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CONDOMINIUM HOME OWNERS
ASSOCIATION OF BC



New Limitation Act Alters Collection Procedures Forever

Cora D. Wilson, J.D.

C.D. WILSON LAW CORPORATION

Many strata council's believed that registering a lien against a defaulting owner's strata lot was sufficient to collect the arrears. The Strata Corporation could then simply wait for payment. This practice involved minimal expenditures of money and little administrative time once the lien was registered. This practice is about to come to a screeching halt. The new *Limitation Act* became law June 1, 2013 and changed the limitation period for collections from six years to two years.

The luxury of time which permitted councils to sit back and wait was abruptly altered with this new legislation. The new order of the day will require a council to commence court proceedings for current arrears within two years failing which the ability to collect the Strata Corporation's financial life blood will be lost forever. Subject to transitional exceptions, an appropriate claim for arrears from June 1, 2013 under new legislation must be filed with the court before June 1, 2015 failing which the limitation clock will run out for that month of common expenses.

This could be a tough bullet for cash strapped corporations. Strata fee arrears could be small in size and may not exceed more than a few thousand dollars even after two years of arrears. It is not unusual to find councils reluctant to budget for legal costs to collect small amounts.

However, there will be consequences for missing a limitation period. Residential strata corporations operate on a "not for profit basis" and in theory must balance their budget annually. In the absence of a budget line item for legal, arguably there is no mandate to make related expenditures. Some councils try to squeeze such expenditures under the permissible excess budgetary expenditures category. However, this practice is not viewed as solid fiscal practice and could be offside the *Strata Property Act*.

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Voice from the Strata-sphere

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New Limitation Act... *continued from page 1*

A council facing inadequate operating funds may be reluctant to authorize legal expenditures to file a petition in the Supreme Court and stop the limitation clock since they could face personal exposure to liability for authorizing improper expenditures. Also, such expenditures may not be an emergency expenditure since council would have known about the arrears for almost two years before the requirement for a Petition. Whether a Court considers expenditures made for collection proceedings under the emergency provisions of the Act meet the statutory test to "prevent significant loss or damage" remains to be seen.

What is clear is that the prudent annual budgetary practice of inserting a reasonable line item for collection expenditures avoids this whole debate and removes any constraints otherwise facing a council wishing to undertake legal action to preserve collections rights.

The failure to adopt reasonably prudent fiscal practices, including failing to budget for collection purposes, could result in allegations of irresponsibility and possibly even negligence on the part of the council.

The inability to collect arrears owing by one owner means that the remaining owners in the strata corporation must pick up the shortfall proportionately. Owners who understand this concept are content to approve interim funding on the understanding that recovery will eventually be forthcoming from the defaulting owner.

The *Strata Property Act* was designed to insulate compliant owners who religiously pay their fees against the negative consequences created by defaulting owners by granting extraordinary collection remedies for certain common expenses. These remedies include the right to lien and sell an owner's strata lot for nonpayment and to adopt bylaws designed to facilitate collections such as an interest bylaw, for example. The interest bylaw shields the strata corporation to a certain extent against the lost time value of money created by arrears and may assist with legal expenditures.

Once a lien is registered, the lien performs a magical legal feat by jumping over most encumbrances registered prior in time on title to the strata lot of a defaulting owner, including most mortgages, and taking first priority position. This means that once a strata lot is sold or refinanced, the strata corporation with a valid lien will be paid out before the lender. This creates a significant legal advantage to the strata corporation.

Although the banks view strata fee arrears as an act of default on the mortgage, this does not mean that the bank will automatically take foreclosure proceedings if the mortgage is not otherwise in default. In this event, the ball will be placed directly in the court of the strata corporation and it must act to preserve its collection rights or face the consequences. The average cost of a strata corporation foreclosure is between \$5,000.00 - \$8,000.00. It could be more. A good portion of these expenditures tend to be recoverable priority legal costs of the proceeding.

It is recommended that the strata corporation annually budget a reasonable amount to address anticipated collections based on historical default ratios. If significant increases to common expenses are contemplated, then the budget should be further revised to address any default-related projections and concerns.

What are the consequences of missing a limitation period?

1. The non-defaulting owners will be required to subsidize the defaulting owner. This drives the fixed costs up for every single owner, including those that are least able to afford to pay the increase such as retired persons living on a fixed income or the

disabled living on a small pension. Increased costs could result in those least able to pay falling into arrears. Prudent fiscal action minimizes this risk and levels the fiscal playing field over time creating smoother operations from year to year.

2. Councils and individual council members could be exposed to lawsuits for any shortfall from angry owners alleging negligence while carrying out the financial duties of the strata corporation as elected officials. The council should make inquiries to determine whether Directors and Officers liability insurance is available to cover such allegations.
3. The proposed Dispute Resolution Tribunal may provide disgruntled owners with an inexpensive and streamlined process to air disputes against a strata corporation and council members. This could create a more litigious and disharmonious environment within the Strata Corporation with negative spin off effects on all owners. No-one wants to live in a place mired in conflict and negativity.

