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VISOA Bulletin - NOVEMBER 2017

What a Snow Job

By Lynn B. Klein

Last year's amount of snowfall for the lower mainland and Vancouver Island caught a lot of stratas off guard. While some snow was forecast, it was the amount that overwhelmed many. For those stratas that have engaged a snow removal service, even these commercial companies were often stretched to over-capacity in ensuring walks and other areas of buildings were cleared to meet various municipal bylaws in regard to snow removal.

The snow did however provide a beautiful landscape. No doubt thousands of photos were taken to capture the event in many parts of island. As romantic as these photos may be, there is a more serious side to keeping on top of snow removal.

Snow, and often accompanying ice, poses a major safety risk for residents and visitors. An even more important reason to maintain clear walkways and steps is in the event of an emergency and first responders are required to respond. Not having a clear pathway for access not only poses a safety risk for the first responders, but slows down response time. In situations where time may mean the difference between life and death, any delay that can be mitigated by timely snow removal is essential. In the event of a fire or other situation that requires immediate evacuation from the strata, having a clear path will be vital.

In our particular strata we are fortunate to have residents who all volunteer to do the snow removal task. It is not uncommon to see people out at all hours of the night or day to keep up with the removal. The building also has a flat roof so this poses a risk of damage or even collapse if snow is allowed to accumulate, so in high snow periods the roof is also shoveled. This may not be a service provided by your particular snow removal company, but if you have a flat roof it is best to see if this service is available. It will cost more that the normal service, but well worth it when the consequences of snow buildup on the roof may be much more expensive to repair, and more importantly place the safety of residents at risk.

One great lesson I have

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learned over the years of living in Alberta is, be prepared for snow every month of the year. I have incorporated this "be prepared" thinking into our strata maintenance plan. The following items should always be planned:

Several good quality snow shovels, both plastic and metal.

Good quality shovels will provide you with easier shoveling. Some Stratas may even have show blowers, or rent these for the rare occasions when such large snowfalls occur in their respective area. One device I recommend as an addition to your shovels, that is advertised on TV, is the "HEFT". This attaches to the handle of most any snow shovel and really does make a difference in the energy needed to shovel and dispose of the snow.

Salt, drains and catch basins.

My advice is buy your salt in October or November at the latest and make sure you buy at least eight to ten 10kg bags. If you don't use it in any given year, it will keep. Please be aware salt and other commercial de-icing compounds are corrosive. The salt or other compounds to remove ice are also hard on the feet of pets, so use only when necessary. When the snow begins to melt it is wise to wash down concrete areas that that have been exposed to salt or de-icing compounds. When the big melt comes, and it will, ensure all your street catch basins are clear of snow and slush. It is a good idea to keep the street gutters clear of snow build up, so when the snow does begin to melt less will travel into the catch basins.

Down spouts running into your perimeter drains need to be clean. The amount of water that will travel down these drains can be dramatically reduced by removing snow from your roof. A huge volume of water exiting from the downspouts into the perimeter drains can also cause backup and possible flooding of below-grade areas. If you are going to have roof snow removal done, it is strongly recommended this work is done by professionals who have all the necessary equipment.

Have a list of residents who are physically able to do the shoveling.

Snow is rare in many parts of the west coast, with the exception of the higher elevations. The snowfalls of late January and early February 2017 in particular were more than most communities in the lower mainland and Vancouver Island had planned for. From many conversations I have had with other strata dwellers it was also more than their councils had prepared for. Hopefully lesson learned, and you can prepare now for Winter 2017-18.

About the author: Lynn Klein is a board member of the VISOA, and has developed a comprehensive maintenance manual for his own strata. The manual has been a major component of the VISOA maintenance workshop presentations.

CRT Roundup

By Kevin Zakreski, Staff Lawyer, BC Law Institute

This post is part of a monthly series on BCLI's website, summarizing the Civil Resolution Tribunal's strata-property decisions. There have been 14 new decisions since the last website post.

Limited common property—significant change in use and appearance—patios & governance—strata council—conflict of interest

Page v Section 1 of The Owners, Strata Plan NW 2099, 2017 BCCRT 84, concerned a dispute "about certain alterations to the limited common property patios of three residential strata lots in the section . . . . which sit underneath an outdoor gazebo or canopy." "[A]t issue," the tribunal noted, "are 2 change orders made after the original Project design: 1) the change from a wood to a steel trellised gazebo or canopy over the Patios, and 2) the placement of stairs that the applicant says extended the Patios out by 40" to the benefit of those 3 strata lot owners. The Project was approved by a 3/4 vote resolution of the owners. However, the Changes at issue were not approved by a 3/4 vote resolution." The applicant strata-lot owner sought the following orders:

an order declaring that the section permitted common property alterations contrary to section 71 of the SPA. The owner also wants an order that a strata council member Frank Furesz was in a conflict of interest and benefitted from unapproved upgrades to his patio and canopy. The owner further wants an order that the section is not responsible to pay the additional costs of the upgrades.

The tribunal decided not to grant the requested orders. Regarding the conflict-of-interest allegation, the tribunal found that the council member's involvement with the project didn't rise to the level of a conflict:

all executive members are also owners and may benefit from decisions. Something more is required than the fact that Mr. Furesz might have received some benefit, in order to establish a conflict of interest. This conclusion is consistent with the court's conclusion in Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837, 2007 BCCA 183 (CanLII), and I agree with the respondent section that if the conflict provisions apply to any interest of a council member then the strata council's work would be stymied because everyone would be in a conflict.

The tribunal also found that the two change orders (which involved moving the location of staircase and switching from wood to steel canopies) did not require authorization by a further resolution passed by a 3/4 vote.

Insurance—responsibility for payment of deductible—water leak (1)

In *The Owners, Strata Plan VIS 6634 v Brown*, 2017 BCCRT 86, the applicant strata corporation asked the tribunal for an order that the respondent strata-lot owner "is responsible to pay the remaining unpaid portion of the strata's insurance deductible in the amount of $2,428.84." The claim related to a water leak, which "[t]he parties do not dispute . . . originated from the owner's refrigerator."

