



## FEATURES THIS MONTH

1. New Requirements of the RESA
2. Late Strata Fees “Illegal”?
3. Benefits of WCB Coverage
4. Hiring Council Members/Owners

## 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. New Requirements of the RESA

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This bulletin intends to update you on a new requirement under the *Real Estate Services Act* (“RESA”) that is imposed on strata management companies and which, ultimately, impacts on your strata corporation.

The requirement is that the brokerage (i.e. the management company - in your case VCS) must provide to the strata corporation a copy of the “bank reconciliation” every month. (VCS does not deposit your operating funds into a bank but rather, as you know, your money is deposited at the Coast Capital Savings Credit Union. For the purpose of this RESA requirement, however, the word “bank” applies.

Your strata corporation may have more than one account at Coast Capital. For example, there is the operating fund and the contingency reserve fund, as a minimum. You may have, additionally, funds for special projects such as painting, leaky-condo rehabilitation, roof, lobby upgrade, etc. Each fund has its own trust account; therefore, requires a “bank reconciliation” every month.

The RESA requires such reconciliations to be done within five weeks of the month-end and then permits a further one week for the brokerage (i.e. VCS) to deliver it to the strata corporation. Here is an example (allowing for weekends):

Month-end	=	November 30/08
Five weeks	=	January 2/09
One week	=	January 9/09

If the “bank reconciliation” is not delivered to the strata corporation within the prescribed schedule, the brokerage (i.e. VCS) would be in violation of the RESA and subject to disciplinary action by the Real Estate Council (“REC”), the provincial government agency which governs the RESA. Of course, we don’t want that to happen do we?

The six-week period will end on different dates due to the length of a given month; however, in any event, it is unlikely that the required bank reconciliations can be produced and included in

your monthly financial statement which may take several weeks or longer to deliver. Therefore, it will be necessary to send them to you separately prior to the expiry of the sixth week.

This new law is effective January 1, 2009; however, it is unclear to VCS whether or not it applies to the January 31<sup>st</sup> reconciliation or the one which would have been due by mid-January (i.e. the November 2008 reconciliation). VCS commenced compliance with this new statutory requirement with the November 30, 2008 reconciliation. Your December financial statement (to all council members) contained the new reconciliation documents. You might want to look at them.

The RESA requirement states that it is to be sent to “the strata corporation”. Hmm.... what does that mean? All owners? Just the council? Just the Treasurer? VCS sought a ruling from the REC and was advised as follows:

*As per section 7-9 (7) of the Real Estate Council Rules, your strata corporation clients (which are represented by their elected strata councils) must receive, for each trust account held by your brokerage on their behalf, a copy of the monthly bank statement and reconciliation referred to in section 8-2 (b) of the Council Rules, within 6 weeks after the end of the month for which a statement was issued (regardless of whether this information is sent separately from the monthly financial statement).*

*With respect to distribution of this information, it would be up to Vancouver Condo Services to confirm and keep records of which strata council member(s) are to receive this information on an on-going basis on behalf of their strata corporation (i.e. treasurer, president, all council members, etc).*

Prior to receiving this written directive, VCS was verbally advised by the REC that “just the Treasurer would be okay”, but note that the written advice from the REC is somewhat ambiguous. At this time, VCS will send the bank reconciliation for each trust account only to the Treasurer. The amount of paper involved to send these documents to all council members would be staggering. We have decided that, for now, the documentation will be mailed only to the Treasurer. Perhaps, at a later date, we might use e-mail. If there is no Treasurer on your council, we will mail the document to the President of your council.

Note the instruction from the REC that we are to keep a record of which strata council member received the documentation on an on-going basis. We are required by RESA to keep records for seven years, so we will have to set up a binder to record the names of specific council members that receive all of the bank reconciliations for each of your trust accounts (at least two per strata, often more) for every month for the following seven years.

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## 2. Late Strata Fees “Illegal”?

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It is universally accepted in strata corporation administration that owners who do not pay their monthly strata fees on time (or at all) must be fined for such indiscretion. Typically, the fines are \$25 but in some strata corporations these fines are set at \$50 or higher. VCS manages some accounts which have \$200 fines for late or non-payment.

What would you say if we told you that virtually all of these fines would be set aside if ever challenged in a court of law? It is likely true.