Such results can be virtually eliminated by creating well thought out fiscal policies and implementing solid and consistent financial, legal and budgetary practices.

The council should ensure that the budget is reasonable to address collection matters. Also, it should adopt a policy to take reasonable collections steps within a reasonable period of time designed to maximize recovery of arrears and minimize any subsidy from the non-defaulting owners at the end of the day. There are several ways to accomplish this goal including the budget process, administrative procedures, collection procedures and practices, bylaw amendments and legal proceedings.

Please note that collection procedures and practices and legal proceedings are addressed in detail elsewhere in this publication. Please review the article prepared by lawyer Kelly Bradshaw of C.D. Wilson Law Corporation for further information.


Budget Process

1. The council should include a reasonable amount in the annual budget for legal costs to address collections. What is reasonable will vary from strata corporation to strata corporation based on past history, unit mix, location, economic conditions, proposed special levies and other factors. Seek direction from the strata manager or other qualified persons when determining what is reasonable. If the funds are not used, then they can be carried forward into the following year's budget. This tends to level the owners' contributions from year to year and avoid huge spikes in strata fees which could be devastating to those on fixed or limited incomes.

Administrative Procedures

2. Jerry Fanaken, retired strata manager, and long-standing high profile author and educator recommends in his article, *"Collecting those Arrears!"* that "early education" when a new owner takes possession of his or her strata lot, "is an excellent tool for the collection process."
3. A statement of arrears should be provided to the council by the strata manager or the treasurer on a regular basis. It is recommended that this be addressed as an agenda item of business at every scheduled council meeting.
4. In the Article entitled, *"How is our Council Managing our Receivables under the Short Periods of the New Limitation Act?"*, Tony Gioventu, Executive Director of CHOA and industry leader and educator states: "Strata corporations and strata agents need to employ an active method of decision making, monthly accounting and reporting, and a record

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keeping system that ensures the strata corporation proceeds with action in the court system to protect the ability of the strata to collect.” It is recommended that strata corporations adopt Tony’s sample Monthly Arrears Report attached to his article.

5. The council should as a matter of customary practice approve a resolution authorizing the delivery of a demand letter to all owners in default. This should be addressed at every scheduled council meeting. Any council decision to send a demand letter must be recorded in the minutes.
6. Since council minutes are delivered to the owners, the council should always be cognizant of privacy issues. Highlighting the fact that an owner is in arrears for the purpose of embarrassing an owner is an improper purpose. How the minutes are prepared is typically a matter of discretion. If it is clear that an owner is in the hospital recovering from a major illness or temporarily out of the country, then there is no need to refer to the person’s strata

lot in the minutes. The minutes could simply state, for example, that the council authorized demand letters to be delivered to those defaulting owners shown on the Arrears Statement presented at that meeting. The council decision is binding even though the detail is absent since the details may be obtained from a review of the Arrears Statement. What is important is that the decision is made by the council and that decision is recorded in the minutes.

Collection Procedures & Practices

7. The council should prepare a checklist of steps to be addressed during the collection process. The checklist should address timelines, due process, budgetary responsibility and administrative authorization.

Bylaw Amendments

8. Every strata corporation should ensure that it has the following bylaws:
 - (a) interest bylaw not to exceed the maximum interest rate set by the regulations for arrears;
 - (b) full indemnity legal bylaw;
 - (c) Small Claims Court bylaw;
 - (d) unapproved expenditure bylaw authorizing unbudgeted, unauthorized expenditures in an amount that is reasonable for that strata corporation (to address any legal shortfall); and,
 - (e) a fine bylaw addressing arrears referring to a specific amount for a fine.
9. If a strata corporation has a bylaw that places a time limitation on collection proceedings, then it should repeal that bylaw. For example, some strata corporation have a bylaw which states that a strata corporation must not register a lien until the strata fees are at least three months’ in arrears. This bylaw could create a financial loss to the strata corporation in the event of an intervening bankruptcy in circumstances where the lien has not been filed.

The changes to the *Limitation Act* will change the customary practice related to collections. Those councils who adopt solid fiscal policies and practices will hardly notice the waves caused by the changes. However, those councils who do not may be blindsided by the recent legislative changes resulting in lost fees subsidized by the remaining owners creating potentially stormy seas.



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“Show Me The Money” Collecting Money Owing to the Strata Corporation

Kelly Bradshaw

C.D. WILSON LAW CORPORATION

Strata corporations will often have to deal with owners who get behind in paying their strata fees or special levies. When an owner doesn't pay his or her fair share, it hits the strata corporation in the pocket book, and, can also cause friction and disharmony, particularly in smaller strata corporations.

The *Strata Property Act* (the “Act”) contains a statutory scheme for collecting money owing to the strata corporation, found in Division 6 of the Act, sections 112 to 118. These sections set out the scheme for collections, including the requirements to be met before registering a Certificate of Lien against title to the owner's strata lot and applying to the Supreme Court for the forced sale of a strata lot.

