



## FEATURES THIS MONTH

1. Avoid Litigation Whenever Possible
2. Odd Bylaws - Obey or Turf?
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## 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.qp.gov.bc.ca/statreg/stat/S/98043\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/S/98043_01.htm)
- Vancouver Condominium Services: <http://www.vancondo.com>

## 1. Insurance Quotes

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We have said it before, but a recent event prompts us to remind you to be very careful when confronted with litigation. The event we refer to deals with a claim by a strata corporation's ex-employee via the Human Rights Tribunal. The issue in this particular event is not relevant to this article but the point is that the ex-employee would have settled his claim at the outset of his dispute for \$5,000.

The strata council was aghast at the ex-employee's allegations and his demand for monetary compensation to go away quietly. It was the "principle" of the matter that had their backs up. The council cannot be blamed for taking a hard line and saying "no". The strata council fought back and the matter dragged on for two years and eventually settled for \$3,000. The legal costs to the strata corporation before the matter had been heard by the Tribunal exceeded \$30,000. Hindsight is a great tool.

It is easier said than done we admit, but strata councils when faced with litigation from owners, employees or others must make every effort to make "business decisions". Initially, it is likely the right thing to do to defend. At some point, however, watch for a door to open and take the opportunity to bail out and save money. Not easy, we know.

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## 2. Odd Bylaws - Obey or Turf?

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Most strata corporations have either the Schedule of Standard Bylaw of the *Strata Property Act* or slightly varied modifications of same. Some of these bylaws rarely poke their heads up for air but when they do they often come as a surprise to strata councils and management agents. Here are some examples:

15 *Requisition of council hearing*

- (1) *By application in writing, stating the reason for the request, an owner or tenant may request a hearing at a council meeting.*
- (2) *If a hearing is requested under subsection (1), the council must hold a meeting to hear the applicant within one month of the request.*
- (3) *If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week of the hearing.*

If you received such a request from an owner or tenant would you be inclined to convene a meeting of your strata council to accommodate the owner or tenant? It is true that most strata councils meet on a regular monthly basis so you would simply tell the owner or tenant to attend the next meeting and that would satisfy the 30-day requirement of clause (2). What would happen, though, if your strata council is not planning a council meeting in the next month? What if you meet less frequently than monthly? What if it was summertime or Christmas season and you plan to skip a meeting? You are still obligated by your own bylaws to accommodate the owner or tenant for a special meeting.

It is hard to enforce bylaws in your strata corporation if you do not, as a strata council, abide by them yourselves, right? Is this a bylaw you still want or should it be removed? As an alternative to both extremes what about amending it to read “two months” instead of “one month”.

19 *Council to inform owners of minutes*

*The council must inform owners of the minutes of all council meetings within 2 weeks of the meeting, whether or not the minutes have been approved.*

It is true that VCS prepares and distributes meeting minutes well within that time frame but there may be times when, for one reason or another, you do not want the minutes distributed. Perhaps consider changing “2 weeks” to “4 weeks”.

26 *Participation by other than eligible voters*

- (1) *Tenants and occupants may attend annual and special general meetings, whether or not they are eligible to vote.*

Tenants are fine people but do you really believe they should attend annual or special general meetings?

*17(3) Owners may attend council meetings as observers.*

Most councils permit owners to attend a council meeting at the start of the meeting to air grievances, offer comments and so on, but do you want to have a bylaw that says that an owner can attend the entire meeting as an observer? Most councils dislike such a practice yet the bylaw requires compliance.

Give some thought to these comments. You may wish to diarize these for the next SGM or AGM.

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### 3. Lien & Deficiency Holdbacks

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Contracts for services entered into by strata corporations often include both a builder's lien holdback and a deficiency holdback provision. Typical wording might be as follows:

*The strata corporation will hold back such amounts of money for such periods of time as required or allowed by applicable lien holdback legislation; and*

*The strata corporation also has the right to retain an additional ten percent (10%) of the total contract price as a deficiency holdback.*

Whether your contract does or does not have the second of these provisions, monies held back to comply with builder's lien legislation can only be held back and used for that purpose. Therefore, once the hold back period has elapsed, if no claims have been properly made against those monies

by law suit or lien filing, the funds must be released. They cannot then be unilaterally converted into a deficiency hold back by the strata corporation just because you are unhappy with the quality of the work performed.