The nub of the dispute in this case turned on the strata corporation's bylaws. The owner argued that the strata corporation had amended its bylaws and "that the amendments in the bylaws, as written, imposed a finding of negligence, inadvertence or carelessness on the part of the owner for the occurrence which gave rise to the loss." The owner further argued that she had met the relevant standard of care.

The tribunal found that the "bylaws" referred to by the owner hadn't been filed in the land title office. The relevant bylaws were found in the Schedule of Standard Bylaws, which didn't contain a bylaw specifically addressing responsibility for payment of an insurance deductible.

In the absence of a specific bylaw, the tribunal found that the *Strata Property Act*'s provision on insurance deductibles governed:

I note that section 158(2) of SPA does not require a strata corporation, as a precondition to suing an owner to recover the deductible portion of an insurance claim, to have a bylaw that [sic] *stating that an owner who is responsible for damage that originated in the owner's strata lot is responsible to pay the insurance deductible.*

In my view section 158(2) of SPA

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can stand on its own and can be relied on to allow the strata to sue the owner to recover the insurance deductible if the owner is responsible for the loss or damage that gave rise to the claim.

Insurance—responsibility for payment of deductible—water leak (2)

In *The Owners, Strata Plan BCS 1589 v Nacht,* 2017 BCCRT 88, the applicant strata corporation claimed that the respondent owners were responsible for damage caused by a pipe failure and were liable to reimburse the strata corporation for payment of its insurance deductible. The case turned on the interpretation of the strata corporation's bylaws:

In this case, as in Morrison, the strata's bylaw 4.4 specifies a specific type of responsibility which attracts liability, that being some affirmative act or a failure to act sounding in negligence, before an owner will be liable to indemnify the strata council for losses not covered by insurance.

However, this case contains the further indication in bylaw 4.4(b) that bylaw 4.4(a) does not limit, in any way, "the ability of the strata corporation to sue an owner pursuant to section 158(2) of the Act."

If bylaw 4.4(b) was not present, I would have no difficulty concluding that here, as in Morrison, bylaw 4.4(a) would require proof of negligence on behalf of the owners if it were to recover the expense of the insurance deductible from them.

The question, therefore, lies in the effect of bylaw 4.4(b).

The tribunal found that the bylaws had the effect of requiring more than mere responsibility for the damage:

I find it is more likely than not that in adopting bylaw 4.4(a), the strata intended to ensure that unless an owner was at fault (in the sense of being negligent as described in Morrison) for the loss giving raise to the payment of the insurance deductible by the strata, the deductible would be treated as a common expense. I consider that the application of bylaw 4.4(b) was not intended to alter the standard for repayment of the deducible set out in bylaw 4.4(a), but was in fact intended simply to ensure that bylaw 4.4(a) was not removing the ability of the strata to sue an owner for repayment of a deductible, as provided for in section 158(2).

The strata corporation was unable to prove that the owners were negligent and the claim was dismissed.

Governance—strata council & common property—repair and maintenance

In *Zhen v The Owners, Strata Plan BCS 1772,* 2017 BCCRT 87, the applicant strata-lot owner claimed that there was "gross misconduct and negligence on the part of the strata council and its property manager with respect to governance of the strata and maintenance and repair of the building." The applicant sought orders that the respondent strata corporation not use a specified contractor (referred to as "R") for repairs, to confirm warranty coverage for the applicant's strata lot, to recover a payment made to the contractor, to hire a new contract to carry out building-envelope repair at a specified cost, and to terminate its relationship with its strata manager.

The driving force behind the claims was the applicant's partner, who had a fraught relationship with the strata council and the strata manager.

With regard to the repairs, the tribunal found "the applicant's claims of substandard work and overpayment are without merit." The tribunal noted:

The strata council members obtained three quotes and reviewed them. They obtained and checked references with respect to quality of work. They decided to proceed with a contractor who was licensed and insured, and who offered to do a wider scope of work for a price less than the other bidders. I find that a reasonably prudent person in similar circumstances would have done just what the strata council members did in this case, and that the strata did not act improperly in hiring R to do the exterior work.

The tribunal also dismissed the applicant's claims of mismanagement:

The evidence submitted by both parties suggests that it is Mr. Kiss [the applicant's partner] who fundamentally misunderstands the obligations and duties of the strata council and property manager. It indicates that he has resorted to any possible avenue to challenge or interfere with work being done to the strata building and the strata's governance. When he has raised these concerns to the owners, they have considered his position and ultimately disagreed with him. This is reflected in the owners' unanimous ratification of

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the council's conduct at the 2016 AGM.

Common property—repair and maintenance—small strata corporation

The strata corporation at issue in *Deane v The Owners, Strata Plan VIS 3224,* 2017 BCCRT 90, consisted of two strata lots. The applicant strata-lot owners sought an order compelling the other strata-lot owners to "reimburse them 50% of the costs to repair an exterior wall of the building plus legal expenses and tribunal fees paid."

The tribunal found the repairs to be necessary and the invoices for them to be reasonable. Even though the strata corporation consisted of a mere two strata lots, the act applies to it as it would to any strata corporation:

I have found the SPA applies to this dispute, the exterior of the south east wall of the building is common property and the strata is responsible to repair and maintain common property. That the strata has not historically paid for repairs to common property does not now excuse the strata from its statutory obligation to do so.

The tribunal concluded that the applicants were entitled to their order:

On review of the overall evidence and for the reasons set out above, I find the owners proceeded in a reasonable fashion to keep the Grahams informed and completed repairs that were the responsibility of the strata. Of significance is the fact that the strata was not following the requirements and provisions of the SPA, such that it did not conduct meetings, elect a strata council or adopt a budget. Given the position taken by the Grahams, I find it was necessary for the repairs to be completed to stop the water ingress from continuing.

Had the strata operated in accordance with the SPA, the strata's costs would have been contributed to with each strata lot paying 50%. The evidence shows the owner paid the total repair costs for which the strata is responsible. It follows that the Grahams should reimburse the owner 50% of that amount, or $4,602.69.

