



FEATURES THIS MONTH

1. Lawsuits Abound
2. Licensing: Another Requirement
3. Licensing Observations
4. Some Clarity on E-Mail and Interest Rates
5. Requests for Exclusive Use of Common Property
6. "Leaky Condo" Updates

NEED GOOD SITES FOR STRATA CORPORATION INFORMATION?

Here are some sites you can access:

Strata U. - Continuing Education Department web site links of interest:

- Canadian Condominium Institute: <http://www.cci.ca>
- Condominium Home Owners Association: <http://www.choa.bc.ca/index.html>
- Clark, Wilson, Barristers & Solicitors: <http://www.cwilson.com/stratafaq>
- *Strata Property Act* information web site: <http://www.fic.gov.bc.ca/strata>
- Vancouver Condominium Services: <http://www.vancondo.com>



Stop Auto Crime

in multi-residential and mixed-use
buildings

A Guide for Strata-Councils,
Building Managers and Owners

www.icbc.com/crime-fraud

click the link:

Stopping auto crime in underground parking areas

1. LAWSUITS ABOUND

As management agent for about 200 strata corporations we, of course, have to keep track of lawsuits against our clients as well as those by our clients against others. While we are not at liberty in this article to disclose particulars of these lawsuits, we thought it would be interesting to share with you some general information.

First, in April 2004 we were tracking four legal actions against strata corporations and five by our clients against others. Eighteen months later, VCS manages roughly the same number of strata corporations but now the inbound missiles amount to thirty-one actions, while there are fifteen actions that have been initiated by our clients.

Here are some typical examples of the types of legal actions against strata corporations that are in progress:

1. Water Damage Claim: An owner in a concrete high-rise building incurred expenses of over \$10,000 to repair his strata lot as a consequence of a water leak from above. The owner above had hired a contractor to renovate the kitchen, including new plumbing. The plumbing failed and there was a huge water escape. The strata corporation's insurance policy carries a water loss deductible of \$10,000 and the council decided not to file an insurance claim. This lawsuit now involves lawyers for the water-soaked owner, the owner above, the plumbing contractor, the plumbing fixture supplier and the strata corporation. Cha-ching!
2. Appointment of Administrator: In this strata corporation, which is "a leaky condo", the owners have repeatedly voted against a repair program. A group of owners have initiated a legal action to force all the owners to pay for a rehabilitation program. (We refer to these types of actions as "Tadesons", named after an owner in a leaky condo who, about five years ago, successfully sued his strata corporation to have it repaired. The B.C. Supreme Court agreed with Mr. Tadeson's argument that the strata corporation must repair and maintain the common property and its assets. The Court ordered a special levy upon the owners. Many strata corporations have since relied on the Tadeson solution.)

The appointment of an Administrator can result in some hefty costs to strata corporation owners. Although the Administrator cannot take away the vote of the owners in a strata corporation (a decision of the B.C. Court of Appeal), persons acting as Administrators do have considerable influence in the direction that a strata corporation must follow. An Administrator generally has the ear of the Court and, as a consequence, can persuade a judge to order levies, etc. on the owners. This process, however, is not cheap, particularly when lawyers' fees are added. Cha-ching!

3. Losses As a Consequence of Bylaws: The interpretation of bylaws can vary and, in one case where a rental restriction bylaw is in place, an owner was denied the right to rent his strata lot. The unit sat empty and, of course, the owner has suffered monetary loss. He is now suing the strata corporation for damages.

4. Expenses Incurred by An Owner: In this case a new owner is suing to recover future expenses he will incur for gas costs. The strata lot has a gas fireplace which is metered separately from the gas consumed by the strata corporation for domestic hot water. The owner was apparently told by the vendor, when he purchased, that "gas was included in the strata fees". He assumed that that included his gas fireplace. This lawsuit is actually not against the strata corporation itself but rather the previous owner, the real estate agents and VCS.

