Statement filed by the Developer contemplated two sections - a commercial one and a residential one. In 1998, after the first leaks were identified in Phase 2, bylaws were properly passed and filed to create three sections: one made up of all commercial lots, and two made up of the residential lots in Phases 2 and 3. This was done specifically to achieve the result that expenses relating to one section or building would be borne by that section or building. I say "section or building" even though the two concepts are not identical. The bylaw itself provided that expenses relating to a specific phase would be paid by all the strata lots in that phase.

In 2000 the Phase 3 owners passed a special resolution assessing a special levy on all owners in that building, both residential and commercial, to fix the building envelope. This levy was passed over the protests of the commercial owners in Phase 3, who asserted they had no obligation to contribute to the repairs because the repairs all related to the residential part of the building. This vote was held before the *Strata Property Act* came into force on July 1, 2000.

A majority of the residential owners voted, before December 31, 2001, to amend the bylaws to continue the three sections. The commercial owners were not permitted to vote because they had refused to pay the special levies and so were technically in arrears.

A key bylaw provided that:

- (a) expenses that related to more than one section or phase would be borne by all owners in proportion to unit entitlement;
- (b) expenses attributable to one phase would be borne by all the owners of that phase in accordance with unit entitlement.

Justice Morrison found that the owners sought, after the *Strata Property Act* came into effect, “to continue to conduct themselves as they had in the past.” She found the strata council had acted diligently and “in a manner that can only be described as fair and democratic” (para 68).

A key paragraph in the decision, paragraph 70, will undoubtedly be quoted frequently in strata cases. It reads:

Presumably, the new Act was to give greater flexibility so that new owners, buying into a strata corporation, could easily understand what they were purchasing, the rules and regulations and obligations that went along with condominium ownership. It is not an Act that is meant to defeat the well-meaning. It was also presumably meant to assist owners and future purchasers in dealing with the pervasive leaky-condo problems. It is an Act meant for people to be able to govern their own property affairs, not one that should require a phalanx of Philadelphia lawyers.

Justice Morrison then went on to note that it would be unfair to change how the repairs would be paid for in Phase 3 after Phase 2 had paid for its repairs in accordance with the bylaws. The express recognition of the relevance and importance of fairness in applying all provisions of the Act, and not just in considering section 164, is also a key development for strata law.

The decision also re-emphasizes the fact-specific nature of these disputes, since the course of conduct of the strata corporation and any sections over the years will need to be examined closely. It also highlights the usefulness of deciding how to deal with these sorts of issues in advance of actual problems. A phased development that has not to date experienced any major expenses would be well advised to consider in advance how it would want to address these issues, and consider bylaw amendments, although whether this case could be used where a strata corporation was created under the *Strata Property Act* remains unclear.



It does appear clear from the Edgepark Manor case that where a strata corporation, under the *Condominium Act*, set up sections democratically and properly and acted accordingly in a consistent fashion and then continued to do so under the *Strata Property Act*, it has a much better chance of defeating an opportunistic attempt to force strict compliance with Regulation 6.4 of the *Strata Property Act Regulations*, than it did before this decision.

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