The Certificate of Lien is one of the most powerful weapons in the collection arsenal. This lien ranks in priority to all other liens or registered charges on title except charges in favour of the Crown and liens under the *Builders Lien Act* (s. 116(5)). The strata corporation's lien will therefore rank ahead of mortgages registered against the property.

Please note that the new *Limitation Act* for British Columbia which came into force on June 1, 2013, will have a significant impact on strata collections. The limitation period for collecting debts has been reduced from six years to two years. The transitional provisions incorporated into the new *Limitation Act* will have to be applied in each particular case to determine whether the new two-year limitation period applies. Since the only way to stop the limitation clock is to commence court proceedings, it will be incumbent on a strata corporation to commence a petition for the forced sale of a strata lot under section 117 prior to the expiration of the limitation period. If this limitation period expires before a petition is filed, the strata corporation will lose its ability to legally require a defaulting owner to pay.

There are two stages to the collection process: the first stage is the registration of the lien and the second stage is the enforcement of the lien through an application in the Supreme Court for an order to sell the strata lot.

Step 1 – The Lien

Notice Requirements Prior to Lien

Before a lien can be registered, section 112(2) of the Act requires that the owner or tenant be given “at least 2 weeks' written notice”

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 criminal and civil litigation.

that money is owing to the strata corporation and that a lien may be registered if the amount owing is not paid. Please note that although the section states “at least 2 weeks”, section 61(3) of the Act states that a notice given is conclusively deemed to have been given four days after it is mailed or otherwise delivered. In addition, since the Act uses the phrase “at least”, section 4 of the *Interpretation Act* requires that the first and last day be excluded. It is arguable, therefore, that the notice should be 20 days. To be on the safe side, giving 21 days' notice is recommended.

If there is a mortgage on title, and the mortgagee has given the strata corporation a Mortgagee's Request for Notification, section 113 of the Act requires that the strata corporation give the mortgagee a copy of a notice given to an owner under section 112 of the Act. Since a lien affects mortgage interests on title, it is good practice to provide the mortgagee with a copy of the demand notice even if they have not submitted the Request for Notification. Since a lien ranks in priority to a mortgage, it is not uncommon for a mortgagee to take some action upon receiving a copy of the demand to the owner, and may pay the arrears on behalf of the defaulting owner to protect its interest.

If the unit owner fails to pay the amount during the notice period, the strata corporation may register a lien against title to the strata lot pursuant to section 116 of the Act.

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Arrears Permitted under the Lien

The Act specifically dictates the categories of common expenses that can be included in the amount owing under the lien. The arrears that may be included are set out in section 116(1) of the Act:

- (a) strata fees
- (b) a special levy
- (c) a reimbursement of the cost of work referred to in section 85; and,
- (d) the strata lot's share of a judgment against the strata corporation.

Interest on strata fees can also be added pursuant to section 107(2) of the Act, provided that the strata corporation has an interest bylaw registered under section 107(1) of the Act. Similarly, interest on arrears of special levies can also be added in accordance with section 108(4.2) of the Act, either pursuant to a registered interest bylaw or a provision for interest in the resolution approving the special levy in question. Since interest can be added if a bylaw is in place, it is extremely important for a strata corporation to have a registered interest bylaw.

Since strata fee arrears typically accrue monthly, the question is often asked whether a new lien has to be registered each month. This is not necessary, as the lien registered under the Act is considered to be a "floating" charge (see, for example, *Strata Plan LMS93 v. Neronovich*, [1997] B.C.J. No. 606 (B.C.S.C.)). It may be advisable, however, to register a new lien in certain situations, such as cases where a large special levy has been approved and is in arrears or if there is a potential for a bankruptcy. A new updated lien will give proper disclosure of the extent of the arrears, and in the case of an intervening bankruptcy, will more accurately reflect the amount owing in the event there is a question related to the amount considered to be a secured debt.

With the enactment of the new *Limitation Act*, the question of whether to update a lien will not arise as often, since court proceeding will have to be commenced before the expiry of the two-year period from the date of the "oldest" arrears to stop the limitation clock.

Costs of Registering the Lien

The following costs of registering the lien may also be added to the amount owing to the strata corporation under the lien pursuant to section 118 of the Act:

- (a) reasonable legal costs;
- (b) land title and court registry fees; and,
- (c) other reasonable disbursements.

The decision in *First West Credit Union v. Milligan*, [2012] B.C.J. No. 819 (B.C.S.C.) confirms that "reasonable legal costs" means "party and party" costs. In other words, the strata corporation is

entitled to costs on a party and party basis in relation to the registration of the lien, not actual costs (see also *Canada Trustco Mortgage Co. v. Gies*, [2001] B.C.J. No. 1597 (B.C.S.C.)). The court in *Milligan* came to this decision recognizing that since the costs permitted under the lien rank in priority to other registered charges, such as a mortgage, allowing party and party costs strikes the appropriate balance:

65 ... Obviously the goal of the legislation is to give priority to expenses for maintenance and improvement of the common property which serves to benefit all, including previously registered charge holders. In respect of legal costs, it is logical that those receive a similar priority. Conversely not extending that priority to actual legal costs does not prevent the Strata from full recovery of its costs from the owner, they simply do not have priority over previously registered charges. A balance is struck between the interests of strata owners and third party charge holders by limiting the priority costs to party and party costs.

