



FEATURES THIS MONTH

1. Ring Any Bells Here?
2. Fall Protection Requirements
3. Strata Councils and Human Rights Claims
4. Owners Complaints Against VCS (RESA)

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
- Vancouver Condominium Services: <http://www.vancondo.com>

1. Ring Any Bells Here?

Annual fire system testing is standard procedure in all VCS client strata corporations and considerable time, effort and money is given to this very important process. Not only is it the law, but also it is just good common sense. It has been our observation that strata councils always accept at face value the recommendations of the fire service companies that do these tests for “deficiency repairs”. Although these repairs often amount to substantial cost (sometimes more than the initial test itself), the strata councils take no chances and authorize the deficiency work to be done. Quite right.

A huge, and common, frustration for strata councils is the fact that in-suite device testing rarely achieves 100% compliance. Occupants have a wide range of reasons why they could not be home on that particular day and time that has been organized and promoted in advance by VCS and/or the fire service firms. Invariably this non-compliance leads to the organization of a second follow up visit, sometimes even a third follow up visit. Several concerns arise out of this process.

The first is what happens if subsequent visits (i.e., more than the second or third) are not organized? Is there an obligation on the strata corporation to continue until 100% testing has been achieved? Is there any liability on the strata corporation or even council members for abandoning further attempts to gain access. As we know, dealing with some owners or tenants in such matters is a futile experience.

Note Standard Bylaw #7 of the *Strata Property Act* which says:

7 *Permit entry to strata lot*

(1) *An owner, tenant, occupant or visitor must allow a person authorized by the strata corporation to enter the strata lot*

(a) *in an emergency, without notice, to ensure safety or prevent significant loss or damage, and*

(b) *at a reasonable time, on 48 hours' written notice, to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the strata corporation to repair and maintain under these bylaws or insure under section 149 of the Act.*

(2) *The notice referred to in subsection (1) (b) must include the date and approximate time of entry, and the reason for entry.*

Surely the provisions of clause (b) are clear enough and provide sufficient authority to the strata corporation to demand entry to a strata lot in order to test in-suite fire detection devices. The problem is that neither the bylaw nor the statute (which is worse) give any direction as to what the strata corporation can do if an occupant refuses access. What is the remedy? None is provided. A hard-nosed approach might be for the strata corporation to call a locksmith and gain entry in that fashion (providing that proper notice has been given) thereby circumventing the occupant's recalcitrant attitude. Unfortunately, it is not as easy as it sounds. Calling a locksmith will result in expenses which ought to be charged back to the strata lot owner. If picking the lock is easy, the expense may be relatively minor. If picking the lock results in damages to the lock, it may be very expensive. Will that owner easily accept the strata corporation's action and will that owner readily reimburse the expense? Probably not. Some premises are equipped with security company services and alarms may be activated which create a lot of noise and may even generate a visit from the security company. Complications abound.

Another dilemma, as we see it, is that strata councils almost invariably take the stance that second and third callbacks ought to be paid for by the occupants rather than the strata corporation. Usually this is done more as a ploy to gain the co-operation of the occupants rather than really trying to recover costs although any expense recovery is always welcomed. Can the strata corporation actually do this? If testing the fire system initially is a strata corporation expense, no argument here, how can it suddenly become not a strata corporation expense for a return visit? Some strata corporations have amended their bylaws to authorize such return visit chargebacks and that is probably a very good idea. Whether or not a court will eventually decide on this point may be years away. At least in the meantime, a strata council can rely on a chargeback bylaw as authority for its actions.

Municipal fire codes are becoming stricter and in the years to come, strata corporations will likely be forced through municipal bylaws to take greater responsibility for ensuring certification of all fire detection equipment in their properties whether or not access is a problem. As far as we know there have been no court cases in B.C. on this topic; however, in Ontario, there has been at least one case which may point to the future for B.C. strata corporations.

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2. Fall Protection Requirements

The Workers Compensation Board requires, by law, that a written Fall Protection Plan be in place before any contractor works on your property in a place not protected by permanent guardrails, and from which a fall exceeding 7.5 meters (25 feet) could occur. That plan must be available at the workplace before work with a risk of falling begins. You should insist on seeing a copy before work involving heights begins.

Further, a Fall Protection System must generally be in place when work is being done in a place from which a fall of 3 meters (10 feet) or more may occur, or where a fall from a lesser height involves risk of injury greater than the risk of injury from impact on a flat surface. Such “systems” would include railings, a harness or other form of restraint.

These requirements are applicable to all work including window washing, dryer vent cleaning, exterior painting, etc. There are no exceptions. You would think that workers who carry out these tasks would endorse such legal rights; yet, we constantly witness work crews avoiding or ignoring the law. You would think that the owners of such contracting firms would “get it” by now; yet, we constantly witness a disregard by them for the law. Surely life safety comes ahead of making money. Obviously not.

