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www.stratasphere.online Fall 2019

Inside This Edition

ALL ABOUT STRATA

by Cora D. Wilson, J.D.

The Strata world is evolving at a fevered pitch with the release of multiple Civil Resolution Tribunal ("CRT") decisions almost daily. Some unhappy litigants appealed their CRT decisions to the Supreme Court. Initially leave to appeal was required to appeal a CRT decision. Legislative amendments now require that appeals after January 1, 2019, with limited exceptions, proceed by a different appeal procedure known as judicial review. The road to certainty appears to be bumpy, long and confusing.

Elaine McCormack, a senior strata lawyer and qualified mediator and arbitrator, offers an alternative approach. In her article, *"The use of Mediation to Resolve Nuisance Disputes"*, Elaine suggests that many complex strata issues involve at the core some kind of a disagreement between owners. Nuisance from smoking is one example. Voluntary mediation using lawyers may be a suitable alternative. The parties would have input into the lawyer's role and hand pick who will be involved in the process. This could set the stage for "a creative solution" satisfactory to all.

Another option is to adjudicate a dispute in the CRT. Cora D. Wilson, a senior strata lawyer, successfully defended an appeal before the Court of Appeal from a Supreme Court Order granting leave to appeal from a CRT decision in *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45 (B.C.C.A.) ("*Allard*"). This was the first case to address this issue before the Court of Appeal. Further, she successfully argued the first challenge in the Supreme Court to determine whether a Strata matter should be adjudicated by the CRT or by the Supreme Court in *Yas v. Pope*, 2018 BCSC 282 (B.C.S.C.) ("*Yas*").

The take away is that the CRT is a specialized tribunal for Strata matters. It is here to stay. The Court of appeal in *Allard* suggests an age of deference to CRT decisions. It will now be more difficult to challenge a CRT decision on appeal or to move a dispute from the CRT into the Supreme Court.

In *Yas* the Supreme Court considered whether it was in the interests of justice and fairness for the CRT to continue to have jurisdiction over a strata dispute. The dispute related to a matter clearly within the jurisdiction of the CRT, namely ongoing unreasonable noise from hardwood floors. The Supreme Court confirmed that this assessment depends on the particular facts of each case, acknowledged the specialized expertise of the CRT and concluded that the dispute should stay and be adjudicated in the CRT.

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THE USE OF MEDIATION TO RESOLVE NUISANCE DISPUTES IN STRATA COMPLEXES

by Elaine T. McCormack, J.D. B.A.

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Legal decisions involving strata complexes often address the rights and obligations of the strata corporation and an owner, or the strata corporation and a tenant. In contrast, the core of many of these disputes is actually a disagreement between owners. As a result of the dispute between owners, the strata corporation is often urged by one of the owners to act as a go-between, and is asked to commence bylaw enforcement against the other owner, and sometimes to commence proceedings. These proceedings are often complicated by the fact that the main players in the proceedings are one owner and the strata corporation, instead of the two owners who are at the core of the dispute. Private mediation between the owners and the strata corporation is rarely used in these disputes, even though it is often the best option.

The ways that residents can annoy each other in a strata complex are endless. Many of these disputes are legally classified as a "nuisance"- meaning an unreasonable interference with the use or enjoyment of land.

Here are some examples of nuisance disputes that commonly occur in strata corporations:

- an owner enjoys smoking a cigar on her patio, and the smoke wafts up into a unit located on the second floor. The person in the second-floor unit above has health concerns that are exacerbated by smoke and complains to council, demanding that all smoking in the complex be prohibited.
- An owner's late-night pastime of playing an electric guitar results in the person in the unit below being unable to fall asleep at night and unable to wake up for his early morning nursing shift and he demands that the neighbour sell her guitar.

