FEATURES THIS MONTH

1. Theft or Flattery
2. Updating *The Strata Property Act*
3. A MUST Read
4. Fines, Felines and Fairness
5. Incorrect Fining Procedures
6. Small Claims Court Gets Bigger
7. Changes to Proxy Form
8. Age Restriction Bylaws

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. Theft or Flattery

Quite inadvertently, we recently learned that one of our major competitors held a seminar for its property manager which included advice on how ¾ vote resolutions ought to be properly written. A copy of a VCS resolution was given to the managers as an example of how to do it right.

Thanks, but hey…

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2. Updating *The Strata Property Act*

The *Strata Property Act* of BC became law on July 1, 2000. Although it is a very good piece of legislation, there are certain sections which have created immense problems for strata councils and VCS. A review of the legislation will be commencing this fall by the government and, although no timetable has been stated for implementation, the time has come to update the statute. If you have a particular section of the *Strata Property Act* that really bugs you, let us know: we will pass it on to the appropriate officials in the Ministry.

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3. A MUST Read

Perhaps you do not have the time or interest to read all the articles in this month's bulletin but we respectfully suggest that you do yourself a big favour and read the article by Angus Gunn called Fines, Felines and Fairness. You need to know the point he raises in this article.

We thank Mr. Gunn for his contribution. Angus Gunn practices law at Borden, Ladner, Gervais, LLP in Vancouver and has been a strata council member for a number of years. His knowledge is extensive not just in respect of strata corporation law but also in respect of "appeal court thinking". It is possible that you may have seen a recent news article about this cat fine issue which reported how a strata council lost its battle in court against an owner who admittedly had a cat contrary to the bylaws of the strata corporation. How is that possible, you ask? Easy. First read Mr. Gunn's excellent article. Second, once you have done so, go on to read our "editorial" comments on what are the root causes of the error.

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4. Fines, Felines, and Fairness: BCSC Judgement Confirms Importance of Following Proper Strata Fine Procedures

Angus M. Gunn, Jr.
Borden Ladner Gervais LLP

The *Strata Property Act* establishes procedures for strata corporations to follow when levying fines for bylaw infractions. Those procedures can be fairly cumbersome, but a recent decision of the Supreme Court of British Columbia confirms the importance of following them to the letter if the resulting fines are to withstand challenge. This article summarizes that decision and identifies the key lessons for strata corporations.

The new decision, *Dimitrov v. Summit Square Strata Corp.*,[1] involved a pet bylaw dispute in a strata corporation. The strata corporation's bylaws effectively prohibited strata owners from keeping pet cats in their residences. Despite that prohibition, the owner in question did so. In January 2004 a representative of the strata corporation informed the owner that a complaint had been made against her for having a cat as a pet and presented her with a written notice that

- described the complaint;
- informed the owner that a fine of $50 had been imposed against her as a penalty; and
- stated that the animal must be removed as soon as possible.

The owner did not pay the fine or remove her cat (a grey Manx kitten named "Gosha"). The strata corporation sent the owner another notice, informing her that a further $50 fine had been imposed for her continuing contravention. A third notice indicated that fines totalling $100 had been levied and stated that "if you have any questions or concerns please contact our building managers … and they will set up an appointment for you to meet with the Strata Board." Still further notices followed, and the strata corporation continued to impose additional fines for the owner's continuing contravention. One notice informed the owner that she could "set up an

[1] 2006 BCSC 967. The Court's reasons for judgment are on the web at http://www.courts.gov.bc.ca/Jdb-txt/SC/06/09/2006BCSC0967.htm.

appointment to meet with the Strata Board if you have any questions or concerns." Another notice indicated that the owner may wish to set up a meeting with "the Strata Board."

After months of stalemate, the owner sued the strata corporation for harassment and the strata corporation responded with a lawsuit against the owner for non-payment of fines. The strata corporation's law suit came on for trial first in the Provincial Court of British Columbia (Small Claims Court), which allowed the strata corporation's claim and ordered the owner to pay (among other things) $350.00 in fines and $200.00 in court costs. The owner appealed to the Supreme Court of British Columbia, which allowed the appeal. Although the owner did not prevail on all issues raised, the issue on which the owner did succeed has importance for all strata corporations in British Columbia.

