VISOA
Vancouver Island Strata Owners Association

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VISOA Bulletin - NOVEMBER 2019

Editor's Angle

David Grubb, Editor

Condo owners have been publishing *The Bulletin* since before 1990, although we do not seem to have them scanned earlier than 2006. And even of the available PDFs, there are quite a few articles that no longer apply as the courts and the legislation have changed many aspects over the years.

Even so, it is interesting to note that throughout the archived years of publication, so many of the same topics keep recurring, and the answers often are no different: just expressed in other words! The French have a saying, *Plus ça change, Plus c'est le même chose!* The more it changes, the more it stays the same!

While our "Bulldozer", Elsie Lockert, has maintained a list of articles, their general categories and their *Bulletin* months and years, (bless her) there has been no means to go direct to a particular edition for an article. However, recently through the knowledge and tenacity of Cindy Young, our Office Administrator, there is a vastly improved version of the index on the *Bulletin* page of our website. Now you can see any item you want from the "Bulletin Index with Clickable links". By clicking on a link in the Index, you will be taken directly to the appropriate *Bulletin* in PDF format and you can scroll down to the applicable article.

Despite the recurring topics, we do try to keep you informed of new developments, and this edition carries on the tradition.

We call to your attention the article on not blocking out the names of complainants from a complaint letter received by council, if the respondent to the complaint requests a copy under Sections 35 and 36. The Office of the Information and Privacy Commissioner (OIPC) has now published Order P19-01 (January 24, 2019) stating that the OIPC, because the *Personal Information Privacy Act* (PIPA) Section 18(1)(0) applies to the *Strata Property Act,* cannot order deletion of personal information from any strata document listed in SPA s.35. Since, under SPA ss.35 & 36, the SPA does not give any permission to delete personal information from any part of any correspondence, including letters or emails of complaint, the strata is obliged, if requested, to supply that information exactly as it was written.

Also, a new development on the Civil Resolution Tribunal (CRT) front. Shawn Smith, who so often sends us worthwhile articles and gives us seminar presentations

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Editor's Angle
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regularly, writes on the necessity of ensuring that you are able to provide everything relative to the case you wish adjudicated, and of submitting clear and distinct statements: Don't Waffle! You have only one chance to make sure you cover all the bases succinctly, and you seldom, if ever, can actually talk to an adjudicator to explain yourself: it is all written!

This is borne out by the Strata Alert article by Alex Chang of Lesperance Mendes Law. He clarifies that "The CRT Act lists specific factors to consider whether it is in the interest of justice and fairness for a claim to proceed in the CRT or the Court." Alternatively, if it starts in Supreme Court but it can be heard by the CRT, the judge may dismiss it and ask it to be submitted to the CRT since the adjudicator is deemed by the *CRT Act* to have "the specialized expertise and jurisdiction granted to the CRT". Therefore, the CRT decision in each case is considered final, and may only be appealed to the Supreme Court if there is an error in law.

The other articles show that across North America condo owners tend to face the same problems (and worse!). Of note, also, is the article by Mary-Ann Trutz about aging in place. Aside from the remark about having a council member maintaining an emergency contact for everyone, which would not necessarily be enforceable, she definitely raises some issues, including dementia, which currently has few legislated responses. Well worth a discussion.

Finally, we are always looking for articles which would interest our readers. Please send your articles or suggestions to us at *editor@visoa.bc.ca*

Making the Most of Your CRT Claim

By Shawn M. Smith

Although the Civil Resolution Tribunal ("CRT") was designed to facilitate and encourage parties to represent themselves, that should not be cause to assume that successfully making one's case is as simple as it might appear. It is dangerous to let the apparent simplicity of the process mask the importance of it. The danger lies in the difficulty of getting a decision made by the CRT set aside. Participants effectively get only one chance to make their case. The importance of achieving a favourable decision must not be overlooked; particularly when it comes to enforcing bylaws.

The CRT cannot change a decision once rendered; even if the Tribunal member didn't understand the points being made by one of the parties. The only option to address a decision which a party is not happy with is to apply to the court for relief. However, it cannot be assumed the decision can or will be set aside. The test is a hard one to meet.

For claims initiated prior to January 1, 2019 a party unhappy with the CRT's decision in a strata property claim can either seek leave to appeal pursuant to s.56.5 of the Civil Resolution Tribunal Act (the "CRTA") or apply for judicial review. For claims filed after January 1, 2019, only the judicial review option under s.56.6 of the CRTA is available.

APPEAL

With respect to appeals, s. 56.5 contained two important provisions, namely that an appeal could only be brought on a question of law and that a party was required to obtain leave (permission) of the court in order to bring an appeal.

Only a pure question of law can be appealed – i.e. did the CRT apply the right legal principle? Mixed questions of law and fact (i.e. did they apply the law properly?) cannot be the subject of an appeal - *The Owners, Strata Plan NES 3120 v Jedmen Holdings Inc., 2019 BCSC 688.*

The court can only grant leave to appeal if it determined that it was "in the interests of justice and fairness to do so". Based on the Court of Appeal's decision in *Allard v. The Owners, Strata Plan VIS962*, 2019 BCCA 45, the test is a hard one to meet. Leave will not be granted in situations where the issue:

- serves no precedential value;
- affects only one owner out of a larger group; or
- consumes a disproportionate amount of time or money relative to the matter at hand.