Party and party costs are based on the tariffs set out in the *Supreme Court Civil Rules*, and will represent a portion of a party's actual costs. If the strata corporation has a full indemnity legal bylaw, however, costs that are not covered under the tariff could still be collected from the owner, but would not enjoy priority status.

Fines and Other Amounts Owing

Amounts owing for fines or costs of remedying a contravention are not permitted to be added to the amount owing under the lien. These amounts are specifically excluded by section 116(3) of the Act. If the amount owing is not specifically permitted to be included in the lien, it cannot form part of the lien. Accordingly the lien process cannot be used to collect fines, NSF charges, insurance deductibles, administration fees, user fees or similar charges. If such amounts are included in the lien, the lien could be held to be invalid. This was the situation in the case of *Strata Plan VR386 v. Luttrell*, [2009] B.C.J. No. 2438 (B.C.S.C.), where a lien was held to be invalid because it included fines. It is vitally important, therefore, to ensure that the lien amount only includes the amounts permitted by the Act.

This does not mean that these other amounts are not collectible from an owner, but separate proceedings would be required, such as a Small Claims Court action for amounts that do not exceed \$25,000. If the strata corporation has a Small Claims Court bylaw, a $\frac{3}{4}$ vote of owners is not required to pursue a claim in Small Claims Court, and therefore it is recommended that strata corporations have such a bylaw. If the amount owing by an owner for fines or other "non-lienable" amounts exceeds \$25,000, a proceeding to recover the debt in the Supreme Court would be necessary, and a $\frac{3}{4}$ vote of owners approving the suit would be required (see sections 171 and 172 of the Act).

Step 2 – Enforcing the Lien

Notice Requirements to Enforce the Lien

Once the lien is registered, the strata corporation can take steps to enforce the lien, which means applying to the Supreme Court under section 117 of the Act for an order for the sale of the strata lot. Prior to taking this step, however, section 112(1) of the Act requires “at least 2 weeks’ written notice” be given that if payment is not made action may be taken. Again, it is recommended that 21 days’ notice be given. This notice should also be given to a mortgagee (and must be provided to a mortgagee if a mortgagee has provided a Request for Notification). If the arrears are not paid within the notice period the strata corporation will be at liberty to commence court proceedings to enforce the lien.

The Petition Proceedings

The forced sale proceedings are commenced by way of a Petition to the Court. Please note that while section 171 of the Act requires a $\frac{3}{4}$ vote of owners before the strata corporation can sue an owner, a $\frac{3}{4}$ vote of owners is not required to authorize Petition proceedings to enforce the lien. In *Strata Plan VR1008 v. Oldaker*, [2004] B.C.J. No. 74 (B.C.S.C.), the court held that the collection scheme contained in sections 112 – 118 of the Act is considered a separate summary process for the collection of money owing to

the strata corporation, and a $\frac{3}{4}$ vote is not required. This means that the council can resolve to proceed to petition as long as approved expenditures are available.

The strata corporation will be the Petitioners, and will name any mortgagee, tenant or other charge holder as Respondents. In the Petition, the strata corporation will seek numerous items of relief, including an order for judgment for the amount of the arrears and an order for the conduct of sale of the strata lot. The facts supporting the Petition are presented by affidavit evidence. Once the Petition and affidavits are prepared and filed, service of the documents will be made on the Respondents, who will have 21 days to file a Response if served within Canada, or longer time periods if served elsewhere.

A mortgagee may file a Response to the Petition so that it is kept apprised of the proceedings. While uncommon, an owner may file a Response to dispute the amounts owing or make other claims against the strata corporation. Court decisions have not entertained such claims as a valid defence. For example, in the case of *Krusoczki v. Strata v. Strata Plan LMS307*, [2004] B.C.J. No. 798 (B.C.S.C.), the Court stated that an allegation that the strata corporation did not keep the building in good repair was not a

