



## FEATURES THIS MONTH

1. Landfill Rates Changing
2. Changes To The Strata Property Act
3. Don't Call Us: It's Your Problem

## 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. Landfill Rates Changing

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As of January 2, 2010 the garbage disposal rates at all Metro Vancouver (formally GVRD) regulated and operated facilities will be increasing fees for waste disposal from \$71 per metric ton to \$82 per metric ton. The waste disposal companies such as Waste Management, Smithrite, Emterra, BFI Services, Superior Disposal, Northwest Disposal, Waste Control Services will be passing this increase on to their clients. The projected increases will be around 10% to 15%.

Don't forget to factor in the 12% HST tax which will take effect July 1, 2010 which will add an additional 7% annually to the overall garbage disposal contracts.

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## 2. Changes To The Strata Property Act

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The Provincial Government has passed changes to the *Strata Property Act* which are effective January 1, 2010. If you wish to read all the amendments you may access them at [http://www.leg.bc.ca/39th1st/3rd\\_read/gov08-3.htm](http://www.leg.bc.ca/39th1st/3rd_read/gov08-3.htm). The purpose of this bulletin is to alert you to some key changes. We also offer our opinion on the changes. Your feedback is welcomed but do keep in mind, this is a "done deal". It is not possible to now persuade the government to make changes to the amendments they have enacted.

1. **Disclosure of Conflict of Interest:** Existing Section 32 is entirely repealed and replaced with the following:

*Disclosure of Conflict of Interest:*

32 *A council member who has a direct or indirect interest in*

- (a) *a contract or transaction with the strata corporation or*
- (b) *a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member must*

- (c) *disclose fully and promptly to the council the nature and extent of the interest*
- (d) *abstain from voting on the contract, transaction or matter, and*
- (e) *leave the council meeting*
  - (i) *while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and*
  - (ii) *while the council votes on the contract, transaction or matter*

We have underlined the key difference between the old and the new wording.

VCS Opinion: The word “*matter*” has been introduced because council members with a potential conflict position were previously able to avoid this section and the entire concept of disclosure by saying that the issue (i.e. matter) was not a “contract or transaction”. This is true; however, we do not believe that the new and improved wording will make much of a difference to those persons who refuse to understand the concept of conflict. There is no penalty or consequence to a violation so it is really a “toothless” tiger. Very fortunately, the vast majority of VCS clients (strata council members) understand the concept and that is good.

2. **Request for Council Hearing:** This is a new section and reads as follows:

- 34.1(1) *By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.*
- (2) *If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.*
- (3) *If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing*

The section, we believe, is self-evident and requires no explanation. Clearly, though, strata councils must now accommodate a request from an owner or tenant who wishes an audience with the strata council. Council does not have the option of declining the request.

VCS Opinion: We do not think there will be a flood of requests. In any event, in our experience (at least in respect of VCS clients) strata councils are more than willing to accommodate such requests. Heads up, though, on the time lines prescribed. Council will have to heed the “4 weeks” requirement and property managers will have to heed the “one week” provision.

3. **Special General Meetings Called by Owners:** The threshold is changing from 25% of the (owners') votes to 20% for owners to force a Special General Meeting.

VCS Opinion: The government obviously feels that more power ought to be given to the owners generally and is making it easier for them to direct strata councils. In actual fact, it is rare to see such SGMs so we do not believe this reduction from 25% to 20% will generate SGMs "like never before".

4. **Notice Given by the Strata Corporation:** There are a variety of methods that a strata corporation has at its disposal to distribute notices (i.e. AGM notices). E-mail is now included. That may seem obvious in today's world but remember the *Strata Property Act* was written in the late 1990s and implemented in July 2000. In those days, believe it or not, e-mail was in its infancy in terms of general widespread communications.

VCS Opinion: We have no objection to this change; however, we caution our clients that e-mail will not anytime soon at VCS replace the standard methods of notifying owners. There are many and substantial reasons for this policy, which are not relevant in this article, but suffice it to say that e-mail will not automatically become the new method of delivery in January 2010.