5. Dismissal of Employees: There are several lawsuits and a Human Rights Tribunal matter in progress or pending by previous employees of strata corporations who were dismissed (fired) by the strata councils, allegedly improperly. These can be very expensive to defend.

These are a few examples of the more interesting lawsuits. There are many more of a routine nature dealing with foreclosures and other administrative issues.

Is there a trend to more litigation? The answer is "absolutely yes". Owners are more inclined to sue today rather than yesterday - even if some of the allegations are "long shots". Further, the *Strata Property Act* is a complex piece of legislation and opens many doors for potential litigation. Although there are some types of lawsuits that are "routine" and can be somewhat predictable in terms of decisions, there are many uncharted areas that will encourage lawyers and their clients to explore potential challenges.

One such area that is quite new deals with "significant unfairness". There are already a dozen cases that have been decided but there is no "Tadeson" yet available to use as a benchmark. Right now, each case is being adjudicated on its own merits although a theme is starting to emerge. Section 164(1) states:

(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The expression "significantly unfair" of course generates strenuous legal argument but, once established, Section 164(2) provides:

(2) For the purposes of subsection (1), the court may

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

One example of reliance on this prohibition against "significant unfairness" now before the courts involving a strata corporation VCS manages, arises from the refusal of council to allow an owner the right to rent on the basis of the "hardship" exception in Section 144 of the *Strata Property Act*. This case, like all others, will ultimately be decided on the basis of its specific fact pattern, but at least one lawyer out there thinks s.164 might entitle his/her client to rent notwithstanding a rental restriction bylaw because refusal to allow such would create a significant financial hardship.

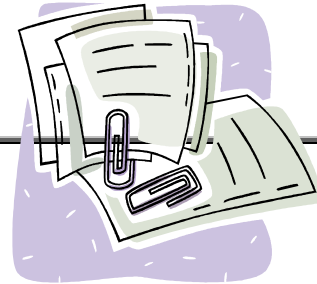
In time, in fact within the next five years, this section of the *Strata Property Act* will be in court more and more. Should be interesting.



We cannot wrap up this article without offering some final comments. Avoid litigation as much as possible. Settle whenever possible. Forget principle. Make business decisions.

This article does not purport to offer a legal opinion. Readers are advised to obtain legal counsel. This article is published by Vancouver Condominium Services Ltd. and is copyrighted. Reprinting without written consent from VCS would violate the copyright.

2. LICENSING: ANOTHER REQUIREMENT



The *Real Estate Services Act* (RESA) requires that the monthly “bank” statement be provided to council. At present, many of our strata council Treasurers are already receiving this documentation. As of January 1, 2006 the RESA requires that each client receive this document. Accordingly, starting with your January 2006 financial statement from VCS you will also receive the “bank” statement(s). In many cases this will involve several documents as most strata corporations have investments at financial institutions other than Coast Capital Savings Credit Union where your operating fund is located.

3. LICENSING OBSERVATIONS

During the past two months, VCS has sent bulletins to all strata councils requesting consent to charge \$2.50 per strata lot (for 2006/2007) to cover the cost of licensing under the RESA (*The Real Estate Services Act*). The response has been rewarding but also interesting. We first thank the vast majority of our customers who have agreed to the \$2.50 charge. Your support is very much appreciated.

Some of our clients have questioned the charge and that is fair enough. We are hopeful that we will be able to answer your concerns and gain your support also.

Some of our clients have refused absolutely to contribute to the new government costs imposed on us. We, therefore, want to explain, hopefully without sounding too whiney, that the new licensing regime is a very, very costly initiative. The \$2.50 charge you are asked to contribute goes toward the actual license for your property agent and toward the insurance fund set up under the authority of the Real Estate Council.

You are not being asked to contribute to the following:

- The cost for VCS to be licensed as a brokerage.
- The cost of courses to be taken by the property agents (about \$900 each).
- The cost for additional staff required by VCS to comply with the RESA regulations.
- The cost for considerable more computer facilities, file cabinets and other office administration.

