

IMPLICATIONS OF THE NEW STRATA PROPERTY ACT ON LEAKY CONDO REMEDIATIONS

Introduction and Background

Strata councils administering properties which are colloquially known as leaky condos frequently experience total rejection from their owners to undertake full scale remediation programs. In fact, during the past year or so the trend to rejection has significantly increased, probably as a result of wider commentary on the topic of so-called gold plated or Cadillac repair programs which are ostensibly unnecessary. Even when there is substantial evidence at hand, condominium owners tend to reject the notion that their properties are leaky condos and they generally react to professional advice from property managers, engineers and other consultants as unwarranted intrusion into their personal administrative affairs. Indeed, in some cases the rejection and resulting pressure from the general ownership has been so significant that even the strata council that initiates the remediation program will back down rather than face the wrath of the owners. There have been some remarkable incidences where strata council members have actually been so pressured and so convinced that they are doing the wrong thing, that they have circulated bulletins to the owners after issuing EGM notices, but prior to the EGMs, advising the owners to vote against the special resolution that is being presented. It is truly remarkable to witness and one can only speculate on the liability issues that arise from such actions.

There are other cases, however, where the strata councils, and the respective management companies, have remained resolute that the remediation programs should be undertaken and they proceed repeatedly, meeting after meeting, to convince their owners that the special resolutions to raise the necessary funds should be passed. Frequently these efforts are unsuccessful and, alternatively, these strata councils often have to settle for something substantially less as a repair program than what had been recommended by the engineering consultants. Cases can be cited where recommended projects costing anywhere up to several million dollars have been decimated to a fraction of the cost in order to appease the recalcitrant owners. (It is common practice for strata corporations to invite their developers to comment on the proposed remediation programs and virtually without exception the response of that industry is to denigrate the engineering recommendations and substitute a "caulking-gun" approach.)

In October, 1999 a remarkable judgement was rendered by the BC Supreme Court in the case of Tadeson et al (Petitioners) and The Owners, Strata Plan NW-2644 (Respondent). (SCBC Vancouver Registry #A992067, October 15, 1999). The petitioners in this strata corporation, known as Windsor Greene located at 7600 Francis Road in Richmond, were three of 35 strata lot owners in the condominium complex which fit the definition of leaky condo. They had endorsed the remedial repair program recommended by the strata council. Professional engineering reports recommended necessary repairs; however, at Extraordinary General Meetings resolutions to raise the sufficient funds to proceed with the repairs were defeated by a minority of strata lot owners. (Special resolutions require 75% approval). The court found that the strata

council had acted properly in its approach to resolving the water leakage problems; however, in view of the failure to obtain the required consent of the owners to proceed with the repair program, ie. essentially the funding thereof, the strata corporation was unable to fulfil its statutory duty to repair and maintain the property. Strata corporations are in a unique conundrum in this regard. On the one hand the strata corporation is bound by the Condominium Act of British Columbia to repair and maintain the property as a statutory obligation; however, in order to meet that statutory obligation it is necessary for the strata corporation to obtain funds from its ownership, ie. the strata lot owners. With the exception of very minor other sources of income, strata corporations do not have any mechanisms for raising funds other than through its ownership contributions. Normal operating budgets of strata corporations require only a 50% plus 1 vote to approve such contributions, whereas special resolutions require 75% affirmative votes (present in person or by proxy at the meeting). Under both circumstances, if the owners do not approve the budget or the special resolution then, effectively, the strata corporation has no funds with which to fulfil its statutory obligations. It is indeed a fascinating dilemma.

In the case at hand, the court said: "The failure of the respondent strata corporation here is not due to any neglect on its part. That failure results from the refusal of the respondent owners to authorize the work and the special assessment necessary to carry it out." The petitioners in this case argued, and the court agreed, that this amounted to a failure to fulfil a clear statutory obligation.

In its judgement the court declared that the repairs to rehabilitate the property were, in fact, required and ordered that the respondent strata corporation proceed with those repairs in such a manner as the strata council would decide. In order to finance the work the court gave authority and empowerment to the strata corporation to issue a special assessment upon the owners based on their unit entitlement in an amount of (approximately) \$313,000. On this basis, the strata corporation would be able to proceed without having to call yet another EGM. This may not be construed as a floodgate decision; nevertheless, it does constitute a remarkable precedent and one which no doubt will be relied upon in future when similar circumstances exist. I predict that there will be many similar circumstances.

