



## 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](http://www.qp.gov.bc.ca/statreg/stat/S/98043_01.htm)
- Vancouver Condominium Services: <http://www.vancondo.com>



## 1. Role of the Real Estate Council

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THE REAL ESTATE COUNCIL OF B.C.

*All strata management companies are regulated by the Real Estate Council of B.C. ("The REC").*

*The following is a statement which appears in the masthead of newsletters and bulletins issued by the REC:*

### ROLE OF THE COUNCIL

The Real Estate Council is a regulatory agency established by the provincial government. Its mandate is to protect the public interest by enforcing the licensing and licensee conduct requirements of the *Real Estate Services Act*. The Council is responsible for licensing individuals and brokerages engaged in real estate sales, rental and strata property management. The Council also enforces entry qualifications, investigates complaints against licensees and imposes disciplinary sanctions under the Act.

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## 2. Are "E-Decisions" Valid?

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What is an "e-decision"?

Strata councils hold regular council meetings (monthly, bi-monthly, etc.) and, at those meetings, decisions are made which are recorded in the official minutes of the strata corporation. With the ubiquitous nature of e-mail, however, most if not all strata councils are now engaged in a daily exchange and discussion on issues which, in the past, were agenda items at the formal, regular meetings of council. Indeed, some very significant decisions are made by e-mail ("e-decisions") and not at formal council meetings.

In a recent court case (not involving a VCS client) an owner sought relief from the B.C. Supreme Court to obtain copies of e-mail correspondence between council members. The Court determined that these e-mail meetings were not formal meetings of the strata council and that

minutes would not be required. The Court stated “*Those are not meetings of the council and it would be unrealistic to expect minutes to be kept of such meetings.*” The Court went on, however, to note that any decisions would be invalid until they are properly ratified at a formal council meeting and, of course, minuted.

Ah, therein lies the problem. VCS clients are utilizing e-mail to administer their corporations and it is our observation that very few of the e-decisions are, in fact, being ratified and minuted at the next council meeting. We frequently note that significant decisions, sometimes involving the spending of thousands of dollars, are simply disappearing into the e-mail directory or even the DELETE box.

You need to be very careful, given the Court’s ruling. If an e-decision is made and it is not valid until ratified, can you proceed with the decision? Even if the matters are brought forward to the next meeting for ratification, it may be too late to serve the purpose intended by the Act. Example: a council decides via an e-decision to spend \$10,000 on a specific project. The matter is brought forward to the next meeting six weeks later and is “validated” at the formal meeting. By this time, the project may be complete, the money spent. The owners receive the minutes two weeks later but by now it is a *fait accompli* and there is no opportunity for them to be informed, ask questions or voice concerns.

Admittedly, this outcome might prevail even if a time delay mechanism was set in place, but the fact remains that the purpose of the legislation is to provide transparency for all members of the strata corporation, not just the strata council.

The issue of e-decisions is one of great concern for management companies --- all management companies, not just VCS. We have discussed this topic with our colleagues in the industry and, without exception, the concern is universal. Before e-mail, councils met on a regular basis (monthly, bi-monthly, etc.) and business was conducted and formalized on that schedule. Certainly, emergencies were dealt with in between council meetings as necessary. What we have today though, with the advent of e-mail, is daily council meetings. As noted above in this article, some very significant but invalid decisions are being made on the basis of e-mail. Legalities aside, property managers (the whole industry, not just VCS) cannot keep up with the demands for instant e-service on routine matters. As a consequence, the strata agents are not attending to their tasks

in an orderly fashion and, indeed, they often fail to adequately address those instant e-demands of council with the result that the strata councils are disappointed that their expectations are not met.

“E-decisions” must be controlled. The legal ramifications are of deep concern to us and the disruption of agents’ workflow is significant.

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### 3. Foreclosures Can Hurt Your Strata Corporation

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In the past decade or so, we have seen very few foreclosures of strata lots in our (VCS) client population (about 16,000 units). This, of course, is a consequence of the strong economy we have enjoyed in B.C. Remember the eighties? We do - and there were many foreclosures in that decade due to the poor economic times. The nineties brought us the leaky condo disaster and, as a consequence of the massive special levies, foreclosures of individual strata lots were prevalent. Now, with darkening clouds on the horizon, we may be headed for a period when more foreclosures will blow into your council meetings so we thought it might be timely to offer a “heads up” and some advice on the subject.

Foreclosures on strata lots are invariably driven by the financial institutions that hold the mortgages. It is extremely rare to see a strata corporation initiate a foreclosure action. The *Strata Property Act* does allow a strata corporation to “foreclose”. Section 117, Forced sale of owner’s strata lot to collect money owing allows the strata corporation to seek judicial relief which takes the form of an order from the Supreme Court of British Columbia to sell a strata lot. It is not a speedy or inexpensive process and, for these reasons, VCS discourages strata councils who want to “go after” delinquent owners by selling their strata lots. From start to finish such a process could easily take up to one year. The legal costs associated with the strata corporation taking legal action tend to run in the \$5,000 to \$10,000 range and are not collectible even if

successful. If an owner owes the strata corporation \$10,000 in strata fees, what is the point of foreclosing if it costs \$10,000 to do so? All in all, it is unusual to see a strata corporation advance this initiative as a remedy for collection.

