



FEATURES THIS MONTH

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

1. We Are Not Lawyers

We wish to remind our clients that VCS does NOT provide legal advice or opinions. We are routinely asked by strata council members to provide answers to difficult situations encountered at their strata corporations. “Ask Management” is a familiar phrase. VCS does have years of experience and considerable knowledge about strata issues; however, we cannot and do not offer legal advice or legal opinions. Any comments we do provide must be considered as “property management experience”. When your strata corporation needs roof repairs, we are happy to contact roofers for “three quotes”. When you have legal problems, we are happy to contact lawyers for “three quotes”.

As for our general non-legal advice, we acknowledge that you are under no obligation to accept our advice. It is our view that it is appropriate for VCS to offer comments. We are not offended if you choose not to accept it.

2. Approving the Agenda

Bylaw 28 of the Schedule of Standard Bylaws (of the *Strata Property Act*) prescribes the order of business at Annual and Special General Meetings of the strata corporation. Item (e) of that prescription says “approve the agenda”. What exactly does that mean and entail? It is very rare that this issue is mentioned but a recent event in one of our accounts gives reason for consideration of this item.

Just prior to an AGM, a group of owners circulated a letter to all owners requesting that they be elected to the new strata council. It was rumoured that the group would amend the agenda at the start of the AGM to facilitate the Election of Council to be held immediately following the approval of the minutes, thereby permitting the new council to officially control the meeting. (This is actually not possible since bylaw 10(1) states “*The term of office of a council member ends at the end of the Annual General Meeting at which the new council is elected.*”) It was further rumoured that, once elected, the new council would withdraw a number of $\frac{3}{4}$ vote resolutions on the agenda. As it turned out, in this instance, the agenda was amended to hold the election immediately, but the newly-elected group did not oppose the proposed resolutions. The

process, however, does raise a very interesting question: Can the agenda be amended to remove items from the agenda that was circulated to the owners in advance?

We believe that the answer is “yes”. The agenda for an AGM is set by the strata council. Section 46 of the *Strata Property Act* (which is a statutory requirement, not a bylaw) states that . . . “*the council determines the agenda of an Annual or Special General Meeting.*” (There is an exception to this provision when an official “demand” by 25% of the owner votes is to be proposed as a resolution; however, that is a separate subject from this article.) So, the council determines the agenda - which means that the council sets the agenda content and topics and the AGM/SGM notice is distributed accordingly. Bylaw 28, however, includes as we have identified at the outset, a provision that permits the owners at the AGM/SGM to “approve the agenda”. Quite odd. The Act is silent as to whether or not such approval requires a majority vote or a $\frac{3}{4}$ vote. We make the assumption that it is a majority vote. Could it be argued that disapproval of an agenda item which requires a majority vote would require a majority vote, whereas an agenda item which requires a $\frac{3}{4}$ vote (such as a special levy or bylaw amendment) would require a $\frac{3}{4}$ vote to remove (ie. not approve as an agenda item) from the agenda. There is no guidance in the legislation.

In the absence of direction from the Act, it will be up to each strata council to interpret this odd requirement if ever confronted at an AGM or SGM. One day a court will have to sort this out. An alternative is to amend the bylaws to remove “(e) approve the agenda” from the order of business requirement. That may not be easy as this in itself requires a $\frac{3}{4}$ vote of the owners and owners generally do not support any kind of bylaw amendment which appears to dilute their power to control the council.

Fortunately, the issue of “approving the agenda” is not a biggie. At virtually all meetings (and we are talking about thousands of AGMs/SGMs over the years), we rarely see the matter raised.

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3. Security Guards At Your Service

Many strata corporations, today, engage security guards (either as employees or by contract) to provide a presence at their properties. Some are “24/7”, others are part-time or ad hoc. Just how much value is being gained by such services is debatable. We frequently find security guards asleep on the job. Many do not speak English very well so it is hard to communicate instructions to them. We wonder (and worry about) what may happen in a true catastrophic emergency such as a fire or earthquake. Recently we caught one security guard reading the newspaper while on duty, instead of patrolling the property. When asked why, he replied that it is important for him to be aware of what movies are currently playing in town and which restaurants have good ratings. He said that the residents frequently require this information so he has to be informed. Good answer! Good security?