The purpose of this paper is to identify and compare the statutory obligations for strata corporations under the current Condominium Act and the new Strata Property Act which will become law July 1, 2000.

The Condominium Act

It is important to first note that the existing Condominium Act, with the exception of some relatively minor amendments, remains as imported legislation from over 33 years ago. The original Strata Titles Act of British Columbia (1966) was, in effect, a plagiarism of the Strata Titles Act of New South Wales. The obligations to repair and maintain, unlike the new proposed Strata Property Act, are segmented throughout the legislation and in some instances are not all

that clear and rely heavily on user interpretation and the day-to-day practice of the property management industry. The relevant sections (edited) are as follows:

Statute

Section 35 Administrative Expenses and Reserves

A strata corporation must do all of the following:

establish a fund for administrative expenses sufficient for the control, management and administration of the common property

Section 14 Duties of Corporation

the strata corporation is responsible for the control, management and administration of the common property, common facilities and the assets of the strata corporation.

Section 34 Duties and Powers of Strata Corporation

A strata corporation must do all of the following

keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation;

comply with notices or orders by a competent public or local authority requiring repairs or work to be done in respect of the land included in the strata plan or the buildings, common facilities or assets of the strata corporation.

The strata corporation may do one or more of the following:

Carry out repairs or work required by the notice or order of a competent public or local authority on a strata lot, whether authorized by the owner or not.

By-laws

By-law 116 Duties of Strata Corporation

A strata corporation must do all of the following:

Control, manage and administer the common property, common facilities or other assets of the corporation for the benefit of all owners.

Keep in a state of good and serviceable repair and properly maintain the fixtures and fittings, including the elevators, swimming pool and recreational facilities, if any, and other apparatus and equipment used in connection with common property, common facilities or other assets of the corporation.

Maintain all common areas, both internal and external, including lawns, gardens, parking and storage areas, public halls and lobbies.

Maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in the strata lot, including the decorating of the whole of the exterior of the buildings.

As can be seen from the above sections of the Condominium Act and its by-laws, the wording provided by the legislation is broad and imprecise. In fact, the language and protocol offered is discomfoting and it is only common sense that has provided the interpretation to these sections and by-laws for the necessary authority to repair and maintain the property.

Note the absence of any direction or authority, either in the statute itself or in the by-laws, for a strata corporation to have a special levy or a special assessment, a very common vehicle used by strata corporations to raise funds. Yet, in over 33 years of existence, the legislation has seldom been challenged in this regard and strata corporations routinely raise money by special levy or assessment in order to fund projects which do not fall within the operating budget or could be funded by way of existing monies in the Contingency Reserve Fund or other similar fund set up by the strata corporation. In *Royal Bank versus Chan, Chan, and The Owners Strata Plan VR-857* (June 1995) the BC Supreme Court determined that special levies raised by a special resolution of the strata corporation did not take priority to the claim of the bank as compared to the normal contributions (ie. monthly maintenance fees) of the owners pursuant to Section 35 of the act. In a later case, however, this decision was overturned and in *Royal Bank v Holden* (H950893 Vancouver Registry) the court determined that special levies raised by a special resolution are tantamount to common expenses contemplated by Section 35 of the act. As a result, strata corporations can now raise money by special assessment notwithstanding the absence of language within the Condominium Act.

The language of Section 35 is far from comfoting when, upon close examination of the actual wording, it is obvious that there is no mention of the need for the strata corporation to in fact have a budget. The only reference to having a budget is found in the by-laws to the act at Section 128. Even here the wording is convoluted and subject to extensive interpretation. At Section 128 (1) the strata corporation retains authority by virtue of the by-law which reads as follows:

The strata lot owner's contribution to the common expenses of the strata corporation must be levied in accordance with this by-law.

A number of subsections follow and at subsection (8) the strata corporation at the first Annual General Meeting *"must cause to be prepared a budget "*.

By-law 128 subsection (9) requires all owners, including the owner developer to *"pay a monthly assessment based on that budget determined in accordance with their unit entitlements"*.

Subsection (11) states that *"At each Annual General Meeting the strata corporation must prepare an annual budget and all owners must pay a monthly assessment in accordance with their unit entitlement"*.

All of these scattered bits and pieces of concepts and words, strung together like leftover lumber to build a house, constitute the authority for a strata corporation to extract money from its ownership. Luckily, as stated earlier, common sense has prevailed and this mishmash of authority has been sufficient for strata corporations to survive.