As we understand it, the rules regarding builder's lien holdbacks are clear enough, generally speaking. 10% of every payment to the contractor should be held back regardless of the amount of the contract. If the contract price is \$100,000 or more, then a separate holdback account must be opened and it will typically be in the joint names of the contractor and the strata corporation, so that nothing can be withdrawn from it without the consent of both parties. The hold back period is 55 days after substantial completion (or abandonment or termination) of the contract. After expiry of that period, the hold back must be released, unless a lien has been filed or a court case commenced claiming an interest in those funds. Interest earned on the holdback account is for the credit of the strata corporation until the end of the holdback period and thereafter it is for the account of the contractor. There are of course some exceptions and variations to the above depending on a variety of circumstances, but this is basically what we understand builder's lien legislation to stipulate in B.C.

Deficiency holdbacks, on the other hand, at least if described as in the sample contract provision above, offer far more flexibility to the strata corporation. Occasionally a contractor will refuse to accept such a provision, but in our experience that is relatively rare. The language used above doesn't say anything about how the dispute regarding the alleged deficiency is to be resolved, how long the strata corporation may keep the hold back, how the held back money is to be administered, what exactly a "deficiency" is or whose definition of that term is to be relied on, among other things. It simply says the strata corporation may hold back 10% as a means of ensuring that the work is done properly.

VCS clients infrequently find themselves in a position where they need to make use of a deficiency holdback. This is in large part because we substantially reduce the risk of our clients experiencing construction deficiencies by carefully monitoring the progress of each project and by actively discouraging clients from contracting with anyone VCS does not know to be reputable and experienced. Nevertheless, it can never be a bad thing to have such "insurance" in place just in case you do need it.

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## 4. A RESA Update (RESA = Real Estate Services Act)

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Under the RESA, when a strata management company receives payment from an owner, it must be deposited within 24 hours and this procedure once again illustrates how old laws are now being applied to strata corporations. These laws find their origins in real estate transactions - sometimes quite inappropriately. It is certainly understandable that, when Mary sells her condo to Bob, any payments (deposits) be transacted via the real estate agent promptly - meaning that such payments must be deposited into a trust account within 24 hours. Should this same principle apply to strata corporations?

“No” is the answer. While it is nice to see money deposited promptly, the parallel between strata corporation administration and real estate transactions is really quite remote. Yet, under the RESA, such payments are to be deposited immediately. This requirement, unfortunately, raises some practical problems.

It is not uncommon for an owner in a strata corporation to submit a cheque for something less than what the owner owes, along with a letter stating that “*This cheque is made as full settlement...*”. In other words, the owner is saying this is a final settlement offer. This is usually done in the context of a dispute with the strata council over fines or something similar; therefore, it is up to the strata council to decide whether or not the settlement offer is acceptable. Often, the strata council will accept the offer, as to continue a dispute is not beneficial for many reasons. A strata council, however, will require time to consider the matter.

It is simply not possible to deal with the issue within the 24 hour time line required by the RESA. This matter has been brought by VCS to the attention of the Real Estate Council of BC (which governs the RESA) and, notwithstanding the apparent legal requirement to deposit the cheque (or cash), the REC has agreed that the payment can be held. The REC have agreed to a suggestion put forth by VCS that a form document be created to record the details of the offer and that the payment be held (and not deposited) until the strata council determines whether or not the payment offer is acceptable.

We bring this to your attention as you do need to know about such procedures now that we (VCS) are governed by the RESA. It is also worth noting that it is one more thing we need to do as a management company and adds to the cost of services. As one of our clients recently commented

*“Whenever government steps in to protect you, you can be sure that the cost of such protection comes from your pocket.”*

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## **5. Special Levy - Can You Spend More Than?**

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The obvious answer seems to jump to mind quickly. No. Yet it happens routinely.

