



FEATURES THIS MONTH

1. Expressions We Use - Where Do They Come From?
2. Turfing An Owner
3. Owners Insurance For Improvements
4. Second Hand Smoke

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. Expressions We Use - Where Do They Come From?

“Chairman”

In the late 1700s, many houses consisted of a large room with only one chair. Commonly, a long wide board was folded down from the wall and used for dining. The “head of the household” always sat in the chair while everyone else ate sitting on the floor. Once in a while, a guest (who was almost always a man) would be invited to sit in this chair during a meal. To sit in the chair meant you were important and in charge. When sitting in the chair, this person was called the “chair man.” Until the 1990s the expression or title “Chairman” or “Chairman of the Board” was commonly used in business organizations. Today, of course, we no longer say “chairman”; we say “chairperson”.

The old *Condominium Act* of BC used the expression “chairman” for denoting the head of the strata council. The *Strata Property Act* uses the term “President”.

Can you think of other changes we need to make to the *Strata Property Act*? If so, let us know and we will pass your comments to the government for consideration.

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. Turfing An Owner

Although removing an obnoxious tenant is not an easy proposition, turfing an obnoxious owner is even more difficult. At least the *Strata Property Act* of B.C. has provisions for dealing with tenants. There is no such provision for owners. VCS has been asked many times in our 25-year history what can be done to get rid of an obnoxious owner. We have always replied “*Not much*”. Well, possibly there is good news as a consequence of a recent court decision.

Now, do not pick up the phone or click the mouse to have VCS get cracking on some obnoxious owner. It will not be quite that easy. Nevertheless, the door has been opened and we are very pleased to direct you to this month's feature article on the topic. Read on.

The Short Answer: A strata corporation can evict an owner. The process involves making an application in the B.C. Supreme Court; however, the court will only evict an owner in extreme circumstances.

The Long Explanation: Refer to the *Strata Property Act*, which states at s. 170 "The strata corporation may sue an owner". In addition, there is authority under s. 171 of the *SPA*:

171 (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

- (a) the interpretation or application of this Act, the regulations, the bylaws or the rules; ...*
- (c) the use or enjoyment of a strata lot;*

Similarly the Standard Bylaws require:

3 (1) *An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that*

- (a) causes a nuisance or hazard to another person,*
- (b) causes unreasonable noise,*
- (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,*
- (d) is illegal...*

There are some court decisions that support the proposition that a nuisance owner may be evicted. In the Alberta court decision in Condominium Plan No. 022 1347 v. N.Y., 2003 ABQB 790, an owner, "N.Y.", was found to be a nuisance resident. According to the written complaints

received by the condominium corporation and the Property Manager, there was noise coming from her strata lot, she was obstructing the passageways of the complex, her pet was damaging the common property, she was not cleaning up after her pets or keeping her pets on a leash, she spoke to owners, occupants and their visitors in a derogatory manner and she allowed her visitors to trespass in parking areas that other owners had the right to occupy exclusively.

N.Y. was renting the condominium from her parents and she and her parents were served with a Notice of Termination of Tenancy from the condominium corporation. The tenancy was terminated on May 31, 2003. N.Y. failed to vacate the premises. Instead of vacating, she purchased the unit from her parents in mid June 2003 for \$67,000. The condominium was valued at \$140,000. Like the B.C. *Strata Property Act*, the Alberta *Condominium Property Act* permits the corporation to evict tenants who create a nuisance; however, like the *SPA*, the Alberta legislation does not have any provisions dealing with the eviction of owners.

The corporation brought proceedings in court to evict N.Y. In June of 2003, N.Y. had notice of the application, but did not appear in court. The court found that N.Y. was an owner, and ordered that she vacate the premises by July 15, 2003. N.Y. then appealed the decision to the Alberta Court of Appeal. The Judge in the appeal found that N.Y. had shown flagrant disregard for the bylaws of the corporation. He further found that, based on the law in Alberta, the lower court had discretion to order her to vacate the premises.

