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VISOA Bulletin - FEBRUARY 2017

BC Human Rights Tribunal Holds Strata Accountable for Failing to Deal with Second Hand Smoke Complaints

By Paul Mendes, Lesperance Mendes

In a ruling likely to have repercussions across British Columbia, the BC Human Rights Tribunal has found a strata corporation liable for failing to accommodate an owner's disability in relation to second-hand smoke. (*Leary v Strata Plan VR1001*, 2016 BCHRT 139)

As is often the case with second-hand smoke complaints, the unit owner had complained about second-hand smoke for years. She suffered from "allergic and asthmatic bronchitis" triggered by exposure to second-hand smoke. Although little detail is provided about the history of the complaints, it was clear from the written decision that the unit owner complained a lot and that the council did not take her complaints seriously. For example, the tribunal member wrote:

"I easily conclude that Ms. Leary is a demanding and difficult member of the Strata. This has clearly impacted the way her concerns were treated by the Strata. I conclude that, due to the volume of other complaints, the Strata concluded that her concerns about smoking lack credibility."

Nonetheless, the council took some steps to try to deal with the problem including asking owners who smoke to take measures to reduce the escape of smoke from their units, and to avoid smoking near windows, doors and vents. In 2014 and 2016 the council put smoking restriction bylaws on the agenda, but those bylaws were defeated by the owners.

One of the things that the council failed to do, however, was thoroughly investigate the complaints. Many councils fall into this trap when dealing with nuisance complaints. They put the onus on the complainant to prove that the bylaws are being contravened, or, if the evidence between the complainant and the "nuisance maker" is contradictory, they throw their hands up because they "don't know who to believe".

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Under the Human Rights Code, once the complainant establishes a basic case of discrimination, the onus shifts to the respondent to justify its actions, including by showing that it has accommodated the complainant up to the point of undue hardship.

One of the curious things about this particular case is that the strata claimed "privilege" over its accommodation efforts and refused to disclose what steps it took to accommodate the complainant's disability. The strata may have put all its eggs in the wrong basket, however, by hoping to prove that the complainant lacked credibility and was not in fact disabled.

Unfortunately for the strata, the Tribunal Member had no difficulty concluding that the complainant was in fact disabled. With no evidence to show what steps the strata took to accommodate the disability, the Tribunal Member had no choice but to find the strata in breach of the Human Rights Code.

Every strata owner, strata council member and strata manager in BC should read this case because it contains a helpful set of guidelines under the heading: How Should a Strata Address a Request for Accommodation Related to Second-Hand Smoke? I will not summarize the guidelines here - I hope that you will actually go and read the decision. I will, however, add my own pointers that would apply to most bylaw infraction complaints:

1. Investigate the complaint. It is not enough to write infraction letters and hope for the best. If the complaint is about smoke, smells, or noise, council members should attend at the complainant's unit to experience the situation firsthand.

2. Do not leave enforcement decisions to the strata manager. The strata manager's job is to assist the council to enforce the bylaws. They may receive complaints, but strata managers require the council's direction to take enforcement actions. The manager's job is not to resolve disputes between owners.

3. Record enforcement decisions in the council minutes. It is possible to record bylaw enforcement decisions in council minutes without compromising privacy. Failing to record the enforcement decisions in the minutes may undermine the strata's position if the complaint goes to court, the Civil Resolutions Tribunal, or the Human Rights Tribunal.

4. Make sure your bylaw infraction letters comply with section 135 of the *Strata Property Act* (SPA). Section 135 requires the strata corporation to give an owner written notice of the complaint and a reasonable opportunity to be heard, including a hearing if requested, before making an enforcement decision. I cannot tell you how many strata corporations fail to follow this basic requirement of the SPA. If you need to defend your bylaw enforcement decisions before the Court or a Tribunal, proving that you complied with section 135 will be crucial.

5. Hold a hearing if requested, and issue your decision after the hearing within one week. The only thing worse than failing to follow section 135 of the SPA is refusing an owner's request for a hearing. An owner's right to a hearing is guaranteed by section 34.1 of the SPA. Failing to hold the hearing when requested will completely nullify the strata corporation's bylaw enforcement efforts.

Lesperance Mendes has been practising strata law since 1997, advising strata owners, strata councils and strata managers on all aspects of bylaw drafting and enforcement. If you find yourself dealing with a difficult bylaw enforcement issue, contact Paul G Mendes, Partner at 604-685-4894 or by email at PGM@LMLAW.CA.