The owner maintained that in purporting to levy fines against her, the strata corporation did not comply with the requirements of section 135 of the *Strata Property Act*. Those requirements are designed to ensure that the person on the receiving end of the complaint is given a meaningful opportunity to be heard before he or she is tried, convicted, and sentenced. The relevant parts of section 135 provide:

135 *(1) The strata corporation must not*

(a) impose a fine against a person, ...

for a contravention of a bylaw or rule unless the strata corporation has

(d) received a complaint about the contravention,

(e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested.....

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1)(a), (b) or (c) to the persons referred to in subsection (1)(e)....

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

The owner noted, first, that the strata corporation failed to give her any opportunity to answer the complaint before the strata corporation decided that she had contravened the bylaw and that a fine should be imposed as a penalty. The strata corporation maintained that the owner was indeed given an opportunity to answer the complaint because the owner was invited to contact the strata council if she wished to discuss the actions that had been taken against her. The Supreme Court of British Columbia rejected the strata corporation's position because the invitations to the owner were not given until *after* the decisions had already been made that she had contravened the pet bylaw and *after* fines had been imposed as a result. The Court held that subsection 135(1) clearly contemplates that the opportunity to answer the complaint must be given *before* any decision is made on the issues of guilt or penalty.

Given that the strata corporation had not complied with section 135 of the *Strata Property Act*, the Court held that the strata corporation had no lawful authority to decide that the owner had contravened the pet bylaw or that a fine should be imposed as a penalty. Because none of the strata corporation's subsequent procedures cured the initial defect, the subsequent fines for continuing contravention were equally vulnerable. The Supreme Court of British Columbia allowed the owner's appeal, set aside the trial judgment, dismissed the strata corporation's claim against the owner, and ordered the strata corporation to pay the owner $500.00 in costs.

The result of two years of wrangling? The strata corporation is out of pocket $500.00 plus whatever legal fees it had to pay its own lawyers, the owner is reported to have paid an additional $4,500 to her lawyer, all of the fines levied in this matter have been set aside, a harassment suit is still in the wings, and the media have had a field day. This should have been a straightforward matter – the owner did not deny keeping a cat in her residence, despite the strata corporation's bylaw – but the strata corporation's failure to abide by the requirements of the *Strata Property Act* doomed the action it took. The inconvenience of complying with section 135 would have been a small price to pay to avoid such a disaster. The story did not even have a happy ending for Gosha, who met an untimely death in traffic around one year ago.

What lessons can be learned? Fines levied in strict compliance with section 135 are less likely to be challenged and are less vulnerable to successful challenge. In particular, when considering a

complaint of a suspected bylaw breach a strata corporation must not impose a sanction for the contravention of a bylaw or rule unless:

- a complaint has been received about the alleged contravention;
- *before* the strata corporation makes a decision as to the existence of a contravention and any responding penalty:
- the owner or tenant against whom the complaint has been made has been given written notice of the complaint's particulars;
- the owner or tenant against whom the complaint has been made has been given a reasonable opportunity to answer the complaint (including a hearing, if requested);
- if the complaint has been made against a tenant, notice of the complaint has been given to the tenant's landlord and the owner; and
- written notice is given to the owner or tenant against whom the complaint is made of any decision made by the strata corporation in respect of the complaint.

The cost of even successfully challenging a strata corporation fine can be high, and most strata fines are not large enough to provoke litigation. Nevertheless, some owners or tenants – such as Ms. Dimitrov — are prepared to resist even modest strata fines on grounds of principle. Once a challenge is underway, it is too late for a strata corporation to shore itself up procedurally in respect of fines already imposed. Is your strata corporation observing section 135 in respect of the fines that it imposes – including, for example, fines for late payment of strata fees? Because one never knows in advance which fines will be challenged and which will not, a strata corporation should honour section 135 in respect of *every* fine imposed for breach of a rule or bylaw. Doing so will protect the strata corporation's position in the relatively few cases in which the resulting fine is actually challenged. When it comes to litigation, an ounce of prevention really is better than a pound of cure.

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5. Incorrect Fining Procedure

So, following up on Mr. Gunns' excellent article and advice, let us ask the question: are we making the same mistake as that strata council? The answer, sadly, often is yes. Why is this happening? The *Act* is so clear about fines.