Recently, one of our strata corporations (a high-rise building in the downtown core) obtained three quotes for window washing. The lowest bid was from Milner’s Window Washing Service and a contract was awarded to the firm subject to it providing a Fall Protection Plan. The owner said he would do this on the first day of the job when the workers started the job. VCS said “no way” and the contractor withdrew from the contract. His position was that, if he had known about VCS’ requirement, he would have bid differently.

Strata councils need to know and understand that the strata corporation is considered, in law, by WCB to be an employer and, as such, if a contractor’s worker is hurt or killed on a job at the strata corporation, the strata corporation could be on the hook and accountable if the contractor was not itself in good standing then with WCB or if the strata corporation’s actions or inactions contributed to the accident. It cannot, therefore, simply be said that it is up to the contractor to comply with the law and that the strata corporation itself is not responsible for compliance. Ask

contractors to prove they are in good standing with WCB by producing a current clearance certificate.

Window washing firms are notorious for failing to follow WCB requirements and some ingenious (or should we say disingenuous?) methods are employed by some of them to avoid responsibility for complying with WCB requirements. Some firms do not hire employees as such. They set up each of their workers as independent contractors and let them comply with the law. It is scary stuff, especially when you consider that the strata corporation can ultimately be held responsible.

The message here is to be wary of the lowest quote when engaging window washers and other service providers that have to hang off the sides of your buildings. It is quite possible that these low bidders have not complied with the law. The high bidders may be compliant (we still have to check to be sure) and, if so, the higher cost to you is well worth it.

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3. Strata Councils and Human Rights Tribunal

In recent years strata corporations have witnessed a significant increase in the number of claims being brought to the Human Rights Tribunal for relief of a given alleged discrimination. Several recent cases have seen strata corporations on the losing end of the adjudications. Apart from the embarrassment of losing, there is always a cost, sometimes very high, of defending the strata council's position. There is the cost of legal representation; there is the possibility of "punitive" costs. It is important, therefore, to remember that every effort must be made to avoid getting immersed in a claim. There is, moreover, the duty to ensure that the law (in this case, the Human Rights Code) is not only acknowledged but also met to the fullest. Attached hereto is a very good summary of this topic prepared by Veronica Franko of Clark, Wilson, LLP. You probably should read it first before reading any further in this article.

The advice offered by Clark, Wilson is good advice and we do not challenge it, but here is the problem for strata councils. First, bylaws of a strata corporation are created by the owners, not

by the council. The *Strata Property Act* does not expressly give a strata council the ability to simply waive a bylaw even in the face of a claim by an owner that his/her rights are being removed or violated. A particular allegation may be evident to a strata council but, if the strata council is acting on the instructions of the owners, or in compliance with a properly enacted and registered bylaw of the strata corporation, there is no authority in the *Strata Property Act* for the strata council to ignore or waive a bylaw which is the source of the owner's complaint. We would draw your attention to Section 121(1)(a), however, which states that a bylaw is not enforceable to the extent that it contravenes the Strata Property Act, the regulations, the Human Rights Code or any other enactment or law.

A very common example in recent years has to do with the installation of hardwood flooring. Many strata corporations have enacted bylaws which prohibit or restrict the installation of hard-surface floors in strata lots. Whether or not such a bylaw is even within the scope and authority of a strata corporation to begin with is altogether another issue. Until such time as a court decides on this matter, it must be assumed that such bylaws are enforceable. If a strata council in a corporation with such a bylaw is approached by an occupant (owner or tenant) asking that the bylaw be waived on medical grounds, the strata council does not have the authority to accede to the request even if it (the council) believes that there are valid reasons to grant an exemption. It is VCS' view that such a decision must be taken to the owners for a vote. It is "The Owners...." who make bylaws, who amend bylaws, who change bylaws, who delete bylaws. That is the authority.

If a particular case alleging a Human Rights Code violation is reviewed by the owners, it will be the owners' collective decision as to the merits of the claim and the consequences of making the wrong decision. Not all claims will be based on the bylaws of the strata corporation. In one recent case before the Human Rights Tribunal, the matter at hand had to do with the strata council's decision to limit access to the building via the entercom system during late evening and night-time hours. The strata council in this case had not relied on a bylaw; it acted on a general mood of the owners who had expressed deep concerns about security matters. (In this case, the strata corporation lost its case before the Human Rights Tribunal due to the prejudice it was determined to cause to one particularly infirm and medically at risk occupant.)