Strata corporations that have undergone extensive and expensive building envelope remediation have for the most part relied on the special resolution mechanism to raise the necessary monies. A special resolution is defined in the interpretation section of the Condominium Act (Section 1) which states: *"A special resolution means a resolution passed at a properly convened general meeting of the strata corporation, of which at least 14 days notice specifying the purpose of the special resolution has been given, by not less than of the votes all persons entitled to vote on the resolution under this act or the by-laws, present at the meeting in person or by proxy at the time the resolution is passed."*

In some cases, although rare, the special assessments flowing from these special resolutions are due and payable in full immediately upon passing of the resolution. Since this would normally place an extraordinary financial burden on individual condominium owners, the vast majority of such special resolutions provide for payment over a period of time, anywhere from three months to as much as a year or two years. In most cases, remediation projects are completed over one year; thus, raising the full amount immediately is not necessary. Extending the payment program beyond one or two years is not workable though, since contractors require payment upon completion of their work. Most, not all, strata corporations raising a special levy over an extended period of months require full settlement of the balance due if an owner sells his or her strata lot during the extended payment period. This cannot be done under the new Strata Property Act. (See later discussion regarding Section 109.)

Since such special resolutions require the standard 75% affirmative vote, it is quite possible that a strata corporation is unable to achieve this goal if a determined group of owners, albeit in the minority, consistently vote against the special resolution. As an alternative, some strata councils

have resorted to raising huge amounts of money for remediation projects, not by special resolution and as a special levy, but rather by an operating budget line item (ie. Section 35). Although it may distort the budget, almost humorously, there is in fact nothing wrong with this process provided that the funds are collected over a 12 month period in accordance with the budget and consistent with Section 35 (4) which states: *"Unless otherwise provided in the by-laws, the contributions levied under subsection (1)(d) become due and payable on the first day of each month."* In 1999 there was a significant court ruling in support of this process and that is *Marco Polo Properties v The Owners of Strata Plan LMS-1328*. In the reasons for judgement the court stated: *"At its Annual General Meeting a majority of the respondent owners passed a budget resolution requiring that each unit owner pay a proportionate share of a \$2,467,000 assessment intended to fund the repair of the waterproof envelope of the buildings comprising the project."* Marco Polo (the developer) contended that the actions of the strata council in including the huge amount for remediation in the annual operating budget was not proper. The court disagreed. The learned judge went on to state: *"I am satisfied that in the circumstances of this case, the inclusion of the remedial cost to repair the waterproof envelopes of the buildings in this development was properly included in the respondent's annual budget under Section 35 (1) (a). That section requires that a strata corporation must: establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation. In my opinion, included in those obligations is the respondents duty to repair, required by Sections 14, 34(1)(d), and 116(b), (d) and (f).*

"While the act does contain specific provisions requiring the passing of special resolutions to obtain funding for expenditures deemed necessary by the strata corporation, there is no such specific reference to remedial or repair work which is identified as being necessary as part of the annual budget process required to be undertaken by a strata corporation. I am not prepared to read into the act such a requirement, notwithstanding the amount of the assessment at issue in this case. In my opinion, unless the act specifically requires the approval of 75% of the unit holders before an assessment can be made, the general democratic principles of condominium living and administration should prevail."

What can be seen from these two cases is that repairs to leaky condos under the current Condominium Act can be funded in a number of ways even though the necessary statutory provisions are either weak or totally absent. With the new Strata Property Act on the horizon (and it may very well be a distant horizon) the statutory provisions are quite different.

Strata Property Act

By contrast with the Condominium Act, the proposed Strata Property Act is a vast improvement in concept and language. The new legislation is logical and relatively clear in its intent: users will no longer have to "create" law as they have had to do with the Condominium Act in the past.

Part 6 of the statute is headlined FINANCES and Sections 91 to 118 clearly lay out the authority and procedures for strata corporations with respect to budgets, maintenance fees, special assessments, etc. Sections 91 and 92 essentially replace Section 35 of the Condominium Act and it is now very clear that the strata corporation is given authority to raise money for its operations and to assess the owners. Section 91 states: *"The strata corporation is responsible for the common expenses of the strata corporation."*

Section 92 states: *"To meet its expenses, the strata corporation must establish, and the owners must contribute, by means of strata fees, to (a) an operating fund for common expenses that usually occur either once a year or more often than once a year, and (b) a Contingency Reserve Fund for common expenses that usually occur less often than once a year or that do not usually occur."*

Section 103 states, in part: *"The strata corporation must prepare a budget for the coming fiscal year for approval by a resolution to be passed by a majority vote at each Annual General Meeting."*

In terms of leaky condo remediation, the improvement in the language is not all that significant but it is important to note that the creation of a budget is now clearly established as a statutory obligation rather than as a by-law (remembering that by-laws can always be changed). The application of the Marco Polo decision will be easier with this change.