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4. A CRF NO-NO

From time to time we observe strata councils, at the fiscal year-end of their strata corporations, eliminating the operating fund deficit by instructing VCS to write off the deficit by transferring the amount to the Contingency Reserve Fund. This is in violation of the *Strata Property Act*. The CRF can only be used under three circumstances:

- (1) In accordance with a $\frac{3}{4}$ Vote Resolution of the owners for a specific project
- (2) In case of a (real) emergency
- (3) To cover an insurance deductible

An operating fund deficit for a given year can be “liquidated” automatically if the strata corporation already has a surplus from previous years which, of course, must be greater than the amount of the current deficit. If there is insufficient or no previous surplus then the deficit has to be recovered by either building it into the next budget or by assessing a special levy.

Some strata councils, when faced with a year-end deficit, declare retroactive emergencies. We do not recommend doing this as the optics are poor. If it was not an emergency six months ago, why is it an emergency now? Emergencies ought to be “real”, at the time of an incident, not artificial when it suits the budgeting process.

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5. What’s Wrong With The Mari Decision

Background:

In May 2007, a decision was rendered in the Supreme Court of British Columbia in which the court ruled that an owner (Mari) must pay an insurance deductible arising from water damages caused by the owner’s washing machine which overflowed. The court did not base its decision on the premise of “negligence” but merely that the owner was “responsible” - a much lower standard. Section 158 of the *Strata Property Act* states:

Insurance Deductible

158 (1) *Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).*

(Emphasis added)

(2) *Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.*

- (3) *Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159.*

Writing in the July 2007 CHOA Journal, prominent strata corporation lawyer Adrienne Murray states:

“The Mari decision clarifies once and for all, that a Strata Corporation may sue a strata lot owner to recover the insurance deductible even though the owner is not negligent and has merely caused or brought about the events that resulted in the damage.”

Indeed.

For strata councils, this mouth-watering decision has penetrated council meetings across this province faster than soapy water cascading from the Mari’s 3rd floor washing machine to the lobby far below. Further, such a positive decision in favour of beleaguered strata councils who have long suffered having to absorb those annoying deductibles caused by careless owners and tenants comes as immense and common sense relief. The overflowing water of the Mari’s washing machine has created a floodgate (no pun intended) of chargebacks by strata councils upon hapless owners for all sorts of “responsibilities”. Water escape is the most common insurance claim but then there are fires, vehicle impacts and a whole host of other types of miscellaneous accidents. Yet to come are other insurance claims for such incidents as ice-cube making refrigerators which leak, stoves with faulty wiring which create fires and that sort of calamity. The list of things that owners/tenants can be held “responsible for” is lengthy.

The seemingly unassailable argument on which the Mari decision rests is the parallel to ownership of a single family house. In such a situation, an owner’s bathtub overflows and causes extensive damage. The homeowner makes an insurance claim but he/she ends up paying for the deductible. He/she does not look to the surrounding community to pick up the deductible. Therefore, in a condominium setting, why should this principle be any different? So goes the logic.

The Case Against Mari:

First, there is the law. Section 158 of the *Strata Property Act* says in very plain language “. . . the payment of an insurance deductible in respect of a claim on the strata corporation’s insurance is a common expense . . .” to be paid from the operating budget. The statute recognizes that a strata corporation might have legitimate reasons for wanting to recover the deductible from an owner or a tenant; thus, subsection (2) opens the door for the strata corporation to sue an owner “if the owner is responsible”. Let’s rewrite the last sentence and change the location of those quote marks. The section says that a strata corporation can “sue an owner (for the deductible) if the owner is responsible . . .” It does not say it can charge the owner.

The strata corporation is obligated “to sue” - which means to litigate in a court of competent jurisdiction. It cannot just say “Here’s the Mari decision, you are responsible so buck up”. That is what is happening in strata council meetings all through B.C. since the Mari decision was rendered. It is vital to remember, however, that the only thing that has changed is that the Court in the Mari decision lowered the threshold from proving negligence of an owner to showing responsibility - essentially meaning ownership of the item that gave rise to the claim.