The Judge also considered the fact that the condominium had been sold for practically nothing. He inferred that the unit was transferred for the sole purpose of defeating enforcement of the eviction under the *Condominium Property Act*. He further found that there was a rebuttable presumption that N.Y. was holding the property in trust for her parents. N.Y. did not provide evidence that the property was a gift, so the Judge found that N.Y. was holding the lot in trust for her parents. The Judge found that she was in fact a tenant, not an owner, and granted an order evicting her. He further found that, even if he was wrong in his conclusions, an injunction should be granted requiring that N.Y. not commit any further breaches of the bylaws.

What the court did was to find a way to evict N.Y. even though she had attempted to avoid the jurisdiction of the Alberta *Condominium Property Act* by becoming an owner. The court found that the decision to evict N.Y. was properly within the Court's discretion, as it is expressly

granted to the Court in s. 67(2) of the *Condominium Property Act*, which describes the remedies available to a Corporation for breaches of the legislation or the Corporation's bylaws: "Where ... the Court is satisfied that improper conduct [by an owner] has taken place, the Court may do one or more of the following ... give any other directions or make any other order that the Court considers appropriate in the circumstances". Note that s. 67(1) of the Alberta legislation defines "improper conduct" as including non-compliance with the *Condominium Property Act*, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner. The court found that eviction was one of the available remedies against a condominium owner.

In February, 2007, the B.C. Supreme Court made a similar decision to evict an owner in Strata Plan NW1080 v. Verlaan, No. S065342 Vancouver Registry. In that case, Mr. Verlaan, a strata lot owner living in Coquitlam had initially lived in a unit owned by his parents, but they transferred title to their son who became an owner and was issued a set of the Strata Corporation's bylaws. He lived in the strata lot for nine years. The court heard several petitioners who were neighbours of Mr. Verlaan. The court found that Verlaan violated several of the strata corporation's bylaws by, among other things, failing to pay his strata fees, allowing friends to sleep on his patio, shouting and fighting with non-residents at various times both inside his strata lot and in the common property, buying and selling drugs on the premises, keeping pets (contrary to the bylaws) and failing to clean up their excrement, keeping garbage and junk in his strata lot and on the adjoining patio, begging for money from other residents, allowing guests to loiter in the common areas, making excessive noise, and other nuisance-causing behaviours. On the first application by the strata corporation in October, 2006, the court ordered Mr. Verlaan to clean up the refuse in and around his strata lot, cease his disruptive behaviour and remove his pets and guests. He did not comply. After four months of non-compliance with the court order, the strata corporation petitioned the court to again require Mr. Verlaan to change his ways, and, in addition, sought his eviction from the strata corporation by the end of February 2007. The petition stated that "the Respondent's [Verlaan's] conduct is so inconsistent with the concept of community living in a strata corporation, outrageous and in flagrant violation of the provisions of the *Strata Property Act* and Bylaws, that only an Order permanently removing the respondent from his strata lot and the common property will stop the Respondent from contravening the Bylaws and the *Strata Property Act*".

The court received the affidavit submissions of 11 owners, and the impact of these submissions combined with the egregious conduct of Mr. Verlaan lead the court to order his eviction effective one week after the second application was heard.

On a practical level, the court decisions above indicate the steps a strata corporation will have to take to ultimately remove a nuisance owner. In most cases the owner will comply before the strata corporation has to resort to a removal order from the court. Faced with the difficulties and costs of legal action, a strata council is advised to:

- Be vigilant to any inappropriate action by owners;
- Document infractions;
- Issue warnings as appropriate;
- Issue notice of bylaw infractions and/or failure to pay fees;
- Obtain supporting documentation from strata corporation and affidavit and other evidence from resident owners affected;
- If infractions and /or payment delinquency persist, make application to the court to enforce the bylaws and require the nuisance owner to comply;
- If the owner still does not comply, make application to the court for removal of the owner.

Conclusion: A court will order the eviction of an owner despite the fact that the *Strata Property Act* makes no provision for such action where it can be shown that the conduct of the owner is inconsistent with the concept of community living in a strata corporation, and is outrageous and in flagrant violation of the provisions of the *SPA* and strata bylaws. The council should start by attempting to enforce its own bylaws and by being diligent in enforcement and monitoring. If the owner persists, application can be made to the court. In the most extreme circumstances a court will act to remove a nuisance owner.