Privacy Matters

By David Grubb,
Strata Support Team Volunteer

THREE COMMON QUESTIONS ON PRIVACY

The *Personal Information Protection Act* (PIPA) imposes a great many obligations on public institutions including strata corporations. Right of access to many forms of documented personal information are dealt with as well as recording meetings, video surveillance, council correspondence, requirements to have a written privacy policy in place, etc.

Three of the most common issues in strata corporations from the perspective of both an individual and the council or the property manager are how much personal information is an owner entitled to receive about other owners, such as phone numbers and email addresses; how much information is the council required to provide to a person who is the subject of a complaint; and third, whether correspondence between council members using their own email addresses constitutes "official" strata correspondence which should be retained on the strata files under SPA s.35.

Councils and property managers need to be cautious about releasing information because of the provisions of PIPA. However, often they abuse the requirement because either they don't understand PIPA or choose to try to use it as an excuse to protect themselves for some particular reason from what they perceive to be a possible negative consequence. Thus they refuse to provide such information even if it is either permissible or required where another statute overrides PIPA.

PIPA makes it clear that SPA ss.35 and 36 take such precedence. Section 35 requires the strata corporation to retain specific items of personal information, or which could have an impact on what may be perceived as personal information. These include:

35 (1) The strata corporation must prepare all of the following records:

(a) minutes of annual and special general meetings and council meetings, including the results of any votes;

(b) a list of council members;

(c) a list of

(i) owners, with their strata lot addresses, mailing addresses if different, strata lot numbers as shown on the strata plan, parking stall and storage locker numbers, if any, and unit entitlements,

(ii) names and addresses of mortgagees who have filed a Mortgagee's Request for Notification under section 60,

(iii) names of tenants, and

(iv) assignments of voting or other rights by landlords to tenants under sections 147 and 148;

(d) books of account showing money received and spent and the reason for the receipt or expenditure;

(e) any other records required by the regulations.

(2) The strata corporation must retain copies of all of the following:

(h) any decision of an arbitrator or judge in a proceeding in which the strata corporation was a party, and any legal opinions obtained by the strata corporation;

(k) correspondence sent or received by the strata corporation and council;

And Regulation 4.1

4.1 (1) In addition to the records required to be prepared under section 35 (1) of the Act, the strata corporation must prepare a record of

(a) each council member's telephone number, or

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(b) some other method by which the council member may be contacted at short notice, as long as that method is not prohibited by the bylaws.

It is notable that telephone numbers (other than those of council members) and email addresses are not included in s.35. PIPA does allow the collection of phone numbers "without the consent of the person" *provided* that they can be obtained from a public source such as a telephone directory, but it is becoming more difficult to find such a directory as more and more people are switching from land lines – most of which can be accessed through 411 on a telephone or a computer – to any one of the cell phone providers which do not necessarily publish their clients' numbers. If there are any composite directories of personal email addresses, they are rare at best.

If the person does supply a phone number to a strata council (or property manager), there is "implied consent" that the council may contact the person. And the same applies to email addresses, which is especially useful for the distribution of council meeting minutes and other notices in accordance with SPA s.61 ("Notice given by the strata corporation").

However, that still does not give the council or the property manager the right to divulge phone numbers or email addresses to another party (in most cases) without obtaining the person's written consent to do so. The council is otherwise restricted to providing only the names and addresses of owners in accordance with SPA s.35.

Many stratas circulate a list of residents with their phone numbers. While such a practice should be covered under the strata's privacy policy, the fact that it is well established suggests that there exists the "implied consent" of each resident. So it would be up to a resident to request council to remove their phone number from the list (i.e. withdraw their consent). Phone numbers should not, however, be posted on any common property since they could be seen by anyone.

It is also very inadvisable to publish or circulate any personal email addresses even to other residents. Many stratas establish a strata email address where residents and others can send their correspondence to council or the property manager. This is a good practice since such emails can be considered part of the "official" correspondence between the strata council and the individuals concerned as required by SPA s.35(2)(k).

But the bottom line is, in the absence of permission (whether through "implied" or "express" consent) from the individuals for the strata council to release such information, how is it possible for an owner to contact other owners other than by mail? Basically it is up to that owner to obtain phone numbers and/or email addresses on their own.

The second issue is one that perplexes people considerably. Is a person who is the subject of a bylaw contravention complaint submitted to council by another person able to see all the documentation pertaining to the allegations? It seems to most of us that in a court of law the "accused" is entitled to confront his "accuser" and see all the evidence being presented in support of the accusation including witnesses and written work (letters, emails, and other documents). So why can he not have the same recourse in order to make a response to the strata council, whether written or at a hearing?