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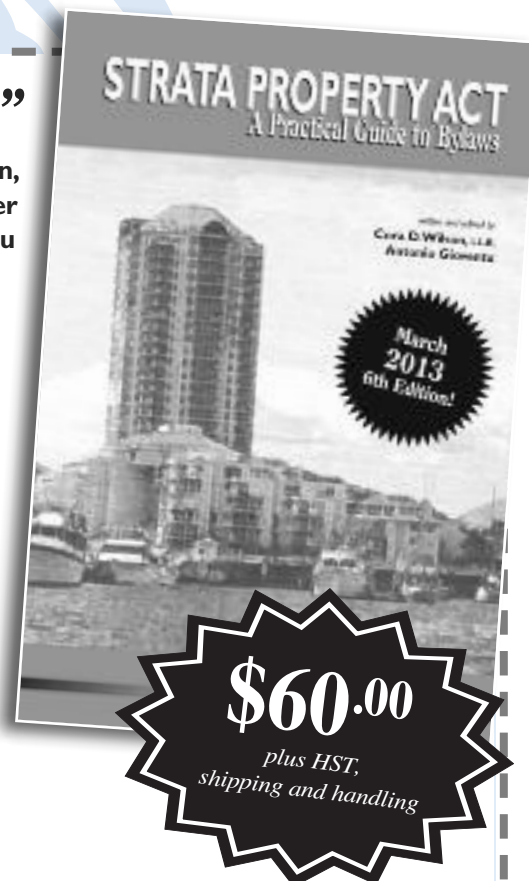
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Collection Questionnaire

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OWNER(S): _____

STRATA LOT CIVIC: _____

STRATA LOT LEGAL: _____

ADDRESS for delivery
outside the SC [mandatory]

OR EMAIL for delivery
if given by owner (s 61(1)(b)) _____

TOTAL AMOUNT OWING \$ _____ As at (Date): _____

STRATA FEES

TOTAL OWING \$ _____ Monthly Strata Fees \$ _____

Months in arrears
(e.g. Jan/12, Feb/12 etc.): _____

Interest Bylaw: ☐ Yes ☐ No

Is there an Agreement for
Payment with Owner? ☐ Yes ☐ No

Attachments: ☐ Accounting Statement
☐ Correspondence with owner regarding arrears and Payment Agreement (if any)
☐ Copy of Registered Interest Bylaw

SPECIAL LEVY

TOTAL AMOUNT OWING \$ _____ Date of Approval _____

DUE DATE: _____ INTEREST BYLAW: ☐ YES ☐ NO

PURPOSE OF LEVY: _____

Attachments: ☐ Minutes of Special/Annual General Meeting Approving Special Levy
☐ Schedule of Unit Entitlement

OTHER AMOUNTS OWING - Fines/NSF charges do not form part of the Certificate of Lien

FINES: \$ _____ MONTHS: _____

NSF: \$ _____ DATES: _____

OTHER: _____ DESC: _____

Attachments: ☐ Correspondence with Owner regarding Fines
☐ Council Minutes approving Fines in accordance with section 135 of Act

Signature of Council Member/Strata Manager
Certified Correct

Date



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defence to failing to pay a duly authorized special levy. Such claims could, however, be the subject of separate proceedings for damages.

Once the time period for filing a response has expired, the strata corporation will be in a position to set the Petition down for hearing. The proceedings will take place in two stages.

Hearing of the Petition

At the first court hearing, the strata corporation will typically be awarded a number of items of relief, including judgment and an order granting it conduct of sale of the strata lot. The order for conduct of sale will be subject to a redemption period, usually 30 days, to give one last opportunity for the arrears to be paid. At the end of the redemption period, if payment is not made, the strata corporation can then proceed to sell the strata lot. At this point, the strata corporation will attend to obtaining an appraisal of the unit and hiring a realtor to market and sell the strata lot. All offers will be subject to court approval.

Approval of the Sale

Once the strata corporation has accepted an offer, a second court hearing will be required to obtain court approval of the sale. A Notice of Application will be prepared, which will include affidavit material setting out the particulars of the proposed sale. The Application and supporting materials will have to be served on the Respondents, who will have 5 business days to file a Response.

Although the strata corporation will be presenting an accepted offer to the court, other prospective buyers may attend at the scheduled court hearing with competing offers for the court's consideration. The process of how competing bids are presented will vary from registry to registry. If the court is satisfied with the offer presented (or a competing offer) the court will grant the

Order approving the sale. The Order will set out the manner in which the proceeds of sale are to be distributed, which will typically be in the following order: payment of outstanding taxes, the real estate commission, the strata corporation arrears and the strata corporation's costs. The award of costs referred to as part of the Order approving the sale are the costs related to bringing the legal proceedings, as distinct from the costs related to the registration of the lien pursuant to section 118 of the *Strata Property Act*. The petition costs are also "party and party costs" pursuant to the tariff contained in the *Supreme Court Civil Rules*. For "strata foreclosures", as these proceedings are sometimes called, the costs awarded are on Scale B, which are higher than the costs that a bank would typically be entitled to in mortgage foreclosure proceedings. The reason for assessing costs on the higher scale is summarized by Master Caldwell in *Strata Plan LMS4012 v. Rangi*, [2007] B.C. J. No. 1466 (B.C.S.C.) at paragraphs 5 and 6:

- 5 First, the strata corporation is required to pursue unpaid assessments in order to protect the individual owners in spite of the fact that the amount owing may be relatively small – often less than \$3,000. In spite of the modest amount of the claims, inexpensive relief by way of the small claims process is not available to strata corporations in these cases.
- 6 Second, the actual cost of the process undertaken is borne by a relatively small group of individuals – the owners. There is an internal reliance on mutuality. When one person fails to meet their obligation, the effect is borne by the other owners. When enforcement or execution action must be undertaken, the expense must be borne by the other owners by way of expenditure from the funds made up of their strata fees, or, in more extreme cases, by extraordinary assessment.