In another case, dealing with an owner's request, based on medical grounds, to replace carpeting with a hardwood floor, the strata council relied on a bylaw and again the Human Rights Tribunal ruled against the strata corporation. It appears that the strata council argued the case before the Tribunal without advising the Tribunal that it, the council, had no authority to waive the bylaw. It is not the Tribunal's fault that it does not know or understand the mechanics of strata corporations. The point here is not whether one agrees or disagrees with the ruling - the point is that the strata council does not have any authority to waive or disregard a bylaw. When faced with a charge of discrimination (based on a bylaw) the strata council should convene a Special General Meeting of the strata corporation and let the owners vote on the issue. This requires the strata council to actually present a $\frac{3}{4}$ vote resolution to amend the "offending" bylaw. It is not sufficient, in our view, to simply convene a General Meeting and ask the owners by either a majority or $\frac{3}{4}$ vote if they are prepared to waive the bylaw. A bylaw cannot be waived even by the owners.

It is also VCS' view that an amendment to a bylaw can be very narrow to accommodate a particular circumstance, meaning that if there is a "no hardwood floor" bylaw, and an occupant has a legitimate medical reason (usually an allergy to carpets), the existing bylaw can be amended to allow that one particular occupant to have hardwood flooring as long as that occupant is residing in the strata lot. To us, that is a perfectly acceptable accommodation to all the owners, who generally have stated that they do not want hard-surface flooring, and the one occupant who has a carpet allergy and has a reasonable and legitimate argument supportable by the Human Rights Code.

A second problem that has emerged from this growing trend of occupants requesting exemption from bylaws is the legitimacy of the medical claim itself. On the surface, a doctor's note is a doctor's note and that should be the end of the story. Or is it? Perhaps unfairly to all doctors, there is a preponderance of suspicion voiced by strata councils that such notes are easily attainable and do not indeed report a true medical reality. Such notes are not easily challenged although a strata council may, on receipt of a general medical practitioner's note citing an "allergy", require the owner to produce a full medical report from a doctor specializing in allergies. This would require the owner to undergo substantial testing (as anyone with allergies knows) and a medical report would be based on this scientific analysis, not just a quick note or letter from the GP to say "*My patient is allergic to carpets*". This more evidentiary-based

protocol may produce different results and, in fact, disqualify the owner/occupant from making the allergy claim to have hardwood floor. Indeed, when faced with a Human Rights Tribunal hearing, such evidence would be very useful in defending the strata corporation's position to not grant an exemption to a bylaw. Conversely, a certified allergist's opinion that a bona fide allergy exists would make the decision to amend the bylaw (as suggested above) a no-brainer and would avoid the need to proceed with a Human Rights Tribunal Hearing.

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4. Owners Complaints Against VCS (RESA)

RESA - The *Real Estate Services Act* - is provincial legislation that governs some of the conduct of strata management companies such as VCS. Most of the legislation pertains to licensing, accounting and financial matters; however, there is widespread misinformation and misunderstanding about RESA insofar as it applies to general services provided by management companies, i.e., quality and compliance issues related to the *Strata Property Act* ("SPA").

The RESA is enforced primarily through the Real Estate Council of British Columbia ("REC") which is a regulatory agency established by the provincial government to protect the public interest by enforcing the licensing and licensee conduct requirement of the RESA.

The REC has no mandate or authority to literally "police" the SPA, other than for those sections of the statute that connect to the RESA - which, as noted above, pertain to accounting and financial matters. So, for example, if a strata council does something which contravenes the SPA, the REC has no authority to discipline the strata council. Much the same principle applies to management companies, although such companies have to be a little more careful. If a strata council violates the SPA in a financial, accounting issue which also violates the RESA, the strata council is still free from the long arm of the REC because strata councils are not licensed under the RESA and it is the function of the REC to monitor licensees only. If, however, the management company acts on the instructions of the strata council in the same violation of the RESA, the management company is not off the hook. In this case, the REC could discipline or revoke the license of the management company.



As word gets out about the RESA and the REC, the condominium public are more aware of their perceived rights and are apt to look to the REC for advice or assistance in remedying alleged violations of either the RESA or the SPA.

It will not be as easy as some would imagine. We have already witnessed, in less than six months, threats from strata lot owners that they want some specific action from VCS, failing which they will lodge a complaint with the REC. As we understand it, the REC will not accept a complaint against a strata management company from either a strata council or a strata lot owner unless that complaint is first raised at a strata council meeting; second, approved by a proper motion; and third, recorded in the council meeting minutes. The complaint must be in respect of the RESA, not the SPA. The REC council is not the SPA police. It is the RESA police.

The most common complaint received so far at VCS has to do with release (or rather refusal to) of internal documents of the strata corporation. This typically involves correspondence from other owners, correspondence between the strata council and VCS, and legal opinions. For many reasons (and not the focus of this article) very few strata councils agree to releasing such materials to owners who demand it. Consequently, VCS usually receives stern warnings from these owners that VCS either provide it forthwith or face reporting to the REC. It is an interesting position in which we find ourselves. The strata council is effectively our boss; therefore, we follow council's instructions..... as long as there is no violation of the RESA.

Time will tell how all this plays out.

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