Let's start with the easy one. A fine of \$200 is likely never to be accepted by a court, simply because it is usurious. A good lawyer will knock this one off the docket very quickly and it will not matter that the strata corporation has a bylaw authorizing such an amount. No bylaw can violate other laws of the country - including the *Criminal Code* which addresses interest rates which are excessive. Do the math. A \$200 fine in one month on a strata fee of \$300 for that month amounts to a staggering interest rate (about 800%).

The next problem is that many strata councils levy late payment fines without having a bylaw to authorize the amount. In these cases, they generally rely on either an omnibus type of bylaw that covers all their bylaws such as “the corporation may levy a fine of up to \$200 for the violation of any bylaw of the strata corporation” or the general provisions of Section 130 of the Act which says the “strata corporation may fine an owner....”. Since the payment of strata fees is a requirement of the Standard Bylaws, councils feel comfortable with the model bylaw of the Act. (Bylaw 1 - An

*owner must pay strata fees on or before the first day of the month to which the strata fees relate.)*

Section 132 of the *Strata Property Act* says in part:

- (1) The strata corporation must set out in its bylaws the maximum amount it may fine an owner or tenant for each contravention of a bylaw or rule.

It is clearly evident then, if your strata corporation is levying a \$25 fine (or other amount) for late or non-payment of strata fees, if you do not have a bylaw, you are likely in breach of the *Strata Property Act*.

It gets worse.

Leave aside for a moment the issue of having or not having a bylaw. Here is the biggest problem.

Strata councils instruct their management companies to automatically levy fines every month for late or non-payment of strata fees. This is sometimes referred to as a “standing order” or an “automated process”. Based on this instruction, the property management firm then, every month, reviews the accounts receivable ledger and levies a fine (with or without a bylaw) on any owner’s account that is delinquent. The owner gets an arrears statement and it’s a done deal.

There are three problems with this process:

- (1) Section 135 of the *Strata Property Act* requires that an owner who has allegedly contravened a bylaw MUST have an opportunity for a hearing BEFORE the fine is imposed. What this means is that, if an owner is late in paying his/her fee, the strata corporation (through its management agent) must send a letter to that owner to essentially say “*you have not made your January strata fee payment and since that is a violation of the bylaws, you may be subject to a fine of \$25 in accordance (gulp) with the bylaw of Strata Corporation XYZ. Before this fine is imposed on your account, you are entitled to a hearing before the strata council. Please respond within two weeks from the date of this letter if you wish such a hearing.*”

This letter would have to be sent to every owner in arrears and the fine(s) could not be added to the account(s) until the hearing takes place or the stated time period expires. (The *Act* does not provide a time period so should it be one week, two weeks, a month? Who knows, but it has to be reasonable.

- (2) The second problem is that this process must be done every month. The failure to pay a monthly strata fee is a specific violation. If the same owner fails to pay for several months in a row, this is not a “continuing contravention”. Section 135(3) allows the strata corporation to impose fines “*without further compliance with this section.*” So, each month is a new violation and the entire bureaucratic process has to be started again.
- (3) The third problem is that management agents do not have the authority to levy fines (bylaw or not, hearings or not). Only the strata council has the authority to make the determination that an owner is in violation of the bylaw to pay the strata fee. This authority cannot be conferred upon the property strata agent. In other words, technically speaking, the strata council would have to review the accounts receivable ledger every month, one owner at a time and decide whether or not there is a violation of the bylaw. Each decision would have to be minuted. Just imagine!

So, let's say that all the above is correct, is it likely that strata councils and management companies will do anything different from now on? Probably not. In all likelihood it will be “business as usual” and the fines will be slapped on just as they always have been before today. The reality is that very few owners legally challenge the process: they just gripe about the situation and/or frequently ignore the fines on their account. Most of the fines (happily for the strata corporation) are eventually collected since the owners sell or remortgage their units and, to do so, require “certificates of payment” (the Form F) from the strata corporation. Despite their objections, the owners are forced to pay through this process.

The real solution to this dilemma is, of course, to amend the *Strata Property Act* so that the levying of fines for late or non-payment of strata fees is not subject to the hearing process outlined above. (You should read Section 135.)

In respect of the other matter, however, that being the requirement to have a bylaw in place to specifically target late or non-payment of strata fees, we urge our clients to review their bylaws and, if one is not registered, then do it at the next opportunity.

The Act is not about to be amended anytime soon, so the process of having the property managers levy the fine, and the matter of these decisions not being minuted for each and every instance, each and every month, will likely mean that late strata fee fines are “illegal”.