All of these costs are being absorbed by VCS, although in time they will have to be factored into the fees that we charge our clients.

Here are some examples of new labour costs that VCS must incur to meet the RESA regulations:

1. Separate bank reconciliations for each special levy account.
2. Separate reconciliations of owners' payment to ensure the correct amounts are deposited to the appropriate trust accounts. (Remember some stratas may have three or more trust accounts.)
3. Daily deposits.
4. Preparation of monthly reports listing every strata corporation and every trust account and the account balances. (VCS has 200 clients and over 1000 individual trust accounts.)

Licensing is the brainchild of the provincial government ostensibly designed to give strata corporations financial protection and better qualified personnel. We acknowledge the lofty goals but there is a huge cost to achieve them which the strata management industry cannot sustain. Unfortunately, these costs must be passed along to the consumer.

4. SOME CLARITY ON EMAIL AND INTEREST RATES

In late October VCS issued an email bulletin to all clients which stated:

“The latest Bank of Canada Rate is 3.25%. The money for your strata corporation which is located at Coast Capital Savings earns the prime rate (i.e. 4.75%) less 2% - in other words 2.75%.”

That short burst of information produced some very interesting feedback which prompts this article.

First, VCS received some harsh criticism about the e-mail, and on reflection, the criticism is well-deserved. Many of you scolded us for not identifying who we were and in an atmosphere of unrelenting SPAM we, of course, made our first mistake. Second, some of you expressed wonderment at what the heck we were talking about anyway. We accept this criticism also. Please accept our apologies.

Not to excuse these errors, we only wanted to alert you to the interest rate message and in our rush we overlooked some basic conditions about communication. Indeed, we have sore shins from learning the hard way.

Second, it was evident that many of our clients did not (do not) understand how we manage your money. Our message, therefore, has unearthed the need for some clarity about your money, which we are now happy to do.

Each of our clients (about 200 strata corporations) have separate trust accounts at the Coast Capital Savings Credit Union (West Georgia Street branch) in the name of each strata corporation. VCS has always maintained this protocol but, as of January 1, 2006, the *Real Estate Services Act* (RESA) requires accounts be segregated, as a matter of law.

When VCS receives money from your owners, be it cash, cheques, automatic debits (PACs) or internet transfers, this money is deposited into your separate trust account. The money is not “co-mingled” with other strata corporation funds. There are actually two accounts: the first is



the operating fund account and the second is the Contingency Reserve Fund account. Under the *Strata Property Act* (not RESA) this is a legal requirement. Under RESA, separate accounts will also be required for any special levy accounts, i.e., a Roof Fund, a Painting Project Fund, a Leaky Condo Repair Fund, and so on.

Each of these funds earns interest, all of which is credited to your strata corporation. None of the interest flows to VCS or any other strata corporation since the accounts are segregated. The interest which is earned is calculated on the basis of Prime Rate minus 2% - which was the point of that laconic October e-mail. If the prime rate increases or falls, so does the amount of interest you earn. Although interest rates are not great, this arrangement is quite a good deal.

A number of clients responded to our e-mail asking "can we do better?". Well yes and no. First, "no" since the operating fund account is your basic account from which we pay your invoices. Money must be available for that purpose so to that extent you are locked into this arrangement; however, you do not need to keep all your money in that operating account. You can keep a minimum operating level and transfer the rest to a wide range of investment vehicles. These can be regular term deposits, government bonds, GICs, etc. There are limits, of course, to where your money can be invested and, although some very attractive interest rates are out there, you have to be cognizant that this is strata corporation money belonging to all the owners and risk has to be taken into consideration. At the end of the day, the arrangement we have at Coast Capital (i.e., prime less 2%) is not bad especially considering that the money is not locked in, a characteristic often associated with investments that offer higher yields.

