voice from the... strata-SPHERE®
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"It's Not Fair, It's Just Not Fair"
Allocations of Repair Costs in Leaky Condo Remediations

Kelly Bradshaw, Lawyer
C.D. WILSON LAW CORPORATION

The allocation of common expenses for a strata corporation is governed by the statutory scheme set out in the *Strata Property Act*, the Regulations and bylaws. When dealing with large remediation expenses, the strata corporation will usually need to raise funds by means of a special levy, which is provided for in section 108 of the Act. In the absence of sections, or a unanimous vote approving a different formula, expenses must be assessed pursuant to the Schedule of Unit Entitlement.

Kelly Bradshaw, Barrister & Solicitor, was first called to the bar in 1995 (Ontario). She began practising law in B.C. in 2008 at C.D. Wilson Law Corporation. The focus of her practice is civil and criminal litigation.

A grey area arises, however, when a strata corporation has historically been allocating expenses in manner that is contrary to the statutory scheme, and then deviates from this historical practice when it comes time to raise funds for a large repair bill. One or more owners may say, "It's not fair, it's just not fair!" But is it "significantly unfair"?

Section 164 of the *Strata Property Act* provides that an owner or tenant can bring an application to the Court to remedy significantly unfair conduct. Section 164 states:

> ***164 (1)*** *On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair:*
> *(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant; or*
> *(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.*
> ***(2)*** *For the purposes of subsection (1), the court may:*
> *(a) Direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes;*
> *(b) vary a transaction or resolution; and*
> *(c) regulate the conduct of the strata corporation's future affairs.*

The meaning of "significantly unfair" is not set out in the *Strata Property Act*, so it is necessary to look to the case law for its interpretation. While an exhaustive review of the definitions contained in the case law will not be undertaken here, significantly unfair conduct will generally include conduct that is unfairly prejudicial, unjust and inequitable. Some cases also refer to oppression, meaning conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing, or has been done in bad faith. The case law suggests, however, that oppression is a more severe standard, and it may be that conduct that falls short of oppression can amount

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to significantly unfair conduct. At a minimum, significantly unfair conduct will result in something that is more than mere prejudice or trifling unfairness (see the B. C. Court of Appeal decision in *Reid v. Strata Plan LMS 2503*, [2003] B.C.J. No. 417).

Since the *Strata Property Act* came into force 10 years ago, the Courts have dealt with a large number of applications alleging significantly unfair conduct, particularly in the context of large remediation expenses. In these cases, an owner or a group of owners want the Courts to allocate these significant expenditures on a basis other than the Schedule of Unit Entitlement.

The recent case of *Peace v. The Owners, Strata Plan VIS2165*, [2009] B.C.S.C. 1791, in which Ms. Wilson and I successfully represented the defendant strata corporation, involved such a situation. The plaintiffs challenged the allocation of repair costs on the basis of unit entitlement, arguing that it was significantly unfair that they had to pay twice as much as other owners. The nine strata lots owned by the plaintiffs had basements, and their unit entitlement was two, while the 32 other units had crawlspaces and a unit entitlement of one. The plaintiffs argued that the Court had the ability to substitute a different formula (the actual cost of repairs) under s. 164 of the *Strata Property Act.*

In dismissing the action, Mr. Justice Sewell held that the Court did not have the ability under s. 164 to "overrule" s. 108 of the *Strata Property Act*, which required the assessment to be made on the basis of unit entitlement (absent a unanimous resolution). He stated that for s. 164 to apply, an action or decision of the strata corporation had to be the source of the unfairness (para. 44). The focus of s. 164 was on the conduct of the strata corporation – not on the consequences of the conduct (para. 55). Mr. Justice Sewell did not accept the plaintiffs' submission that the Court could deviate from the allocation of costs by unit entitlement if there was a significantly unfair *outcome* to that allocation. He stated at para 60:

> … the case law demonstrates that there will inevitably be a wide divergence of opinion on what is or is not significantly unfair. I think it would be contrary to the purpose and intent of the SPA for the courts to engage in a detailed review of the relative costs of repairs to common property on a unit by unit basis to determine whether the outcome of applying section 108 is significantly unfair.

Mr. Justice Sewell relied on the decision of Mr. Justice Bauman, as he then was, in *Terry v. Strata Plan LMS2153*, [2006] B.C.J. No. 1404. The *Terry* case also involved a consideration of "who pays" in the leaky condo context, where one of the buildings leaked, and the owners of the other two buildings argued it would be significantly unfair for them to pay for the repairs. Mr. Justice Bauman reiterated the principle of condominium living that "you are all in it together" (*Strata Plan LMS1537 v. Alvarez*, [2003] B.C.J. No. 1610).

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Unit Entitlement and Significant Unfairness

Cora D. Wilson, LL.B., Strata Lawyer
EDITOR OF "VOICE FROM THE STRATA-SPHERE"

It is easy to allege that certain conduct or actions are significantly unfair; however, it is much more difficult to prove.

There has been significant litigation surrounding this issue in recent years, much of which has been spurned by the Leaky Condo Crisis. The question of "who pays" and "how much" becomes a front and center issue when owners are faced with a significant repair bill or perceived significant unfairness.

Many Strata Corporations, often unwittingly, invoke a scheme for the allocation of expenses in violation of the statutory Schedule of Unit Entitlement formula. This inevitably leads to conflict and potential challenges at great expense to all owners.