If the party seeking leave to appeal is fortunate enough to get over the hurdle presented by the leave test, they must then convince the court that the decision reached was wrong. In *The Owners, Strata Plan BCS1721 v. Watson* 2018 BCSC 164 the British Columbia Supreme Court held that the standard to be applied when reviewing the CRT's decisions was "reasonableness", as opposed to the more stringent "correctness" standard. Reasonableness is a deferential standard (so the review must start from the position the Tribunal got it right). The standard of reasonableness does not require perfection. Not every flaw in a tribunal's reasoning will result in judicial intervention.

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JUDICIAL REVIEW

The CRTA was amended in late 2018 to exclude the possibility of an appeal for claims made after January 1, 2019. The amendment also changed the applicable standard of review. By virtue of s. 56.7(1) of the CRTA, the CRT is considered an expert tribunal for matters within its exclusive jurisdiction (being those set out in s. 121 of the CRTA). Accordingly, a CRT finding of fact or of law or an exercise of discretion in these areas will be reviewed on a standard of patent unreasonableness. That standard is a highly deferential standard and, as a result, the court will only overturn the decision if it is so immediately and obviously defective on the face of the issued reasons that it requires no probing to see that it is wrong.

The practical effect of this change is that the vast majority of CRT decisions (good, bad or ugly) will truly be final decisions, binding on the parties. The principle of *res judicata* prevents bringing back a claim that has been dismissed or otherwise adjudicated on.

GETTING IT RIGHT

As can be seen, disputing a CRT decision regarding strata matters will be difficult. Practically speaking, there will only be one "kick at the can" to get the decision you want.

Despite the less formal aspects of the CRT process, a great deal of care and attention must be taken in preparing or defending a CRT claim. A successful outcome should not be taken for granted. It is dangerous to assume that the Tribunal member making the decision will interpret a collection of emails, letters, photos and witness statements in the same way the party submitting them does.

Referencing the correct legal principles and relevant case law is important as well. Merely leaving it to the Tribunal member to identify the applicable case law means risking that a favourable argument or case will be missed. For example, has the limitation period been extended by the actions of one of the parties? Is there a case from another jurisdiction that might be persuasive?

CRT decisions are not precedent. As such, they do not need to be followed by another Tribunal member. It is entirely possible that with a well crafted argument, the member deciding the case can be persuaded not to apply a certain decision.

Tying the evidence and the legal principles together in a coherent and compelling way is critical to a successful argument. Since there is no oral hearing in most cases, there will generally be no chance to explain a point that is unclear. Making a solid argument through a well written and organized submission increases the chances of a favourable and defensible decision. (Saying too little can often be as damaging to a case as saying too much).

While some parties may feel up to the task, most owners and most strata council members will not. It is a heavy burden to place on the shoulders of a volunteer council member. That burden can be relieved by obtaining assistance with preparing and presenting the claim or defending against one. Participants in a CRT process can get assistance to properly present or defend their case. Often this involves providing assistance in drafting the claim or response and later in helping to assemble evidence, identifying applicable case law and presenting detailed and well laid out arguments (there is a 20,000 *character* limit for submissions, which demands conciseness without sacrificing content or arguments; a difficult task even for a lawyer!). The importance of the matter will influence the need for help. The greater the importance of the claim, the greater the impact of an unfavourable decision.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for 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. He can be followed on Twitter @stratashawn.

BCLI Consultation Paper on the Builders Lien Act

The British Columbia Legal Institute (BCLI) has issued a Consultation Paper on the *Builders Lien Act,* having had a law reform project underway for quite a while.

Naturally, BCLI wants to get input from VISOA and other organizations representing owners' interests, and so VISOA is encouraging our members to look at the consultative documents and make their views known. The consultation paper and overview are freely downloadable from the BCLI website at: https://www.bcli.org/project/builders-lien-reform-project.

BCLI is requesting responses to be sent in by January 15, 2020.

The policy discussion about the scope of the Act in Chapter 3 raises questions about the applicability of the Act to residential construction, home renovations, and projects below a significant cost threshold, and no doubt will be of interest. VISOA's input on these threshold questions will certainly be desirable.

Tentative recommendations of particular interest to VISOA members and all strata owners include:

• T.R. 1 calling for an Increase in the minimum value for a valid claim of lien from $200 to $3000 (pp. 25-26)

• T.R. 17 proposing a mechanism to notify registered owners when a claim of lien is filed against their titles (pp. 60-64)

• T.R.s 48-52 regarding faster and less costly procedures for clearing claims of lien from title (pp. 121-134)

• T.R.s 61-65 regarding easier removal of abusive and vexatious lien filings and strengthening of monetary sanctions to discourage same (pp. 147-156)

• T.R. 68 protecting owners of private land against liens filed in relation to work performed under a statutory right of entry (pp. 157-160)

• T.R. 69 ameliorating the effects vis-à-vis holdback obligations and liabilities to lien claimants when a CRA requirement to pay is issued to an owner in order to collect unpaid tax liabilities of a contractor (pp. 161-163)

• T.R. 73 regarding actions to enforce a lien arising in connection with improvements to common property (pp. 171-175)

BCLI has expressed its thanks for the input of VISOA members on its consultation on potential changes to the Strata Property Act, and they look forward to hearing from VISOA on Builders Lien Act reform.