5. **Limits to Pet & Age Bylaws:**

The existing Section 123 (2) of the Act states:

- 123 (1) *A bylaw that prohibits a pet does not apply to a pet living with an owner, tenant or occupant at the time the bylaw is passed and which continues to live there after the bylaw is passed.*
- (2) *A bylaw that restricts the age of persons who may reside in a strata lot does not apply to a person who resides in the strata lot at the time the bylaw is passed and who continues to reside there after the bylaw is passed.*

A new sub-section is added at Section 123 to read:

- (1.1) *Without limiting a strata corporation's power to pass any other bylaws, a strata corporation may pass a bylaw that restricts the age of persons who may reside in a strata lot.*

We believe the additional wording is self-evident, (albeit mis-numbered).

VCS Opinion: None.

6. **Bylaw Amendment Procedures:** Prior to the *Strata Property Act* (July 2000), if a strata corporation passed a bylaw amendment at an AGM or SGM, there was no time limit as to when it had to be registered in the Land Title Office. An amendment was not effective, however, until such time as it was registered. The *Strata Property Act* changed that and required that a new bylaw had to be filed in the LTO within 60 days of passage or else it was null and void.

The current amendment to the Act reverts to the old *Condominium Act* requirement. In other words, the 60 day provision is gone. Note that an amendment “has no effect” until such time as it is registered in the LTO.

VCS Opinion: None.

7. **Provincial Court:** Until now, under the *Strata Property Act*, certain legal issues could only be resolved in the Supreme Court of British Columbia. The new legislation allows the Provincial Court to be used in certain legal disputes. Two areas of dispute rarely visit strata corporations. They are:

Section 52 (2) Unanimous votes disputes

Section 58 (1) Voting rights of a strata lot if there is no person

The following two areas of dispute were formerly heard only in B.C. Supreme Court. Now they can be heard in Provincial Court.

Section 164 (1) the right of an owner or tenant to bring an action against the strata corporation:

- (a) to prevent or remedy a significantly unfair action or decision of the council or the corporation in relation to that owner or tenant or;
- (b) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an Annual or Special General meeting.

What is very important to note here is that Provincial Court means, effectively, Small Claims Court. In other words, an owner or tenant no longer has to rely on the Supreme Court of British Columbia for a hearing on such disputes. Supreme Court is an expensive process and, although having a lawyer in Supreme Court is not mandatory, very few lay people are sufficiently skilled to represent themselves. Small Claims Court is the “Peoples’ Court” as you may know from past experiences in respect of debt collection. Strata councils and strata corporations will now have to contend with the “Peoples’ Court” approach to lawsuits for issues other than debt.

VCS Opinion: This is a huge “heads up” for strata councils. The new provision now opens the door wide for owners and tenants to apply to the Small Claims Court for a Hearing. Essentially, any “action, threatened action or decision” of the strata council or the strata corporation can be challenged by an owner or a tenant in Small Claims Court where that owner or tenant can represent him or herself. This could easily turn into a nightmare. We predict that, over the next few years, this new provision will become a thorn in the sides of strata councils and corporations. Remember also that, in Small Claims Court, you pay your own legal fees. Even if you win against an owner or tenant, you still pay your own legal costs. Also, Small Claims Court entails a series of steps prior to trial. First there is mediation, then there is a settlement conference, then the trial. Oh boy! Just think of the “decisions” that you routinely make at monthly council or general meetings and now reflect on the possibility that those decisions can drag you into Small Claims Court in a flash.

Keep in focus the term “*significantly unfair*” that is used in Section 164 (1). An owner or tenant must show that they are affected in a “*significantly unfair*” manner. Not just unfair, but *significantly* so. This language works to the benefit of a defending strata council or corporation; however, you might well imagine that the allegations by owners or tenants will be easily made but the defenses will be very difficult. Strata councils and corporations will require not only (expensive) legal counsel but also (expensive) expert witnesses to distinguish between unfair and *significantly unfair*. To date, such distinctions have been dealt with by judges of the Supreme Court of B.C. and, with no disrespect to Small Claims Court judges, this new forum will be a whole new area of law for them to immerse themselves.