The general rule is that the community governs and the owners are "all in it together." The typical statutory formula for assessing common expenses for residential strata lots is the habitable area formula. For example, if strata lot #1 is twice as big as the neighbours strata lot #2, then strata lot #1 pays twice as much as strata lot #2. If the repair bill is $120,000, then SL#1 pays $80,000 and SL #2 pays $40,000. The actual repair costs might be split 3: 1 as opposed to 2:1 or $90,000 for SL #1 and $30,000 for SL #2. One owner overpays by $10,000 and the other underpays by $10,000. Is there any recourse?

The statutory formula is etched in stone as part of the Schedule of Unit Entitlement. Since the Schedule of Unit Entitlement is registered in the applicable land title office for each Strata Corporation, all owners are deemed to have notice of this formula. The argument that "we didn't know" carries little weight in the eyes of a Court.

The answer to the issue of "who pays" for common expenses and "how much" is found within the framework of the legislative scheme of the *Strata Property Act* (the "Act"), the Regulations and the Bylaws. The only exceptions to the general rule that "we are all in it together" may be summarized as follows:

(a) the strata corporation has by unanimous vote agreed to use a different formula for the allocation of contributions to the operating fund and contingency reserve fund ("CRF"), other than those set out in s. 99 and the regulations (Act, s. 100);

(b) the strata corporation has by a unanimous vote established a "fair division" of expenses for that particular levy (Act, s. 108(2));

(c) sections have been created (Act, s. 195);

(d) a bylaw is filed in the land title office before July 1, 2000, providing for the apportionment of contributions to a contingency reserve fund as a common expense according to type of strata lot, if that type of strata lot is a type identified in the bylaws of the strata corporation (Reg. 17.11(6)); or,

(e) a bylaw is enacted before January 1, 2002, that identifies the type of strata lot set out in the budget in effect on July 1, 2000, as a "type of strata lot" in accordance with section 128(2) of the *Condominium Act* or a similar bylaw, then the strata corporation may continue to use the type of strata lot identified in the budget as a "type of strata lot" for the purposes of allocating operating expenses in the budget (Reg. 17.13(1) & (3), 6.4(2) and 11.2(2)).

This scheme was approved by the Court of Appeal in *Coupal v. Strata Plan LMS2503*, [2002] B.C.J. No. 2313 (B.C.S.C.), revd 332 W.A.C. 273 (B.C.C.A.).

A bylaw adopted under exception (e) above does not apply to an assessment for greater than annual expenses (e.g. a major repair bill).

Now, lets muddy the waters. The owners in the Strata Corporation adopted a "fair allocation" formula without a unanimous vote of

owners and it has applied this formula to the allocation and assessment of operating and contingency reserve fund expenditures over a period of many years. This substitute formula is operating as the norm, until one day an owner questions whether or not this substitute scheme complies with the Act.

Then the fur flies. The owners are divided and chaos reigns. One faction argues that the historical scheme must prevail. The other faction argues that the statutory Schedule of Unit Entitlement formula set out in the Act prevails. One group of owners has underpaid and the other group of owners has overpaid. Who wins?

The Act does not permit the Strata Corporation to unilaterally implement a substitute scheme that differs from the statutory Unit Entitlement Formula. Unanimous resolutions are virtually impossible thresholds to achieve, especially after the fact. One group smells blood and a potential wind fall, while the other group feels victimized.

The scope of legal advice that a strata lawyer can provide to the Strata Corporation in this situation is extremely limited. The options include:

1. create sections, if this option is available;
2. seek a unanimous resolution to approve historical practice and if it fails, then resort to the Schedule of Unit Entitlement Formula (someone will always be unhappy);
3. apply to court under s. 246 of the Act, but this remedy is only available to correct an inaccuracy on the plan; or
4. wait until an owner challenges the allocation, but this is not a viable option since it means the Strata Corporation is operating contrary to the law.

Legal advice typically directs the Strata Corporation to exhaust its political remedies (unanimous vote and/or sections, if applicable) and if this fails, then the Strata Corporation must comply with the law.

If Unit Entitlement prevails, what do we do about past contributions? Owners buy and sell. Strata lots are foreclosed upon. Someone screams foul and if the dissatisfaction is deeply rooted, the potential for a law suit by an owner looms.

Absent a political solution, most of the available options involve legal proceedings, which can be lengthy, divisive, uncertain and extremely expensive.

Strata councils are advised to seek legal advice before implementing a seemingly equitable assessment of expenses. The consequences far outweigh any benefits. If you question whether or not an expenditure has been properly assessed, you should seek advice from a qualified strata lawyer as soon as practically possible.

The best cure for a violation is prevention.

"It's Not Fair, It's Just Not Fair".... *continued from page 2*

As in *Peace*, the petitioners in *Terry* argued that the Court had jurisdiction to alter the manner in which repairs were assessed under s. 164 if there was significant unfairness. Mr. Justice Bauman held that there was no conduct by the strata corporation that drew the "extraordinary jurisdiction of the court under s. 164" (para. 104), because the assessments were made pursuant to the legislation, not pursuant to a decision of the strata corporation.