Please note, however, that even though costs are awarded on the higher scale, the strata corporation may still not recover all of its costs for the proceedings.

Conclusion

The ability to collect money owing to the strata corporation is obviously vital to the operation of all strata corporations. The scheme contained in the for collecting money is comprehensive, providing strata corporations with a powerful lien and the ability to literally sell an owner's strata lot to collect the arrears. While this may seem to be a Draconian measure, in some cases, there is often little choice: if an owner is not paying his or her fair share, or, sadly, has no ability to pay, the only way to protect all the other owners in the strata corporation is to proceed with a forced sale.



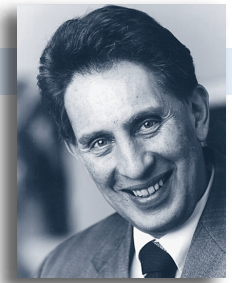
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Collecting Those Arrears!

Gerry Fanaken, former CEO
VANCOUVER CONDOMINIUM SERVICES LTD.



One of the best ways to collect strata fees and special levies is, of course, not to have any in the first place. Admittedly that is easier said than done but, indeed, the first step in collecting those arrears is education. In other words, make sure that the owners are well-informed of their obligations to pay. It is not uncommon to hear delinquent owners claim that they “did not know” they had a debt owing to his or her strata corporation. It is a specious argument but it is used frequently.

Education should commence immediately when a new owner takes possession of his or her strata lot. That is a very good time and opportunity to send a polite but clear message that strata fees are due on the first of every month and no invoice, statement or reminder is sent. Point out that the obligation to pay is automatic, pursuant to the standard bylaws of the corporation. This “early education” is an excellent first tool for the collection process.

Nevertheless, some owners will fall into arrears (even though they are fully aware of their obligations) and there is an endless list of reasons why payment cannot be made. A strata council (or property manager) should always remain polite but avoid allowing any discussions or debate on the delinquent owner’s offerings. It is not relevant that they are short of cash or disagree with some aspect of the administration and are therefore withholding payment. To enter into such debate leaves open the possibility that some leniency might be gained.

There are options available to a strata corporation if an owner remains in arrears and the debt is growing. They are:

1. Levying a fine on the owner’s account
2. Attaching a lien to the title in the Land Title Office
3. Contacting the owner’s mortgage company
4. Foreclosing

- 1. Levying a fine:** The strata corporation must have a registered bylaw to authorize a fine and must include the specific amount (section 132 of the Strata Property Act (the “Act”). It is not sufficient to simply rely on the general belief that the strata corporation can levy a fine of up to \$200. (Regulation 7.1 of the Act states that the fine maximum cannot exceed \$200, once per seven days.) If the strata corporation does not have such a specific bylaw (and many do not) then there is some risk that, if legally challenged, a fine may not be held valid by a court. So be sure to implement such a bylaw with a specific amount. A strata council should apply fines with fairness and equity in mind. You cannot fine Bob for late payment because he is an annoying owner and not fine Mary for late payment

Gerry Fanaken is a 35 year condo owner, former CEO of Vancouver Condominium Services and author of *Understanding the Condominium Concept: An Insightful Guide to the Strata Property Act*.

because she is a nice person and is on the strata council. The application of fines must always be consistent and even-handed. Discretion can be used but with care. For example, an owner who has never been late with payments for the past five years, and then inadvertently forgets one month, should not necessarily be fined. A polite and considerate reminder is all that is required. Fines should not be viewed as a vindictive action or as a good revenue source. There have been court cases which have decided that excessive fines were not legitimate as the strata council did not pursue any other course of action for collecting the debt. Instead the council permitted the fines to simply pile up to an enormous amount and that is not acceptable. Fines, therefore, should be used as a warning device, not a money grab.

- 2. Attaching a Lien to the Title:** If the fining process fails to motivate a delinquent owner, the next step is to file a lien on the title to the owner’s strata lot. Before this is done, the owner must be given adequate notice and an opportunity to pay. Section 112(2) of the Act mandates this procedure and requires “2 weeks’ written notice demanding payment and indicating that a lien may be registered if payment is not made...” Two weeks is actually 20 days. Note:

2 weeks = 14 days (Section 112)

Notice = 4 days (Section 61)

Interpretation Act = 2 days

20 days

continued on page 12...

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If the two week period (i.e. 20 days) comes and goes and payment is not received, then and only then can the strata corporation file a lien on the owner's title. This process should begin by obtaining a copy of the owner's title from the Land Title Office. This document will show exactly who the registered owner is and if there are any mortgage holders or other claimants on title. Importantly, the title will provide the correct and precise legal identification of the strata lot which is required for the lien document.