SPA s.135(1)(e) requires only that council give "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". There is no requirement that the complainant (or any third parties) be present at a hearing requested by the owner or tenant, nor can the council order them to attend.

Lacking any definition in the SPA of what constitutes the "particulars", the council must rely on PIPA for direction where the complaint involves a number of people.

The *Privacy Guidelines for Strata Corporations and Strata Agents* (July 2015) published by the Office of the Information and Privacy Commissioner (OIPC) seems to provide an explanation (on pages 13/14) of the requirements of PIPA with respect to such complaints and what information about people must be or may be excluded. Portions of it are repeated here:

…. in the absence of express consent from the complainant to disclose the entire letter, a strata corporation should review the contents of the letter to determine what information, if any, is the personal information of the requester and what information is the personal information of the complainant and/or other third parties. The person making the request is only entitled to access their own personal information, not the personal information of others. When reviewing

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a complaint letter, strata corporations must be aware that it is not just the name of the complainant that might reveal the identities of third parties. Other details in the complaint letter may also reveal the identities of the complainant or the third parties. Pursuant to sections 23(4)(c) and (d) of PIPA, a strata corporation must not:

> *(a) disclose the personal information about another individual; and*
>
> *(b) reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to disclosure of his or her identity.*

If there is a request for the complaint letter, the strata corporation has a duty to sever ("black out") the personal information of anyone other than the requester. If the strata corporation is satisfied that no other PIPA exceptions to disclosure apply, it must release the balance of the requester's personal information, provide written reasons explaining why information has been removed from the letter and advise the requester of his or her right to appeal to the OIPC.

In reviewing the letter, the strata corporation also may consider if any other exceptions to disclosure under PIPA apply, such as the strata corporation is still investigating the complaint, the material is covered by solicitor-client privilege or there is a genuine concern that harm could come to the complainant and/or others. In such circumstances, PIPA may authorize the personal information to be withheld.

It has been very common, therefore, for strata councils to refuse to give a complainant's name (or other particulars) to the requester because of a "genuine concern that harm could come to the complainant", especially in smaller stratas where disputes could easily grow so acrimonious that they spread among the other owners to a point which cannot be handled by the council. Thus the council have most often "erred on the side of caution."

All that said, there now appears to be a conflict with Shawn Smith's article in this edition where he states:

"…if the offending owner asks for a copy of the complaint letter [pursuant to the SPA] they are entitled to it, without redaction."

This coincides with the OIPC FAQ on p.4 which sates:

*Q: **What obligations does a strata corporation have to redact third-party personal information in correspondence when requested by a strata property owner?***

Section 36 of SPA is a mandatory disclosure provision – strata corporations must disclose documents and records upon request by owners and other authorized individuals. PIPA authorizes this disclosure pursuant to s. 18(1)(o). As this disclosure is expressly authorized by SPA there is no authority under PIPA to redact personal information contained in correspondence.

So what are we to believe?

The information to which the last paragraph of the Privacy Guidelines quoted above refers was a reflection of some subsections of PIPA s.23. Recent correspondence with the OIPC offers some clarification:

… if section 18(1)(o) of PIPA is properly applied, then sections 23(3)(c), 23(4)(a),(c) & (d) and 23(5) do not apply.

Where there might be a desire to redact information (PIPA s.23) if there may be some serious harm to the complainant, the OIPC sets the bar high in defining "serious harm" by stating: *If there are serious safety concerns (such as the person complained about is a violent drug dealer with a criminal history including*

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convictions for violent acts), then the strata could refuse to disclose the complaint letter until ordered to comply by a Court or the Civil Resolution Tribunal.

In conclusion, OIPC wrote:

[That they] do not believe that our Office will be updating the Guidelines. There is no easy explanation for the intersection between SPA and PIPA. Handling complaints is always a sticky subject. With the prior approach [i.e. as described in the Guidelines] a complainant was not able to know who their accuser was, which also caused problems. The most important issue now is for strata corporations to explain to owners how future complaints will be handled so that no one is surprised that they need to stand behind their complaints.

This is probably going to aggravate problems for stratas because residents, if their name must be revealed, may become much more reluctant to make complaints if they fear repercussions, and the possibility that the atmosphere in the strata community could become very intense. Perhaps an amendment to the SPA could be made to specify that despite PIPA s.18(1)(o), PIPA s.23 may be applied in considering complaints: but that is for the future.