The owner who is bothered by the behaviour of the other resident in the complex often demands that the strata corporation stop the other resident from exhibiting the behaviour that they say they cannot tolerate. Councils are often asked to enforce bylaws that prohibit nuisance, including bylaw 3(1) from the Schedule of Standard Bylaws from the *Strata Property Act*, which reads as follows:

Use of property

3 (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that

(a) causes a nuisance or hazard to another person,

(b) causes unreasonable noise,

(c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

(d) is illegal, or

(e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

Sometimes, strata corporations enact further bylaws, such as bylaws that prohibit smoking in the complex. The problem is that bylaws don't enforce themselves, so council still must deal with the issue. Although councils have a legal obligation to reasonably enforce bylaws, council members are often reluctant to do so in nuisance matters. Enforcing nuisance bylaws often involves council members performing an independent investigation of the interference one owner is experiencing, including being on call to smell smoke or hear noise at different hours of the day and night. Enforcing nuisance bylaws involves standing in judgment of your neighbours and their behaviours. This is often difficult for council members who generally have no special training. Also, council members may live in the complex or have friendships with the individuals involved. Typically, to change a resident's behaviour, more is involved than simply following the bylaw enforcement procedure set out in section 135 of the *Strata Property Act* and rendering a fine.

The resident complaining about the nuisance is often dissatisfied with council's efforts to enforce the bylaws and may commence legal action. The legal options considered often include a claim against the strata corporation as a defendant, as opposed to a claim against the other individual.

Small Claims Court offers no relief to the individual who wants his neighbour to stop creating a nuisance, as the jurisdiction of Small Claims Court does not include prohibiting behaviours.

It is possible for an individual owner to apply to the Supreme Court of British Columbia for relief against a neighbour by pleading nuisance, but it is necessary to commence the proceedings by way of a Notice of Civil Claim, and the costs are prohibitive.

Commencing proceedings against the strata corporation, as opposed to the other owner, is often the least costly approach. For instance, under section 8 of the *Human Rights Code*, the

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THE CIVIL RESOLUTION TRIBUNAL IS HERE TO STAY! CRT APPEALS LIKELY VULNERABLE

by Cora D. Wilson, JD

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The first Court of Appeal decision from a Civil Resolution Tribunal ("CRT") appeal application will make future challenges of CRT rulings by unhappy litigants more difficult. In *Allard v. The Owners, Strata Plan VIS 962* ("*Allard*"), the 3 member panel of the Court of Appeal unanimously set aside a Supreme Court Order granting leave to appeal the CRT decision to the Supreme Court.

The owner disputed the exclusion of the balcony solarium addition from a major renewal project. The Strata excluded this alteration on the grounds that it had no responsibility to repair and maintain owner constructed improvements on exterior balconies. The owner contended that the exclusion was significantly unfair. The CRT held that the Strata had an obligation to repair and maintain the solarium under bylaws similar to the statutory standard bylaws, but determined that its exclusion was not significantly unfair. The CRT relied upon an architectural expert report tendered by Strata concluding that the solarium did not need work. Further, the solarium's appearance blended in with the project.

The Supreme Court granted leave to appeal. The Court of Appeal overturned this decision on grounds that the appeal did not raise a question of law. Moreover, the appeal was not in the interests of justice and fairness since the chambers judge failed to consider the limited precedential value of the proposed appeal, the relative lack of significance to the parties and the CRT's special mandate based on the proportionality principle.

The Court of Appeal reviewed some of the relevant factors for leave applications to the Supreme Court pursuant to section 56.5 of the *Civil Resolution Tribunal Act* as follows:

1. Precedential value means that the appeal must provide guidance to other strata disputes. The Court of Appeal found that the case did not have precedential value since it was "thoroughly infected" by facts unique only to *Allard*.
2. The total class of owners must be reviewed to determine the importance of the issue to the parties. In this case, the $4.5 million renewal project to address original windows and doors did not include the only 2 solaria out of over 50 units. "It will never be in the interests of justice and fairness to hear an appeal that is of significance to only one of the parties. But the overall significance of the dispute ought to be a relevant, even if non-determinative, factor".
3. The Tribunal has an express mandate to provide "accessible, speedy, economical, informal and flexible" dispute resolution services using electronic tools, while recognizing that relationships will likely continue after the proceedings. The Court of Appeal addressed the proportionality principle by stating: "An appeal in the Supreme Court, while affording a more painstaking procedure, would unduly lengthen resolution of the dispute and thereby negate the many benefits of the Tribunal proceedings."

