



FEATURES THIS MONTH

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4. Alleged Bylaw Violations
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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. World Economic Crisis: A Silver Lining for Strata Corporations

Who would have think it? As a consequence of the world economic crisis, the management of your strata corporation's money just became a whole lot easier.

As you know from recent VCS bulletins (issued before the "Wall Street disaster") we had informed you that VCS would no longer keep track of your money (other than CRF money) if it exceeded \$100,000. For the last decade or more, VCS has been very careful to ensure that any money in excess of "insured" limits was transferred to term deposits, Treasury Bills and similar investments in order to protect your funds. (As an aside and with apologies for tooting our own horn, VCS has been the only management company to implement this policy).

Credit unions have always been insured up to \$100,000 for deposits. Banks used to be \$60,000 but recently increased their level to \$100,000.

The *Strata Property Act* requires money belonging to a Contingency Reserve Fund to be deposited in an insured account so, for that additional legal reason, VCS has monitored CRF levels and purchased investments when appropriate. This has been done at no charge by VCS. The *Strata Property Act* has no similar provisions for non-CRF money such as the Operating Fund or Special Levy Project Funds; nevertheless, VCS had implemented a similar policy for protecting client money. This turned out to be a formidable experience. As of July 2008, VCS was administering some 1,300 separate investments. We had to hire a person just for this task.

Due to the obvious expense for such a service, VCS recently announced that it could no longer provide this service for free and we advised that we would no longer offer the service at no cost. (This new policy did not apply to CRF investments). We advised our clients that they (the strata councils) would have to instruct us if they wanted us to purchase investments and, if so, there would be a \$25 service charge.

Then came the Wall Street/AIG./Lehman Bros/Fannie May/Freddie Mac/Goldman Sachs debacle. The shocking revelations sent the world economics into a tailspin and governments everywhere reacted swiftly to prevent a perilous collapse of the system and one of the key strategies

implemented was to shore up public confidence in the banking system. To do this they guaranteed deposits. In other words, depositors would no longer have to worry about losing their money. This strategy is designed to stop “the run on the banks” and it would appear that it has worked to quash the potential panic that was emerging by depositors.

In British Columbia, credit unions are regulated by the provincial government and on October 22nd (2008), Premier Gordon Campbell announced that credit unions will enjoy unlimited deposit insurance protection (up from the previous \$100,000 limit).

In Canada, banks are regulated federally and the Finance Minister (Jim Flaherty) announced on October 23rd (2008) that all bank deposits will be backed by the government of Canada.

So, what does all this mean for strata corporations? Essentially your money is safe if the bank or credit union where you have funds deposited should fail. For VCS, it means that we no longer have to monitor those client balances and worry about potential losses. Not only does this new policy apply to operating funds and special levy funds, it also applies to CRF money. Bonus!

At this time VCS has various client investments (those 1,300 separate certificates) totaling some \$50,000,000. These can, at maturity, just be rolled over and plunked into your Coast Capital Credit Union account.

Good news!

2. Insurance Update

Here is the latest news from BFL Canada on the 2009 insurance renewal.

1. The average increase in premium for 2009 will be 10% (which is what we generally expected; however, some increases are as much as 20%) BUT...
2. Starting in 2009 (after the January 1 renewal), any renewals will likely see a 20% increase in premium. If your policy comes up any time after January 1, 2009, it would be wise to budget at least 20% for the premium. VCS continues to recommend a 10% increase just for

the building value. Construction costs may soften as we see the economic downturn in the coming year but, for now, stay with the 10% factor.

3. Any building over 4 stories will now see a \$5,000.00 deductible for water losses. This is irrespective of claims. It is just a new policy by the underwriters.

The above items pertain to insurance policies with BFL Canada (which is most of VCS clients), but the trend should be considered universal. Other brokers and underwriters are likely to follow this pattern.

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3. Voting at General Meetings For Dummies

At this time of year we are asked on a regular basis questions relating to who is able to vote at the upcoming Annual General Meeting, why a certain owner owing money can still vote, why a certain issue must be addressed by a $\frac{3}{4}$ vote and not decided by a majority vote, etc... Well, here is as straight forward an explanation as we can muster.