This one is a very big worry.

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There are other important changes to the *Strata Property Act* which we will explore next month.

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### 3. “Don’t Call Us: It’s Your Problem”

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*The following is a true incident, but not involving a VCS managed property.*

An owner suffered water damages to the ceiling of his strata lot which was caused by a dishwasher that overflowed from the unit directly above. The owner called the management company (not VCS) of his strata corporation to ask that the damages be repaired. The management company told him, “Sorry, we can’t help you: it’s a problem between you and the owner above”. The owner then asked the property manager why the strata corporation and its insurer would not assist and he was told that the insurance broker had stated that, pursuant to a recent court ruling and other legal advice obtained at professional seminars, the position of the insurance industry is that such incidents as this one do not obligate either the strata corporation or its insurers to take any responsibility to rectify resultant damages. It is essentially up to the owners to resolve themselves.

VCS is well aware of this type of advice that is now being promulgated throughout the industry and clearly, for the record, VCS disagrees with such advice. In fact, we think it is appalling that such misinformation and ill advice leaves affected condo owners without any recourse for restitution of damages to their properties. In the case reported above, the water loss damage insurance deductible was \$2,500 and the necessary repairs amounted to about \$1,000. In the overall scheme of things, very annoying, but certainly not sufficient to warrant the expense of hiring a lawyer and/or litigating in court. In recent years, though, we have seen deductibles (particularly for water loss claims) increase substantially. Many strata corporations are now saddled with water loss deductibles of \$25,000 to \$100,000. Thus, in the case reported above, the cost to the affected owner is perhaps “no big deal” but just imagine if a major water incident occurs in a strata corporation that has a \$100,000 water loss deductible. For example, let’s say that a tenant or owner has a marijuana grow operation that comes loose (and they do) and the water damage is substantial to a number of strata lots below (as is often the case). Now, it is a big deal and the question is clearly more obvious: why are the affected owners left to fend for themselves? Why do not the strata corporation and/or the insurance underwriter have any responsibility to repair the damages?

The mis-advice that is prevalent stems from two sources. One is a court case known as the Mari decision. The second is from a series of seminars sponsored by a professional property manager association for ongoing education and licensing requirements of strata property managers.

The Mari decision is widely misunderstood and, as a result, widely mis-used. In Mari, an owner (the Mari family) was held accountable by the court (The Supreme Court of British Columbia) to reimburse the strata corporation \$5,000, being the amount of the water loss deductible of the strata corporation's insurance policy. The Mari's washing machine overflowed and caused considerable damages to other units below. The court found that the Mari's were "responsible" for the incident since they owned the washing machine (which overflowed as a consequence of a malfunctioning control switch deep inside the guts of the machine). The significance of this decision is that the owners were held to be responsible not negligent. Up until the Mari decision, court decisions and awards were essentially and generally premised on the concept of negligence which is a much higher and more difficult standard to prove. For example, would we consider an 80 year old woman living on her own to be negligent if a shut-off control switch deep in the guts of her washing machine failed? Likely not. But certainly it is much easier by a long shot to say that she should be held accountable for the water damages because she owns the washing machine and is, therefore, responsible for what might occur as a result of using that washing machine.

That is all that the Mari decision is about: the difference between negligence and responsibility. Sadly though, that decision has been used wrongly by many people to avoid reliance on the strata corporation's obligation to invoke its rights of the insurance policy and to the insurance underwriters to restore damages as needed.