Finally, a word about emails amongst council members discussing a case using their own email addresses. Some "requesters" demand to see or be given copies of all such emails on the grounds that they may reveal information that the "requester" can use in the presentation of their point of view.

Dealing with emails as "personal" correspondence as opposed to "official" correspondence has not been addressed definitively under the SPA. Commonly, however, regardless of any issue under discussion, the bar seems to have been set high when considering emails as "official" council correspondence if it is between people using their own addresses. Most often, the majority of such emails are treated as "personal" just like a telephone conversation (or even, perhaps, a personal letter or memo between two people). There are undoubtedly cases where the OIPC, a Court or the Civil Resolution Tribunal (CRT) will order that some such correspondence be presented and may decide whether it constitutes "official" correspondence, but a strata council has no such legal authority, and therefore cannot compel such emails to be presented.

As mentioned at the beginning, many contentious issues can be resolved by having a strata email address, which can be considered "official" correspondence pursuant to SPA s.35, between the council and an individual or between council members themselves as well as the property manager. Under such conditions, any owner or authorized person has the right to see such documentation in accordance with SPA s.36.

If there is a dispute about the admissibility of the personal information of a complainant, or a third party, or of email correspondence, the matter can be referred to the OIPC. They will try to mediate the matter first, but will make a ruling if it becomes necessary.

All strata councils should have a copy of the *Privacy Guidelines for Strata Corporations and Strata Agents* and the *PIPA and Strata Corporations: Frequently Asked Questions* which can be downloaded from the OIPC website or through the VISOA website's Resource Link page at https://www.visoa.bc.ca/?page_id=264

By the way… Does your strata have a Privacy Policy and a Privacy Officer? (Hint: PIPA requires that you do!)

City Stormwater Billing Policy vs *Strata Property Act*

By Harvey Williams, Strata Support Team Volunteer

Stormwater is rainwater that falls on streets, sidewalks, parking lots and building roofs as opposed to rainwater that soaks into lawns and gardens. Stormwater carries with it oil, metals, silt and sand, substances that are harmful to the marine environment. Past practice has been to discharge stormwater directly into the local marine environment.

The City of Victoria has developed a system for removing contaminants from stormwater before it is discharged into water bodies. Residential and commercial properties are charged for stormwater disposal on the basis of their water impermeable surface areas such as roofs, parking lots, driveways and sidewalks.

Stratas, like other properties, are billed for stormwater disposal. Since all strata stormwater is from common property, the bill for stormwater disposal should be paid from the strata corporation's annual budget. For stratas larger than four units, that is the case.

But, for reasons that my repeated inquiries have not been able to discover, the city insists on billing individual owners in stratas of four units, which is contrary to section 99 of the *Strata Property Act*. Each owner of a four unit strata complex receives a bill for 1/4 of the stormwater cost for the strata; an owner in a three unit strata is billed for 1/3 of the cost; and each owner of a duplex ½ of the cost irrespective of unit entitlement.

Not surprisingly, this often results in friction among strata owners in 4-unit, 3-unit and duplex stratas whose units are not of equal entitlement.

Owners of small stratas in Victoria who are concerned should contact Mr. Adam Steele, Stormwater Management Specialist either by email Stormwater@Victoria.ca or telephone 250-361-0318, or contact city council members.

For more information, visit:

http://www.victoria.ca/assets/Departments/Engineering~Public~Works/Images/Stormwater/Stormwater%20Utility%20Insert%20-%20FINAL.pdf

Early 2017 Workshops

February 18
For New Strata Councilors
March 4
Strata Maintenance Plans
March 18
Best Practices for Strata Secretaries
March 25
Dispute Resolution

Quotes *for change*

"Isn't it nice to think that tomorrow is a new day with no mistakes in it yet?"
- L.M. Montgomery

"It's never too late to right a wrong."
- Emily Acker, No Longer Broken

"You raze the old to raise the new."
- Justina Chen, North of Beautiful

"So what do we do? Anything. Something. So long as we just don't sit there. If we screw it up, start over. Try something else. If we wait until we've satisfied all the uncertainties, it may be too late."
- Lee Iacocca

"Making New Year resolutions is one thing. Remaining resolute and seeing them through is quite another."
- Alex Morritt, Impromptu Scribe

"They say, timing is everything. But then they say, there is never a perfect time for anything."
- Anthony Liccione

If you don't like how things are, change it! You're not a tree.
- Jim Rohn

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These businesses have chosen to support our member strata corporations and owners by joining VISOA's growing group of Business Members. We encourage all our members to return the support we receive from the business group by including these businesses in their consideration for provision of services for their corporation.