When real estate prices are on the up and up, strata corporations do not have to worry too much about arrears. Even if and when the delinquent owner's bank forecloses, there is generally enough equity in the asset value of the strata lot to pay off the debt to the strata corporation. The strata corporation, thanks to the *Strata Property Act*, enjoys a privileged position. Section 116 (5) states:

- 116 (5) The strata corporation's lien ranks in priority to every other lien or registered charge except
- (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
  - (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
  - (c) if the other lien or charge is made under the *Builders Lien Act*.

Notice the repeated use of the word "lien". VCS does routinely monitor arrears and files liens but should a strata corporation not file a lien on a delinquent account, the wonderful provisions of Section 116 (5) are out the window.

Note also who may be ahead of the strata corporation in the lineup to vulture the leftovers of the delinquent owner:

- (a) A person (could be a company) who has sued the strata corporation and won - that is the "judgement against the strata corporation".
- (b) The government (except for a government mortgage - the so called "B.C. Second". The government includes the Canada Revenue Agency - a very common creditor.
- (c) A stiffed contractor who has rights under the Builder's Lien Act.

That is not too bad a list because (a) and (c) are quite rare. The only one of concern is (b) and, as noted, it is usually the CRA (Revenue Canada).

Typically the biggest claimant is the financial institution (banks, credit union) that advanced the first and/or second mortgage on the delinquent owner's title. These claimants are in the line

behind the strata corporation, which is great. As noted above, on VCS advice strata corporations almost never advance foreclosure actions: we just wait for the bank to do it at their expense (which is perfect) and, when the legal dust settles, the strata gets paid out first (except for the rare situations noted above) ahead of the bank. The bank takes the loss.

Sounds good right? Well, not so fast. Here are some complications. First note the reference to “liens”. All the above good news hinges on the lien. A lien can only be applied to a strata lot for the following items:

- (a) strata fees
- (b) special levies
- (c) a cost arising from a municipal court order (very, very rare)
- (d) a court judgement (very, very, very rare)

So, essentially it boils down to strata fees and levies; however, Section 118 allows the strata corporation to tack on some other charges. It says:

### **Costs added to amount owing**

**118** The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:

- (a) reasonable legal costs;
- (b) land title and court registry fees;
- (c) other reasonable disbursements.

The item (c) “other reasonable disbursements” would include such nominal costs as the management company's service fee to prepare the lien.

Note, contrary to general opinion, that fines are not included in the lien tool kit. Interest, if permitted by a strata corporation bylaw, can be collected because it is considered as part of the strata fee. Note Section 107 (2) which states:

### **Payment of strata fees**

**107 (2)** The interest payable on a late payment of strata fees in accordance with a bylaw referred to in subsection (1) is not a fine, and forms part of the strata fees for the purposes of section 116.

As long as the equity in the delinquent owner's account is sizeable, which it usually is in a rising real estate market, the strata corporation is in a comfortable position to collect its debt. In some cases we have seen the financial institution even pay out the accumulated fines. This is not because they are "nice guys" - it is because there is sufficient equity to pay out the bank's loan, legal costs etc. and there is money left over.

Note that the great provisions afforded to the strata corporation by the legislation do not include chargebacks for such things as damages to the property by the owner, insurance deductibles (a favourite of councils) and other similar debts. Again, as noted above, in a rising real estate market there is sufficient equity in the hapless owner's asset that all these expenses/charges get paid out to the strata corporation by the nice banks. But what happens if the real estate market is in decline and the equity has shrunk? Ah ...

Let's take a recent case at VCS. The numbers here are approximate but you will get the idea. An owner was in arrears of strata fees by about \$8,000. He also had defaulted on his mortgage and the bank foreclosed. Prior to the final foreclosure date, the owner had a water leak in his unit which created tens of thousands of dollars of damage to his and other strata lots. The deductible for water loss in this strata corporation is \$25,000. The council instructed VCS to charge this amount to the owner's account. The real estate market in Vancouver had already started its decline and, lo and behold, there was insufficient equity in the owner's asset to absorb all these expenses. The foreclosure was consummated and the strata corporation received the \$8,000 arrears of strata fees and its "reasonable legal costs" but the fines and the insurance deductible amount (about \$20,000) had to be written off as the bank had no obligation to pay these amounts. Perhaps six month ago it would have been a different story and there would have been lots of equity and the nice bank would have paid the entire balance. That was then and this is now.

As we go forward in the next year or two while the economy stumbles, it is reasonable to expect declining real estate values and that translates into reduced equity. Your strata corporation will generally have no difficulty in receiving outstanding strata fees and special levies (where and when the bank forecloses) but other chargebacks (typically repair items and insurance deductibles) will be less certain for recovery. There is not much that you can do about this but at

least be aware of this reality as we head into the next two or three years of real estate market decline.