More importantly, the new Strata Property Act now provides the authority for a special levy. Section 108 recognizes that strata corporations do, from time to time, require funding from sources other than the annual budget. The interpretation section of the new statute does not provide a definition for special levy and that might have been a wise idea; however, given the detail provided by Section 108, users and the courts ought not to have much difficulty in accepting the strata corporation's authority in this vital process. What is significant is that subsection (2) permits the strata corporation to calculate each strata lot's share of a special levy in one of two methods.

The first method is essentially in accordance with the unit entitlement concept, provided a 3/4 vote has been passed at an annual or special general meeting. The new act refers to such votes as "3/4 votes" as compared to the Condominium Act which used the expression "special resolution" as defined in the interpretation section. The new expression "*special general meeting*" replaces "Extraordinary General Meeting".

The second manner in which a special levy can be calculated under the new act is to permit what the act calls "*a fair division of expenses for that particular levy*"; however, this requires a unanimous vote at an annual or special general meeting. The idea here is to recognize that there are times when a strata corporation is faced with an expenditure which should not be determined on square footage (unit entitlement) but rather on an equal basis for all owners. For example, a legal judgement against a strata corporation is, in effect, an equal charge against all owners and

has nothing to do with square footage entitlements. The new act recognizes these types of situations and provides the mechanism for this equal sharing basis. Note, however, that it does require a **unanimous** vote. While it may be reasonable to assume that a unanimous vote means having the agreement and consent of **all** voters, this is actually not the case with the Strata Property Act which has created its own definition of unanimous at Section 52 to prevent abuse of the process. This paper does not address this distinction; however, readers with a further interest should carefully review Section 52 of the new act.

Also, when conducting a 3/4 vote, the process is a little different under the new act than the Condominium Act. Under the latter, owners at the meeting who do not vote are considered as abstentions. In effect, these votes are tantamount to "no" votes when seeking a 75 percent goal. In the new act, a 3/4 vote eliminates such abstentions. The definition of a 3/4 vote "*means a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting.*" Clearly then, those owners who attend but choose not to vote will not have a negative influence on the outcome of the vote. In terms of leaky condo remediation, this will be very beneficial as often the votes are "squeakers" and can fail only by the few votes that abstained.

Subsection (3) of Section 108 requires the resolution to approve a special levy to meet all the following conditions:

the purpose of the levy;
the total amount of the levy;
the method used to determine each strata lot's share of the levy;
the amount of each strata lot's share of the levy;
the date by which the levy is to be paid or, if the levy is payable in installments, the dates by which the installments are to be paid.

Many strata corporations and management companies have essentially already implemented the terms and conditions shown above while working under the Condominium Act and, in fact, it is likely that the new legislation is based on such historic practices. Nevertheless, there are still many strata corporations (particularly those which are self-managed) which present special resolutions that are very poorly worded and do not meet these criteria. In fact, they often did not even meet the criteria set forth by the definition of special resolution in the Condominium Act.

Therefore, a strata corporation now proceeding with a leaky condo remediation program will have to be very precise in the wording that is presented to the ownership for approval. In my view, only the unit entitlement formula (that is to say the standard formula relying upon square footage) is applicable for leaky condo remediations. The equal share formula, in my view, would not be appropriate. As a side issue, whether remediating under the current Condominium Act or the future Strata Property Act, there remains an issue of some contentious nature and that deals with commercial strata lots within a "mixed" strata corporation. It is not infrequent that commercial strata lot owners object to a full unit entitlement application of the remediation

expense contribution for their commercial strata lots. They are of the view that they should pay something less since, within operating budgets, the commercial strata lots are not normally charged with the full amount for repairs and maintenance that is usually associated with a strata corporation. To the best of my knowledge, this matter is unresolved by either statute or by any precedent-setting case.

109 Payment of special levy when strata lot sold

At present, under the Condominium Act there is no mechanism to direct who pays the balance of a special assessment if a strata lot sells during a prolonged payment period. It is generally the practice that the vendor of the strata lot pays the remaining balance. The theory is that a purchaser should not be saddled with the liability especially given the fact that he or she may not know about the outstanding balance. Under Section 109 of the new act, however, the vendor (the "seller") need pay only that amount due to the date that the strata lot is conveyed and the purchaser will become responsible for the balance due after the date of conveyance. (This, by the way, is bad law.) In a leaky condo remediation program, the balance due could be very significant and if not disclosed there may well be litigation not only between the parties but also against the strata corporation, the management company, the real estate agent and the conveyance lawyers. It will happen.