Section 135 states:

(1) The strata corporation must not

(a) impose a fine against a person,
(b) require a person to pay the costs of remedying a contravention, or
(c) deny a person the use of a recreational facility

for a contravention of a bylaw or rule unless the strata corporation has

(d) received a complaint about the contravention,
(e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
(f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner
.
(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

Strata councils have a remarkably good understanding of the basics of the *Strata Property Act* but there is a tendency to ignore sections they do not like. There are two such sections, one being

who pays for insurance deductibles, and the second being the procedure for fining. We have written about this before, but the message is not getting through. Maybe the cat case will register and send an important lesson about the right protocol.

At, or in between, council meetings, strata councils are dealing with bylaw violations by owners and it is so common to hear "*levy a fine of $_____ on so and so*" , and the property manager does as instructed. Both parties are wrong. WRONG. You cannot say "*levy a fine…*". A strata council cannot levy a fine until certain conditions are met, as clearly demonstrated in Mr. Gunn's article. Council should instead say "*Council believes that a bylaw violation by (owner or tenant) has occurred and, if so, a fine of $______ will be considered*". The owner is to be given an opportunity first to reply with his/her side of the story, and for a hearing, if requested. This procedure rarely happens. The property manager is instructed to proceed. At this point the agent should advise council that they have made an error and he/she cannot do what council is asking. They know the drill but do not follow it sometimes because they are afraid to counter council's instructions. Accordingly, they stay silent and do as told…a fine gets added to the owner's account. VCS management goes over this with the property managers but the general practice continues in violation of the statute. In defence of their actions (or rather the failure to not act) councils often show resistance, even anger, to the advice of the agent. Instead of heeding the advice, therefore, the council pushes the agent to follow instructions and this pattern of conduct leads property managers to not put themselves in the firing line.

So you can see, it is a risky business just fining away without compliance with the *Strata Property Act*. Most times, the fines sit on the owner's account and they pay up sooner or later (later being at the point of sale) but once in a while someone out there, as in the cat case, will challenge you and it will be very difficult to win the argument. We urge our clients to follow the law, i.e., do not fine until an opportunity has been given to reply and for a hearing and do not ignore the advice of your agent. VCS management will reinforce this procedure with its agents at special seminars over the next few months. Do not get mad at your agent if he or she says "*I cannot do*

that" next time you say at a council meeting, or send an e-mail "*Please fine so and so $25 because they played their stereo too loud last Saturday evening*".

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6. Small Claims Court Gets Bigger

Two things happened in the recent past to significantly alter the role and function of the Provincial Court in strata related disputes. Both expand the jurisdiction of that Court, but each in a different though complementary way.

Firstly, and as we have reported before, as of September 1, 2005 the financial limit of disputes that can be heard by that Court was increased from $10,000 to $25,000. As then Attorney General Geoff Plant said when announcing this change, "*The cost of going to court is often more than the amount of money under dispute. That is why we are making these changes.*"

The $10,000 limit had been in place since 1991, so an increase was long overdue. Hopefully, planning is now in place for further incremental increases more frequently in the future.

The second issue of relevance is of potentially greater significance, though not necessarily cast in stone - yet. It has to do with the types of legal claims that can be heard by the Small Claims Court and arises from a decision of that Court out of the Richmond Registry on December 13, 2005 and called *Valana v. Law et al*.

The general wisdom seems to have been that claims for money allegedly owing by a strata corporation to an owner or vice versa could be brought in Small Claims Court, subject to the monetary limit applicable, while other matters of strata property law belonged in the Supreme Court. Not inconsistent with this statement is the fact that there are at least 25 sections or

subsections in the *Strata Property Act* that refer specifically to the Supreme Court. Conversely, only three subsections of that *Act* speak specifically of the Small Claims Court to our knowledge.

In this case, one owner in a townhouse complex sued another for damages arising from injuries suffered by the Claimant's dog as a result of an alleged mauling by the Defendants' dog. The Defendants in turn brought the strata corporation into the action as a third party saying that, if they were liable to the Claimant, then the strata corporation would in turn be liable to them for any loss they may sustain due to the strata's negligence in failing to maintain an adequate fence to properly contain and separate the two dogs.

Remember the days when individuals took responsibility for their own actions or inactions; the days before it became the norm to always blame someone else for one's own mistakes, shortcomings and faults? Okay, maybe you are too young, but trust us there are valid reasons why they are called "the good old days". But, we digress.