All of this, we caution is easier said than done.

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.

3. Owners Insurance For Improvements

You already know that the strata corporation's insurance policy does not provide coverage for any 'improvements or betterments' (as they are termed by the insurance industry) done by an owner to his or her strata lot. It is fairly common knowledge and we remind owners during the Insurance Report portion of each Annual General Meeting and via the resultant minutes.

A very common example is the replacement of carpets with hardwood flooring. If there should be a claim (usually it is water damage), and the strata corporation's insurance policy will pay subject to the deductible for the repair or replacement up to the replacement cost value of the carpet, not for the improved value of the hard surface product. That expense is up to the strata lot owner to carry.

Recently, VCS received a call from a new owner of a strata lot where such damage occurred. The new owner had not installed the hardwood. The previous owner had installed it; however, the new owner was unaware that the upgrade was not covered by the strata corporation's insurance policy. In fact, he assumed that it was covered and, as a result, did not carry his own insurance for the improvement. Needless to say, it came as quite a shock to him to be told there was only limited coverage to the value of the original carpet (at replacement cost).

As a result of this incident, VCS is adding another page to the Welcome Package letter that is issued to new owners to advise them of this potential exposure.

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.

4. Second-Hand Smoke

Second-hand smoke is an emerging health issue that we at VCS are beginning to hear about from our clients. Given the high resident-density of strata apartments, smoke from neighbours can be a

significant nuisance. Only minute amounts of smoke are required to create a detectable smoke odor, even at concentrations far below anything that would pose a health risk. In most cases, the concentrations of smoke are not a health hazard. However, hypersensitive individuals may experience significant distress.

A quick search of the Internet finds several local resources that address the issues. The BC Lung Association newsletter *Your Health*, in its Spring 2006 issue contains an article on drifting smoke in apartments and condominiums. According to the BCLA education coordinator, “*Although it’s legal to smoke, the right ends where another person is adversely affected by that action*”. The article goes on to address the issue of smoke as an irritant to persons with chronic health issues, and suggests the following: sealing cracks and electrical outlets, improving ventilations systems, weather-stripping doors.

The BC Ministry of Health in their *Health Files* newsletter of August 2005 also addresses the issue. The newsletter discusses the danger of second-hand smoke migration, the various toxic chemicals found in tobacco smoke, the fact that second hand smoke can be more dangerous than first-hand smoke, and the corollary issue of accumulation of toxic chemicals on drapery and furniture. The newsletter suggests that strata corporations lead the way in taking action to curb smoking. They remind us that the *Strata Property Act* already contains provisions to ban nuisance behaviour that interferes with other owners’ enjoyment of their property.

The Condominium Home Owners Association *Bulletin 400-018* discusses the issue of smoke and odours to penetrate hallways, and find their way into suites. The CHOA blames ineffective exhaust fans, buildings without air pressurization systems, and poor construction as the causes of smoke and odour issues. The CHOA takes the position that proper construction of buildings and proper ventilation can address the issue of smoke and odour. They are reluctant to endorse the idea of non-smoking bylaws, and question their enforceability and the jurisdiction of strata corporations to regulate owner lifestyles.

The BC Clean Air Coalition produced a *Fact Sheet* in November of 2005 that discusses the dangers of second-hand smoke and the benefits of going smoke-free. On a practical level, the Coalition suggests that landlords and tenants (or for our purposes councils and owners) try to resolve complaints and agree to modify smoking behaviours to minimize nuisance, that they make

reasonable repairs to seal cracks and close other avenues of smoke migration, and that they ensure enforcement of bylaws. The fact sheet includes reference to *Young v. Saanich Police Department et al*, 2003 BCSC 926. That was a case heard in Victoria where a resident and his wife lived in a rental building operated by the Capital Region Housing Corporation and smoked medically sanctioned marijuana. The smoke irritated their neighbours. Neither the building rules nor the tenancy agreement prohibited smoking. However, because the smoke and odour deprived fellow tenants from the quiet enjoyment of their suites, Mr. Young and his wife were enjoined from smoking in the building.