Historical Practice & the Reasonable Expectation Test

In *Terry*, Mr. Justice Bauman distinguished a number of decisions in which significantly unfair conduct was found. These were cases where the strata corporation had a historical practice of allocating expenses contrary to the provisions of the *Strata Property Act*, and then altering the pattern by relying on the Schedule of Unit Entitlement, negatively impacting a minority group of owners.

For example, *Chow v. The Owners, Strata Plan LMS1277*, [2006] B.C.J. No. 430 is often relied upon by owners arguing significant unfairness. The strata corporation in *Chow* had two different types of strata lots – apartments and townhouses – and the strata corporation historically divided the budget in three ways - for the whole strata plan, for the townhouse lots only and for the apartments only. The strata corporation had never formally created sections, and as such, was operating outside the jurisdiction of the *Strata Property Act* in separating out the budget as they did. This was a leaky condo case as well as a "deadlock" case, where, given the disagreements of the owners, ¾ votes could not be passed. The Court found that s. 164 of the *Act* applied in relation to the Chow petitioners primarily based on the decision of the strata corporation to deviate from the historical practice of allocating expenses by type and imposing a single budget on the strata corporation as a whole in dealing with the repair costs. The Court found that this resulted in significantly unfair conduct against the townhouse owners, and ordered the creation of sections pursuant to s. 191(1)(c) of the Act. Sections were available under the Act.

The case of *Strata Plan VR 1767 v. Seven Estate Ltd.*, [2002] B.C.J. No. 755 (B.C.S.C.) was also distinguished by Mr. Justice Bauman in *Terry* on the basis of it being a case in which there was a historical practice of allocating expenses contrary to the *Strata Property Act*. In that case, there was a mistake in the registered unit entitlement of the strata lot owned by Seven Estate (a parking lot), and for years, the strata corporation assessed the strata lot on a reduced unit entitlement pursuant to a resolution which cut the unit entitlement virtually in half. When it came time to assess owners for repair expenses, however, the strata corporation used the registered Schedule of Unit Entitlement. The Court held that it would be significantly unfair to assess Seven Estate on the basis of the registered unit entitlement formula, given the historical practice.

Where there is a historical pattern of allocating expenses contrary to the *Act*, therefore, the Courts may find that deviating from this practice is a decision of the strata corporation that is open to attack under s. 164. The basis for such an argument would be that the owners had a "reasonable expectation" that the affairs of the strata corporation would be conducted in a certain way.

In the *Peace* decision, Mr. Justice Sewell considered the "reasonable expectation" test as set out in the Supreme Court of Canada decision in a company law case (*BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37). He found that there was no suggestion in the history of the affairs of the strata corporation in Peace that would lead the plaintiffs to conclude that the unit entitlement provisions of the *Strata Property Act* would not apply to the repair costs.

The cases involving historical practice add a level of uncertainty to predicting whether the outcome of an application alleging significant unfairness will be successful. Lawyers acting for owners or strata corporations should investigate historical practice when providing advice. It may be that the strata corporation followed the legislation in assessing a special levy, but if it represents a deviation from a historical practice, that decision may constitute significantly unfair conduct. An open question is what evidence will be needed to show a historical practice, and this will be a fact-driven question, based on the circumstances of each case.

In the absence of historical practice, the *Peace* and *Terry* decisions make it clear that following the legislation is not an action or decision of the strata corporation that draws the jurisdiction of s. 164 of the *Strata Property Act* – even if the consequence of following the legislation leads to significantly unfair results: the focus of s. 164 is on the conduct, not the consequences.

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The Unanimous Resolution Remedy

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When the historical practice used to allocate expenses differs from the statutory formula, Strata Corporations should take timely steps to correct the misstep. It is important to exhaust available political remedies. The approval of historical formulas using the unanimous vote option is one such political remedy.

If the unanimous vote of owners to continue historical allocations fails, then the Strata Corporation must, by default, use the unit entitlement formula into the future. All owners should be informed of the consequences of a failed vote.

Some may argue that it is highly probable that such a resolution will fail – so why go this route? Recent judicial comments lead me to believe that it is a wise course of action to present the unanimous resolution, even if it is likely to be defeated.

In *Strata Plan NW2212 (Re)*, [2010] B.C.J. No. 680 (B.C.S.C.), the strata corporation sought to amend the strata plan by bringing an application under s. 164 (significant unfairness) for an order to dispense with the unanimous vote required by s. 257(a) of the *Strata Property Act* ("SPA") to amend the strata plan. The strata corporation also sought orders to approve a special levy to accomplish the amendment of the strata plan and for the liberty to apply for further orders to effect the resolution they sought. A group of owners also brought its own application to require the strata corporation to comply with the strata plan.

The strata corporation was comprised of 40 townhouse style lots and common property. Each strata lot had a carport and a yard designated as limited common property for their exclusive use. However, the fences and hedges planted by the developer 25 years prior did not follow the designated boundaries for the yard area. The owners of one lot argued that they were denied the use of a portion of their private yard enjoyed by the adjacent strata lot owner.

The Owners wishing to continue the historical fence line brought an application to Court for an order to amend the strata plan to conform to the original fence lines. In addition, six visitor parking stalls were not designated on the strata plan. The parking encroached onto the limited common property of two lots. While one of the lot owners consented to the amendment of the strata plan to provide for three parking stalls, the owner of the second lot did not consent and sought enforcement of the strata plan, which would result in the loss of three parking stalls.