Section 158 of the *Strata Property Act* clearly states that an insurance deductible is a common expense of the strata corporation. Repeat: a common expense of the strata corporation (to be paid for by owner contributions i.e. strata fees). The Mari decision did not nullify this statutory direction. Section 158 (1) 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). (Underline added)***

Section 158 then recognizes that there may be times when a strata council/corporation will have good and legitimate reasons to recover that deductible. For example, the guy who grows marijuana and creates a \$70,000 water loss, clearly should be charged back the deductible, right? That is a very possible, normal reaction that a strata council would want to pursue and the Act recognizes this and allows at Section 158(2) the opportunity to recover such deductibles by suing the owner. It states:

***Insurance deductible***

*158 (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.*

When this section of the legislation was created (in 2000) the legislators understood and recognized that strata councils might well have legitimate reasons for attempting to recover deductibles, but the legislators also recognized that owners (and tenants) must be protected from capricious, biased or unfair decisions that may be made by strata councils in determining whether or not chargebacks should be implemented. For example: council likes Helen since she is a long-standing council member and has given hours of time to her strata corporation so “we won’t charge her the deductible”. Council does not like Bob because he is always late with his payments and has loud parties so “we will charge him the deductible”. The legislators wished to avoid this type of bias; therefore, while allowing the opportunity for chargeback, they required that the strata corporation still had to litigate for recovery. This process would ensure a fair and impartial hearing on the incident in a court of law and not leave it to the strata council to make that decision. Prior to the Mari decision, when suing, the strata corporation had to prove “negligence”. Post-Mari, the strata corporation only has to show the lower standard of “responsibility”. That is the point and the only point of the Mari decision. It did not eliminate the requirement to litigate.

The second reason has to do with the course material at professional seminars. The advice (opinion) that has been dispensed with surety at these seminars (in respect of strata corporation insurance requirements) is not always correct. In particular, students at these seminars (i.e. property managers, insurance brokers, claims adjusters) have been told that the strata corporation is not liable to address certain types of claims. Examples to distinguish claims have been given as follows:

- A hot water tank on the roof of a strata corporation leaks and causes damage to a dozen units below. Because the tank belongs to the strata corporation, the strata corporation is liable to address the damages and make good necessary repairs through its insurance program.
- Bob, the party guy in 1102, allows his bathtub to overflow and damages occur to a dozen units below. This has nothing to do with the strata corporation; therefore, neither the strata corporation nor its insurance underwriter has any liability to address the issue. It is up to the dozen affected owners to duke it out with Bob.

The distinction is absurd. It not only fails in common sense; it fails at law. Unfortunately, however, it has developed wide acceptance particularly with some firms in the insurance industry which may be relieved of obligations it would ordinarily have to absorb. As a result, we now have wrong advice passed out by some adjusters to property managers to tell affected owners that they are not entitled to the benefits of their strata corporation insurance. To some property managers it is also good advice because, instead of having to arrange for and supervise a damage claim (i.e. more work), it is much easier to tell an owner “Sorry, we can’t help you; it’s a problem between you and Bob”.

The problem, of course, is that the advice is just plain wrong. Here is why.

A strata corporation is obligated by law (at Section 149 of the *Strata Property Act*) to obtain and maintain property insurance. Every owner is obligated to pay strata fees. The strata fees derive from the annual operating budget and that budget includes an allowance for insurance. In other words, every owner is purchasing insurance for his/her own benefit and this concept is reinforced at Section 155 which states clearly that an owner is a “named insured”. (In fact, so are tenants and “persons who normally occupy the strata lots”.) A person who is a named insured has the right to utilize and benefit from the strata corporation’s insurance policy. Thus, it makes no difference whether the cause of an incident originates in common property or from a strata lot above. Damage in either instance must be restored through the strata corporation’s insurance policy. One cannot impose distinguishing criteria to trigger the insurance policy such as where the claim originates - i.e. the roof top boiler room or within strata lot 77.

In short, in every circumstance when and where damage is done to the strata corporation, be it common property or individual strata lots, the strata corporation must utilize its insurance policy and it must treat the deductible portion as a common expense (i.e. to be funded by the operating fund/budget). The strata corporation does have the right to recover any deductible but it must



do so only by litigating against the person who caused the incident and not by an automatic chargeback. Further, it is incorrect to tell an owner that he or she is on their own and to resolve the issue with another owner or tenant if they suffer from damages.

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