Section 158 (2) of the *Strata Property Act* was created by the provincial Legislature to protect owners from arbitrary, inconsistent, prejudicial and unfair decisions of strata councils. Strata councils naturally take umbrage at suggestions that they act in such a manner yet, present company excluded, we do know that it happens. The legislators were all too aware that it is not good public policy to have a strata council be “judge, jury and executioner” and when Section 158 was written they were relying on considerable evidence from many affected owners in the years leading to reform of the legislation. The Mari decision, or at least the manner in which it is being interpreted and used, has set aside the fundamental principles of equity and fairness in support of Section 158.

Let’s now turn to that so-called common sense principle that, if you live in a house not a condo, you get to pay the deductible. The court, and others, have suggested that it’s no different in a strata corporation. Really? Last time we checked, a condo (strata lot) is part of a specific legal

community known as a strata corporation. The strata corporation is located physically in a broader community (i.e. Burnaby) and, in that context, it is absolutely valid to make the observation that the insurance deductible(s) of the strata corporation belong to that “homeowner” and not the neighbours. But, within the strata corporation, it is essentially one home - there is only one insurance policy for the benefit of all owners which is mandated by the *Strata Property Act*. Section 158, as outlined above, addresses deductibles and directs the corporation to pay it as a common expense. A common expense is an expense which is funded by the annual Operating Fund, or the Contingency Reserve Fund or a Special Levy. Each of these fund vehicles has been contributed to by every owner - including the Mari’s of this world. The comparison to single family home ownership is inapplicable. In the context of disputes in strata corporations which are leaky condos there have been court cases where some owners have argued that they should not have to contribute to the expense for rehabilitation. For example, a strata corporation may consist of a concrete high rise tower as well as wood frame townhouses. Let’s say the townhouses are a “leaky condo” but the high-rise is not. The courts have said in these cases that all owners must contribute since “you are all in it together”. Bingo. That is the concept of condominium ownership - you are all in it together. Section 158 for that reason calls insurance deductibles “a common expense” - which is funded by contributions from each of the owners in proportion to unit entitlement. The parallel to single family home ownership fails.

Ah, There is More . . .

Water escapes are the most common type of incident giving rise to insurance claims. Exactly what happens when there is a water leak? (These can be from washing machines, bathtubs, drug operations, water beds, aquariums and so on). Water flows downward and sideways in a triangular pattern. The property manager dispatches a restoration company to mop up the mess as soon as possible. Concurrently, a trade is dispatched to stop the source if that is appropriate - i.e. a broken water pipe. Now that we have the Mari decision, the property manager has to decide if the chaos he/she is handling will result in the deductible being a strata responsibility (i.e. broken pipe in the wall) or an owner chargeback item (i.e. washing machine overflow). This is important for reasons explained below. Let’s digress for a moment . . .

Earlier this year (2008) a professional organization of property managers (to which VCS does not belong) sponsored a series of seminars on insurance in strata corporations. The seminars were

conducted by a Vancouver lawyer associated with a firm well known as strata experts. The Mari case, naturally, was discussed as were other examples of common strata corporation incidents that give rise to insurance claims. The lawyer offered the following advice:

“If the source of the claim is from or on common property (i.e. a broken pipe in the rooftop boiler room) the matter is a strata corporation insurance claim. If the source of the claim (i.e. an overflowing washing machine) is from an owner’s strata lot, the matter is NOT a strata corporation insurance matter, but rather a matter between the affected owners. The strata corporation, under this circumstance, has a duty to initially investigate the incident and mitigate the damages. Beyond that, the strata corporation is to “butt out” and let the owners figure it out themselves.”

Have you ever heard of anything so bizarre?

All we can say is that such advice is yet another example of the failure to understand the concept of insurance in strata corporations. “*You are all in it together*” have said the courts, and for perfectly good reason. It would be dangerously impractical for the system (i.e. the governing legislation) to require each owner of a strata lot in a strata corporation to purchase their own insurance. Just imagine! It simply would not work. That is why insurance is a responsibility of the corporation including deductibles if and where applicable. Each owner contributes to the annual Operating budget (i.e. strata fees) and that contribution pays for the premium and the deductible identified at Section 158.

But Wait . . .