Another Small Claims Court case (*Clappa v. Parker Management Ltd.* – August 7, 2003) had concluded that claims of this nature belong in the Supreme Court, and as noted above, that had been the conventional wisdom in the condominium industry in B.C. However, the Judge in the *Valana* case concluded that the *Clappa* decision was wrong, and came to a quite different conclusion, ruling that "the Provincial Court has jurisdiction to hear this... Claim." His rationale was that because the *Strata Property Act* clearly recognizes the Small Claims Court as having jurisdiction in some strata related matters, and because this was not a claim in the nature of one of those types of actions specifically reserved for the Supreme Court in the *Act*, it was within his jurisdiction to hear. The Small Claims Court can, in general, hear actions in negligence alleging a breach of a duty of care, such as this, he noted, so why should the mere fact that it involves a strata corporation change that, unless the *Strata Property Act* or some other legislation clearly says so?

This decision was not been appealed to our knowledge, but the same issue will likely be heard in the Supreme Court before long, until which time we will not know if this new law is going to weather the test of time. It is also unclear for the time being if other Judges of the Small Claims Court will follow the reasoning in this case or the *Clappa* case. In any case, the door to the Small Claims Court has now been widened considerably for owners who wish to pursue certain types of

claims against their strata corporations and councils, and insofar as the amounts that may be recovered. This may, in fact, be good news on both fronts. Stay tuned.

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7. Changes to Proxy Form

For those of you who have not yet noticed or been advised by your VCS property manager, please note that we have recently changed the standard form of Proxy that we send out with all notices of general meetings. The purpose and result of the change is to provide for the automatic appointment of the president of the strata council as proxy in the event that the owner filling out the form doesn't name a proxy in the space provided. The reason for this change is that we regularly get proxy forms returned to us in which no proxy has been specified. Any such proxy form is invalid and must be discarded. Seldom is it possible for VCS to chase after such owners to get them to rectify the mistake, due to time constraints, nor is it even part of our job description to do so.

We believe it is fair and reasonable to assume that this error results from a misunderstanding on the part of the owner who sent in the proxy form. He or she apparently wanted to participate in the decision making process, but didn't fully understand the mechanism. We also think it fair and reasonable to conclude in general, that he or she probably also didn't have any particular agenda or position to advocate contrary to that being supported by council or he/she would have made more effort to put the proxy into the hands of someone to whom specific instructions could be conveyed, and whose appointment for that purpose would then have been clear.

In the corporate world it is common to name a board or executive member to act as proxy by default if no one else is named. We see no reason why the same should not apply here. Thus, the proxy form we now use provides as follows:

"The undersigned owner of Strata Plan _______ hereby appoints ____________, or failing him/her, the strata council president, as the proxy of the undersigned to attend and vote at the Meeting to be held on _____________________, and at any adjournment thereof…"

Please note, though, that if we are specifically instructed to vary this language for reasons that are stated to be in the best interests of a given strata corporation, we will of course give due consideration to the request. We recognize that there may be particular general meetings, or even particular strata corporations, where this is not appropriate. There may, for example, be strong differences of opinion on council, which could make it inappropriate to give the president the right to vote by default on contentious issues. In such cases, the proxy form can be changed if necessary. In the meantime, the objective is to ensure greater representation at general meetings by owners who are unable to attend in person, but nevertheless clearly wish to participate and have their votes counted. We trust democracy is better served in this manner.

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8. Age Restriction Bylaws

We have no idea how many of the strata corporations in British Columbia have age restriction bylaws in place at present, but do know that the number will surely increase as the general population ages. Thus, this commentary.

As a starting point, the *Strata Property Act* (the "SPA") dictates that a bylaw is unenforceable if it prohibits or restricts the right of an owner to freely sell a strata lot (see section 121(1)(a)). Age limitations on those who may own, or even occupy, a strata lot would clearly create such a restriction. However, the SPA expressly creates a partial exception to this by allowing bylaws that restrict the age of persons who may reside in a strata lot (see section 121(2)(c)).

These subsections, taken on their own, would apparently allow a strata corporation to pass a bylaw that prohibits anyone under 35, for example, from living in the complex, but could not prohibit such persons from owning a strata lot. Note, though, that section 121(1)(a) of the SPA states that a bylaw which contravenes the *Human Rights Code* of B.C. is also unenforceable to the extent that it does so, and the *Human Rights Code* does prohibit discrimination on the basis of age in some situations.

For these purposes, "age" is defined in the *Code* to mean an age of 19 years or more and less than 65. Importantly, not every category of activity wherein discrimination is prohibited by the *Code* includes age as one of the proscribed reasons for such discrimination, however. Thus, for example and of specific relevance to this discussion, the *Human Rights Code* prohibits denying a person the right to buy a strata lot because of the:

> "race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons" (see section 9(1)).