3. **Contact the Mortgagee:** The title search will also reveal if the owner has a mortgage on the property and the mortgagee's (lender) name will appear – usually a bank, credit union or similar financial institution. Find out which branch office applies and then contact the manager at that branch and inform him/her that a lien has been filed. Note Sections 60 and 113 of the Act which describe and prescribe the obligations of a mortgagee and the strata corporation in respect of arrears.
4. **Foreclosure:** If there is a mortgage on the property, more often than not the mortgagee (the lending institution) will

pay the amount owing to the strata corporation. That amount is simply added to the balance of the mortgage as the mortgage itself contains such authority for the lender. In some rare circumstances a lender may not pay, (or there may be no mortgage whatsoever) in which case the strata corporation is given authority under Section 117 to foreclose. This rarely occurs but it is an excellent tool for the strata corporation. (This article does not deal with the details of this process.)

The above four steps will generally result in successful collections of debts; however, it is evident that each one of them involves cost, stress and hard feelings. Who wants that! So back to the beginning: educate and inform. Inform and educate.

Be aware of the (new) *Limitation Act*. Other articles in this edition discuss this Act but for the purpose of this article be aware that a strata corporation must pursue a claim not later than two years from its due date. If an action for collection in court is not commenced within two years (it used to be six years) the strata corporation will be barred from any court proceeding to sue the owner.



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Strata Alert: New Limitation Act Dramatically Changes Collection Practice

Cora D. Wilson, J.D.

C.D. WILSON LAW CORPORATION

Effective June 1, 2013, the new *Limitation Act* became law in British Columbia. A limitation period dictates the time available to a claimant to file a suit in court to assert a right, seek damages or collect money. It is the filing of the court proceeding that stops the limitation clock. The failure to file the court proceeding in time means that the limitation clock runs out and the claim is lost forever.

This is bad news for many strata corporations in British Columbia who do nothing and wait to collect with the Form F, Certificate of Payment, upon transfer or who play a lien and wait for payment game. Historical common practice is about to change radically.

The good news is that the new *Limitation Act* simplifies the limitation regime and brings British Columbia's legislation in line with other provinces. The new limits will apply equally to arbitration proceedings and court proceedings.

The basic limitation period for all claims after June 1, 2013 is two years, commencing on the date that the claim is "discovered." There is an ultimate 15 year limitation period after which no claim can be brought, even if that claim has not yet been discovered. A person holding a judgment has 10 years to enforce the judgment before the right to collect is lost.

There are exceptions to the *Limitation Act* expressly set out in other statutes, such as claims against a municipality governed by the *Local Government Act*. Such limitation periods are typically short. For example, the limitation period under sections 285 and 286 of the *Local Government Act* is six months to start an action after the date the claim arose and two months to provide written notice of the claim to the municipality. Strata corporations should seek legal advice early on when addressing such claims. The notice letters are technical and should be drafted by a lawyer to ensure compliance.

Claims discovered prior to June 1, 2013 are grandfathered and governed by the limitation periods under the old regime. Councils are advised to prepare a schedule listing all known old claims for arrears which will be governed by the six year limitation period, as well as a list of new claims governed by the two year limitation period. This will ensure that future collection proceedings are taken in a timely fashion and limitation periods are not missed.

Insurance deductible claims relate to property loss and damage and are governed by the shorter two year limitation period under

the old legislation. Little has changed for such claims with the adoption of the new *Limitation Act*.

As noted above, a limitation period starts to run when it is "discovered." Section 8 of the *Limitation Act* outlines the test and provides that a claim is "discovered" on the first day a person knew, or reasonably ought to have known all of the following:

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made; and
- (d) having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

In most case, the commencement date of the limitation period will be the date that the event happened. The discovery date for arrears of common expenses commences on the day after the due date. In damages suits such as wet building syndrome cases, it is not necessary to quantify the value of the loss or damages before a claim can be made. It is sufficient that the claimant know that there will be a loss.

It is possible to postpone the discovery date. The Court of Appeal postponed a limitation period to allow a strata corporation time to hold a general meeting to obtain a $\frac{3}{4}$ vote of owners authorizing the suit as required by section 171 of the *Strata Property Act*: *Strata Plan LMS 2940 v. Quick as a Wink Courier Service Ltd.*, [2010] B.C.J. No. 246 (B.C.C.A.). It is unlikely that this will be an issue in most strata corporation claims.

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The administrative procedures of each strata corporation should be tightened up after June 1, 2013. A strata corporation must now start a court action in either the Supreme Court (including lien enforcement proceedings) or in the Small Claims Court within two years from the date that the fees or special levy were first due and payable. Section 6 of the *Limitation Act* requires a “court proceeding” to stop the limitation clock. In other words, the filing of a lien falls short since it does not constitute a “court proceeding.”