A strata owner (not a VCS account) contacted VCS recently for some advice. His strata corporation recently acquired security cameras (see related article this month) and the funding was by a special levy of \$5,000 which was approved at the Annual General Meeting.

The strata council subsequently determined that \$5,000 would not purchase the quality and number of cameras that were required to properly do the job (poor research and planning). The actual cost was \$12,000. Nevertheless, the council proceeded on the basis that the owners had expressed their overwhelming support for a security system at the AGM since a number of them had suffered vehicle break-ins and losses. It was council’s view that this support amounted to “carte blanche” and that the \$5,000 special levy was only one part of the funding arrangement. They took the remaining \$7,000 from the Contingency Reserve Fund since the job had to be completed once started.

Did the strata council err in their decisions? The answer is yes, on several fronts. First, a special levy is a set maximum amount. That is all that the owners have agreed to pay. Not a single cent more than this maximum can be spent, no matter what good reason may arise. (Genuine emergencies can be addressed via Section 98(3) of the *Strata Property Act*.) If subsequent events give rise to additional costs, the strata council must go back to the owners to seek further approval to spend more and to find a source for that spending. In the case of the security camera incident noted above, the strata council could easily have called another meeting for this purpose.

Second, expenditures from the Contingency Reserve Fund must be sanctioned either by a genuine emergency or by a  $\frac{3}{4}$  vote of the owners. To say that the owners overwhelmingly agreed to improved security is not tantamount to saying money can be taken from the CRF if the special levy is not enough. If a council is unsure of the exact bottom line of a planned project, a second  $\frac{3}{4}$  vote resolution can be presented at the (initial) AGM or SGM when the special levy resolution is presented. The second resolution can provide authority to spend up to \$X from the CRF if the special levy is insufficient.

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## **6. Acquiring An Asset? There Are Some Rules To Follow**

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Strata councils often decide to purchase assets for their strata corporations. Exercise equipment is a common example. Tractors are sometimes acquired for hauling garbage containers. You can likely think of other assets that may be acquired by your strata corporation.

There are some rules to follow and we direct you to Section 82 of the *Strata Property Act* which states:

**82 Acquisition and disposal of personal property by strata corporation**

- (1) *The strata corporation may acquire personal property for the use of the strata corporation.*
- (2) *The strata corporation may sell, lease, mortgage or otherwise dispose of personal property.*
- (3) *The strata corporation must obtain prior approval by a resolution passed by a 3/4 vote at an annual or special general meeting of an acquisition or disposal of personal property if the personal property has a market value of more than*
  - (a) *an amount set out in the bylaws, or*
  - (b) *\$1 000, if the bylaws are silent as to the amount.*

*(4) This section does not apply to the acquisition or disposal of an investment instrument referred to in section 95 (2).*

We draw your attention specifically to clause (3). Very few, if any, strata corporations have a bylaw such as is contemplated by paragraph (a); therefore, the \$1,000 provision is the guideline. So, for example, if your strata council is purchasing a new vacuum cleaner or a lawnmower, these types of assets usually cost less than \$1,000 and the general statutory requirement to get owner approval does not apply in these types of “minor” acquisitions.

However, if you do contemplate a purchase of an asset worth more than \$1,000 (and you do not have a bylaw with a higher limit) the law does impact your decision and procedure. You must obtain approval by a  $\frac{3}{4}$  vote of the owners. The example given above (exercise equipment) is very common and these types of items generally cost thousands of dollars. You should always remember to follow this requirement. It is interesting to note that the section makes no mention as to how the cost is to be funded. That means when you do purchase an asset, not only do you need to remember the required vote, you also need to remember how it is to be funded. Does it come out of a budget category (i.e., R & M)? Does it get charged to the CRF? Is there a special levy? These details also require your attention.