STRATA ALPHABET SOUP

BCREA – British Columbia Real Estate Association
CMHC – Canada Mortgage and Housing Corporation
CRF – Contingency Reserve Fund
CRT – Civil Resolution Tribunal
FAQ – Frequently Asked Question
FICOM – Financial Institutions Commission
HPO – Homeowner Protection Office
HRT – Human Rights Tribunal
LCP – Limited Common Property
LTSA – Land Title and Survey Authority
OF – Operating Fund
OIPC – Office of the Information and Privacy Commissioner
PIPA – Personal Information Protection Act
RECBC – Real Estate Council of British Columbia
REDMA – Real Estate Development Marketing Act
RESA – Real Estate Services Act
SPA – Strata Property Act
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YOU ASKED How To Get Fellow Councilors To Follow The SPA?

Have a question about managing your strata corporation? Ask us, we've had a lot of experience helping strata corporations solve problems - perhaps we can help you. Questions may be rephrased to conceal the identity of the questioner and to improve clarity when necessary. We do not provide legal advice, and our answers should not be construed as such. However, we may and often will advise you to seek legal advice.

By Gloria Martins, Strata Support Team Volunteer

Q: I am one of two new members on my strata council, as two long-serving members chose not to run for council this year. These two kept everything running on track, advising the rest of the council on the *Strata Property Act*, etc. The other members of the current council are NOT interested in following the Act or our bylaws. I thought I was helping out by letting them know what the Act or bylaws state as matters arise (having been to your excellent Strata Council 101 Workshop) but now I've been labeled as a troublemaker. They say "We're just a small strata". I've started keeping the emails I send, with pertinent links, and I'm concerned about any liability I might have for the way our strata conducts business. Do you have any other suggestions?

A: It's unfortunate that the other council members are unappreciative of the effort you have made to attend a workshop and spend some time learning about the *Strata Property Act*. I don't know if it's of any consolation to you, but the same thing happens often. A new councilor's intentions are good, but that's not what it looks like to the other council members. They may be already used to doing things their way, and don't want someone telling them that they need to do things differently.

Since you asked for "suggestions," I think that things may turn out differently if you go about things in a different way, perhaps by keeping a low profile for a while. Whether they know it or not, you have something to contribute to council that the others do not have, and you have been elected to council, so some people are counting on you.

From my experience, it's better to be on council than not, even if it is sometimes aggravating. As a council member, you get to see what's going on, and, sooner or later, you may be able to influence an important decision. The difficulty is to find some way to reduce the hostility (if any) and encourage the trust of the other council members. It can be done! Here's your chance to practice your diplomatic skills, a worthwhile objective for all of us.

I wouldn't overload the other council members with emails if I were you. It doesn't really protect you in terms of liability, and I don't think it helps the other council members. Annotate your own copy of the minutes, showing where you disagreed, and it's good practice to include a reference to the bylaws or the section of the Act as you go along. If you are comfortable doing so, ask that your "No" votes be recorded by name in the minutes.

In the meantime, keep learning! Attend all the seminars you can and keep up with the changes that take place in the (always evolving) *Strata Property Act* and related legislation. You can't help but win in the long run!

Fines and Due Process – An Analysis of S.135

By Shawn M. Smith, Cleveland Doan LLP Barristers & Solicitors

"For want of a nail the shoe was lost, for want of a shoe the horse was lost, for want of a horse the rider was lost."

Sometimes small things can have big consequences. The same can be said when it comes to s.135 of the *Strata Property Act* ("SPA") and enforcing bylaws. A failure to comply with the requirements of that section can leave a strata corporation unable to collect fines (and potentially unable to enforce its bylaws).

Section 135 sets out various conditions as well as a process to be followed before enforcing bylaws. It provides as follows:

Complaint, right to answer and notice of decision

135 (1) 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 the owner.

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection 1(a), (b) or (c) to the persons referred to in subsection (1)(e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravening of that bylaw or rule without further compliance with this section.

What becomes obvious right away from reading the section is that a strata council cannot simply impose a fine against a person. There are certain steps that must be taken first. If not, the fines and any other steps taken are not valid. In both *Strata Plan VR 19 v. Collins* 2004 BCSC 1743 and *Dimitrov v. Summit Square Strata Corp*. 2006 BCSC 967 the court held that a failure to meet the requirements of s.135 when imposing fines or collecting the costs of remedying a bylaw contravention renders the strata corporation unable to collect those amounts. That principle was recently confirmed by the Court of Appeal in *Terry v. The Owners, Strata Plan NW309* 2016 BCCA 449 where the court confirmed that strict compliance with s.135 is required.