Keep in mind that, historically deposits in credit unions, and now in banks and trust companies, are insured only to a maximum of \$100,000. Should there be a collapse in the banking structure, any deposits in excess of the \$100,000 would not be insured. When client accounts reach the \$100,000 level, VCS encourages councils to authorize us to transfer excess funds to other financial institutions. Is a collapse of the banking structure likely? Probably not but who knows, so we do endorse the concept of divesting your deposits. On the monthly financial statement you receive, you will see a page called "Cash Schedule". Note your cash balances and your investments.

This is what we were trying to convey to you via e-mail in late October. The Bank of Canada raised its rate, the banks in turn increased their prime rate and your strata corporation's deposits



at Coast Capital floated upward also. We hope this now makes sense but feel free to contact us if you have further questions or comments.

Again, our apologies for the well-intended but clumsy e-mail.

5. REQUESTS FOR EXCLUSIVE USE OF COMMON PROPERTY

We have recently had a number of situations at strata corporations that we manage where an owner has requested (or demanded) authorization to use, or be given the assignment of, common property for his/her exclusive use. Sometimes this is due to the need for additional storage area and the owner is asking for what is currently common property (i.e. a bike room) to be changed to limited common property (i.e. storage locker(s)) and assigned to him/her exclusively. Another example, which is somewhat less permanent, is an owner wanting a place to store their tools and utilize as a workshop. What do you do with these requests?

There are two alternatives:

1. Change in designation and use of common property

This is a two part process. The common property would have to be changed to limited common property for the exclusive use of a specified owner/strata lot, and the change in use would have to be approved. Both steps require a $\frac{3}{4}$ vote of owners.

First, note Section 74 of the *Strata Property Act*, which states:

(1) Common property may be designated as limited common property by a resolution passed by a 3/4 vote at an annual or special general meeting.

(2) A resolution passed under subsection (1) must be filed in the land title office with a sketch plan that

(a) satisfies the registrar,

(b) defines the areas of limited common property, and

(c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property.

(3) A resolution passed under subsection (1) does not have effect until it is filed in the land title office.

(4) The designation of limited common property by a resolution under this section does not require an amendment to the strata plan.

Second, one must refer to Section 71 of the *Strata Property Act*. It provides that:

Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

(a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

In the situations we are talking about here, ensuring safety or preventing significant loss will obviously be irrelevant; however, a significant change in the use and appearance of the common property in question will certainly be contemplated. Thus, after the change from common property to limited common property has been approved by a $\frac{3}{4}$ vote of the owners at an annual or special general meeting, a second $\frac{3}{4}$ vote will be needed to approve the significant change in use and/or appearance, in order to comply with Section 71 of the *Act*.

How ready is the ownership to give up an area of common property to a single owner for their exclusive use? Unless there are well explained and extenuating circumstances, this is not common. For this reason, we seldom see this happen.

2. Short term exclusive use

In considering the other possibility of the owner (or tenant) asking to use an area of common property "for the time being" with no intention or implication of assignment or "ownership", the strata council may grant permission to the request under Section 76 of the *Act*, which states:

(1) Subject to section 71, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property.

(2) A permission or privilege under subsection (1) may be given for a period of not more than one year, and may be made subject to conditions.

(3) The strata corporation may renew the permission or privilege and on renewal may change the period or conditions.

(4) The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

The *Strata Property Act* Regulations should also be consulted so that you are aware of all the parameters. Regulation 17.7 states:

Despite section 76 (2) of the Act, a right, permission or privilege granted, before the coming into force of this section, under section 117 (f) of the Condominium Act or a similar bylaw under which the strata corporation gives an owner permission to exclusively use or enjoy, or a special privilege in relation to, common property that is not designated as limited common property under section 53 of the Condominium Act continues to be enforceable in accordance with its terms, but may be renewed only as permitted by section 76 of the Act.

Section 117(f) of the *Condominium Act*, in turn, stated:



The strata corporation may grant an owner the right to exclusive use and enjoyment of common property, or special privileges for them, the grant to be determinable on reasonable notice, unless the strata corporation by unanimous resolution otherwise resolves.