No Expurgation by Council of Name of Complainant from Correspondence if Sent to Respondent Under SPA ss. 35 & 36

By Valerie Lipton, David Grubb & Others

Some time ago, Ms. Lipton was accused of allowing her dog off leash on common property, contrary to the strata's bylaws, and was fined $50. Note that in following the requirements of Section 135 of the *Strata Property Act* (SPA), the strata was not obliged to reveal any names of the complainants. Such information has to be requested by the respondent.

Before she would comment further, Ms. Lipton stated that under Section 36 of the SPA she was entitled to see a copy of the accusation - as written - which must be kept by the strata corporation under Section 35. The council refused to let her see anything but a copy, redacted of the names of the complainants.

When she contacted VISOA, a representative discussed the matter with an officer of the Office of the Information and Privacy Commissioner (OIPC), especially with respect to Section 18(1)(o) of the *Personal Information Protection Act* (PIPA) which states:

Disclosure of personal information without consent

18 *(1) An organization may only disclose personal information about an individual without the consent of the individual, if*

[….]

(o) *the disclosure is required or authorized by law, or*

[….]

That officer wrote that that PIPA section applied, and that Ms. Lipton was entitled to see all the information which would include the name of the complainant. He also stated that strata owners must understand the implications that, as in court, an "accused" was entitled to know who was accusing him.

The council would not accept that explanation and asked the OIPC to review it. Another person reviewed it and reversed the first statement, declaring that in fact PIPA Section 23(4) would take precedence over Section 18(1)(o).

Access to personal information

23 *(4) An organization must not disclose personal information and other information under subsection (1) or (2) in the following circumstances:*

(a) the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request;

(b) the disclosure can reasonably be expected to cause immediate or grave harm to the safety or to the physical or mental health of the individual who made the request;

(c) the disclosure would reveal personal information about another individual;

(d) the disclosure would 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.

Ms. Lipton would still not give up and applied for a formal review knowing that the publication would apply to all stratas. This was done and resulted in the adjudicator Elizabeth Barker, OIPC Senior Adjudicator, reviewing the extensive documentation presented by Ms. Lipton and writing OIPC Order P19-01 (CanLII Cite: 2019 BCIPC 03) on January 24, 2019.

She indicates that Section 18(1)(o) provides that an organization may disclose an individual's personal information without their consent if the disclosure is required or authorized by law. There are simply no provisions in PIPA, including the Commissioner's order making powers under s. 52, which can compel an organization to disclose an individual's personal information to another individual.

Ms. Barker finished the Order with:

CONCLUSION

[19] For the reasons provided above, I find that s. 23 of PIPA does not apply in this case. I also find that the Commissioner has no jurisdiction to decide if the organization failed to comply with its obligations under the SPA.

It is interesting to note that a statement made in the OIPC publication *Privacy Guidelines for Strata Corporations and Strata Agents – June 2015* seems to have been altered from what it used to be not very long ago, so that stratas are now advised:

Under s. 36 of SPA, any registered strata lot owner, a tenant who has been assigned a landlord's right to obtain copies of documents, tenants who are family members (as defined

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in the Strata Property Regulation), tenants who have leases of three years or greater, and any person authorized in writing by an owner or tenant can request copies of the records listed in section 35 of SPA.

A strata corporation must comply with a request for records under s. 35 of SPA within two weeks of receipt of the request, unless the request is for the strata corporation bylaws or rules, in which case it has only one week to comply.

Note that where stratas were advised that they had to reveal such information because PIPA s.18(1)(o) required SPA ss.35 & 36 to take precedence, now PIPA advises that although PIPA s.18(1)(o) applies to the SPA, it is entirely up to the strata (and the legalities of SPA ss. 35 & 36) to properly enforce the release of complaints without deleting any names, etc.

The following is the letter from the council:

Strata Plan VIS 4673
Qualicum Beach, BC
July 24, 2019
Ms. V. Lipton
Qualicum Beach, BC

RE: RESCINDING OF FINE AND COPY CHARGES FOR BYLAW 38 (1) - DOG ON COMMON PROPERTY

Dear Ms. Lipton:

Council has received and reviewed a copy of Order P19-01 issued by the Office Of The Information and Privacy Commissioner (OIPC) on January 24, 2019. That Order was issued in response to your request that the O1PC review the strata corporation's decision to sever the names and email addresses of complainants regarding a strata bylaw issue, and order the strata corporation to provide you with that information, as per Sections 35(2)(k) and 36(1)(a) of the Strata Property Act (SPA).

Paragraph 15 of that Order relates that questions of compliance with the SPA are matters the Commission has no statutory authority regarding and that such matters are appropriately addressed under the Civil Resolution Tribunal (CRT) Act. Paragraph 15 also refers to three CRT decisions which are identified in the footnotes. Those CRT decisions were reviewed and in each case, CRT found the strata corporation could not redact information from requests made under sections 35(2)(k) and 36(1)(a) of the SPA.

Paragraph 17 of that Order discusses PIPA and notes that "Section 18(1)(o) provides that an organization may disclose an individual's personal information without their consent if the disclosure is required or authorized by law." The SPA is provincial law and in light of the CRT decision findings as above, it is reasonable to conclude the disclosure is required by the SPA.