The Court of Appeal noted that the Tribunal is not bound by the rules of evidence, but may receive, and accept as evidence, information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

I was legal counsel for the Strata in the *Allard* case and offer the following take away:

1. The CRT is here to stay.
2. The Court of Appeal decision suggests significant deference to CRT decisions.
3. This direction will raise the bar for appeals and impact the success probability for future appeals.

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BYLAW ALERT – THE INSURANCE DEDUCTIBLE ON APPEAL!

by Cora D. Wilson, J.D.

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Water damage claims from a broken pipe, for example, are common. When is an owner responsible to reimburse the Strata Corporation for an insurance deductible? The answer to this question is of great importance to both Strata Corporations and owners.

A recent decision from the Supreme Court on appeal from a Civil Resolution Tribunal decision clarifies that the answer to this question involves a review of both the bylaws and the *Strata Property Act* ("*SPA*").

In the recent decision of *The Owners, Strata Plan BCS 1589 v. Nacht*, 2019 BCSC 1785 (B.C.S.C.), ("*Nacht*"), the Supreme Court refused on appeal to overturn the Civil Resolution Tribunal decision concluding that the owner was not responsible for the deductible in the absence of negligence being the standard required by the bylaws of the Strata Corporation.

Section 158 (2) of the *SPA* permits the Strata Corporation to sue an owner to recover the deductible portion of an insurance claim if the owner is "responsible" for the loss or damage that gave rise to the claim. The standard of "responsible" is a much lower standard as compared with a standard of negligence and as such much easier to establish.

In *Nacht*, the bylaws of the Strata Corporation increased the standard required by section 158(2) from that of a "responsible" owner to that of a "negligent" owner. The latter standard is much more difficult to establish as compared with that of responsibility which includes "accountability" and "answerable for one's actions". Legal counsel for the Strata Corporation argued that a bylaw cannot narrow the application of the governing legislation – namely the *SPA*.

The Supreme Court determined that the CRT's view that the bylaw "clarifies" or "specifies" the basis upon which "responsible" is interpreted was reasonable and upheld the CRT's decision. The outcome might have been different if the standard of review on appeal was based on correctness, as opposed to reasonableness. The Supreme Court emphasized the CRT's mandate "to interpret and apply the *Strata Property Act* and the legislature has clearly indicated its specialized expertise in this regard.

This decision underscores the importance of conducting a regular review of the Strata Corporation's bylaws by a qualified strata lawyer to ensure that the Strata Corporation is not prejudiced by unduly restrictive bylaws.

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This determination could be different if some of the relief sought falls outside the jurisdiction of the CRT and/or if the parties consent to having the matter heard by the Supreme Court: see *Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, [2018] B.C.J. No. 1381 (B.C.S.C.).

Recently, on appeal, the Supreme Court refused to interfere with a significant decision of the CRT restricting the recovery of an insurance deductible in *The Owners, Strata Plan BCS 1589 v. Nach*t, 2019 BCSC 1785 (BCSC). In that case, the CRT concluded based on a review of the bylaws that the owner was not responsible for the deductible in the absence of evidence of negligence. Section 158(2) of the *Strata Property Act* ("*SPA*") imposed the standard of a "responsible" owner. The bylaws raised this standard to that of a "negligent" owner, which is much more difficult to establish. The *Nacht* case stands for the proposition that a bylaw can narrow the standard for compliance with a statutory provision. Many lawyers would be surprised to learn that a bylaw can colour and change the interpretation of a statutory provision. The bylaw provision in *Nacht* turned an otherwise recoverable insurance deductible into a non-recoverable claim. This is a harsh result and underscores the importance of an annual review and update of bylaws to mitigate against surprising outcomes in a rapidly changing Strata landscape.