Common property—repair and maintenance—dryer vents & proceedings before the tribunal—limitations

In *Corner v The Owners, Strata Plan K 833,* 2017 BCCRT 89, the applicant strata-lot owner claimed "that the strata is not properly managing dryer vent installation and cleaning and that she is entitled to reimbursement of amounts paid by her." The claims related to various fees for the inspection of dryer vents connected to "old, existing stovetop exhaust vents and did not meet fire code because the pipes were undersized."

The tribunal held that the claim for an inspection fee was barred by the Limitation Act because it was commenced more than two years after being discovered by the applicant. The tribunal found that the applicant would have been aware of her claim "when the applicant had to pay the strata for the cost of a professional inspection of her dryer exhaust vent in December 2013." This was more than two years before the date on which the applicant commenced her claim (21 April 2017).

But the tribunal found that the strata corporation was not authorized under its bylaws to charge an administration fee. This fee was levied under what the tribunal found to be an unenforceable bylaw:

The strata must repair and maintain common property and common assets. (SPA s. 72(1)) The definition of "common property"

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includes ducts and other facilities for the passage of water, sewage, drainage, gas, oil, electricity, telephone, radio or other similar services, if they are located within a floor wall or ceiling that forms a boundary between a strata lot and the common property. (SPA s. 1, Definition of common property)

Therefore, by definition, the dryer venting ducts are common property because they are located between a strata lot and the common property roof.

The strata may, by bylaw, make an owner responsible for the repair and maintenance of common property, other than limited common property, but only if the regulations to the SPA permit it and subject to prescribed restrictions. (SPA s. 72(2)(b)).

At present, there are no regulations to the SPA that permit a strata corporation, by bylaw, to make an owner responsible for the repair and maintenance of common property. Therefore, bylaw 3.3 is contrary to the SPA because it makes owners of super suites responsible for the cost of cleaning common property dryer vents. I find bylaw 3.3 is unenforceable.

Common property—repair and maintenance—negligence—drain pipe

In *Tam v The Owners, Strata Plan BCS 282,* 2017 BCCRT 93, the applicant strata-lot owner sought "orders that the strata is responsible to repair damage to SL 29 resulting from the backup of water from the common property plumbing drain and that they be reimbursed for tribunal fees paid." The owner alleged that the damage was due to "the strata and its plumbing contractor [being] negligent in not properly maintaining a common property drain pipe given the strata's duty to repair and maintain common property."

The parties agreed that the pipe was common property and its blockage had caused damage. At issue was the strata corporation's regular maintenance plan, which the tribunal ultimately found to be reasonable in the circumstances:

The strata reasonably relied on the expertise of Werner Smith in determining what preventative maintenance work should be completed with respect to drain cleaning and the scope of work did not include the drain line.

The strata is not an insurer. The courts have found that a strata corporation, when repairing and maintaining common property, is not held to a standard of perfection but is required to act reasonably when fulfilling its obligations. If the strata's contractor failed to carry out work effectively, the strata should not be found negli-

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gent if the strata acted reasonably in the circumstances. . . .

The standard of the strata when meeting its obligations to repair and maintain common property is therefore one of reasonableness. That Werner Smith did not clean all common property drain lines, and specifically the drain line, does not mean the preventative maintenance program adopted by the strata is unreasonable.

The tribunal found that the strata corporation wasn't responsible to reimburse the owner for damage to the strata lot, except for an amount connected to an emergency repair call, which the strata corporation purported to charge back to the owner:

The owner has requested the strata be responsible for all costs related to the damages and repair of SL 29 and I infer that includes the emergency repair expenses contained in the Platinum invoice.

As noted earlier, the strata does not have a bylaw that gives it authority to charge back a non-lienable amount to an owner's strata lot or an owner's account. Given that such a bylaw does not exist, I find the charge back of Platinum's invoice to the owner's account was not permitted and is therefore invalid.

In summary, I find that the owner is responsible for repairing the damage to SL 29 caused by the blocked drain line, save and except the $955.74 paid by the strata for emergency repairs completed by Platinum.

Common property—repairs and maintenance—window washing

Mellor v The Owners, Strata Plan VIS 2316, 2017 BCCRT 92 was a dispute "about whether the 26-unit largely single-story strata is responsible for window cleaning as part of its responsibility to repair and maintain common property." The tribunal described the composition of the strata property as follows:

The strata is comprised of 26 units in 9 buildings. It is undisputed that 22 of those units being a single story where windows can be reached with a stool or stepladder by the owner. The owner's unit 302 is 1 of 4 two-storey strata lots. The strata has no limited common property.

The strata corporation's bylaws were the standard bylaws.

The tribunal found the strata corporation to be responsible for window cleaning:

Strictly speaking, cleaning may not appear to fall within the common definition of maintain, which is to keep something in good working order but also includes "keep in proper condition." It may be that window cleaning does not affect its function or performance, although as noted above the BC Housing documentation submitted appears to suggest that it could. In any event, there are a variety of things a strata does in maintaining common property that would appear to be primarily for aesthetic reasons, such as regular lawn mowing or weeding of garden beds or cleaning up transient litter from common areas. Overall, given the case law and the evidence submitted, I find that cleaning falls within the common sense meaning of "repair and maintenance." Given bylaw 8, I find the strata is responsible for the exterior window cleaning in the strata.

The tribunal ordered the strata corporation to "implement a reasonable exterior window washing schedule within 30 days of its next annual general meeting."

Reimbursement for repairs—windows

In *Atlas v The Owners, Strata Plan 991,* 2017 BCCRT 96, the

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applicant strata-lot owner asked the tribunal for "reimbursement of $16,511.25 she says she spent on replacing the windows of two enclosed balconies that formed part of her strata lot." The owner was suffering from water entering her strata lot through the windows. After investigation and ineffective repairs, the owner received "permission to undertake repair work on the windows on both of her balconies." Later, as a result of continuing water issues, the strata corporation "approved the enclosure of all the building balconies," with the result that "the windows that the owner had paid to be replaced were all removed."