The first requirement under s.135 is that the strata

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corporation must have received a "complaint". The complaint does not need to be in writing. However, that is preferable as it gives greater legitimacy to the complaint and ensures that there is no misunderstanding as to the nature of the complaint. If a verbal complaint is received notes should be made of the same so there is a record of a complaint being received.

The strata council is not precluded from being the initiator of the complaint; particularly when it comes to administrative matters such as the non-payment of strata fees (something the court seemed to implicitly accept in *Terry)*. A council member can also make a complaint in their capacity as an owner. In fact, one could argue that given the obligation under s.26 of the SPA to enforce the bylaws and their duty under s.31 of the SPA to act in the best interests of the strata corporation, council members have little choice but to do so where they are aware of a breach. Where a council member makes a complaint, it is best practice that they excuse themselves from any meeting wherein a decision regarding the complaint is made to ensure that s.32 [conflicts of interest] of the SPA is complied with.

The second requirement under s.135 relates to notifying the owner or tenant of the alleged breach. When a strata corporation receives a complaint about a bylaw violation, it must first write to the offending party and provide "particulars" (details) about the complaint. The SPA is not clear as to what those details must be. In *Terry* the court stated they should include the bylaw or rule being breached and details "sufficient to call to the attention of the owner or tenant the contravention at issue". In other words, what they did that constitutes a breach of the bylaws. Dates and times are important, if not critical, when dealing with issues such as noise and smoking. It is best practice to have council make the decision to act on a complaint and send a letter (not the president or strata manager acting on their own) – see *Dimitrov*.

With respect to a series of contraventions (i.e. noise or smoking), those can be dealt with in a single letter. The dates and times of each incident can be set out in a table or schedule. Care should be taken to ensure that incidents are not left too long before being reported and dealt with. It may be difficult for an owner to answer a complaint regarding an

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incident that occurred several weeks ago. Where that happens, the delay may be considered unfair and the strata corporation unable to enforce the bylaws with respect to the same.

There is nothing in the section stating that the complainant must be identified when providing particulars. In fact, the *Privacy Guidelines for Strata Corporations and Strata Agent*s established under *Personal Information Protection Act* suggest the strata corporation not reveal the complainant's identity unless doing so is necessary in order for the accused owner or tenant to answer the complaint (perhaps with respect to a noise complaint where the location and proximity of the complainant might be critical). However, if the offending owner asks for a copy of the complaint letter [pursuant to the SPA] they are entitled to it, without redaction.

The letter sent to the offending owner/tenant must also set a reasonable time for providing an answer to the complaint. Twenty days is probably sufficient (given that this is the time frame used for a number of other deadlines under the SPA). However, the complexity of the complaint could dictate a longer period. The court in *Terry* specifically sanctioned such extensions saying:

> "What constitutes a reasonable opportunity to be heard in response is a case-specific inquiry that must take account of the nature of the alleged contravention, the context in which the violation is said to have occurred, and the time that might reasonably be required to gather information or evidence needed to answer it."

The onus appears to be on the council to determine whether a longer time is required. However, where an owner makes a request for an extension and it is appropriate to give one the council should not refuse.

The owner or tenant is also to be advised of and afforded an opportunity to request a hearing before the council. Section 34.1 of the SPA requires the hearing to be held within four weeks of the request and a decision to be issued one week after the hearing. In this instance a hearing is an opportunity to appear in person before the council and argue against the complaint. It is not an overly formal process. The SPA does not require the person making the complaint to be present and available for cross examination. Nor is that appropriate. If the hearing needs to be rescheduled the onus lies with the council to see that this is done in a timely manner. A failure to do so may result in a reduction of the fines by the court. (see *Strata Plan NW391 v. Forsberg* 2010 BCSC 1301).

Where there is conflicting evidence from the complainant and the accused owner/tenant it is appropriate to make further inquiries of the complainant in an attempt to reconcile the matter – *Chorney v. The Owners, Strata Plan VIS770* 2016 BCSC 148.

Once the council has had an opportunity to consider the response provided by the owner/tenant, it can then, and only then, decide whether or not there was a breach of the bylaws. If no response is provided by the deadline, then council can proceed to consider the matter; but not before then. Only council can make the decision to impose a fine; not the president or the strata manager – see *Dimitrov*. Decisions to impose a fine must be made at a duly convened meeting and recorded in the minutes, identifying the strata lot or unit in question. It is important to do so in order that there is a record of a decision to impose a fine being made. That decision must be conveyed to the owner or tenant as soon as feasible – in other words: without delay.