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## 4. Can Your Insurance Underwriter Change Your Deductible Mid-Stream?

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The answer is “yes”.

Let’s say that your strata corporation’s insurance policy runs from January 1<sup>st</sup> to December 31<sup>st</sup> each year. Your insurance underwriter informs you in September that the water loss deductible will change from \$5,000 to \$50,000. Hard as this is to swallow, the underwriter can, in fact, do this and it comes as quite a shock to council members. Usually councils say “wait a minute - they can’t do that; we have a contract in place to the end of the year so they are breaking the contract!”

Unfortunately, that is not really how insurance policies work. It should be noted at the outset that these types of mid-stream changes do not occur very often and never without “good reason,” at least from the underwriter’s perspective. Invariably, changes in deductibles (be they mid-stream or on renewal) result from excessive claims that have hurt the underwriter.

As an example, let’s say that a strata corporation has a water loss deductible of \$5,000 and, during the insurance year, there are five claims which total some \$50,000 of claims on the policy. The underwriter has collected a premium of \$20,000 for the policy so it loses \$30,000 on the account. In such circumstances it is common to see the underwriter raise the water loss deductible in the subsequent year to a much higher amount such as \$25,000. In one VCS client, the water loss claims in a three-month period totaled about \$100,000! In this case, the underwriter did not wait until the renewal to increase the deductible. It implemented a new

deductible for water loss, mid-stream (no pun), of \$50,000 for the balance of the insurance policy year.

In another VCS account, a marijuana grow-op caused a flooding costing some \$30,000 to repair. The insurance underwriter instituted a new deductible of \$50,000 for “illegal activities” claims. This was effective immediately, not at renewal. The strata council was (not surprisingly) aghast that this could be done and asked why and how. Fair questions indeed.

The answer is that, an underwriter can change the deductible and this does not constitute a breach of contract with the insured (the strata corporation). The insured (the strata corporation) has to agree by signing an endorsement but, if it does not, the underwriter can simply cancel the policy on 15 days’ notice. It is deemed as a “material change” in the terms of the policy. Translated this says that when Insurance Company A entered into its contract with Strata Corporation XXX, it did so on a basis of normal conditions and risk. The insurance company did not offer coverage for claims beyond the normal expectation of the policy. So Strata Corporation XXX has routine claims including water losses and the policy responds as per the terms and conditions of the coverage prescribed. All good so far, but then the strata corporation suffers excessive and unusual losses which are beyond what the contract envisioned and now the contract is actually “breached” by the strata corporation since this volume of claim was not part of the deal at day one. This is what allows the insurance underwriter to cry “foul” and bump up the deductible mid-stream.

For the last few years we have observed insurance underwriters (via the brokers) warning that the claims arising from illegal drug operations are escalating to a point where sizeable deductions (i.e. \$50,000) would apply. Until recently these warnings have generally been just that, warnings. But now we are seeing that the insurance underwriters are getting fed up of the huge claims from drug ops gone wrong. They are implementing the higher deductibles immediately after the first event. Do not be surprised to see such deductibles implemented prior to the first event - meaning that this will become standard on future renewals.

All this poses a huge dilemma for strata councils. Where a property has bad pipes it is relatively easy to understand the need to re-pipe the building and the council moves forward in that direction. However, the drug grow-ops are not visible - until they go wrong and by then, of

course, its too late. In the example cited above, VCS received a letter from the underwriter/broker asking “What the strata council is doing to prevent drug ops from their building?” Well, the answer is “nothing”. That’s not what the underwriter wants to hear, but that is the correct answer. What really can be done by the strata council and management to prevent drug ops in their buildings? Council and management do not have 7/24 unfettered access to all strata lots to undertake inspection for drug ops. Heck - think about the difficulty every strata council faces just getting owners/residents to provide access for the annual fire inspection of in-suite devices! Its “like pulling teeth” right? So how is a council supposed to track and monitor for drug ops? The usual clichés pop to mind such as watching for suspicious behaviour, reading electric meters to see how fast the dial is spinning, smelling strange odours and so on. Do we really practice these “preventative steps”?

One small solution (and we use this word with some reluctance) is to create bylaws that make owners responsible for the deductibles. This is not easy as Section 158 of the *Act* states clearly that insurance deductibles are a “common expense” to be paid for by the strata corporation. Yes, the strata corporation can go after an owner to recover the deductible but that takes time and money to do and is not really much of a solution after the fact. In future bulletins we will continue this discussion.

For now, be aware that, yes, your insurance underwriter can change the deductible in mid-stream.

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## 5. 2009 Insurance Renewal

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We remind our clients that most (not all) insurance policies expire on December 31<sup>st</sup>. VCS has arranged for renewal with BFL Canada. VCS has no objection if your council wishes to insure with another broker; however, please advise us as soon as possible if that is your wish.

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