In the tribunal's view, "this is not, however, a dispute over the strata's responsibility to repair balconies. Rather, this is a dispute about the strata's responsibility to reimburse the owner for the expense of replacing windows that formed part of her balcony enclosures."

The tribunal decided that the strata corporation's bylaws led to the conclusion that the strata corporation wasn't required to reimburse the owner in this case:

In sum, I find that the bylaws of the strata provide a clear answer to the owner's claim in this dispute. In my view, the unambiguous meaning of the bylaws is that maintenance and repair of windows that form part of a balcony enclosure improvement is the responsibility of the individual strata lot owner, not the strata. As the owner is seeking reimbursement for repair/replacement of her balcony enclosure windows, I find that her claim must fail.

Governance—access to records—contracts—significant unfairness

In *Wang v The Owners, Strata Plan LMS 2970,* 2017 BCCRT 97, the applicant strata-lot owner claimed the respondent strata corporation had treated her with significant unfairness in setting conditions on her access to strata-corporation records concerning a contract for the rental of water-treatment equipment. She also claimed that the strata council didn't have authorization from the owners to enter into that contract.

The tribunal noted that there "are 3 issues that concern access to records and documents":

Was it reasonable for the strata to require the owner to be supervised while inspecting records and documents?

Was it reasonable for the strata to limit the inspection periods to one hour increments or should other arrangements have been made to accommodate the owner's request?

Was the owner denied access to certain records and documents and did the strata meet the time limits provided in the SPA?

"While the SPA is silent on the issue" of supervision, the tribunal found "it reasonable for a strata to maintain security over its original records and documents. Here, the owner was not asked to pay for the supervision and was not charged for inspecting the records, which is consistent with the SPA that does not allow a strata to charge for inspection. Therefore, I find the actions of the strata requiring supervision of its original records to be reasonable."

But the tribunal did find the strata corporation's imposition of a one-hour time limit to inspect records concerning:

The SPA is silent on the issue of limiting the amount of time an authorized person can inspect records. Absent any statutory guidelines, it is my view that the strata must be reasonable in establishing any time limits for inspection of records and documents based on the circumstances at hand. Some factors that should be considered include the specific records and documents requested and the number of, if any, prior requests made

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by the same individual. While the strata's cost to provide access to the requested documents should also be considered, cost cannot be the sole determining factor given the SPA does not permit the strata to charge for inspection.

Given there appears to have been options available to the strata to arrange for supervision of the inspection, the large volume of records requested that could not possibly have been reviewed in a short period of time, and that the owner had to take 8 vacation days from her employment to complete her inspection, I find the actions of the strata in limiting the owner's access to 1-hour increments to be burdensome, harsh and wrongful and therefore, significantly unfair.

I see no reason why the timeframe of the inspection arrangements could not in future be extended to 4 or more hours at a time so as to allow the owner sufficient time to complete her inspection in 2 or 3 days rather than 8 days. To this end, the owner should give the strata reasonable notice of the estimated time she requires for such an inspection, so that the strata could make the appropriate arrangements. Nothing in this decision changes the strata's obligation to provide the documents for inspection within the two-week timeframe set out in the SPA.

Finally, the tribunal found that the strata corporation had also effectively denied the owner access to certain records through delay.

On the issue of authority to enter into the agreement itself, the tribunal found that "section 38 of the SPA gives it permission to enter into the agreements."

In the result, the tribunal ordered the strata corporation to comply with section 36 of the *Strata Property Act* and that "with respect to inspection of its records and documents, the strata":

May, at its discretion, require the inspection to be supervised,

May set a reasonable time limit for the inspection considering the circumstances of the request, and

May not deny multiple inspections of the same record or document.

The owner's other claims were dismissed.

Special levy—unauthorized expenditures—roof

In *Mbolekwa v The Owners, Strata Plan LMS 3719,* 2017 BCCRT 95, the applicant strata lot owners claimed "the strata exceeded its authority and breached the *Strata Property Act* (SPA) when it made expenditures from a special levy that the applicants claim were not authorized by the resolution." They also claimed that the strata corporation denied them access to records and hampered their ability to make their concerns known to other owners. They sought an order compelling the "strata to refund the total amount of the unauthorized expenditures to all of the owners."

The gist of the applicants' concerns was:

the resolutions authorizing the special levies were for roof replacement, eaves and enhanced insurance and any surplus must be returned to the owners in accordance with the SPA. The applicants claim that council acted beyond the scope of its authority and breached the SPA by not making expenditures from the roof contingency without informing strata owners in advance and thereby giving owners an opportunity to have input on the decision to use funds from special levies for non-emergency items that are not the roof, eaves or insurance. The applicants claim that the expenditures from the roof contingency were unapproved expenditures because they were not specified directly in the resolutions and, as 'unapproved expenditures' the strata did not follow the SPA to approve them.

The tribunal declined to accept this reasoning:

the applicants claim that the expenditures made by the strata from the roof contingency are unauthorized because these expenditures were not "explicitly stated in the resolutions." I cannot agree that the resolution must include absolutely every possible expenditure that may arise for the purpose set out in the resolution. I do not believe that is what is required by section 108 of the SPA. To anticipate every possible expenditure for a project of this size and scope is not possible or reasonable. To include in a resolution the explicit wording for every possible expenditure in order for the expenditure to qualify as meeting the purpose of the resolution is beyond the requirements of section 108 of the SPA.

The applicant's other claims based on this purported unauthorized expenditure were also dismissed.

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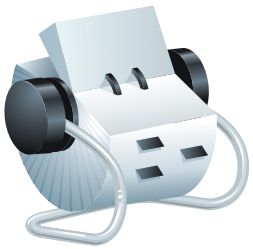

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Finances—expenditures from the contingency reserve fund—legal fees

Chao v The Owners, Strata Plan LMS1509, 2017 BCCRT 99, involved a strata property that had fallen "into disrepair as a result of water ingress." Its owners were at odds on how to proceed. At a special general meeting, a 3/4 vote resolution to retain a lawyer was defeated. With a petition to appoint an administrator coming on quickly for a hearing, the strata council decided to retain a different lawyer. This was paid for out of the strata corporation's contingency reserve fund "initially," but was ultimately allocated against the strata corporation's operating budget.