Before we get into the actual vote itself, it is helpful to have a good understanding as to who is eligible to vote in the first place. Section 54 of the *Strata Property Act* states:

54. *The following persons may vote at an annual or special general meeting:*
 - (a) *an owner, unless a tenant or mortgagee has the right to vote under paragraph (b) or (c);*
 - (b) *a tenant who has been assigned a landlord's right to vote under section 147 or 148, unless a mortgagee has the right to vote under paragraph (c);*
 - (c) *a mortgagee of a strata lot, but only in respect of insurance, maintenance, finance or other matters affecting the security for the mortgage and only if*

- (i) *the mortgage gives the mortgagee the right to vote, and*
- (ii) *at least 3 days before the meeting the mortgagee has given to the strata corporation, the owner and the tenant referred to in paragraph (b), if any, written notice of the mortgagee's intention to vote.*

Or to look at it from the other side (who cannot vote), strata lot owners are eligible to vote at a general meeting, unless one or more of the following are in evidence:

- pursuant to a bylaw they are ineligible to vote on resolutions requiring a majority or $\frac{3}{4}$ vote due to unpaid strata fees or other monies owing, or
- they have assigned their right to vote on certain matters to tenants or mortgagees, or
- they lack capacity to vote or are under sixteen years of age, or
- there are two or more owners of a strata lot, in which case only one owner representing the strata lot may vote on any given matter (if owners who share a vote cannot agree on how their vote should be cast, the vote in respect of their strata lot will be discounted by the chair of the meeting), or
- tenants who have been assigned a landlord's right to vote, or
- residential tenants who are family members as defined in the Regulations or who have entered into a lease of three years or greater, or
- mortgagees who have given the strata council a notice of an intention to vote, or
- the Public Trustee or other person appointed by the court.

Simple, right? Many of the above are once in a blue moon situations... the most common confusion relates to when an owner is still entitled to vote even though there is money outstanding on their account. The vast majority of strata corporations that have a bylaw allowing the disenfranchisement of an owner that owes money will allow for the vote to be cast unless the strata corporation is in a position to file a lien on the owner's account. This means that a lien warning letter needs to have been sent and the 21 days stipulated for receiving payment need to have elapsed.

With respect to the votes themselves, as detailed in Section 50 of the *Strata Property Act*:

- 50 (1) *At an annual or special general meeting, matters are decided by majority vote unless a different voting threshold is required or permitted by the Act or the regulations.*

- (2) *Despite section 45 (3), during an annual or special general meeting amendments may be made to the proposed wording of a resolution requiring a 3/4 vote if the amendments*
- (a) *do not substantially change the resolution, and*
 - (b) *are approved by a 3/4 vote before the vote on the resolution.*

A majority vote requires the support of more than $\frac{1}{2}$ of the votes cast by eligible voters present in person or by proxy at a general meeting who have not abstained from voting. As noted, all resolutions should be determined by a majority vote, unless the Act or Regulations require an alternative level of voting approval. A $\frac{3}{4}$ vote requires the support of at least $\frac{3}{4}$ of the votes cast by eligible voters present in person or by proxy at a general meeting who have not abstained from voting. Lastly, a unanimous vote requires the support of all voters. Only exclusively non-residential strata corporations or sections can pass a bylaw which allows new bylaws to be approved by a voting threshold of other than a $\frac{3}{4}$ vote.

Example of Strata Corporation decision that requires a Majority Vote:

- approving the budget

Examples of Strata Corporation decisions that require a 3/4 Vote:

- create, amend or remove bylaws for residential lots and non-residential lots
- approve special levies when the method of payment of the levy is based on unit entitlement;

Examples of Strata Corporation decisions that require a Unanimous Vote:

- approve changes to the schedule of unit entitlement;
- approve a method other than by unit entitlement, in which a special levy will be assessed to the owners;
- amend a strata plan to designate or remove a designation of limited common property or divide a strata lot into two or more strata lots,
- change the basis for calculating a strata lot's contribution to the operating fund and contingency reserve fund.

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4. Alleged Bylaw Violations

Recently, at a strata corporation VCS manages, an owner was witnessed bringing a dog into the building on three separate occasions, in violation of a “no dog” bylaw. Not only had the building manager verbally warned the owner not to bring the dog to the building, but also the individual incidents were recorded as evidence on the building security cameras.