51 Reconsideration of Resolution Passed by a 3/4 Vote

The single most significant change affecting leaky condo remediation is Section 51 of the new Strata Property Act. This section of the statute allows votes to be reconsidered. Under the existing Condominium Act, once a special resolution vote has been taken, it stands. Under the new legislation, providing some conditions are met, the vote does not stand and the strata council (on behalf of the strata corporation) cannot proceed with implementation of the resolution.

The statutory provisions now found in Section 51 are brand new additions to the condominium concept. In part, these additions will meet with considerable disfavour from strata corporations and, in particular, from strata councils and management companies. First, however, it should be noted that this section will only apply if a resolution which requires a 3/4 vote is passed at an Annual or Special General Meeting by persons (ie. owners) holding less than 50% of the strata corporation's votes, in other words by a minority of the owners. If a strata corporation holds an Annual or Special General Meeting to pass a 3/4 vote and more than 50% of the owners attend the meeting, this section of the statute does not apply. A low attendance factor at strata corporation meetings is frequently the case since many condominium owners are somewhat apathetic and do not involve themselves in the affairs of their strata corporations. This may not be the case in a leaky condo remediation meeting involving huge sums of money.

If less than half of the strata corporations voters are present at the Annual or Special General Meeting and a 3/4 vote is passed, the strata corporation (ie. the council) is now prohibited from taking any action to implement the resolution for one week following the vote unless there are

reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage. This wording will be open to interpretation and will surely give rise to further disputes within strata corporations, some of which may lead to arbitration or court action. If, however, the resolution is about something that does not involve safety or prevent significant loss or damage, the strata council cannot proceed with its plan of action. An example would be a resolution to undertake a painting project. It is highly unlikely that a leaky condo remediation project would be exempt, so unless there are safety issues or other extenuating circumstances, the project will be on hold.

Subsection (3) provides that, within one week following the vote, persons holding at least 25% of the strata corporations votes may, by written demand¹, require that the strata corporation hold another Special General Meeting to reconsider the resolution. If the strata council receives such a demand, the strata corporation (ie. the council) must not take any action to implement the resolution unless, once again, there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage. If the strata council does not perceive safety or prevention of significant loss or damage, then the strata corporation must hold the additional Special General Meeting within four weeks after the demand is given to the strata corporation. Just imagine the arguing that all this is going to create and consider the frustration level that will evolve when a strata council is all set and ready to commence a major restoration project, contractors are lined up, owners are informed of their assessments and then finds that it is handcuffed by this statutory restraint. Strata councils will quickly learn that the way around this one is to collect proxy votes in sufficient quantities to ensure that more than 50% of the strata corporation's votes are represented at these meetings.

If there are less than 50% of the votes at the first meeting and, presumably on the basis that there is really nothing to discuss in respect of calling the additional Special General Meeting, subsection (7) permits the president (formerly the chairman) of the strata council to call the Special General Meeting without holding a council meeting. He or she can just do it without having to first convene a council meeting.

At the new Special General Meeting, the resolution to be reconsidered must be the first item on the agenda and must be dealt with before consideration of any other matters about which notice has been given. This is an excellent idea and prevents the agenda from being manipulated to the detriment of the minority group who demanded the reconsideration. If, within a half hour of the proposed start time of this Special General Meeting there is not a quorum, the meeting cannot proceed.

¹Under Section 53(2) the strata corporation has the authority to create a by-law that the vote for a strata lot may not be exercised, except on matters requiring a unanimous vote, if the strata corporation is entitled to register a lien against that strata lot under Section 116. Section 116 permits a lien to be filed if an owner fails to pay strata fees, a special levy or other charges with certain exceptions such as fines and legal costs. Section 53(3) says that the strata lot's vote must not be considered for the purpose of this section, i.e. establishing the 25% minimum. In other words, if an owner is in arrears, and if a by-law has been created and filed, the owner cannot sign the petition, or demand as it is now properly termed.