Paragraph 18 of the Order states the Commissioner wanted to "take this opportunity to also comment on the [strata corporation's] Complaint Confidentiality Policy because it contains inaccurate information about PIPA. It suggests that PIPA requires the [strata corporation] to remove personal information from complaint letters that it is required to provide under s. 36(1)(a) of the SPA. As explained above, this is not what PIPA says and I recommend the [strata corporation] amend its policy."

Council has added the issue of amending the strata corporation's Complaint Confidentiality Policy as recommended by the O1PC to its 'to do' list and may secure legal advice regarding proper content and wording of the policy.

Council also decided to rescind the $50 fine that was previously assessed against you under bylaw 38 (1) and refund the $8.50 you paid for copies of redacted documents. A copy of the Resident Aged Detail dated July 24, 2019 has been provided herewith to illustrate those decisions have been implemented and there is currently no balance on your account.

We trust this meets with your approval and that the matter is now at finality.

Sincerely,
Strata Council

The Reserve Fund: Top Condo Feature to Sell Your Condo

By Bernice Mills, PhD., MBA Guest Author

[Note: Alberta's "Reserve Fund", although with different rules, equates to B.C.'s "Contingency Reserve Fund". Ed.]

As a prospective buyer, knowing that you will not have to be special assessed when major repairs will have to be done or face huge increases in your monthly fees are key deciding factors in the purchase of a condo.

Each condominium corporation has a Reserve Fund Plan of expenditures based on a Reserve Fund Study itemizing the capital assets and their anticipated lifespan. However, there are often unexpected problems that need to be dealt with before anticipated repairs. Each month, a portion of your contributions (condo fees) should be directed to a Reserve Fund trust account which is separate from the day-to-day Operations Fund. The rule of thumb is that 15-20% of your monthly fees should go to the Reserve Fund.

Blacklisted Condominiums

While there are no "official" blacklists, mortgage insurance entities, like CMHC and Genworth, have records on properties with less than desirable financials and Reserve Fund allocations. Banks and other loan agencies have their own guidelines for approving mortgages. Should the Condominium Corporation have to borrow to pay for repairs or have insufficient funds for major replacements/ repairs, there is even the risk than an owner may not be able to renew his/her mortgage.

Is your Reserve Fund healthy?

It is important for owners to read the Reserve Fund Plan included or attached to the Reserve Fund Study which has to be renewed every five years. [Note: 3 years in B.C. Ed.] In addition, the new Alberta Condominium Regulations require corporations to forecast the Reserve Fund expenses for the next year as part of the Reserve Fund Annual Report for the AGM. The Reserve Fund balances are found in the AGM financial statements. Comparing the requirements of the Reserve Fund Plan from the Study to the annual financial statements will provide insight as to whether the Corporation is meeting its obligations in maintaining a healthy Reserve Fund. A transparent Board will provide fund balances in their regular meeting minutes. If not, owners can motion to have the Board do so at the next AGM.

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Reserve Fund Investments

Schedule 2 of the Alberta Condo Regulations lists the authorized investments a Board is allowed to make. The Regulations provide for all types of investments including bonds, debentures, dividend paying stocks but with certain restrictions. Optimizing returns on investments helps maintain purchasing power as the rate of inflation fluctuates. It is the usual practice to purchase very liquid redeemable GICs from banks. However, their average rate of return is at an all time low and currently at or below inflation. The Reserve Fund Plan includes an estimated rate of return on investments which is only adjusted for inflation every five years. For corporations, these discrepancies can be sufficiently large to cause special assessments or increases in condo fees if major repairs do occur or the investment returns do not meet the estimated target.

Reserve Fund Committee

Condominium Boards should create a special Reserve Fund Investment Committee to prepare an investment plan which parallels the objectives laid out in the Reserve Fund Plan. This investment plan ensures that funds will be available for major projects while at the same time enhancing investment returns for the Reserve Fund. An investment portfolio should consist of fixed and non-fixed securities with the fixed securities having laddered maturities and interest paid annually. To assure liquidity within a given year, short term T-bills or GICs are ideal. Non-redeemable GICs pay higher interest rates and are available on very short term basis but are not necessarily available from banks. Where there is no knowledge or basic financial literacy in the Corporation, a licensed investment professional should be considered. However, management fees for an advisor have to be taken into account in calculating returns. A 2% management fee on a 4% return would not warrant investments in other types of securities.

*The **Condo Owners Council of Alberta** (COCOA) is a non-profit organization of Alberts condo owners committed to making condominium communities great places to live. Their aim is to educate and advocate for condo owners, so they can work collectively to share best practices and find solutions to common issues that affect everyone. hptts://condoownerscouncilab.ca/*

Now For the Elephant in the Room: Growing Older in Your Condo

By Mary-Anne Trusz

It really does take a village… and a sense of humour!

In the last two months or so I was invited to two presentations: one regarding the issue of seniors growing older in their homes (& sometimes neglected) and another sponsored by a Strata where a lawyer covered all the by-laws, skimming by the mention of this same growing issue in condominiums. At the end of the presentation I stood up and addressed the meeting and found that most in the room were very relieved that the subject was being addressed and seemingly nobody knew how to proceed with this topic because of issues of privacy etc.