We were all very excited with the 2017 Court of Appeal decision of *The Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377 ("*Baettig*") which authorizes a Strata to recover the actual reasonable legal costs from a defaulting owner under both s. 133 (costs to remedy a contravention) and s. 118 (costs added to amount owing on a lien for nonpayment of common expenses) of the *SPA*. The Court of appeal confirmed that the intent was to ensure that "strata owners who comply with the bylaws and rules of the strata should not have to shoulder the financial burden of remedying infractions committed by non-compliant owners".

The article by Cora D. Wilson entitled, "*Life after Baettig*", reviews several cases addressing the recovery of actual reasonable legal costs. These cases confirm that a strata corporation is indeed entitled to legal cost recovery against a defaulting owner as long as such charges are authorized by the governing legislation and meet the standard of "reasonableness". The cases also confirm that the strata is not obligated to reduce the arrears of strata fees or to absorb legal fees to accommodate a defaulting owner. These very important cases will impact legal cost recovery leading forward.

The guiding legal principles forming the foundation for the adjudication of legal cases is evolving at a rapid pace. We recommend that Strata Corporations seek legal advice at an early stage from a qualified strata lawyer to assist with the review of bylaws and the resolution of strata disputes.

The Use of Mediation to Resolve Nuisance Disputes in Strata Complexes... *continued from page 3*

strata corporation has an obligation to accommodate, to the point of undue hardship, physical and mental disabilities of individuals living in the complex. As a result, those suffering from a medical condition exacerbated by second-hand smoke may choose to seek relief against the strata corporation from the Human Rights Tribunal ("HRT"). However, the owner who is smoking generally cannot be named in these proceedings. HRT proceedings might result in an order that the strata corporation must take more effective steps to enforce its bylaws and so on, but the remedy will not directly deal with the issue.

Each individual involved in the dispute, if they are dissatisfied with how the council responds to his or her request for personal information, can file a complaint with The Office of the Information and Privacy Commissioner ("OIPC"). This process again puts the strata corporation front and centre in the dispute instead of the two individuals directly involved.

The Civil Resolution Tribunal ("CRT") may prove to be the most effective legal venue to deal with nuisance disputes between those who reside in strata corporations. However, from the decisions rendered by the CRT thus far, the matter of nuisance behaviour is being addressed as an issue between one of the owners and the strata corporation, as opposed to an issue between two individuals.

The Courts, HRT, OIPC and the CRT have varying ways of settling disputes on a non-adversarial basis before a decision is rendered. However, the added strain placed on the relationships of those living in the strata community cannot be avoided once the proceedings are commenced.

Voluntary mediation using lawyers as advocates may be a suitable option to avoid this problem. Unlike the CRT, voluntary mediation allows the parties free reign to decide the role that lawyers will play in the process. By participating in mediation, the parties may arrive at a creative solution. For instance, perhaps the lady who enjoys smoking cigars on her patio can do so on Sunday afternoons while her neighbour is out visiting her daughter. The person who cannot stand hearing "Stairway to Heaven" one more time might be able to sleep better if council grants the guitarist permission to use the common meeting room located in the basement of the complex as a studio from time to time. Agreements reached in mediation can include provisions that are more effective than orders from the Court, the HRT, the OIPC or the CRT.

RECOVERY OF ACTUAL LEGAL COSTS - LIFE AFTER BAETTIG

by Cora D. Wilson, JD

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The 2017 Court of Appeal decision of *The Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377 ("*Baettig*") stands for the proposition that the Strata Corporation is entitled to recover the actual reasonable legal costs from a defaulting owner under both s. 133 (costs to remedy a contravention) and s. 118 (costs added to amount owing on a lien for nonpayment of common expenses) of the *Strata Property Act* ("*SPA*").

The Court of Appeal confirmed that the intent of ss. 133 and 118 of the *SPA* is to ensure that "strata owners who comply with the bylaws and rules of the strata should not have to shoulder the financial burden of remedying infractions committed by non-compliant owners".

Several recent cases interpreted the *Baettig* decision including *Strata Plan NW 2089 v. Ruby*, [2019] B.C.J. No. 173, B.C.J. No. 544 ("Ruby"); *Strata Plan K 27 v. Caron*, [2019] B.C.J. No. 1205 ("Caron"); *Strata Plan NW57 v. Lambert* [2019] B.C.J. No. 59 ("Lambert") and *Strata Plan NWS3075 v. Stevens*, [2018] B.C.J. No. 3410 ("Stevens").