The court in *Terry* also held that a failure to comply with s.135 cannot be cured by the fact that the owner engaged in a dialogue with the strata corporation regarding the fines after they were imposed. It is unclear whether improperly imposed fines can be rescinded and imposed again after compliance with s.135. In *Cheung v. Strata Plan VR1902* 2004 BCSC 1750 the court held that a failure to comply with s.135 could be corrected by doing just that.

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The third requirement relates to bylaw breaches committed by tenants. Where the tenant breaches the bylaw, the notice letter must be sent to the tenant with a copy to the landlord. This is because it is the tenant who is fined under s.130 of the SPA (although the landlord remains liable for any unpaid fines).

In *Terry*, fines were imposed for a failure to pay strata fees when due. As is a common practice, fines were automatically imposed and the owner notified accordingly; after all what is there to dispute? The Court of Appeal did not share that view and held that compliance with s.135 is required even where it is obvious there has been a breach of the bylaws (such as with the non-payment of strata fees). Under the SPA there can be no automatic imposition of fines.

In summary, the following points regarding s.135 can be taken from the case law:

1. In order to impose a fine, the strata corporation must have received a complaint (either from an owner or council);

2. The person against whom the fine is being imposed must have been given:

a) sufficient details with regard to the allegations (dates, times, etc.) and be told the particular bylaw(s) breached;

b) an opportunity to answer the allegations against them before the fine is imposed.

3. There is a requirement to send the owner a copy of any complaint against a tenant (and to impose a fine against the tenant).

4. The decisions of council to write a letter alleging a bylaw violation, to impose a fine and to determine that a contravention is "continuing" should be clearly recorded in the minutes.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is a lawyer whose practice focuses on strata property law. He frequently writes and lectures for a variety of strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.

Suggested Smoking Prohibition Bylaw

VISOA's Strata Support Team is often asked for wording for bylaws, and a "non-smoking" bylaw is a frequent request. A local lawyer provided this wording, and in our opinion it hits all the marks. What may be especially helpful are the clauses (9) - (13) which apply to smokers in residence at the time of passage of the bylaw. Those owners are often the hardest to convince that this would be a good bylaw for your strata – but by "grandfathering" those existing smokers, they are accommodated and the number of smokers will become fewer over time.

Reminder: VISOA volunteers are not lawyers. As always, VISOA recommends that a qualified strata lawyer be consulted on any proposed bylaw amendments.

Be it resolved by Owners Strata Plan xxx with a 3/4 vote that the following non-smoking bylaw be adopted:

(1) Owners, tenants, occupants, and visitors shall not smoke in, on, or about the following areas of the Strata Corporation:

a. Any part of the interior common property including:

i. the front lobby,
ii. hallways,
iii. corridors,
iv. stairwells,
v. common rooms,
vi. elevator, and
vii. the parkade; and

b. all portions of the exterior common property that are within 7 meters of a door or window.

(2) Owners, tenants, occupants, and visitors shall not smoke in, on, or about a strata lot or any limited common property area designated for the exclusive use of that strata lot. This prohibition shall include:

a. the interior of strata lots, and
b. exterior balconies and patios.

(3) For the purpose of these bylaws "smoking" shall include the inhaling, exhaling, burning, or carrying of any lighted cigarette, cigar, pipe, narcotic or any similar product whose use generates smoke.

(4) Any owner who sells a strata lot shall specifically disclose to all potential buyers and realtors that smoking is prohibited everywhere within the building, including the patios and balconies.

(5) Any owner who rents, leases or otherwise allows someone other than the owner to reside within or occupy a strata lot, shall disclose to said persons prior to their residency or occupancy, that smoking is prohibited within all areas noted above, and that they shall be responsible for any breach of these bylaws by them.

(6) Section (2) of this bylaw shall not apply to any owner, occupant or tenant who has a medically or culturally based requirement to smoke.

(7) Those with cultural or medical requirements must apply to the Strata Council in writing for permission to smoke within their strata lots. The Strata Council may place conditions on the grant of permission.

(8) The grant of permission by the Strata Council may be subject to the condition that said owners, occupants, and tenants must make all reasonable efforts to seal their strata lots to prevent their smoke from infiltrating the interior common property, or other strata lots.