Notably, "age" is missing from that list. On the other hand, a strata corporation or individual strata lot owner cannot:

> deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or
>
> discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,
>
> because of the "race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons" (emphasis added) (*Code* section 10(1)).

But, in typical legislative fashion, there are even various exceptions to this exception, one of which is of specific application to strata corporation bylaws. That exception allows a strata bylaw to prohibit rentals on the basis of age as long as every rental unit in the strata corporation is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age (see section 10(2)(b)(i)). Thus, a bylaw may only restrict renters from residing in a strata corporation on the basis of age if the age limit is 55 or higher. If there is a no rental bylaw, on the other hand, this issue will be moot of course.

In this context note also that an age restriction bylaw does not in any case apply to a person who lives in the strata corporation at the time the bylaw is passed and continues to reside there (SPA section 123(2)).

These provisions were an attempt by the provincial government to clarify some uncertainty that existed before the SPA came into effect, and have since been scrutinized by the courts and the Human Rights Tribunal and remain intact and unscathed.

In *Drummond v. Strata Plan NW2654*, (2004), 34 B.C.L.R. (4th) 359, the B.C. Supreme Court was asked to set aside an age restriction bylaw that prohibited occupancy by anyone under 19. The bylaw was in place when the petitioner and her 13 year old son took up residence with an adult owner. She shortly thereafter became the owner herself. She argued that the same protection granted to a renter by the *Human Rights Code* should apply to an owner. The court disagreed, noting that “the legislation is rife with instances of exceptions to the general rule prohibiting discrimination.” The challenged bylaw was found to be “a legitimate and justifiable restriction on the use of the strata units which has been demonstrated to be in the interests of the majority of owners.”

The court also concluded that this bylaw was not “significantly unfair” to the petitioner, which would have entitled her to relief under section 164(1)(a) of the SPA. While it “might seem “unfair” to the petitioner and perhaps others, the “unfairness” is not demonstrably significant or oppressive”, and it must be such in order for SPA section 164(1)(a) to come into play, according to the judge.

The petitioner was successful, however, in having $16,400 in fines levied against her reduced to $1,000. The applicable bylaw allowed an owner to be fined a maximum of $200, and gave the strata the option to do so every seven days for a continuing contravention. However, the judge felt that the circumstances did not justify the maximum to be levied, in that much of the delay resulted from the time it took to get the matter before the courts, and because he was unable to conclude that the petitioner lacked “clean hands”.

In *Ryan and Ryan v. Strata Plan VIS 3537*, 2005 BCHRT 559, the B.C. Human Rights Tribunal, not surprisingly, also concluded that a bylaw limiting occupancy to persons 55 and over did not contravene the *Human Rights Code*. In this case the Ryans had purchased and moved in with their 16 year old child knowing about the bylaw, but with the hope and belief that it would be defeated at the AGM. It was not. The Ryans then applied to council for an exemption, but it was denied. They challenged the bylaw claiming that it discriminated against them on the basis of “family status” and relied on section 8(1) of the *Code*, which states:

Discrimination in accommodation, service and facility

***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.

The Tribunal rightly concluded that the strata’s objection to the Ryans was not because they were a family, but because of the age of their child, pointing out that “if the Ryans were in their late 70’s and had a daughter over 55 living with them, the Owners would not be asking the daughter to leave the premises.” The Tribunal also noted that to allow a claim of discrimination to succeed under section 8 would defeat the legitimate exceptions deliberately included in sections 9 and 10. A supplemental argument apparently based on “significant unfairness” under section 164 of the

SPA, was dismissed as being outside the jurisdiction of the Tribunal. Hear hear. We hope this HRT adjudicator is assigned to more strata related cases in the future.

In summary:

a bylaw cannot restrict ownership on the basis of age;

a bylaw can restrict residency on the basis of age, but it will not apply to any renter who is 19 years or older and younger than 65, unless there is a bylaw that prohibits residency by anyone under 55;

3. notwithstanding point 2 above, if a strata corporation has a no rental bylaw, then residency can be effectively restricted on the basis of any age, as number 1 above would then apply; and

4. in any case, an age restriction bylaw does not apply to a person who lives in the strata corporation at the time the bylaw is passed and for so long as he/she continues to reside there.

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