The actual text of Section 51 is as follows:

51 *Reconsideration of resolution passed by 3/4 vote*

- (1) *This section applies only if a resolution required to be passed by a 3/4 vote is passed at an annual or special general meeting by persons holding less than 50% of the strata corporation's votes.*
- (2) *The strata corporation must not take any action to implement a resolution referred to in subsection (1) for one week following the vote unless there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage.*
- (3) *Within the one week following the vote, persons holding at least 25% of the strata corporation's votes may, by written demand, require that the strata corporation hold a special general meeting to reconsider the resolution.*
- (4) *The demand must be signed by each person making it.*
- (5) *After receiving a demand for a special general meeting under subsection (3), the strata corporation must not take any action to implement the resolution unless there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage.*
- (6) *The strata corporation must hold the special general meeting within 4 weeks after the demand is given to the strata corporation.*
- (7) *The president of the council may call the special general meeting without holding a council meeting.*
- (8) *At the special general meeting, the resolution to be reconsidered is the first item on the agenda and must be dealt with before consideration of any other matter about which notice has been given.*
- (9) *Despite any other provision of this act, the regulations or the bylaws, if a quorum is not present within 1/2 hour of the start of the special general meeting, the meeting must not proceed.*
- (10) *The resolution stands and may be implemented only if one of the following conditions are met:*
 - (a) *a demand for reconsideration is not made under this section,*
 - (b) *the resolution is approved by a 3/4 vote at the special general meeting held under this section, or*
 - (c) *the meeting held under this section does not proceed for lack of a quorum, as set out in subsection (9).*

(11) *The resolution may be presented for reconsideration under this section only once.*

Section 72. Repair of Property

Although this is a very short section, it is one of great importance because this is the principal statutory requirement that the strata corporation must repair and maintain the common property and common assets of the corporation. Sometimes strata councils avoid such responsibility, usually on the basis of economics; however, this section makes it abundantly clear that the strata corporation is fully responsible for repairing and maintaining the common property. Oddly, the new act has also included in the Schedule of Standard By-laws, Section 8, requiring the strata corporation to repair and maintain the common assets and common property of the strata corporation. This duplication may be an oversight by the legislature but, in any event, the statutory provision will prevail even if the by-law is changed to say something completely contrary. As an aside, I have a strong disagreement with creating by-laws to achieve basic and fundamental responsibilities of the strata corporation. By-laws ought to be used for regulating day-to-day housekeeping issues and the manner in which the strata government conducts itself. By-law 8 is unnecessary and should be part of the statute. Note also Section 3¹ of the Strata Property Act which somewhat duplicates Section 72.)

Subsection (2) of Section 72 provides an exception to the strata corporations requirement to repair and maintain and the strata corporation may, providing it has a by-law, make an owner responsible for the repair and maintenance of limited common property that the owner has a right to use, which again appears to duplicate by-law 8. The strata corporation may also, providing it has a by-law, make an owner responsible for repair and maintenance of common property other than limited common property under certain circumstances which will be subject to regulations. As these regulations are not yet published, it is, of course, uncertain what specifics will be detailed. It is hard to comment without knowing but there is danger in having a by-law of a strata corporation that is contrary to a statutory requirement, even if it is permitted by regulation. The implication for leaky condo remediation is significant if strata corporations amend their by-laws to make specific owners responsible for the repair of either common property or limited common property. Depending on the regulations which will control such by-laws, it is unlikely that changes to common property will be extensive but where limited common property is involved there is surely to be much debate. There is already much confusion over what constitutes limited common property and the definition provided in the new act is essentially the same as the previous act. It "*means common property designated for the exclusive use of the owners of one or more strata lots*". (See Sections 73, 74 & 75) In a leaky condo which has balconies which are designated as LCP (which is typical) is it possible that the strata corporation could require the "owners" of the LCP areas to undertake their own remediation? If so, how would this happen? Currently, relying on by-laws 115(c) and 128(3) of the Condominium Act strata councils

¹ **Responsibilities of strata corporation**

3. Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

frequently hold the view that the "owner" of limited common property is responsible for the repair and maintenance. The new act has removed this by-law from the standard schedule but permits the strata corporation at Section 72(2) to create such a by-law.