The tribunal noted three issues for resolution:

whether the strata council acted improperly in retaining legal counsel for the strata to attend at the hearing of a Petition brought by some of the owners to have an administrator appointed, in the context of significant and expensive repairs needed to address water ingress problems;

if so, whether the strata acted appropriately in allocating those expenses to the operating fund under a budget line item for legal expenses and;

whether the individual respondents are personally liable for a proportionate share of the legal expenses related to the Petition.

The tribunal found that the council hadn't acted improperly in retaining a lawyer:

Based on the nature of an application to appoint an administrator, which clearly impacts the strata, and on the direction that there is a duty to obtain proper representation . . . I find that it was appropriate for the strata council to retain a lawyer to appear at those proceedings on behalf of the strata, even though a 3/4 resolution did not pass in respect of a similar proposal earlier.

While the tribunal did find that "using the CRF funds was not appropriate, because the purpose did not meet the criteria in SPA s. 96 for a 3/4 vote, nor did it fall under an emergency exception," it ultimately held that the expenditure was properly paid for out of the operating fund:

While it is preferable not to use the CRF as a borrowing source and retroactively apply an invoice against a budget line item, the situation here appeared to involve a stalemate on how to proceed with repairs, which extended to a practical inability to pass a 3/4 resolution, leaving the strata council in the unenviable position of considering how to fulfil their duty to obtain appropriate representation for the strata on the Petition.

I find that the application of the expenditure of $33,072 against the operating fund as part of the majority approved budget line item for legal expenses of up to $50,000, was appropriate and consistent with SPA s.97(b)(i) which provides that expenditures from the operating fund can be made if authorized in the budget.

On the final issue, the tribunal found that "the strata council members acted honestly and in good faith, and therefore cannot be personally liable even if they were wrong to retain and pay [the lawyer]."

Nuisance—noise—air conditioner

Raincock v Burton, 2017 BCCRT 91, involved a two-unit, duplex strata corporation. Both strata lots were serviced by air conditioners, located side by side on the strata property's roof. One strata-lot owner asked for an order against the other owner that her air conditioner "causes noise and vibrations and that [it] be relocated to a ground location." This other owner made counterclaims based on what she characterized as retaliation.

The tribunal declined to make

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the order, citing a lack of evidence that the air conditioner was causing a nuisance:

Ms. Raincock has not discharged the onus on her to prove that the Burton AC causes unreasonable noise or excessive vibration. Based on the evidence before me, I find that the Burton AC is not defective and does not cause noise or excessive vibration.

The tribunal also concluded that the evidence supplied on the counterclaims regarding retaliation wasn't sufficient to support any of the orders requested. The tribunal did make the following general comments on the nature of duplex strata properties:

I reiterate that living in a duplex can be strained and very stressful if the residents are not getting along. In delivering this decision and making orders, I have not intended to criticize either owner for their conduct. I have attempted to make the future easier for owners living so close together in the future. They do not need to be friends, but they do need to respect and be civil with each other

Nuisance—noise

In *A.P. v The Owners, Strata Plan ABC,* 2017 BCCRT 94, the applicant strata lot owner claimed that the respondent strata corporation had failed to enforce its nuisance bylaw with respect to the owner's complaints about noise from a neighbouring strata lot and had failed "to properly investigate and respond to the owner's noise complaints about unit 801, noting in particular that since January 2016, the unit 801 owner has been a strata council member."

The tribunal found that the owner had failed to provide evidence of any negligence or bad faith in the strata corporation's investigations:

I turn first to the owner's allegation that the strata was improperly investigating itself, given the unit 801 owner was a council member since January 2016. I find this allegation is not proven, simply because there is no evidence to contradict the strata's evidence that the unit 801 owner did not participate as a council member in the noise complaint investigation or in the strata's decisions. . . . The owner has not provided any evidence to suggest the strata has been improperly swayed by unit 801, other than speculation and his interpretation of the strata's position that to date has not substantiated the owner's noise complaints. Based on the evidence before me, I find the strata has not failed to act in good faith. I say the same of the owner's broad allegations that the strata has been negligent in its investigation of the noise complaints. While it might have been easier to adjudicate this dispute

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if the strata had maintained more internal documentation of its investigation, there is no requirement for the strata to document the investigation and the evidence above simply does not support that negligence allegation. . . .

Further, the owner wasn't able to point to any objective evidence of nuisance:

The primary and significant challenge for the owner is that, with perhaps the exception of January 16, 2016, he has failed to contact the strata while the noise was occurring, even after being given phone numbers to do so. Based on the owner's own log that he later provided, there were a number of occurrences where the alleged noise occurred during the daytime or early evening, and yet he did not contact the strata. I find that based on the owner's own evidence, he invited the strata to unit 701 only three times (November 2015, January 16, 2016, and November 2016), and on 2 of those occasions they attended (November 2015 and for the November 2016 noise testing). Overall, I find the owner has not provided an adequate explanation for why he did not contact the strata to witness the noise first-hand on the alleged numerous other occasions, given his evidence that the noise continued essentially daily.

In the result, the tribunal dismissed the claim.

Limited common property—parking stall—access

In *Kuo v The Owners, Strata Plan LMS 4350,* 2017 BCCRT 98, the applicant strata-lot owner claimed "the strata has mistakenly used one of his parking stalls for storage and refuses to remove the stored items." He asked the tribunal for "an order that the strata give him 24 hours' notice to access his parking stalls and that he should be reimbursed for tribunal fees paid."

While the strata corporation appeared at the hearing, it "did not provide submissions with respect to the owner's claim for advance notice and reimbursement of tribunal fees paid." Since it didn't "[dispute] any of the owner's evidence or submissions," the tribunal "accept[ed] the owner's submissions for that reason."

"While it is not clear why the strata may still require access to the owner's LCP parking stalls," the tribunal decided, "to give the order requested by the owner as it is most certainly reasonable."