BELOW PROVISIONS ONLY IF YOU HAVE EXISTING SMOKERS – OTHERWISE LEAVE OUT:

(9) A Resident shall register in writing as a smoker with the Strata Corporation within thirty (30) days from the date that this bylaw is adopted failing which that Resident is deemed to have agreed to be bound by and comply with this Smoking Prohibition Bylaw.

(10) This Smoking Prohibition Bylaw will not apply to a Resident who complies with subsection (9) hereto until such time as the strata lot is sold if the smoker is an owner or the strata lot is vacated if the smoker is a tenant or occupant (collectively the "Grandfathered Residents" or singularly, a "Grandfathered Resident").

(11) The Resident must be a smoker to qualify as a Grandfathered Resident.

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(12) A Grandfathered Resident who smokes must not cause a fire hazard, nuisance or allow smoke or smoking debris to unreasonably interfere with the use and enjoyment of the common property or the strata lot by another Resident.

(13) The strata council must make reasonable accommodation pursuant to the Human Rights Code to a Resident who upon written application establishes by medical or other satisfactory evidence that he or she has a physical disability that is caused or exacerbated by second hand smoke generated by a Grandfathered Resident.

SPA Copies for Sale to Members

A current unofficial consolidated version of the ***Strata Property Act***
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*VISOA made a bulk purchase of these and will have them for sale for **$23** at our seminars while quantities last.*

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VISOA
Vancouver Island Strata Owners Association

VISOA Bulletin - MAY 2016

Must a Strata Admit Census Takers?

By Sandy Wagner

In this issue...

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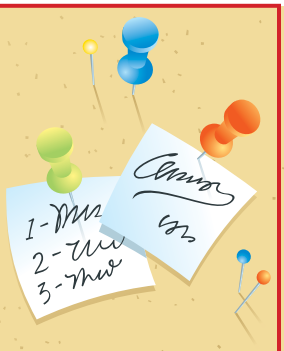

VISOA 2017
Planned Seminar Dates

FEBRUARY 26
Victoria – Comfort Inn – AGM

APRIL 2
Nanaimo – Bowen Centre

MAY 28
Courtenay – Crown Isle Resort

JUNE 25
Victoria – Comfort Inn

SEPTEMBER 17
Nanaimo – Bowen Centre

NOVEMBER 19
Victoria – Comfort Inn

President's Report

I'm always amazed at how quickly time passes – here it is another new year. I try to include some interesting quotes in each Bulletin, and this issue's quotes are on "change" – apropos at this time of year, I think.

And speaking of change, you may notice our references in this Bulletin to "Helpline" have been changed to "Strata Support Team". Our website team suggested the change, as "Helpline" implies only a telephone line. We do still offer the phone line but the majority of you contact us via email. One more change: Harvey Williams has officially "retired" from the Strata Support Team and has given over responsibility for the phone to our newest team member, Betty-Ann Rankin. Thanks, Harvey, for your many years of frontline service, and welcome Betty-Ann.

With a new year underway, we at VISOA have our AGM coming up soon. February 26th, all members are encouraged to join us at the Comfort Inn in Victoria for our Annual General Meeting, followed by guest speaker, lawyer Tino DiBella. During the AGM, we'll ask you to approve the budget for 2017 – with some unusual changes – and elect/re-elect directors to help run your board. Tino will speak on some of the many recent court developments affecting stratas. I'm sure you'll find the topic fascinating! Look for the AGM package to be posted on our website by February 1st.

In this issue of the Bulletin, we hope the enclosed articles can help you with some of your peskier strata problems. For example, smoking (and non-smoking) concerns are addressed by lawyer Paul Mendes, and we also include suggested wording for a smoking prohibition bylaw.

Lawyer Shawn M. Smith has written an article on correct procedures for bylaw enforcement. That should be "Strata Council 101" but so often we hear of problems and disputes caused because of a council skipping some of the required steps for enforcement. And of course, please remember that the object of bylaw enforcement is to modify behavior, not to collect fines!

Finally, VISOA's David Grubb answers some frequent questions on strata privacy issues. How much personal information is an owner entitled to receive about other owners; what details must council disclose to a person who is the subject of a bylaw complaint; and which council member email correspondence is "official" strata business? Good on David for tackling these topics; and during the writing of the article some questions arose which were further clarified by the Office of the Information and Privacy Commissioner. We aim to clear it up for you!

As always, members are encourage to write to us with your comments, beefs or bouquets. I am pleased to hear from you at president@visoa.bc.ca

Sandy Wagner
VISOA President