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### 3. Benefits of WCB Coverage

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In the eyes of the Workers Compensation Board, the strata corporation is considered an employer, which means the strata corporation must be registered with Worksafe BC and must pay annual premiums. The workers' compensation system in British Columbia provides two-way protection. Since 1917, when the WCB came into being, this no-fault system has been funded by employers in exchange for immunity from lawsuits by workers with an occupational injury or disease.

The majority of contractors a strata corporation may hire - such as janitorial, landscaping, fire service, etc. are supposed to carry their own WCB insurance. However, there are some exceptions. If the contractor that you wish to hire does not have employees and is deemed to be a “one man show” then legally they do not have to carry WCB. If the strata corporation engages in such a firm then it becomes the employer.

From time to time councils wish to hire their own contractors rather than use the ones recommended by VCS. We often discover that these contractors either do not have WCB coverage or are delinquent in their premium payments to WCB. When we receive an invoice to pay, which

has been approved by council, we first check with WCB to see if the contractor's status is in good standing. This report from WCB is known as a "clearance letter". Here are some commonly asked questions:

*What is a clearance letter?*

A clearance letter tells you whether a business, contractor or subcontractor is registered with the WCB and if they are current with their premiums.

*Why should I get a clearance letter?*

Because it protects your interests. If the business you hire is not registered or not making its payments to the WCB, the strata corporation could be liable for insurance premiums owing in connection with the work or service being performed on their behalf.

Whether the strata is seeking a contractor to do repairs or to transport manufactured goods, a clearance letter should be part of the research to select the right person or business. It gives you peace of mind, and helps you make an informed decision about who to hire for the job. Although clearance letters are not compulsory, they are free of charge and serve as a valuable reference. They give the strata corporation assurance that they won't be held responsible for someone else's WCB payments.

*When should I get a clearance letter?*

You should request a clearance letter before a contractor starts working, and again before you make the final payment to the contractor.

*How do I know if a contractor is required to register with the WCB?*

Not all contractors or businesses are required to register with the WCB. Registration is required if the contractor employs people on a regular, casual, or contract basis, pays hourly or by some other method.

If the contractor is in violation of WCB the strata corporation could be deemed to be the employer and be held responsible for payment of the WCB premiums related to the specific project.

A clearance letter protects the strata corporation. It's free, and it could save the strata corporation the cost of paying for WCB premiums on a contractor's behalf.

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## 4. Hiring Council Members/Owners

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One complaint often made about caretakers and others performing work for a strata corporation is that they do not have an "investment" (financial or otherwise) in the strata corporation for which they work. As a result, it seems like a perfect solution to have an owner or tenant do the work (caretaker, landscaper etc.) The expectation is that someone who owns a strata lot in the building will look out for the strata corporation's best interests more so than a non-owner might.

There is nothing in the *Strata Property Act* that prevents the strata corporation from hiring an owner, resident or tenant to provide services required by the building. In fact, there is nothing in the *Strata Property Act* to prevent the strata corporation from hiring a strata council member as an employee of the strata corporation.

All council members are bound by Section 31 of the *Strata Property Act* which requires a strata council member to "act honestly and in good faith with a view to the best interests of the strata corporation." This does not preclude a council member from being an employee as well.

Section 32 of the *Strata Property Act* requires that a strata council member who has a direct or indirect interest in a contract with the strata corporation promptly and fully disclose the nature and extent of his or her interest, abstain from voting on the contract and leave the council meeting when the contract is discussed and voted on. Obviously, in most employment contract arrangements, the interest in the contract will be apparent; however, the council member should still ensure that they clearly and demonstrably comply with this requirement in order to prevent the strata corporation from obtaining an order to set the contract aside (Section 33).

Failure to fully disclose may open the door for the strata council or an owner to apply to the court to do any or all of the following:

- (1) Set aside the contract;
- (2) Require the council member to pay compensation to the strata corporation; and
- (3) Require the council member to pay any profits made from the contract to the strata corporation. Should full disclosure not have been made at the beginning, another alternative is to ratify the contract, after the fact, by a resolution passed by a 3/4 vote at an annual general meeting or special general meeting.

While it may be obvious that a strata corporation should have a written contract with a caretaker regardless of whether it is an owner/council member or not, the strata corporation should have written contracts even for smaller contracts to ensure the terms are clearly understood by both sides. Ideally, any contract should outline:

- the employee's duties
- salary and benefits
- vacation
- length of employment
- termination provisions
- other similar aspects

Any time you have any doubt, consult the experts. There are many excellent labour lawyers in the Lower Mainland.

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