Why are we so reluctant to talk about it or put a few suggestions forward?

In the seven years I lived in a condo I witnessed at least four people who required assistance and we all pitched in to invite them for tea, ask how they were doing and if they had family close by if needed. We did what we could. Eventually the realization came that this would become a growing concern and a dialogue should be started about how to approach it fundamentally.

It would be good to have some "default" steps to follow, like guidelines if we see that someone is in distress and not asking for help (especially with dementia) until we have actual by-laws to help us navigate this time in history with

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some integrity – remembering that we may be next!

Legally the only people that can contact someone in their home if there is concern is the Health Department. They can come by and check on the person to see if they need help. This would be a last resort as family or a care-giver would solve most problems.

We're all going to need some help at some point and some simple steps can at least start a process of communication at strata meetings. After all, it's not just that person's welfare that we should be concerned about but also the welfare of everyone else in the building. It becomes a safety issue over a health issue at some point.

Better to be pro-active than reactive and behave as maturely as possible regarding ourselves as well. Should one committee member have an emergency contact for each person in every condo? Not a bad idea – this really should be discussed sooner than later.

Shifting back to compassion and caring about someone who may be living in fear because they are becoming more vulnerable is better than having a bully attitude – which usually comes from a lack of education about all the options that are available for all of us when we need help at a certain point in our lives as well – and remembering that.

Mary-Anne is a personal concierge & care giver and is available as a consultant for home management. She has written a booklet as a "Do it Yourself" kit to help family members who are looking after another family member & is considering "Home Care Management" and being a "Daughter by Proxy" after finding that so many need help - & won't ask for it! She is available for consultation on how to begin the process of being safe at home. She is also a health & nutrition consultant & is trying to change the food attitude in hospitals & nursing homes.

She may be reached at healthier.at.homecare@gmail.com

Upcoming VISOA Events
Save the Dates:

January 11 – Learn More About Volunteering With VISOA
VISOA Board Room, Victoria
January 18 – Workshop For small Stratas
VISOA Board Room, Victoria
February 23 – VISOA AGM and Seminar on Form B's
Comfort Inn – Victoria
April 19 – VISOA Business Members Showcase
Comfort Inn – Victoria
May 24 – Date tentative – VISOA Seminar
Nanaimo or Courtenay – Venue and Topic TBA
June 14 – VISOA Seminar –Topic TBA
Comfort Inn – Victoria
September 20 - VISOA Seminar –Topic TBA
Nanaimo – Venue TBA
November 15 - VISOA Seminar –Topic TBA
Comfort Inn – Victoria

Why Your Bylaws Should Include a Preamble

By Trevor Morley

The key difference between owning a strata and owning a single family home is that owning a strata comes with additional responsibilities towards the other owners. The level of cooperation and respect between owners is the most significant factor in determining whether strata ownership is a pleasant and rewarding experience or if it is one characterized by stress, hostility and expense.

For most people who own a strata lot, it is both their home and their largest financial investment. Therefore, every strata owner should prioritize the creation of a 'strata community' within the strata corporation. The core of every community is communication, and strata owners should actively engage in discussions regarding expectations and the vision for the community. The goal of discussing expectations and the vision for the strata community should be to minimize, as much as possible, the difference between an owner's expectations and the reality of living in that community.

The best way of communicating expectations is through a strata corporation's bylaws because all members have them, potential purchasers get them, and when there are disputes between owners it is often the bylaws that are referred to when determining what is permitted. Unfortunately, my experience is that most bylaws are bland statements of the obligations and entitlements of unit owners *(thou shalt pay thy strata fees on time, thou shalt not unreasonably interfere with the enjoyment of other owners, thou canst expect the common property to be maintained…)*.

I recommend that all strata corporations engage in discussions around writing and inserting into their bylaws a **'Preamble'**. In this context, what I mean by preamble is an introductory statement at the beginning of the bylaws that briefly describes the vision for the community. Imagine that you are considering purchasing a strata lot and you get a copy of the bylaws from your realtor, and the bylaws include one of these four different (fictional) preambles:

The Mews at Broadstreet is a development located in the heart of the entertainment district. It is a development that represents a significant increase in the density of the neighbourhood; and is a haven for artists, performers and other people that value convenient access to all the amenities and entertainment provided by this great city. As the poet Langston Hughes wrote: "Life is for the living. Death is for the dead. Let life be like music. And death a note unsaid."

Creekside at the Glen is a community of people who value the peace and quiet that exists only when you are surrounded by nature and disconnected from the chaos and noise of modern society. Located in a rural area and surrounded by parks, trails and with easy access to recreation, Creekside is a community where everyone knows their neighbours and respects privacy and quiet.

Community Towers is a high-density development conveniently located near the city core. It is close to transit hubs and schools, and, with several two- and three-bedroom units, it provides an excellent environment for families to experience all the excitement of downtown living.

Sanctuary in the City is a community that supports people that are at transition points in their lives. It has no rental restrictions, is conveniently located near social services, and intends to keep strata fees as low as possible while providing a safe and sustainable environment for those who live there.

…

I suspect that after reading these preambles you would have a pretty good idea if your expectations for what strata-living meant corresponded with the expectations of your neighbours.