When the building manager made the agent aware of the alleged bylaw violations, a letter was issued to the owner notifying him of the complaint and giving him an opportunity to respond in writing (and for a hearing with council, if he so chose). The owner did respond in writing, citing ignorance of the bylaw as his excuse, and requested a hearing with the strata council to explain his objection to the levying of any fines. Council agreed to a hearing with the owner to hear his side of the story.

The events to this point were detailed in council meeting minutes and distributed to all owners. Several owners wrote to council expressing dismay at the thought of the owner being “let off the hook” on such a clear and flagrant violation of the building bylaws.

Much to the contrary, the procedure the strata council and agent followed was exactly correct. No matter how obvious a bylaw contravention may seem, every owner is entitled to the exact same treatment as his or her neighbours. Section 135 of the *Strata Property Act* clearly lays out the procedure that must be followed before any penalty is imposed on an owner:

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.*

This is often a bitter pill to swallow for councils and owners, especially in cases where it would seem that there is no excuse or justification for a bylaw violation. However, to prejudge an incident and to deny an owner the right to a hearing or to decide on a fine before the person has a reasonable opportunity to respond to the complaint opens the door to the possibility that the fine will be overturned in court.

VCS urges all our strata councils to be patient when dealing with alleged bylaw violations, and to ensure that the proper procedures are adhered to. Though individual cases may appear simple and straightforward, every owner has a right to have his/her case heard and strata councils have a duty to be fair in not prejudging alleged violations.

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5. Employee V. Contractor

It is increasingly common for individuals to work as independent contractors instead of as employees. There are pros and cons to both approaches, but your strata corporation could be facing a significant financial liability if you mistakenly consider an employee as a contractor. It is not up to you to make this determination. It is not enough simply to call oneself a contractor. The courts, the BC Employment Standards Branch and the Employment Standards Tribunal have all developed various tests to distinguish between the two. Failing to understand that distinction could prove costly.

The BC Employment Standards Branch uses the following test:

Control – Is the person under the direction and control of another regarding the time, place, and way in which the work is done? Is the person hired, given instruction, supervised, controlled or subject to discipline? Did the person answer a help wanted ad, was told what to do, how to do it, and when to do it? Did the person have to do the work him or herself, or could that person give the work to another to do? Does the person perform work normally or previously performed by an

employee?

The greater the degree of control, the greater the likelihood of the person being found to be an employee.

Ownership of Tools – Does the person use tools, space, supplies and equipment owned by someone else? If so, this would indicate an employment relationship. However, it is recognized that some employers require employees to provide their own tools or vehicles.

Chance of Profit – Does the person have a chance of profit? If their income is always the difference between the cost of providing the service, and the price charged for the service, the worker may be someone other than an employee.

Risk of Loss – Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? If not, this would indicate an employment relationship.

Payment – Does the person receive payments of regular amounts at set intervals? Does the person receive payments regardless of customer satisfaction or customer payment? If so, this would indicate an employment relationship.

In general, the degree to which the party who pays for the service provided controls the supply of material and tools, and retains direction and control of the activities, increases the likelihood that the Director will find the relationship to be one of employer/employee.

Generally, the problems arise once the relationship with the individual has terminated. It is very important that the strata corporation maintain detailed records of the employment relationship in order to comply with the *Employment Standards Act* and to have adequate records in the event there is a dispute between the employee and the strata corporation.

The strata corporation could be liable retroactively for the employer's share of statutory deductions and employment benefits under the *Employment Standards Act*. This can result in significant and unexpected costs and penalties for deductions expected for an employee but not made due to the mistaken belief the individual was an independent contractor. An employer

must remit their portion of CPP and EI premiums and income tax to the government as well as vacation pay (at least four to six per cent of wages. Overdue remittances may also be subject to interest and penalties.

While a strata corporation may not be required to pay severance to an independent contractor, should that individual be determined to be an employee, the strata corporation may then be liable for severance pay.

Remember, no agreement between an employer and an independent contractor or employee is binding on the government. In fact, it is prohibited under the *Employment Standards Act* to agree to waive employment standards entitlements. A strata corporation cannot necessarily escape liability by simply designating an individual as an independent contractor.

When in doubt, seek legal counsel. A small investment in proper legal advice now could save significant additional costs down the road.

Note: The BC Employment Standards Branch “test” was taken from the **“Employee or Independent Contractor?”** Fact Sheet provided by the BC Employment Standards Branch

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