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- *promote the clarification and simplification of the law and its adaptation to modern social needs,*
- *promote improvement of the administration of justice and*
- *respect for the rule of law, and promote and carry out scholarly legal research.*

Privacy Matters

The following is a frequently asked question about strata privacy, with the answer provided by the Office of the Information and Privacy Commissioner (OIPC):

Q: Can an owner have access to a letter of complaint about them?

Under s.36 of the Strata Property Act (SPA), strata corporations must disclose records and documents to owners and other authorized individuals, including correspondence received by the strata corporation. The Personal Information Protection Act (PIPA) authorizes this disclosure, pursuant to s.18(1) (o). An owner may also make an access request pursuant to s.23 of PIPA for his or her own personal information under the control of the strata corporation.

As strata corporations are at liberty to disclose complaint letters to the person who is the subject matter of the complaint pursuant to SPA, it is advisable for strata corporations to have clear policies explaining to all owners and residents that the strata corporation will disclose complaint letters under SPA s.36 upon receiving a written request by an authorized individual. This includes disclosure to the person who is the subject matter of the complaint should they make a request under SPA.

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Handling Nuisance Records Requests under Section 36 of the *Strata Property Act*

Paul G. Mendes, Partner, Lesperance Mendes Lawyers

Ontario gets a lot of things wrong. The Toronto Maple Leafs, and the misspelling of that team's name immediately come to mind. But sometimes the folks in "Upper Canada" get it right. As the old saying goes, even a broken clock is right twice a day!

One thing that they do get right in Ontario is record requests of Condominium Corporations (i.e. stratas) under the *Condominium Act* (the Ontario version of the *Strata Property Act*).

One of the most common complaints I get from council members and strata managers is the problem of "nuisance" document requests made under sections 35 and 36 of the *Strata Property Act*. Section 35 requires a strata to keep certain records, and section 36 requires a strata to make those records available for inspection, and to produce those records to owners and others upon request.

The problem is that s. 36 does not limit the number of times a person can make those requests, nor does the *Strata Property Act* concern itself with the reasons for the request. As a result, an owner can make multiple requests for the same records over and over and, on an initial reading of section 36, the strata corporation must comply with those requests.

Believe it or not, there are some owners who make requests under s. 36 for the sole purpose of burdening the strata corporation, the strata council and the strata manager with the duty of responding to those requests. Such owners do not care what the information says, they just want to make sure that someone has to go through the time-consuming effort of providing the requested information over and over.

In Ontario, however, this problem is addressed by language in the Ontario *Condominium Act* which requires the request for documents to be "reasonably related to the purposes of this Act". The Ontario *Condominium Act* is about to be amended to change that to "having regard to the purposes of the Act", but the effect is probably the same.

In the Lahrkamp decision, a condominium corporation re-

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fused to produce records and the matter ended up in court. The Judge ordered the strata to produce some of those records but not others. With respect to the records that the strata was not required to produce, the Judge wrote as follows:

> "In my view, the inevitable conclusion to be drawn from the plaintiff's conduct and dealings related to his requests for access to records over the years was that the plaintiff was not genuinely interested in looking into certain specific aspects of the financial operations of the defendant but was either oblivious to the fact that he was wasting other people's time and money or, more likely, that he took a certain delight in pestering the Board and others with his demands."

As my teenagers like to say: same.

There is a lot of this in BC. I can think of a dozen clients I have right now that are faced with an owner making onerous and repetitive document requests for no apparent purpose other than "pestering" the council. Some these owners have been doing it at their strata for years. If my experience is typical, this is probably going on at hundreds of stratas across BC, when you consider how many strata lawyers we now have in BC.

Although there is nothing in the *Strata Property Act* that requires the strata to consider the reason for the request, or the number of requests, there are some things a strata can do to minimize the impact of these nuisance record requests:

1. Make the documents available for inspection first. Nothing in the *Strata Property Act* requires the strata to comb through its records to find specific information for owners. If an owner wants copies of all records related to the enforcement of the pet bylaws going back to 2001, show him or her the boxes of strata records going back to 2001 and let them comb through those records on their own. Some people will go away if satisfying their curiosity comes at the price of hours spent reviewing boring strata records.

2. Don't deliver records without advance payment of the fee. Section 36 only requires production of the records if the person making the request pays the prescribed fee (25 cents per page) in advance. The fee applies even if the document is emailed or saved to a USB fob or CD Rom. If a person asks for all the financial statements going back to 1972, make them pay first. Some people will go away if satisfying their curiosity comes at a price of hundreds of dollars.

3. Don't answer questions about the documents. Nothing in the *Strata Property Act* requires the council or the strata manager to spend time explaining the documents. You might do that in some cases as a matter of courtesy, but you would never do it for a person who is in the habit of making nuisance requests.

4. Keep track of requests and the records you have produced in the past. Section 36 does not actually require the strata to produce the same records over and over to the same person. If an owner requested copies of all the financial statements back

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to 2001 last year, and makes the same request again today, remind him or her that the strata complied with that request last year. Let them explain why they need those same records again. Unless they can come up with a good reason, I would not recommend producing those records again.

5. Consider whether the documents are protected from disclosure by solicitor client privilege. Case law in British Columbia states that a strata corporation is not required to produce documents that are subject to solicitor client privilege. Some owners will make document requests in anticipation of legal proceedings or while legal proceedings are underway. The council should get legal advice on whether or not the requested documents might be subject to solicitor client privilege before disclosing them.

6. Consider whether repeated records requests contravene the strata's nuisance bylaws. This is a tricky strategy but it is worth considering. Standard bylaw 3 says that an owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that "unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot". Arguably, repeated requests of this nature are a nuisance if you can establish that the obvious purpose of those requests is to pester the council or the strata manager.

What I describe above are "self-help remedies" that are designed to deal with true nuisance requests. These tactics should only be used in the most extreme cases and should not be used to thwart legitimate document requests. Remember always that the council has a duty to act honestly and in good faith when carrying out its duties under the *Strata Property Act*. These strategies should not be employed without the benefit of legal advice first.