Section 72(3) provides that the strata corporation may, again by by-law, accept responsibility for repairing and maintaining specified portions of a strata lot. This may seem somewhat innocuous at first blush; however, it is an important concept. For example, in a building where there has been a serious water leak from the outside of the building which has damaged the inside of a strata lot (a very common occurrence), the strata corporation clearly has the responsibility to repair the source of the water ingress problem since it originates from common property. In the past, repairs to the inside of a damaged strata lot have been done by strata corporations without much resistance; however, there have been some strata corporations which have not accepted responsibility for the repairs to the interior of strata lots on the basis that there was no statutory requirement for the strata corporation to effect these repairs even if the cause and source of the damage came from common property (ie. the envelope). The strata council would express sympathy to owners that their property was damaged but, since there was no statutory obligation, the strata corporation itself did not undertake the interior repairs. Under the new act, the strata corporation may take responsibility for such a circumstance; however, it is important to note that a by-law is required to authorize this type of repair. I would predict that many strata corporations will fail to implement such a by-law and simply carry on the past practice of repairing interior strata lot damage in any event. It is unfortunate that the act has required a by-law to authorize this type of repair and maintenance: it should have simply obliged the strata corporation to undertake the responsibility. I have observed many instances of owners suffering damage to their strata lots, caused by external sources, and the strata councils have declined to accept responsibility to effect the necessary repairs. Providing a solution by the creation of a by-law will likely do nothing for such owners as these types of strata councils will not create the required by-laws. For leaky condo properties the new legislation is of little value and, in fact, may make things worse since, technically, the strata corporation now has to create a by-law to gain the authority. Remember the new rules concerning 3/4 votes, reconsideration votes etc.

Section 72 states:

72 Repair of property

- (1) *Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.*
- (2) *The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of*
 - (a) *limited common property that the owner has a right to use, or*
 - (b) *subject to the regulations, common property other than limited common property.*
- (3) *The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.*

In addition to Section 72, the new Strata Property Act has created a by-law (Division 2 Powers and Duties of Strata Corporation) which reads as follows:

Division 2 -- Powers and Duties of Strata Corporation

Repair and maintenance of property by strata corporation

8 *The strata corporation must repair and maintain all of the following:*

(a) common assets of the strata corporation;

(b) common property that has not been designated as limited common property;

(c) limited common property, but the duty to repair and maintain it is restricted to

(i) repair and maintenance that in the ordinary course of events occurs less often than once a year, and

(ii) the following, no matter how often the repair or maintenance ordinarily occurs:

(A) the structure of a building;

(B) the exterior of a building;

(C) chimneys, stairs, balconies and other things attached to the exterior of a building;

(D) doors, windows and skylights on the exterior of a building or that front on the common property;

(E) fences, railings and similar structures that enclose patios, balconies and yards;

(d) a strata lot in a strata plan that is not a bare land strata plan, but the duty to repair and maintain it is restricted to

(i) the structure of a building,

(ii) the exterior of a building,

(iii) chimneys, stairs, balconies and other things attached to the exterior of a building,

(iv) doors, windows and skylights on the exterior of a building or that front on the common property, and

(v) fences, railings and similar structures that enclose patios, balconies and yards.

Division 5: Voting

The new act contains a specific division dealing with voting procedures, a topic often the source of much debate in strata corporations.

Under the Condominium Act, voting was regulated by the statute at Section 72(1), and also at by-law 125(9). Under the new act, voting is regulated by Section 53 as well again in the by-laws at 27 of the Schedule of Standard By-laws. Section 53 provides that, at an Annual or Special General Meeting, a strata lot has one vote only unless different voting rights have been set out in the schedule of voting rights. What is new is that this section also provides that a strata corporation can have a by-law that a vote for a strata lot may not be exercised, except on matters requiring a unanimous vote, if the strata corporation is entitled to register a lien against that particular strata lot. (See Section 116.) Note that the authority is reliant on the word, Entitled, which suggests that a lien does not necessarily have to be literally filed in order to deny a vote. It is merely an entitlement. The wording of by-law 125(9) of the Condominium Act was better. It said that *Unless a unanimous resolution is required, an owner is not entitled to vote at a general meeting unless all contributions payable for his or her strata lot have been paid.* Where such a strata lot vote is not permitted by a by-law under the new act, the strata corporation cannot count that particular strata lot for the purpose of determining a quorum at an Annual or Special General Meeting pursuant to Section 48.

Section 54 describes the persons who may vote at an Annual or Special General Meeting and these would be an owner, a **tenant** who qualifies under Sections 147 or 148 and/or a mortgagee who has given proper notice to the strata corporation. This latter provision is similar to Section 18 of the Condominium Act and it permits a person holding a mortgage (the mortgagee) to usurp the vote of an owner (the mortgagor) in order that the mortgagee can protect its interests. This is limited to matters of insurance, maintenance, finance or other matters affecting the security of the mortgage but this is still a very broad range of activities. It is extremely rare¹ to see a mortgagee exercise this privilege and to do so there must be two conditions. First, the mortgage itself must contain a clause giving the mortgagee the right to vote and, second, the mortgagee must give at least three days written notice to the strata corporation, the owner and the tenant if applicable, that the mortgagee intends to vote. (For further reference to the Condominium Act, see Section 68 and by-laws 126(3) and (4).)