Note that a  $\frac{3}{4}$  vote is also required to dispose of an asset. It is quite rare to see, but it is possible. A strata council may decide to sell existing exercise equipment because no one uses it. That decision must be supported by an owner vote. Note also that section 82 applies only to “personal” property. Separate provisions apply to the acquisition or disposal of real property or interests and rights in respect of the same.

Subsection (4) (thank goodness) allows the strata corporation to make purchases of investments without reference to a  $\frac{3}{4}$  vote. Strata corporations with more than \$100,000 on deposit at a bank or credit union will routinely purchase T-Bills, investment certificates, etc. Owner consent is not required in these transactions provided they fall within the range of investments allowed in Section 95(2) of the *Act*.




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## 7. Emergency Calls

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VCS receives about 4000 “emergency” calls per year. These are calls from owners and tenants in your properties that come in after our regular business hours. We have to be very careful how we deal with these calls. Some are genuine emergencies; others are not. In fact, over half the calls we receive on our emergency line are not emergencies and, although it is annoying to be woken at 2:00 a.m. for such calls, there is no cost to you.

We carefully screen these calls to determine whether or not a contractor really needs to be dispatched after regular business hours. If we can avoid spending your money unnecessarily, that is a high priority. Take the following two recent incidents as examples:

An owner called at 9:00 p.m. to say her hardwood floor was very wet and would we please send a plumber right away. This building has in-floor hot water lines and a history of failed pipes. The call fit the pattern so we dispatched the heating contractor. A half hour later, the owner called to cancel the service call. She had just discovered that she spilled a large water jug inside her

fridge and that was the cause. The contractor was en-route at this point but we were able to contact him. He very generously did not charge the strata corporation.

A night security guard at a large downtown high-rise called at 1:30 a.m. to advise that an electronic security door would not lock. He requested that a service company be dispatched immediately to repair it since it posed a security risk.

VCS made a “judgement call” and did not dispatch a service contractor as it was an inner courtyard door leading to the main lobby. The next morning we learned that the door in question was located five feet from the security guard’s desk.

We do not profess to always guess correctly but we do try to make our best judgements in order to provide our clients with the proper service without incurring unnecessary costs.

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## **8. Anyone Feeling Conflicted?**

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Volunteering to sit on your strata council is an excellent way of participating in the decisions affecting your home and the manner in which your strata corporation is managed. By voting you onto the strata council, the ownership in turn puts their trust in you and rightfully expects that council members act honestly and in good faith with a view to the best interests of the strata corporation. Division 1 of Part 4 (Strata Corporation Governance) of the Strata Property Act specifies matters relative to the strata council regarding eligibility for membership, various responsibilities, accountability, standard of care and other related issues.

From time to time, strata councils must deal with issues or concerns that arise that are specific to an individual council member due to less than ordinary circumstances. For the purpose of illustrating such an occurrence in this article and how it may relate to and is addressed under the Strata Property Act, we will focus on Section 32.

It is not outside the realm of possibilities that an individual sitting on council may have business interests that in some way cross the path of the strata corporation. Whether it is as an employer or employee of a potential contractor, a shareholder or agent that may benefit from the award of a contract, etc... the duty of the council member to disclose the conflict and the actions required are detailed in Section 32 as follows:

#### Disclosure of conflict of interest

32 A council member who has a direct or indirect interest in a contract or transaction with the strata corporation must

- (a) disclose fully and promptly to the council the nature and extent of the interest,
  - (b) abstain from voting on the contract or transaction, and
  - (c) leave the council meeting
- (i) while the contract or transaction is discussed, unless asked by council to be present to provide information, and
  - (ii) while the council votes on the contract or transaction.

The bottom line here is that full disclosure is the best and only policy when it comes to conflicts of interest. This does not necessarily result in a business relationship hindering the involvement of that business and its' associates with the strata corporation. As detailed in Section 32 above, there are provisions in place to deal with voting and abstaining from issues related to the conflict. The proper disclosure of the perceived/potential/existing conflict simply keeps everything "above-board" and the optics of the situation clear to the ownership and the Courts.

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