Lesperance Mendes advises strata corporations and owners on all aspects of bylaw drafting and enforcement. If you are faced with a particularly challenging problem at your strata, call Paul Mendes at 604-685-4894 or email at pgm@lmlaw.ca. THIS ARTICLE IS NOT LEGAL ADVICE: This article provides general information and should not be relied on without independent legal advice.

By Lorne Craig, used by permission.

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Insuring Bareland Strata Properties

By Shawn Fehr

Over the past few years, I have written several articles for VISOA that focus on insurance coverage for strata owners. Unfortunately, none of those articles have provided much information to members that are living in a bare land strata situation. I have recently had a request to rectify this imbalance so the following article is devoted exclusively to owners living in a bare land strata.

As you are likely aware, in a bare land strata property the owner has an interest in his bare lot and any common buildings on the property, including above ground or underground services.

Any buildings or houses constructed on the bare lot that are owned by the individual are not the responsibility of the Strata Corporation. This means that the homeowner would be responsible for all maintenance and repairs on the house as well as procuring appropriate insurance coverage.

Similar to any Strata ownership there would be two insurance policies required for the Owner living in a Bare land strata situation: **The Owner's policy** and the **Bareland Strata** Insurance policy.

The Owner's policy would include insurance for the house, personal contents, additional living expenses, and personal liability.

The **insurance on the house** would be the same coverage as a home that is not on a Strata property. It should be insuring All Perils, such as fire, lightning and vandalism and it should also include Earthquake insurance so in the event of damage caused by a significant earthquake event then the owner is in a position to rebuild.

The policy would also need to insure the **personal contents** of the Owner with similar perils insured as the home including: Fire, Theft and Earthquake.

Additional Living Expenses is another important coverage. This coverage would be triggered by any peril already insured on the policy and provide reimbursement of out of pocket living expenses until such time that the house was repaired or rebuilt. Expenses such as hotels, meals, laundry, etc.

Note that if Earthquake coverage is not purchased, and an Earthquake occurs, then the coverage for Additional Living Expenses would not be triggered.

The Personal Liability would extend to all activities of the owner whether on premises or off premises anywhere in the world. (i.e. the golf ball through the window of a house in Arizona requires personal liability).

Loss Assessment Endorsement – this endorsement will provide coverage for the Owner for any deductibles that are assessed to him by the Strata Corporation. For example, in the event of an Earthquake, each owner would be responsible for his portion of the Strata deductible and this endorsement could cover that amount.

The Bareland Strata Insurance policy works in conjunction with the Owner's policy.

It will insure the common property within the Strata including above ground structures such as buildings, fences, roadways, lamp posts, etc.

It could also include underground services such as water systems and wells, sewer systems, utility lines, etc.

These property components can enjoy the same types of coverage that are purchased for other condominium and townhouse type of strata buildings. They should also be insured on an All Perils basis to cover things like Fire, Impact by a Vehicle and Earthquake.

The Strata Insurance policy also will insure **General Liability**. General Liability will cover any kind of bodily injury or property damage that occurs on the common property of the Strata.

The most common type of General Liability claim is the slip and fall. In BC, many areas are subject to cold and icy winters so liability is extremely important to protect the Strata Corporation from being sued by third parties that are injured by the slip and fall. Without liability coverage the burden of the injury expenses would fall onto the individual Strata Owners.

It is also important to note that an owner cannot sue the Strata Corporation for injuries they may sustain on the premises as they are a party to the insurance

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contract and you cannot sue yourself.

The other important coverage in a Bareland Strata policy is **Directors & Officers Liability**. Any owner that volunteers his time to sit on a Strata Council needs to be protected from lawsuits that may emanate from decisions made by the Strata Council. Without this coverage in place it would be even more difficult to get volunteers to sign up for the Council!

I have mentioned insuring Earthquake several times already as the question of insuring a Bare Land Strata for Earthquake arises frequently. The *Strata Property Act* states that all Strata Property must be insured for all major perils. It does not specifically state that Earthquake is required to be purchased, but as Vancouver Island is sitting in an extremely active earthquake zone it would be recommended to purchase this coverage. If the Big One hits and damages or destroys the infrastructure of the bare land strata corporation, then certainly every strata owner would want to have the protection afforded by an insurance policy to replace that infrastructure to enable them to rebuild their homes. This coverage would rebuild the roadways, repair broken pipes, and enable the rebuild of the houses or other structures on that strata property.

It should be noted that most Earthquake coverage carries a deductible of 10%, which means that if there was a Common Property limit of $2,000,000 then the deductible would be $200,000. The deductible is calculated as a percentage of the total insured value and not a percentage of the loss. In a 50-lot bareland strata that would mean that each owner would be responsible for $4,000 - a small price to pay to rebuild the necessary infrastructure. And if preferred, most insurance companies will add an endorsement to the Owner's policy for Loss Assessment coverage to insure that Strata Earthquake deductible.

Whether you live in a bareland strata, a townhouse, or a condominium, it is important that the insurance coverage you purchase is covering all of your needs.

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The Benefits of Periodic Bylaw Review

Amanda M. Magee, Associate, Lesperance Mendes Lawyers

A recent decision from the Civil Resolution Tribunal (CRT) highlights the importance of having your strata's bylaws reviewed to ensure that they are enforceable.

When a strata updates its rental restriction bylaw, the bylaw is often passed as an amendment rather than a repeal and replace. This is because section 141 of the *Strata Property Act* (SPA) has a grandfathering provision that allows owners and tenants to be exempt from a new rental restriction bylaw for at least 1 year after the bylaw is passed (or longer if they have an existing tenant). Strata lawyers will often recommend amending a rental restriction rather than repealing and replacing it with a 'new' bylaw in order to avoid triggering that grandfathering provision.

However, the danger in passing a rental restriction bylaw by amendment is that a strata can end up amending a rental bylaw several times over the course of many years without knowing that the original rental restriction was never actually enforceable.

This is what happened in the case of Louie v. The *Owners, Strata Plan LMS2083*, 2017 BCCRT 72. The applicant was an owner who was renting out her strata lot contrary to the strata's rental restriction, arguing that the rental restriction did not apply to her.