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After the strata corporation became aware that the fence lines did not conform to the strata plan, it obtained estimates of the costs of relocating the fences to conform to the strata plan and put forward resolutions at general meetings that the estimated costs to relocate the fences be paid for by special levy. After the resolutions were defeated, the strata corporation presented a resolution that it bring a court application to amend the strata plan, which was approved by a ¾ vote. At no time did the strata corporation attempt to pass a unanimous resolution to amend the strata plan under s. 257 of the SPA because it believed that such a resolution would be defeated.

The Court in *Strata Plan NW2212 (Re)* dismissed the application by the strata corporation and allowed the application by the owners. The Court held that the strata corporation could not bring an application against itself under s. 164 of the SPA. The availability of an application pursuant to s. 164 is specifically limited to an owner or tenant. The Court further ruled that the only legal avenue available to the strata corporation was to pass a resolution by unanimous vote at a general meeting. In proceeding to the Court for relief from the unanimous voting requirement, the strata corporation sought to avoid the rigours of s. 257 (amend the strata plan) and did so by proceeding in a manner that was not open to it. Finally, the conduct complained of, being required to adhere to the obligations imposed by the SPA, was not significantly unfair. The owners were entitled to conformity with the strata plan and to the full benefit of their limited common property.

In reaching its conclusions, the Court reviewed a number of decisions which are instructive on this issue. The Court stated as follows:

> 35. This situation is similar to *Liverant* in the sense that the strata corporation there, who was not the petitioner, had not considered proposing a resolution under s. 100 to change the formula for funding contributions to the operating fund. The petitioner argued that there was no point in putting forward such a resolution because he could never obtain the required unanimous approval. **The court considered that if significantly unfair and oppressive conduct is to be found, the strata corporation should be given the opportunity to remedy the problem through the statutory process before the court could be in a position to consider unfairness** [emphasis added]. The court said at para. 28:
>
> > [28] The facts of this case are distinguishable from those in *Shaw, [2008] B.C.J. No. 655*. First of all, although the petitioner has made his objection known to the other owners and to the strata council, there is no evidence that any resolution under s. 100 has ever been put before an annual general meeting. The petitioner suggests that this would be a pointless exercise because he could never obtain the required unanimous agreement. That may be so, but the procedural requirements of the *Act* are not to be dismissed as empty formalities. If the strata corporation, made up of all of the owners, is going to be accused of significantly unfair, oppressive, or unfairly prejudicial conduct, all of the owners must be presented with the evidence and argument in support of that allegation and be given the opportunity to remedy it. It is only when they are given that opportunity and specifically refuse to act that the court is in a position to consider whether their conduct is significantly unfair.
>
> **36.** The same can be said here because the strata corporation has not sought to pass a resolution to amend the strata plan under s. 257 because it considers that it would not pass. While the failure to pass a special resolution may not be determinative if the underlying conduct is significantly unfair (*Chow* at para. 95), s. 57 provides a specific legislative solution in the face of the requirement for unanimity which cannot be ignored. In this circumstance, the judicial attitude towards the exercise of discretion in *Liverant* is preferred so that the strata corporation must have tried to seek unanimity through the legislated process before it can seek redress from the court, if indeed it is even entitled to do so under s. 164.
>
> **37.** While it does not deal with s. 257 specifically, *Ang v. Spectra Management Services*, 2002 BCSC 1544, contains a useful discussion of what use can be made of s. 164 to overcome a specific statutory voting requirement. In that case, the petitioner applied pursuant to s. 164(1) of the SPA to have two leases of common property in a 127 unit boutique hotel strata development declared void. The petitioner was associated with a group of owners who sought to take over the operation of the hotel, for which control of the leases in question was necessary. The court dismissed the petition on the basis that the petitioner did not have standing to pursue the claim. As the leases in question related to common property, and under s. 3 of the *SPA* the strata corporation is responsible for managing the common property, it was the strata corporation, and not an individual owner, that must bring the action on behalf of all owners. Having failed to muster sufficient support among the other owners to obtain the requisite 3/4 vote that would authorize the strata corporation to make the application under s. 171, the petitioner was not entitled seek relief in her personal capacity. Put simply, the petitioner could not rely on s. 164 merely because she was unable to meet the rigours of the governance procedure in s. 171. While the issues in *Ang* are different than in this case, the reasoning with respect to s. 164 is apposite. **Section 164 is not a catch-all provision that permits dissatisfied petitioners to obtain relief from the court every time they fail to secure the required number of votes at a council meeting to effect their wishes. Rather, s. 164 does no more than authorize proceedings by an owner to redress the actions of a strata corporation that are significantly unfair to that owner** (*Ang* at para. 21) [emphasis added].
>
> **38.** Courts have been reluctant to use their discretion to override specific legislative requirements under the *SPA* based upon significant unfairness. Section 164 could not be used to override the specific requirements under s. 108 of the *SPA* for the allocation of special levies according to unit entitlement in *Peace*, notwithstanding that the allocation meant repair costs had to be paid on a 2:1 ratio. The consequence of the conduct conferring a benefit on some and not others is irrelevant when the conduct itself is pursuant to the *SPA* and exercised in good faith and on reasonable grounds. Just because conduct adversely affects some to the benefit of others is not a basis for a finding of significant unfairness under s. 164, particularly when the consequence is mandated by the requirements of the *SPA* itself. Direct compliance with governing legislation cannot be considered significantly unfair (*Peace* at para. 22).