I think that for most strata communities there would not be instantaneous and unanimous consensus on what the preamble would say. That is okay – the act of discussing what would be contained in the preamble is part of community-building!

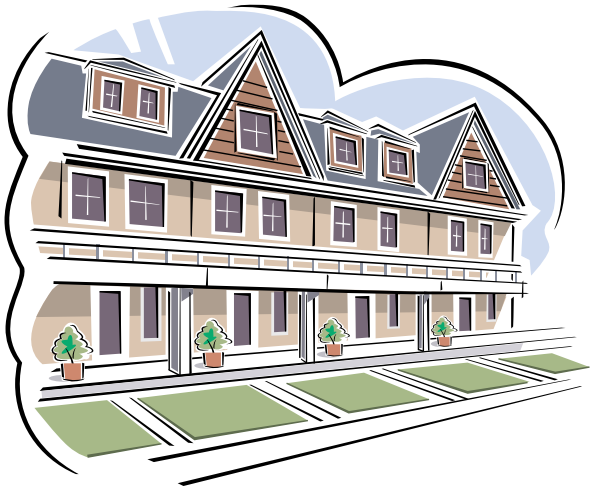
Trevor Morley is the founder and principal at Trevor W. Morley Law Corporation. He provides a full range of support to strata corporations and owners and is particularly passionate about community building and governance. He can be reached at tmorley@twmlaw.ca.

HOA Lawsuit, Deferred Maintenance Make These North Myrtle Beach Condos a Tough Sell (South Carolina)

By Deborah Goonan, Independent American Communities

[This article has been modified to make it clearer in the Bulletin. Deferred maintenance is not just a B.C. problem. It seems that Depreciation Reports are not even required in some States! But we hope that all stratas are regularly building up their Contingency Reserve Funds to avoid having to face these expensive problems. Ed.]

Tilghman Beach and Racquet (condo) Association has been embroiled in a lawsuit for the past three years. A group of seven owners of vacation condos is suing the HOA board, claiming the representatives of the association were negligent in maintaining the common property.



Finally, local journalists are starting to cover a very common HOA problem, especially for condominiums: deferred maintenance.

[….] The rotting wood framing, siding, and balconies on the WMBF report [linked in the original article] show that three decades of exposure to salty and corrosive ocean breezes has certainly taken its toll on the all-wood condo buildings, set one short block from the beach.

As is typical in HOA-ville, Tilghman Beach condo association didn't collect and save a portion of HOA fees for future repairs. According to current long—time owners, there has never been a reserve account.

Deferred maintenance leads to expensive repairs. And with no money in reserve, that means hefty special assessments for condo owners. At Tilghman Beach, owners could reportedly face a $131,000 assessment for each unit.

Ouch!

As usual, some outraged owners disagree with the board's past management of the association. That has led to the long, drawn-out lawsuit.

Now condo owners are paying for expensive legal fees, too. The condo association's insurer has denied their claim for legal defense.

One owner, who doesn't wish to be identified, says it took her a year to sell her condo. Real estate experts estimate that the ongoing HOA lawsuit and pending special assessments have reduced the value of her condo by $65,000.

Unfortunately, Tilghman Beach is the predictable point in a condominium's life cycle where the only buyers are investors making low-ball cash offers.

Strata Alert: Supreme Court Clarifies Jurisdiction of the Civil Resolution Tribunal over Strata Claims

By Alex J. Chang Associate, Lesperance Mendes

Under the *Civil Resolution Tribunal Act,* both the BC Supreme Court and the Civil Resolution Tribunal (CRT) have overlapping jurisdiction over strata claims. Both bodies also have the power to dismiss or stay claims brought before them on the basis that the other venue should hear the case.

The CRT has also rendered decisions such as *Somers v. The Owners, VIS 1601*, 2017 BCCRT 28 (Somers), which has held that a former owner cannot bring a claim against a strata corporation even where the claim arose while they were an owner.

This has caused uncertainty regarding where strata claims should be brought. In a recent victory for Lesperance Mendes and our client, the Court in *Downing v Strata Plan VR2356*, 2019 BCSC 1745 gave some clarity to both these questions.

Jurisdiction of the CRT

The underlying facts of the *Downing* case are common. An owner who was trying to sell her strata lot reported water leaks into the unit. The strata corporation responded by hiring a contractor and engineer to mitigate and inspect the water ingress. The mitigation work involved pulling up carpets, cutting drywall, and removing cabinets from the walls. Unfortunately, the unit could not be restored until the strata's building envelope was repaired.

The owner filed a Petition in Court alleging that the strata had acted significantly unfairly in how it responded to the leaks. She claimed damages resulting from her inability to sell her condominium. The owner also subsequently amended her claim to allege trespass and mental distress against the strata for how her strata lot was, in the words of the owner's lawyer, "torn apart."

The strata denied the allegations and argued that the CRT, not the Court, was the appropriate venue for the dispute.

The Court accepted that all of the issues raised in the Petition in some way deal with a combination of:

1. The application of the *Strata Property Act* (SPA) and the strata's by-laws;
2. The decisions of the strata corporation and its council; and
3. The actions of the strata corporation.

The Court also held that s. 121 of the CRT Act conveys jurisdiction for such matters to the CRT, and therefore the presumption was that the Court should stay the Petition under s. 16.1 of the CRT Act so that the matter could be heard by the CRT.