The strata had initially passed its rental restriction bylaw in March 2000 under the old *Condominium Act*. Unlike the SPA, which came into force 4 months later, the *Condominium Act* did not allow for a bylaw prohibiting rentals. The CRT found that the initial rental restriction bylaw was unenforceable because it was contrary to the *Condominium Act*, and that as a result, all later amendments to that bylaw were also unenforceable.

When the strata did a full update of its bylaws in January 2012 it included a newly written rental restriction bylaw. The ¾ resolution passing that bylaw attempted to get around the SPA's grandfathering provision by stating that the existing rental restriction bylaw "remains in effect to the extent that it prohibits the rental of strata lots". The CRT found this resolution to be "of no force and effect" since it was based on the unenforceable rental restriction. It therefore held that the 2012 rental restriction was a "new" bylaw, so the 1-year grace period under the SPA's grandfathering provision began to run.

As an owner with an existing tenant at the time that the 2012 bylaw was passed, the applicant's 1-year grace period began to run in November 2012 when that tenant moved out. When the applicant continued to rent out her unit to a different tenant 1 year later in November 2013, she was in contravention of the bylaw.

The owner argued that the strata had enforced its bylaws inconsistently against her and had acted in bad faith. The CRT disagreed, finding that the strata had mistakenly believed their old rental restriction was enforceable, and later mistakenly also believed that the applicant was exempt from the rental restriction by being an original purchaser. The strata learned of its mistake when it obtained a legal opinion in 2016, and at that point the strata advised the applicant that she was in contravention of the rental restriction and invited her to a council hearing.

The strata gave the applicant until the end of the year to end her existing tenancy, but she instead continued to rent her unit and filed a CRT claim against the strata. The CRT held that the strata had acted in accordance with the SPA, dismissed the applicant's claim, and ordered her to immediately stop renting her unit.

This decision emphasizes the importance of having your strata's bylaws and amendments periodically by a strata lawyer to ensure that they are enforceable, especially with respect to bylaws that have been passed as amendments to much older bylaws.

Lesperance Mendes has been advising strata corporation and strata lot owners on bylaw amendments and enforcement since 1997. To learn more about our strata property law practice, contact Amanda Magee, Associate, at 604-685-5438 or by email at amm@lmlaw.ca

This article is intended as general information only and should not be relied on as legal advice. Readers should obtain their own up-to-date independent legal advice before making any decisions that affect their rights.

Changing Bylaws for Changing Times

Did you get a chance to attend either of our two recent seminars on changing bylaws for changing times? Many of you did, as they both had very high turnout. If you missed the presentation by lawyer Shawn M. Smith, you can read his handout and view his powerpoint on our website under Seminar Handouts and Speaker's Notes.

Meanwhile, changing laws for changing times was on people's minds even two centuries ago, as you can see by this quote from Thomas Jefferson:

"I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."

Every great dream begins with a dreamer. Always remember, you have within you the strength, the patience, and the passion to reach for the stars to change the world.

- Harriet Tubman

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VISOA 2018 Planned Seminar Dates

February 25
Annual General Meeting (Victoria) Comfort Inn
April 15
(Nanaimo) Bowen Centre
May 27
(Courtenay) Crown Isle
June 24
(Victoria) Comfort Inn
September 16
(Nanaimo) Bowen Centre
November 18
(Victoria) Comfort Inn

BULLETIN SUBSCRIPTIONS

VISOA provides 4 information-packed bulletins each year.


VISOA
Vancouver Island Strata Owners Association

VISOA Bulletin - MAY 2016

Must a Strata Admit Census Takers?

By Sandy Wagner

In this issue...

- Corporate membership fees include emailed bulletins to up to 4 council members.
- Individual membership fees include emailed bulletins.
- Postal mailed bulletins are available to members for $15 annually per address.
- Non- members may subscribe to these bulletins at the following rates:
  By email: $15.00 per year and by postal mail $25.00 per year

President's Report

Dear Members,

Are you interested in joining your Board of Directors? It's not quite the same as being on your strata council, as there is no common property to manage. Some of the tasks are the same – providing information to members, planning a budget, generating revenue and paying the expenses. No bylaw enforcement, though!

As another fiscal year winds down, your Board is seeking new recruits to add to our numbers. Although we all enjoy giving our time for our members, we recognize the need for succession plans and sharing the responsibilities. You do not need to be a strata council member or *Strata Property Act* expert, although a working knowledge is important.

The Board of Directors:

• Provides direction and leadership for VISOA between General Meetings;
• Speaks on behalf of the Association; and
• Plans and provides for VISOA member services such as publications, seminars, workshops, website, and support team.
• Attend and participate in Directors' meetings, seminars and other meetings sponsored by the Association as required;
• Serve on and/or chair, standing and ad hoc committees of the Board of Directors as required;
• Act honestly and in good faith and in the best interests of the Association;
• Exercise the care, diligence and skill of a reasonably prudent person; and
• When acting on behalf of VISOA, act in accordance with VISOA's Bylaws and Constitution.

Currently we have standing committees ("Working Groups") for the Bulletin, Workshops, Seminars, Website, Strata Support Team, Membership, Marketing, Publications, Volunteer Coordinator, External Relations, and Social Media. Our office staff assists the board in their duties by providing administrative support.

Your talents in any of these areas would be appreciated by all the current board members – what area interests you?

Researching, writing or editing the Bulletin? Planning or facilitating workshops? Sourcing guest speakers and organizing seminars? Website content or edits? Assisting other members on the Strata Support Team? Generating new members, by marketing VISOA's services? Liaising with government and other stakeholders?

The board meets once a month, and between-meeting responsibilities are organized by email between the committee members, with as much or as little time as each is able to contribute. Board members do not have to be located in Victoria, as the work is done virtually most of the time.

I can tell you from my ten years on your board, six of them as your President, there is nothing more rewarding than a sincere "thank you, VISOA, you really helped us" to make my day.

If you are interested in hearing more about the board, or being considered for a nomination at our Annual General Meeting, please email me at president@visoa.bc.ca or leave a message at 1-855-388-4762 and let's meet to discuss it.

Sandy Wagner, VISOA President