I was one of the joint counsel for the Strata Corporation in the *Peace* case, and as such, I have some insight into this case.

Given the judicial reasoning set out above, it may be wise to present a unanimous resolution to the owners thus to allocate expenditures using a formula other than unit entitlement consistent with past practice. If this resolution fails, then the Strata Corporation will have no alternative but to assess common expenses based on the statutory formula (typically the habitable area formula).

The unanimous resolution should be presented to the owners even though there is almost a certainty that it will fail. In the event of a court challenge, the Strata Corporation can inform the court that it availed itself of all available remedies before it reverted back to the statutory formula. It is clear from the above case law that the Strata Corporation does not have the legal right to bring an application to court for an order approving the historical formula based on a foundation of significant unfairness.

Where's Your Money?

Tony Gioventu, Executive Director
CONDOMINIUM HOME OWNERS ASSOCIATION OF BC

In an earlier column this year, I addressed the issue of insurance on strata trust funds. This is a growing issue for strata owners as funds increase, and will be even a greater risk as funds grow with the commissioning of reserve fund studies. Beyond the basic insurance, there is also the CDIC insurance provided for deposit accounts with prescribed financial institutions in Canada. Strata councils and owners must be vigilant in the management and reporting of their financial operations.

Dear Condo Smarts: I am on the strata council of a large development of over 250 units in Surrey. We are interviewing prospective management companies and a question has come up that no one seems to have the correct answer for. How much of our strata funds, that are held in trust by a strata manager, are insured? One company indicated that the trust funds are insured for $200,000, another indicated it was $100,000, and a third advertised that they were fully bonded and insured. This is an important issue for our strata as our operating account and contingency account usually carry over one million in actual cash, and we need to know what the real risks may be. - Paula M.

Dear Paula: Your concerns are well justified. It is almost impossible to insure large amounts of money, so there is always going to be some level of risk. However, as the strata council you need factual information so that you can assess the risks before you have to make a decision. I rarely, if ever take anyone's word for it.

A real estate brokerage, licensed for strata services, under the Real Estate Services Act, may be contracted to hold the strata funds in trust, and the company may be contracted to administer the collection of the funds, payment of invoices, accounting of the funds, and the administration of the investments and banking services. Under the Real Estate Services Act the strata brokerage is covered for total losses to a limit of $500,000 and a maximum of $100,000 per strata corporation. The implication of this limit is that each strata is covered to a maximum of $100,000 in losses, but that could also be reduced if there are more than five strata corporations affected, as the $500,000 limit would apply. Does your strata know that potentially only $100,000 of your 1.2 million dollar reserve fund is insured? Is there a risk that a loss could occur? Absolutely, as there has already been a loss where the compensation fund has been called upon to cover claims for losses by a strata manager. There is also a risk where a strata corporation holds their own funds, as there have also been losses where a treasurer has unlawfully used the strata funds to cover gambling debts, and losses where investments not permitted under the Act have resulted in losses.

What about the claim that a company is fully bonded or fully insured? If the claim is valid, then the broker should be expected to provide copies of current valid insurance certificates showing that your strata corporation is named on the policy, and your strata funds are insured for specific amounts, specific types of losses such as, theft or fraud, and the specific period of time; however, it is virtually impossible to insure large sums of strata funds for theft or fraud.

The CDIC, Canadian Deposit Insurance Corporation, which applies to funds deposited in Canadian financial institutions, insures an account/client for up to $100,000 in losses. This does not include fraud, theft or misuse of the funds by an authorized party with access to the account. Don't be misled by the insurance provided by the CDIC. A strata corporation cannot increase its coverage on the account by including names of owners as joint accounts or separate accounts, as the account is in the name of the strata corporation in trust, and not a joint account of the owners. The accounts held by the strata corporation are only insured through CDIC for a maximum of $100,000 in the event of the failure of the financial institution in some capacity.

Antonio (Tony) Gioventu, is the Executive Director and Strata Property Advisor for the Condominium Home Owners' Association of B.C. (CHOA). He brings 25 years' experience in management, real estate development, construction, building operations, and strata property legislation to this position.

The best way to manage the risks is the full disclosure of all limitations of the insurance, and monthly transparent reporting to the strata council of bank statements and transactions. The licensed broker/strata manager is required to provide reconciled financial statements and bank statements to the strata corporation/council each month, and the same practice should apply to self-managed strata corporations. Section 7-9(7) of the Real Estate Council Rules obliges the brokerage to provide the strata corporation with a copy of the bank statement and monthly reconciliation referred to in section 8-2(b) in relation to that bank statement. The strata can also add a provision to a service agreement to provide monthly financial statements. As the acting strata council, it is your duty to review the financial reports monthly and declare or report any errors or material changes in finances that are not within the scope of the operating budgets, contingency reserve funds or special levy funds. If you have special instructions for your strata manager, such as investing reserve funds or special levies, ensure that your strata council properly constitutes a majority vote decision at a council meeting and that the decision is recorded in the minutes. The decision provides the manager with the authority they need to transfer your funds into investments. Regulation 6.11 of the *Strata Property Act* limits your options of investment, and while they do permit investments in securities of Canada, a province, the United Kingdom, the United States of America or a municipal corporation in a province, I would recommend that you seek legal assistance and credible financial assistance before you consider moving any of your strata funds outside of Canada. As recent financial events have taught us, even permitted securities in other countries are not 100% reliable. While audits are not yet mandatory, a strata with a significant annual cash flow should seriously consider the cost. A full audit is a prudent action against fraud or misuse of funds.