Looking to the legislation, the BC *Strata Property Act* and its *Regulation* do not address the issue of smoke or odour directly, but it does speak to the issue of nuisance behaviour and owner's expectation of quiet enjoyment of their homes.

The authority to regulate the uses of strata property and by extension the behaviour of owners through bylaws is found in section 119 of the *Strata Property Act*:

119 *Nature of bylaws*

119 (1) *The strata corporation must have bylaws.*

 (2) *The bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation.*

Similarly, the *Standard Bylaws* to the SPA provide for the prevention of nuisance and the quiet enjoyment of strata property by owners and tenants alike:

Use of property

(1) *An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that*

 (a) *causes a nuisance or hazard to another person,*

 (b) *causes unreasonable noise,*

- (c) *unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,*
- (d) *is illegal...*

The initial enforcement mechanism for a violation of a bylaw or rule is warning, followed by a fine for continued infractions:

Fines

- 130** (2) *The strata corporation may fine a tenant if a bylaw or rule is contravened by*
- (a) *the tenant,*
 - (b) *a person who is visiting the tenant or was admitted to the premises by the tenant for social, business or family reasons or any other reason, or*
 - (c) *an occupant, if the strata lot is not sublet by the tenant to a subtenant.*

There are no court decisions that bear directly in this issue, but it is fair to say that the issue of smoke odour falls broadly within the area of the law of nuisance. Nuisance in law amounts to an unreasonable interference with an occupier's use and enjoyment of land. It doesn't matter whether the interference was intentional, negligent or unintentional. The usual remedy for victims of nuisance that the law provides is to prevent one occupier from using their property unreasonably so as to injure a neighbour.

The leading case on nuisance in BC is *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179. In that decision of the BC Court of Appeal, Judge McIntyre sets out some general principles for nuisance (at para 184):

As has been said in Street on Torts, at p. 212: 'The essence of the tort of nuisance is interference with the enjoyment of land.' That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land; in negligence one must consider the nature of the conduct complained of.

The law of nuisance attempts to reconcile conflicting uses of adjacent land. It is a balancing of rights between one user's lawful use and another's right to quiet enjoyment. Courts in BC apply

an objective test to determine what the average resident in the community would consider nuisance. It is important to note that the courts will not attempt to provide more protection from inconvenience or discomfort than that which generally exists in the community.

A case that relates to nuisance in strata property is *The Owners, Strata Plan NW87 v. Karamanian* [1989], B.C.J. No. 629. In that decision, Judge Proudfoot for the court discusses the concept of communal living in a strata and the need for residents to be considerate of their neighbours:

While the courts are reluctant to interfere with how persons live in their own homes, there are some activities which may not be done particularly when the home is regulated by the Condominium Act and by-laws of a Strata Council. This is the communal type of living which often requires a tremendous amount of co-operation and consideration from each other, for all residents to enjoy the lifestyle to its maximum.

The case law on nuisance suggests two related concepts. Persons who live in close proximity need to consider the effect of their behaviours on their neighbours. Persons living in close proximity also need to be aware that they are required to put up with some inconvenience but not to the point where it becomes harmful by objective standards.

To sum up, second-hand smoke is an issue that is likely to arise as the population density in Vancouver increases. This is especially true in apartment-style strata developments. So far the issue has been dealt with directly in situations involving rental property, but not strata lots. However, the law of nuisance applies, and there is some treatment of nuisance in relation to strata property. In addition, the SPA provides for the quiet enjoyment of strata property by owners, and has mechanisms to resolve issues regarding nuisance. In addition, strata councils may draft bylaws that address the specific issue of second-hand smoke. In the alternative, action may be taken to address owner's behaviour to prevent smoke from aggravating neighbours. Finally, physical alterations to strata lots such as adjusting ventilation systems, sealing holes that conduct smoke, and other measures may be effective in addressing the issue.





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.