Assuming all of the above is wrong and the Mari door and the “willy-nilly” corollary is the new order of the day, is there a danger in simply forging ahead with repairs and charging back the responsible owner? A recent example serves to illustrate some risk in this process. It is by no means an isolated example. In fact, it is quite typical.

A water leak occurred from the tiles around an owner’s tub-shower enclosure, damaging the strata lot below. Council proceeded with repairs to the damaged unit. In this case the cost of the damages, about \$1,500, was below the deductible. Based on Mari the repairs were completed and

the bill sent for recovery from the owners above who were “responsible.” *Quel surprise!* They had no idea that repairs were being done - they had not been invited to view the damages; they had not been given an opportunity to review the quotes for repair; they had not been given the opportunity to obtain their own estimates. They were completely in the dark. Except at the time when they opened their mail and the letter said “Please make your cheque payable to Strata Plan _____”.

Here’s the point. If a strata council wants to rely on the Mari decision, it is vital that repairs not be commenced until the presumed guilty party has had an opportunity to see the damages, review the quotes and obtain their own quotes. That might be problematic - how easy and fast is that going to happen while the affected owner below looks at a soggy ceiling? And so it is for such practical and, yes, common sense, reasons that strata councils and their management companies proceed with repairs without providing the three review opportunities to the responsible owner. Today, most water loss deductibles are \$2,500 but many are increasing to \$5,000 or \$10,000 and it is no longer uncommon to see \$25,000 or \$50,000. With such huge deductibles, chargebacks based on Mari and “willy nilly” might very well be challenged in court. We will have come full circle - instead of strata corporations suing for deductibles as per Section 158, we will see owners suing their strata corporations for improper chargebacks. We need to think about this and be careful.

If you find your strata in this circumstance we suggest that the “guilty” owner be advised that the strata corporation intends to collect the deductible. If the owner agrees, terrific. If, on the other hand, the owner disagrees and challenges the strata corporation’s position, they are free to object and a lawsuit can follow.

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6. Can VCS Tell The Strata Council What To Do?

Interesting question. Under normal circumstances, which is 99.9% of the time, the strata council makes the decisions and VCS implements them. Is there ever a time when VCS can act or do something which has not been authorized or sanctioned by the strata council? If a strata council asks VCS to do something which is clearly contrary to law, VCS is under no obligation to accede to the request - but that's obvious. What about those occasions when the issue is not so obvious? This concern is probably best illustrated by an example; an actual event.

In a strata corporation managed by VCS, an issue arose pertaining to the number of rental units "on the books". A sale of a strata lot in the strata corporation hinged on whether or not the maximum number of strata lots that could be rented had been reached. There was confusion as to what the exact number was in the strata corporation's official records, much of it centering on interpretation of the *Strata Property Act*.

The owner was selling his strata lot to a purchaser who wanted to purchase it as an investment rather than to occupy it. The owner provided credible evidence that the maximum number of rentals had not been reached. The council, more or less, disagreed and would not grant consent for the new rental. "More or less"? What does that mean? Answer: only one out of seven council members would offer a position, and that one opinion/position essentially boiled down to a commentary about rentals generally.

Evidence at VCS supported the owner's contention that the maximum number had not been reached; therefore, the request to rent from the prospective purchaser would be acceptable. Closing was imminent and the owner selling threatened legal action against the strata council and the strata corporation generally if consent was not granted. The closing date was delayed 24 hours and, despite repeated emails from VCS to the strata council to state their position and obtain their direction, the council said nothing. Total silence.

So, can VCS tell the strata council what to do? Can VCS make a decision based on its own opinion despite the direction (or lack of) from the strata council?



Although it will, one day, be up to a court to answer those questions, we believe that the answer is “yes” in certain circumstances. Where a strata council refuses to accept its responsibility to deal with an issue; where VCS has made every effort to inform and advise the strata council; and, where the silence of council might lead to litigation (or some other loss or consequence) it is our view that VCS must act in the “best interests of all the owners” of the strata corporation. Indeed, there is a risk that VCS could make a wrong decision but sitting idly by while a catastrophe unfolds is not an option either. The management contract is with the strata corporation as a whole, not with the strata council. So, reluctantly (but fortunately very rarely) yes, there are times when VCS tells the strata council what to do.

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