Additional information or the CDIC Membership brochure can be obtained by contacting a CDIC member institution or by calling toll-free 1-800-461-2342 (1-800-461-CDIC). Web site: www.cdic.ca, E-mail: info@cdic.ca. Canada Deposit Insurance Corporation, 50 O'Connor, 17th Floor, P.O. Box 2340, Station D, Ottawa, Ontario K1P 5W5

Common Expenses – NOT

Gerry Fanaken, CEO
VANCOUVER CONDOMINIUM SERVICES LTD.

Christmas is not for everyone

Recently I came across a decision by a strata council that they would not allow one of its owners to use the strata corporation's common area recreational room to hold a Buddhist religious event. The strata council felt that the event would be "commercial in nature." Later, at the same council meeting the strata council sanctioned its social committee to prepare for Christmas decorations and other related activities. Is there anything obviously wrong with this picture?

A few years ago, at one of the strata properties that I manage, the strata council allocated $1,000 from its annual operating budget (as it had done in previous years) for the "Christmas party." An owner protested the spending of strata corporation money for this event on the basis that he did not celebrate Christmas and that, in any event, such an expense is not a common expense of the strata corporation as prescribed by the *Strata Property Act.*

So what exactly does the legislation say? First, Section 72 says that the strata corporation must repair and maintain the common property and common assets of the strata corporation. This message is expanded at Section 91 which says the strata corporation is responsible for the common expenses of the strata corporation and Section 92 directs that an operating fund be established to meet those common expenses. The clincher, however, is at Section 97 which states: Expenditures *from operating fund*

97 *The strata corporation must not spend money from the operating fund unless the expenditure is*

(a) consistent with the purposes of the fund as set out in section 92 (a), and

(b) first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or authorized

(i) in the budget, or

(ii) under section 98 or 104 (3).

Gerry Fanaken, Author, Educator and President of Vancouver Condominium Services Inc., Vancouver. Mr. Fanaken has been actively involved in the administration of strata corporations for over 25 years. His company currently manages about 200 residential strata corporations which represents approximately 13,000 individual condominium units.

Note especially clause (a): ***consistent with the purposes of the fund*** *as set out in section 92 (a)….*

"Common expense" is defined at Section 1 of the Act as follows:

Common expenses means expenses

(a) relating to the common property and common assets of the strata corporation, or

(b) required to meet any other purpose or obligation of the strata corporation;

Looking at these various sections can we safely conclude that Christmas decorations or any other social event organized by or through the strata council, when strata corporation money is used, would fit the criteria of the statute? I think the answer is clearly no.

Protecting Owners' Vehicles

While it may be relatively easy to make the argument when judging Christmas and other religious functions, just how easy is it when making decisions about other kinds of expenses that strata councils often face? Let's take an example. In this case we will say that a strata corporation has a locked, secure parkade. From time to time there are expenses incurred which are necessary to fix the parkade gate, to replace light bulbs, to clean and to repair damaged concrete. In this example, we will say that not all owners have cars and require parking stalls but, since the parkade is common property, all owners have to contribute to the expenses. No argument. Then one evening, the gate stops operating and is in the "open" position which permits any person – including bad guys – to walk in. The strata council is concerned about the security of all the vehicles in the parkade which are now easy targets for B&Es. Council hires a security guard for the night and, naturally, there is an expense. Is this a common expense of the strata corporation to be borne by all owners or is it an expense only for the benefit of the vehicle owners? Hmm.

Be Careful

You can see that it is not always so easy to distinguish common and not common expenses and then isolate responsibility. Strata councils need to be very careful when it comes to spending strata corporation money on such items as "the Christmas party" or parkade security or other expenses which do not fit the criteria of the *Strata Property Act.*

Raising those Strata Fees

Adam Major, Strata Manager
HOLYWELL PROPERTIES

There are numerous questions a strata council must ask when preparing a budget for their strata corporation's annual general meeting. The biggest question is usually: "How much of an increase in strata fees should we propose?" The answer is often a balance between the large increase the council would like to propose and the smaller amount a majority of the owners will actually approve.

CHOA recommends a cost of living increase every year, indexed to inflation, but many strata corporations have seen annual increases averaging 5 to 10 percent or more, as they try to account for future repairs, rebuild their contingency funds and pay for added costs like the HST.

In addition to "How much?" there are other questions that strata councils should consider.

One question which relates to budgeting is, "When should we hold our AGM?"

Section 40(2) of the *Strata Property Act* states that AGMs must be held no later than 2 months after the strata corporation's fiscal year end. The Strata must also provide 20 days written notice of the meeting to all owners and prepare financial statements to accompany the budget.

Many councils seem to be in a rush to have their AGM right before or right after the end of the fiscal year because they want to get new fees and the budget in place.

One way to provide a more accurate accounting of the previous year's expenditures though, is to have the AGM later, about 6 or 7 weeks after the fiscal year end.