This essentially prohibits an owner that has been using an area of common property for their exclusive use (with the authorization of the strata council granted under the *Condominium Act*) from claiming historical precedent and saying, "This workshop has been mine, is mine and will remain mine... forever!" Well, no, the strata council can let you continue to use it on the same basis as before, but may cancel the foregoing permission with reasonable notice and thereafter let you use it for a period of only up to one year, subject to specified conditions.

This article does not purport to offer a legal opinion. Readers are advised to obtain legal counsel. This article is published by Vancouver Condominium Services Ltd. and is copyrighted. Reprinting without written consent from VCS would violate the copyright.

6. "LEAKY CONDO" UPDATES

1. Vancouver Sun - Thursday, November 10, 2005, "Feds tried to hide complicity in leaky condo crisis: MP".

A page one story although not really breaking news. Anyway, in case you did not see it, the story is about correspondence in 1981 between a federal deputy minister (Energy, Mines and Resources) and a senior Ottawa bureaucrat in the National Energy Program. It turns out that what we now refer to as "leaky condo syndrome" was predicted in the late seventies - well before any of the thousands of B.C. strata corporations were even contemplated, never mind built. In other words, had someone's advice been heeded, we would not have endured this crisis. The financial horror story for thousands and thousands of condo owners in the wet coast part of B.C. would have been avoided.

You are already, of course, familiar with the magnitude of this disaster but here is just one more statistic to drive home the point. VCS manages about 200 strata corporations. In varying degrees of severity, no less than 100 of these properties have had to undergo "leaky condo" rehabilitation programs. A staggering and shameful statistic.

In the above-noted newspaper article there is comment about possible compensation for crisis victims, and reference to a smoking gun in the hands of CMHC. While this seems like an excellent initiative, we suggest that you not hold your breath.

2. For those of you who have already travelled the road of "leaky condo" rehabilitation, we do have some good news (sort of) for you. You did it just in time. If you think the costs were horrendous then, you ought to see what is coming. For those of you who still have to replace your building envelopes, there is a brand new worry. Not only will you have to pony up big bucks as have other stratas this past decade, you should also plan on doubling or tripling the estimated costs as they would have been in 2004 or 2005. We can cite several examples and reasons.
 - A 55 unit condo in Victoria (which VCS is involved with) could have been repaired in 2002 at a cost of about \$800,000. The owners could not agree on a repair strategy and

now, following a court order, the estimated cost is \$2.2 million. It could be more as the tenders have not yet been received.

- An 85 unit strata in east Vancouver could have been repaired in 2003/04 at a cost of under \$2,000,000. The latest estimate is over \$3,000,000. The owners (inappropriately) blame the strata council for not doing their homework, despite receipt of two qualified engineering reports. The file is headed for the Supreme Court of British Columbia and by the time the dust settles in about one year from now, the cost will likely be \$4,000,000.
- BC Housing (a crown corporation) is faced with “leaky condo syndrome” for hundreds of schools. Just imagine the amount of money this will consume and, not surprisingly, it is a story that the government tries to keep under the tarps. The result, however, is that all available qualified reconstruction companies (there are not that many) are inundated with work. It is pure and simple supply and demand economics and that will drive up the costs substantially. Many of the consultants and repair companies prefer working for B.C. Housing rather than strata corporations; consequently, they are more apt to seek that business rather than strata corporations.
- The Olympic construction boom has begun and no rocket science is required here to understand the effect of this element on strata corporation expenses. This aspect will affect not only the “leaky condo” strata corporations but even those which are not but require regular upgrades such as new roofs, parkade slab rehabs, etc.

As noted earlier, if your strata corporation has completed its “leaky condo” repair program, consider yourself to be lucky. (Did you ever imagine you could feel this way five years ago?) For those who still have to face this dilemma, well, what can we say? It will be financially horrific far beyond anything we have seen so far.