The owner argued that s. 16.1 of the CRT Act only requires the Court to stay or dismiss the proceedings in favour of a resolution by the CRT if the court determines that "all matters" are within the jurisdiction of the CRT. She further argued that her trespass and mental distress claims moved this dispute outside the typical jurisdiction of the CRT. However, the Court rejected that argument, stating that those common law claims did not change the "complexion of the dispute" which concerned

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"the strata corporation's powers and duties to enter, inspect, maintain, and repair strata property" and are "firmly within the specialized expertise and jurisdiction granted to the CRT".

Once the Court finds the CRT has jurisdiction, the claim may still proceed in Court if it is in the interest of "justice and fairness" to do so. The CRT Act lists specific factors to consider whether it is in the interest of justice and fairness for a claim to proceed in the CRT or the Court.

On justice and fairness, the petitioner argued that the claim was too big, too evidentially complex and should be left to the Court to establish a precedent. The Court rejected these arguments holding that:

• "Precedent is not entirely a monopoly of the courts: the reasons of the [CRT] are publicly available online and would provide persuasive, albeit not binding, authority and guidance for future similar disputes."

• The case would not establish a valuable precedent because it "will largely turn on the individual facts."

• The CRT had resolved similar cases in the past.

• The CRT has jurisdiction to decide larger claims over $100,000.

• The CRT can consider expert evidence that may be needed to decide claims for lost opportunities to sell strata lots.

• "[T]he CRT, like other administrative tribunals, frequently adjudicates disputes where there are conflicts in the evidence."

This ruling confirms that if the underlying facts of the dispute relate to the application of the SPA, the bylaws, or the decisions and actions of the strata corporation, then framing the action in terms of a large or complex common law claims may not take the action outside the jurisdiction of the CRT. An exception may be where the parties consent to have the court hear the matter (see *Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, 2018 BCSC 1162).

Claims by Former Owners Are Allowed in the CRT

The Court also ruled the Somers case was wrongly decided because it did not consider *Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 (Sze Hang). Although Sze Hang did not deal with the CRT, it did decide the issue before the CRT in Somers regarding whether an "owner" includes a former owner for the purposes of bringing a claim under the SPA. Following Sze Hang, the Court held that the owner becoming a former owner would not oust the CRT's jurisdiction to hear her claims that arose when she was an owner.

Lesperance Mendes has been advising strata corporation and strata owners on strata governance and dispute issues since 1997. For more information on how we can assist you in your strata matter, contact Paul G Mendes, Partner at 604-685-4894 or by email at pgm@lmlaw.ca or Alex J. Chang at 604-685-1255 at ajc@lmlaw.ca.

Is it Worth it to Buy a Condo in Canada Anymore? New Book Warns of Risk of Collapse

By Daniel Tenser

Taxpayers may find themselves on the hook for bailing out bankrupt condo corporations.

Beset by overly ambitious developers, absentee landlords and rising costs — among many other things — Canada's condo corporations could one day collapse, an Ontario academic is warning.

University of Windsor professor Randy Lippert's book "Condo Conquest," which comes out in paperback on September 1, describes an often dysfunctional world of condo development and governance in Toronto and New York.

Lippert argues the 50-year-old ideal of the condo — a vertical community of urban homeowners — is disappearing in favour of commodified investment properties and short-term rentals.

Among many issues highlighted: Developers often sell new condo units promising unrealistically low condo fees — which spike very quickly after the building's move-in date. That means owners face much higher costs than they expected, and will often resist spending money on maintenance work. As a result, buildings can quickly fall into disrepair.

And Lippert expects maintenance costs to keep rising faster than incomes, which could prompt some condo corporations to go bankrupt eventually.

"I think there will be a number of condos where those fees will become unsustainable and people will want to get out, and there's a point at which it (all) becomes unsustainable," Lippert said in an interview with HuffPost Canada.

"We saw this in the U.S. in 2008, where some condo corporations had to dissolve."

Condos account for an increasing share of housing in Canada's major cities — it's 21 per cent of all residences in Toronto today, more than double what it was 20 years ago. So the sector has in essence become "too big to fail," and the result is likely to be a bailout at the taxpayers' expense, Lippert predicts.

Governments could institute a bailout, for instance, by lowering the property tax rate for people in struggling buildings, Lippert suggested.

Because condo boards are often secretive about finances, and because owners are often unaware of their condo corporation's financial state, condo owners may not know that their building is in trouble until it's too late, Lippert warned.

One problem the book identifies is that developers often sell condos promising unrealistically low monthly fees. Costs spike soon after the move-in date, and buyers end up owning properties they would not have bought had they known what maintenance would really cost. When they resist spending on maintenance, buildings can very quickly fall into disrepair.

The book also chronicles the growing tension between condo owner-occupiers and investor-owners, both individual investors and corporations that own many large units.

These two groups have different interests. Owner-occupiers are willing to spend more to maintain the quality of life in a building; investor-owners just want the lowest possible costs to maximize profits. In between these two are condo renters — who Lippert says end up with all the blame in conflicts between condo owners.

In the world of condo boards, renters are seen "as variously immoral, risky, unsafe or transient." And yet, Lippert argues, renters are essential to the whole thing. Many condo buildings would not have been built had it not been for assumed demand from renters.