Having the AGM later, allows the strata council to plan a budget meeting approximately 2-3 weeks after the end of their fiscal year and ask their strata manager to provide a year end financial report, reconciled with the bank statement, for review. At the budget meeting, the council can finalize their proposed budget based on accurate expenditures from the previous year and disclose how much, if any, is left over. The finalized year end financial statement can then be sent to all owners with the notice of meeting. One problem with this approach is that owners will often face an increase in strata fees retroactive to the start of the fiscal year. However, the advantage of a later meeting date is that owners are able to see precisely how much was spent the previous year.

Adam Major has been working with Holywell Properties on the Sunshine Coast of BC since 2006. He is a licensed strata manager. In his spare time he enjoys spending time with his wife and daughter enjoying the Great Outdoors.

Another frequent question raised by strata councils is, "How do we convince the owners that a large increase is needed?" Council members involved in the day to day operations often have a better handle on the state of their strata's finances when compared with the average owner, who may not bother to read all of the minutes.

The best way to convince owners to vote in favour of an increase is to explain the basis for the increase and to prepare them by stating in the council minutes the size of the proposed increase. Sometimes stating in the minutes that the council is considering a 10% increase, will help get a 7% increase approved when the AGM comes around. If the strata council has a goal of building the contingency reserve fund, then it can spell it out in the minutes and the AGM notice.

Depreciation reports may one day be mandatory in BC and aiming to have at least one year's operating expenses in the contingency reserve fund is good policy. People looking to buy in your strata corporation will look at the financial statements and read the minutes. If your strata corporation has a large contingency and it has been running a healthy budget surplus each year, then spell it out in the AGM minutes for potential buyers to read. At the AGM, tell the owners to look at the fee increase as an investment that will pay off when they sell their property rather than as a tax that they will never get back.

Nobody likes to hear that their fees are going up, but a healthy budget and a large contingency reserve fund equate to sound fiscal policy. Owners need to ensure that their properties are being properly maintained and the council needs to ensure that there are enough funds on hand to do so. Take time to properly prepare the budget and encourage owners to look at their fees as a long term investment.

Today's Preparation Determines Tomorrow's Success:

Understanding Your Options

Tony Ngo, Manager, Industry Programs
BMO FINANCIAL GROUP

Most of us are familiar with the adage: "Be Prepared," and this holds true for all aspects of our lives, not the least of which being strata property ownership. Good prudent maintenance and financial plans are keys to ensuring the smooth running of a strata corporation and securing the long term value of a strata property. However, even the best laid plans can be met with unforeseen events, particularly when it comes to funding common property repairs. For strata owners and councils, an understanding of the various funding options that are available will put the strata corporation in a better state of preparedness.

Well run strata properties have ongoing maintenance plans in place, both for daily activities and those more of a preventative measure. These types of expenses are funded directly out of the monthly fees collected from strata owners for which the strata should never be in a deficit position. For larger common property replacements, planning ahead can create greater stability for unit owners, the strata corporation and value of the property overall. At a minimum a strata corporation should have a capital expenditure forecast on hand that lays out estimated timing and costs for major expenditures for up to 20 years depending on the condition of each strata property. This would include such items as roof replacement or a complete parking garage restoration. Such forecasts can be very basic with less reliability on costs to complete capital plans prepared by qualified firms.

Ideally, the anticipated funds required for longer term projects are collected in increments as part of unit owners' fees, so cash can be built up in the strata corporation to match with the timing of each major expense. But even such prudent planning can encounter changes such as:

- increased construction costs
- changes in building/fire code
- emergence of a latent construction flaw
- enhancements to the property of an elective nature (such as for energy savings)
- advancing a project timeline to take advantage of better market pricing

While the building up of cash reserves to meet forecasted long term

and unexpected expenses is perhaps the exception rather than the norm, a strata still needs to source cash to fund such expenses of a building.

When large capital expenses do arise, the strata corporation has the option of simply delaying the project but this can often lead to bigger problems. Accordingly, there are two main options in acquiring funding for the expenses. The most common option is for the strata corporation to put forth a special assessment on all strata owners. Such assessments tend to be in the multiples of thousands of dollars and are met with varying degrees of ability to pay by unit owners.

A second option is for the strata corporation to contribute some portion of the expenditure and borrow the remainder from a financing provider, such as a bank or credit union. In this, the loan becomes an obligation of the strata corporation, no individuals are required to sign personally and it is not registered on individual suites. To pay for such a loan, typically the strata would have to increase fees to cover the requisite interest and principal payments.

While this concept is fairly straightforward, not all financiers are equally versed in (or have the appetite for) advancing funds to well run stratas. Accordingly strata councils should seek financing providers that understand their needs and also engage the appropriate experienced professionals to provide the proper advice.

To get an initial indication of financing and associated conditions, a strata council should designate one council member as the key financing contact, who should be prepared to provide the following to the financier:

- Nature of the work contemplated and amount required
- Quotes for work contemplated (less than 12 months old)
- Capital expenses projections
- Two most recent years financial statements
- Minutes of monthly strata council meetings and annual general meeting
- Number of units and average market value per unit
- Most recent three months' bank statements
- Site visit by financier

Once these documents have been gathered, the financier can assess the requirements of the strata corporation and determine what level of financing is available, how much cash down may be required and how monthly fees would have to increase to cover loan payments. A big determinant of the latter is how many years the financing is paid back over. While this typically ranges from 5 to 10 years, the loan duration should be less than the expected life of the repaired element. For instance, if a loan was obtained today for a 20 year roof over 20 years, the strata's ability to build up cash for the next new roof would be impeded - creating the need for another roof loan or special assessment.

continued on page 15...