When does the limitation clock start to run when dealing with fines? Arguably the two year limitation period starts to run from the date that the fine was imposed by the council. This underscores the importance of ensuring that the levy of fines by the council be recorded in the council meeting minutes. The date of this meeting

likely constitutes the commencement date. It is not the date that the owner became aware that the fine was imposed.

If the council does not take steps to stop the limitation clock by filing a claim for the fines within two years, then the fines will be lost.

Insurance deductible claims are common place in many strata corporations. Action to collect an insurance deductible should be taken within two years from the date of the incident that gave rise to the costs being incurred. The clock does not run from the date that the strata corporation became aware of the incident – it runs from the date of the loss. It may be difficult to determine this date in some cases. When a strata corporation is in doubt, it should exercise an abundance of caution and file a claim on the earliest date.



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It will be difficult to determine when costs to remedy a contravention under section 133 of the Act become owing by an owner. They are not fines. The limitation clock could start to run from any one of a number of different dates including the date of the bylaw breach, the date the costs were incurred or the date costs were imposed. Legal advice should be sought to determine the appropriate commencement date.

When is that last date available to a strata corporation to commence a legal proceeding to compel compliance with the bylaws? For example, if an owner alters the common property or a strata lot without prior written permission contrary to the bylaws, what is the last date that a strata corporation must file the claim before the clock ticks out?

The safest course of action is to assume that the limitation clock starts to run from the date that the alleged breach of the bylaw becomes known to the strata corporation. This is an earlier date than the date that the strata corporation determines that a breach has occurred. These are complex issues that may ultimately require a legal opinion or a court decision to finally resolve.

The same limitation rules apply to owners and tenants who wish to bring a claim against a strata corporation.

At the end of the day, the new *Limitation Act* necessitates a higher level of administrative due diligence. Councils should take steps to change their historical collection practices as soon as possible. Such changes will ensure timely collection procedures, minimize receivables, maximize financial health and virtually eliminate missed limitation dates.



How is our Council Managing our Receivables under the Short Periods of the New Limitation Act?

Tony Gioventu, Executive Director

CONDOMINIUM HOME OWNERS ASSOCIATION OF BC

The greatest impact that many strata corporations are going to experience from the new provisions of the *Limitation Act* is going to be managing their receivables and collecting funds. The days of waiting until someone sells their unit to collect an insurance deductible, or unpaid special levies, strata fees or fines from three years ago, are over. Strata corporations and strata agents need to employ an active method of decision making, monthly accounting and reporting, and a record keeping system that ensures the strata corporation proceeds with action in the court system to protect the ability of the strata to collect. Filing a lien does not stop the limitation period from running, only a court action will have the proper effect. Only strata councils are permitted to enforce bylaws, impose fines and make decisions that implement these actions for the purpose of collections. The strata agent relies on the actions of strata council to ensure the manager has the authority to proceed with the collection actions that they have been authorized to conduct. A summary report, each month, will give the strata council a continual update on receivables, a receivable report that balances to the balance sheet, identifies which receivables require decisions to authorize the agent to

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.

proceed and identifies which receivables must be on the next general meeting agenda to approve a court action, if required, so they can protect the interest of the strata corporation. While many strata corporations attempt to collect items like insurance deductibles on sales of strata lots when a Form F is requested, it is critical to understand that this practice is not permitted. If the seller disputes the claim, the strata corporation will likely lose the collection. Here is a sample Form that can easily be created in an excel document, updated monthly and integrated into an accounting system. Please note that all charges are segregated. This is also important because items that are not lienable, such as fines, penalties, damages and insurance deductibles, cannot be included in claims for items in order for sale proceedings.

Monthly arrears/action report

1	2	3	4	5	6	7	8	9	10
Strata Lot Number	Date of Occurrence	Date of Council Meeting	Strata Fees	Interest Bylaw	Special Levy	Fines	Insurance deductible/damages	Legal Costs/Admin	Total
14	2.1.13	2.25.13	\$299.40	\$2.50		\$25.00			\$326.90
25	12.7.12	12.19.12					\$5,000.00		\$5,000.00
178	11.1.12	11.15.12	\$214.50	\$1.77		\$25.00			\$241.27
178	12.1.12	12.19.12	\$214.50	\$1.77		\$25.00			\$241.27
178	1.15.12	1.20.13	\$214.50	\$1.77		\$25.00			\$241.27
178	2.1.13	2.25.13	\$214.50	\$1.77		\$25.00			\$241.27

Columns 1-9:

1. all units are identified by strata lot #
2. the date of each occurrence is detailed when the claim or violation occurred
3. the date of the minutes that record the decision of council & action
4. amount of the Strata Fee Due is detailed
5. the amount of interest at 10% per annum calculated monthly is detailed if the bylaws permit

6. levy amounts are detailed, interest on levies are detailed if the bylaw or resolution permits
7. fines imposed are detailed
8. insurance Claims are detailed
9. legal/collection /admin costs are detailed
10. total owing per occurrence

The report is for council records and is not part of the minutes.



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