¹ Both the *Condominium Act* and the *Strata Property Act* have given mortgagees an extraordinary opportunity to involve themselves in important issues of a strata corporation especially since the very security of the mortgage is at stake. Yet, remarkably mortgagees almost never avail themselves of the opportunity. At the Glen Robin strata corporation in Burnaby, a special resolution was presented to the owners at an Extraordinary General Meeting in August 1998 to authorize the strata council to apply to the Supreme Court of British Columbia, pursuant to Section 65 of the *Condominium Act* (Deemed Destruction of Building), for an order to effectively sell the property (over 200 strata lots) to a developer who would destroy the existing buildings and rebuild. Not one mortgagee attended the meeting or even inquired about the resolution.

Section 55 permits special voters such as for persons under the age of 16 where the vote may be exercised only by the persons parent or guardian. Similarly, a provision is included for persons who *lack the capacity to make a decision* to have their votes exercised only by someone who is legally authorized to act for the person. This is essentially a carry forward of Section 72(2) of the Condominium Act.

Proxy voting is now regulated by the Act rather than the by-laws and Section 56 and the accompanying regulations are much broader and spell out the details of such proxy voting. The proxy must be in writing and signed by the person appointing the proxy and may be either general or for a specific meeting or a specific resolution and, further, it may be revoked at any time. These provisions are somewhat similar to those of the by-laws (Sections 126(1) and (2) of the Condominium Act). The regulations pursuant to Section 56(3) of the new act introduce a very important change concerning the use of proxies by management companies or employees of the strata corporation. These individuals may exercise a proxy vote but may not propose and second motions and participate in the discussion.

There has always been confusion at general meetings whether or not a person holding a proxy is limited in his or her activities at the meeting. Section 56(4) now makes it clear that a proxy holder standing in the place of the person appointing the proxy can do anything that person can do including vote, propose and second motions and participate in the discussion. The only limitations would be those determined by the granter of the proxy in the appointment document. It is important to note that the new act has not placed any limits on the number of proxies that one individual may carry; thus, in terms of voting for leaky condo remediation projects there will be no change in the "political atmosphere" that surrounds these events.

In the vast majority of strata corporations the use of proxy voting works successfully and without problems. In fact, without the benefit of proxy voting it is likely that many general meetings would not quorate and would have to be reconvened. Remember also that, under Section 51, a strata corporation has to wait a week before implementing the results of a special resolution if less than 50% of the voters attend the Annual or Special General Meeting. Strata councils will, therefore, be highly motivated to collect proxies to make sure the 50% minimum threshold is met.

There are some situations, however, when proxy voting can be a nightmare. Where there are issues of great debate within a strata corporation, the opposing factions invariably rely on the use of proxies to achieve the requisite vote count in their respective favours. That brings about challenges to the validity of proxies and neither the Condominium Act nor the new Strata Property Act address this issue. It is possible that a by-law could be created to establish wider criteria for proxies such as requiring check lists or other mechanisms to validate the signatures. It would seem, however, that no matter what steps are taken to limit the number or style of proxies, the arguing will continue. Suffice it to say that Section 56 of the new act does not solve all the associated problems of proxy voting.

If two or more persons share one vote with respect to a strata lot, Section 57 provides that only one of them may vote on any given matter. The wording is an improvement on the old by-law 125(10) of the Condominium Act. Section 57(2) provides that, if the chair is advised before or during a vote, that the two or more persons who share the one vote disagree on how their vote should be cast on a matter, the chair must not count their vote in respect of that matter.

Section 58 permits the Supreme Court of British Columbia to appoint a voter if necessary, if there is no person to vote in respect of a strata lot. (This replaces Sections 72(3), (4) and (5) of the Condominium Act.)

* * * *

Conclusion

The proposed changes to the governing statute for strata corporations are significant and for leaky condo remediations, considerable more thought, time and effort will be required to raise monies by special assessments. Errors in procedure will negate the outcome of 3/4 votes so it is incumbent on strata councils to permit more time for their property managers to properly prepare and present resolutions. Property managers will, vicariously, assume more responsibility and liability for their work.