The Hearing – Act Like A Judge

Cora D. Wilson, Strata Lawyer
C.D. WILSON LAW CORPORATION

The strata council has the sole authority to determine whether or not a bylaw has been violated. This duty must be carried out by the strata council and cannot be delegated to any person, including a strata manager.

Standard Bylaw 20(4) prohibits the council from delegating its powers to determine, based on the facts of a particular case, whether there has been a contravention of a bylaw or rule, whether a fine should be levied, including the amount of the fine and whether a person should be denied access to a recreational facility. Section 27 of the *Strata Property Act* (the "Act") prohibits the strata corporation from interfering with the exercise of this discretion.

The legislature recently added section 34.1 to the Act to permit an owner or tenant to request a hearing. Regulation 4.01 defines a "hearing" as an opportunity to be heard in person at a council meeting.

Section 34.1 reads as follows:

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

It is not clear what the consequences are for failing to provide a decision within one week.

I recommend that the council adopt the following course of action when it receives a request for a hearing:

1. A council member should not address the matter with any person outside of a scheduled council meeting.
2. No information should be provided about the matter until such time as the matter is addressed at the hearing and a decision rendered. At that time, the owners should be advised of the council decision.
3. A council member must not prejudge the outcome of the hearing and should refrain from making statements of any kind regarding his or her position on the issues prior to the decision.
4. The member should listen and may ask questions during the hearing. However, the member should refrain from making comments regarding the evidence or the manner in which the council member intends to vote or the council member's leaning on the issues. The council members should avoid any appearance of bias.
5. In other words, a council member should act in an impartial, fair, reasonable, objective and in a quasi-judicial capacity – act like a Judge.
6. Once the hearing is concluded, council may wish to go into an in camera session to address the evidence and arrive at a decision. Observers cannot be present.
7. If the council wishes to seek legal advice, it should do so prior to providing their written decision.
8. The hearing must be held within 4 weeks after the request and if the purpose of the hearing is to seek a decision, then the written decision must be provided within 7 days after the hearing.

The above is not intended to constitute an exhaustive code of conduct when a hearing is requested. If the council has any questions regarding this process, it should seek legal advice to avoid the numerous pitfalls.

Cora D. Wilson, Lawyer for over 20 years and President of C.D. WILSON LAW CORPORATION. Ms. Wilson is a condominium lawyer, educator and author. She currently represents numerous strata corporations wherever they are located in British Columbia. She is the co-author of the Strata Property Act – Practical Guide to Bylaws. She is the owner and editor of Strata-sphere Condominium Services Inc.

Today's Preparation Determines Tomorrow's Success .... *continued from page 14*

Should the strata council then determine that financing is a prudent option, they will then need to present this to strata owners for discussion and ultimately vote on an appropriate bylaw to allow the corporation to borrow for this purpose. Having the financier, legal and other relevant advisors at a strata meeting earlier in the process can greatly enhance the understanding of what funding options exist. In addition, they can provide clarity on the expected time required to approve and fund strata loans and any expenses involved.

While financing can be a useful option for stratas, it shouldn't necessarily be the default option. Holding debt in the strata does have some impacts worth considering and like the owner of a detached home, seeking a loan for every repair is not practical. Rather, strata councils and owners should be aware of what options are available to meet expected and unexpected expenses in the prudent long term management of what constitutes the single largest asset for many consumers – your home.

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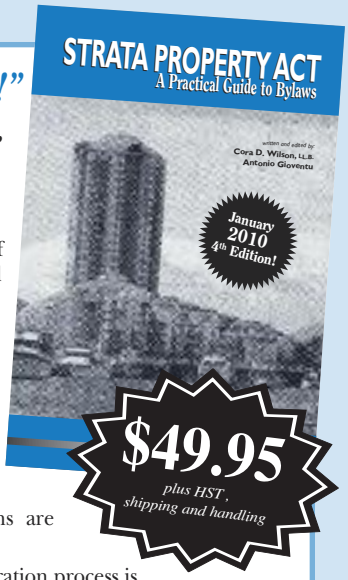
Cora D. Wilson, Lawyer and President, C.D. Wilson Law Corporation. Over 21 years of experience as a Condominium Lawyer. Ms. Wilson currently represents numerous strata corporations wherever they are located in British Columbia. She is co-author of the book "Strata Property Act - A Practical Guide to Bylaws." She is also president and editor of Strata-sphere Condominium Services Inc..

STRATA PROPERTY ACT
A Practical Guide to Bylaws

"Every Strata should have a Copy!"

Written by Cora Wilson, Condominium Lawyer and Tony Gioventu



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The Guide provides a review of every provision of the Standard Bylaws to the Strata Property Act, including a recommendation on what to do with the bylaw. Also, the wording of typical proposed amendments is included.

For example, you may wish to provide for a bylaw that permits a non-owing spouse to sit on the strata council. The sample wording is provided for your convenience.

The Guide provides a review of the provisions of the *"Strata Property Act"* that permits additional bylaws, such as rental bylaws, interest bylaws, remuneration bylaws for strata council members etc.. The proposed wording for these types of bylaws is also provided.

Further, a review of some of the relevant provisions for different types of strata lots, ie. sections, commercial strata lots and residential strata lots, is available.

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