Developers prevent banning Airbnb

The Airbnb phenomenon is changing condos, turning some buildings essentially into hotels, but condo boards may not be able to change that. This is because developers can still control the governance of a building after they hand it over to a condo corporation.

Developers write the declaration, or the "constitution," of the condo corporation, and often they will dictate that short-term rentals are allowed.

It's often impossible to change that rule afterwards, Lippert says, because condo owners are largely

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disengaged from governance issues and don't show up for meetings, making it impossible to reach quorum to change a by-law. This is especially true in buildings that already have many absentee landlords.

I think there will be a number of condos where those fees will become unsustainable and people will want to get out, and there's a point at which it (all) becomes unsustainable. [Randy Lippert, author, "Condo Conquest]

Lippert would like to see developers' ability to control condo boards reduced. For instance, governments could write generic condo board declarations that would apply to new buildings until tenants write their own rules.

More generally, Lippert wants to see more government oversight of condo corporations, and he praises Ontario's creation of a Condo Authority, a sort of consumer-protection agency for condo dwellers.

But he notes that these agencies are quasi-non-governmental organizations, often heavily influenced by the industry they regulate. He would rather see fully-controlled government agencies in charge of regulating condos.

All of which is not to say that all condos are bad and headed for financial disaster, Lippert stresses.

"Some buildings are functional. I spoke with people where clearly things were going quite well and (there was) no reason to be concerned," Lippert said.

In the end, the real trick may be recognizing which is which.

"Condo Conquest," from UBC Press, was released in paperback recently.

OBEYING THE STRATA PROPERY ACT

The strata must comply with the SPA and Regulation whether I order it to or not. Therefore, a general order that the strata comply with the SPA and Regulation would be unenforceable and unhelpful.

Eric Regehr,

Civil Resolution Tribunal Member,

2019 BCCRT 968

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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.

Bulletin Subscriptions

- Corporate membership includes emailed bulletin to up to four council members
- All Individual and Associate memberships include emailed bulletins
- Bulletin is sent by email to all others who subscribe to VISOA's email subscription list, see VISOA home page for details

President's Report

It's hard to believe it's nearly the end of 2019. This must mean it's time for my annual "pitch" for new directors for your Board. Please do consider giving back to VISOA's members by joining the Board, who plan and guide the year's activities.

At least two of the current Board will not be standing for re-election at our AGM in February so there are several openings. Just as in your strata, the members elect the directors, and the directors elect the officers at the first Board meeting of the year. The officers are president, vice-president, treasurer and secretary, and meetings are usually monthly on a weeknight. But that's where the similarity to strata council ends!

Your VISOA Board never has to hold bylaw contravention hearings, or levy fines. We don't respond to middle-of-the-night calls about noisy neighbours or water leaks. We don't need to tell an owner we will be placing a lien for unpaid strata fees. And we never have to issue a special levy!

What your Board does do is plan, organize and provide education and assistance for our members and the public. We are very much committee-based, although we call them "working groups". For example, our seminars group plans and researches the venues for our annual 5 to 6 seminars, arranges guest speakers and their handout materials, and ensures the day runs smoothly with volunteer help. The workshops group has a similar role – planning and arranging for presenters for our 10 to 15 annual workshops.

Other working groups include website (recommending and arranging for updates to our website); social media (posting to our social media accounts and arranging for volunteers to assist); the Bulletin (finding appropriate articles and writers, editing, and ensuring publication); membership (welcoming new members and following up with lapsed members); strata support (answering your email inquiries on strata governance); government relations (building and keeping good working relations with our elected officials and their staff); marketing (finding creative ways to attract new members); publications (arranging for new educational material) and lastly our nominations committee and volunteer coordinator, two roles with similar functions.

The volunteer coordinator's role is to recruit and organize volunteers, then assign volunteers to tasks, and tasks for volunteers; and the nominations committee's role is to recruit new Board members. (Hence this message!) Why I say those roles are similar, is that many of our Board members have come from satisfied volunteers.

If you have never considered volunteering for VISOA, either as an occasional volunteer or as a Board member, please consider it for 2020. A volunteer's role can be as large or small as you like, and a Board member is asked to make a two-year commitment. Either one can be targeted to tasks you enjoy doing and have expertise with, tailored to your available time.

I can tell you from my 12 years volunteering here, that it is incredibly gratifying to provide the assistance we do: whether it was providing replies for the Strata Support Team; chairing or assisting members' AGMs; coordinating and recruiting volunteers as I did for several years; or facilitating and teaching our workshops. Although I've learned as much from you as you have from me, there is absolutely nothing like helping a troubled strata get back onto the straight path.

I know, for some, it can be intimidating to talk one-on-one so for our 2020 Board and Volunteer recruitment, we plan on a drop-in session, where you can find out more about the day-in day-out needs of our association and how you can help. If you are thinking of volunteering, this is the day to find out more: January 11, 2019, between 10:30 a.m. and 3:30 p.m. at our downtown Victoria office, Third Floor, 620 View Street. We'll have plenty of time to talk in small groups about what your skills and interests are, relative to what is required of a Board member or other volunteer. And it's a great excuse to get to know you better – I hope to see you there!

— Sandy Wagner

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