In the Ruby case, the Strata Corporation sought to enforce a lien by forced sale of an owner's strata lot. The Strata Corporation obtained a judgment in the Supreme Court of $4,532 for the arrears of the special levy, an order for sale after 30 days and an order for recovery of the actual reasonable legal costs after an assessment before the Registrar. The Registrar initially denied recovery of legal costs on grounds that Mr. Ruby made repeated attempts to pay, but the Strata refused payment unless accompanied with payment of all legal costs claimed. The Registrar believe that a single email to Ruby demanding payment consistent with historical practice would have resolved this matter without incurring any legal costs. The Registrar concluded that Strata's legal costs were not reasonable or proportional in the circumstances.

The Registrar's decision was overturned on appeal. The Registrar should only have addressed the reasonableness of the amount of legal costs claimed – not entitlement to such costs. A Supreme Court Order was already in place addressing entitlement.

After the appeal and reassessment, the legal costs were reduced from $28,503.93 to $14,996.94. The Ruby case confirms that the standard of reasonableness applies when quantifying legal costs. In our view, this outcome is roughly equivalent to legal cost recovery in forced sale proceedings under the pre-Baettig regime.

The Court was careful during the Ruby Appeal to refer to the policy reasons for awarding actual reasonable legal costs pursuant to s. 118 of the *SPA*, namely: "(1) keeping the strata corporation whole as to the reasonable costs it incurs; and (2) protecting compliant owners from the financial burden of taking recovery steps against delinquent owners who are unable to pay or otherwise refuse to pay their fair share in strata fees."

The Court of Appeal in *Baettig* addressed the protections afforded an owner from excessive legal charges - namely the taxation process and the restriction in section 118(a) of the *SPA* that only reasonable legal costs may be added to the amount owing under the lien. The recent cases are consistent with this policy direction.

Further case law is required to clarify which legal costs may not be recoverable under s. 118 or s. 133 of the *SPA*. What is clear is that Strata Corporations should adjust their collection procedures and cost recovery strategies to comply with the restrictions from the bench.

Other recent cases have been instructive. The question regarding whether a Strata Corporation is required to forego legal costs when the amount of the arrears of common expenses is small was addressed in *Strata Plan NW57 v. Lambert*, [2019] *B.C.J. No. 59* (B.C.S.C.). In this case, the Strata commenced a Petition to enforce a lien against the owner by seeking judgment for the arrears of strata fees of $838 plus legal costs. The owner's mother advised that the owner was suffering from a mental illness. She offered to settle the accumulated arrears of $2,482 at that time by a one-time payment of $1,800. The Strata Corporation refused and demanded full payment including legal fees. Lambert's mother sent a cheque for the arrears excluding the legal costs. The Strata Corporation rejected the cheque and demanded full payment. Lambert's mother submitted a further cheque and began making monthly payments for an amount less that the actual strata fees. The Strata Corporation negotiated some cheques and returned others. Arrears at the time of trial were $2,183. The Court confirmed that the Strata Corporation was not obliged to reduce the strata fees or absorb legal fees to accommodate a defaulting owner.

Another case addressed recovery of legal costs to remedy a bylaw infraction and confirmed that legal costs may not be recoverable

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EXISTING GLAZED BALCONY ENCLOSURES – A STEP BY STEP GUIDE TO PLANNING AND EXECUTING A SUCCESSFUL REPLACEMENT PROGRAM

Prepared by Read Jones Christoffersen Ltd.

For over 70 years, Read Jones Christoffersen Ltd. (RJC) has provided excellence in the fields of Building Science, Restoration, and Structural Engineering. In particular, RJC has worked on many balcony restoration and replacement projects, which has allowed us to develop significant experience and a strong understanding of feasible, practical, and effective solutions.

We understand the complexities and challenges that accompany balcony restoration projects, particularly those that encompass glazed balcony enclosures. There can be significant and costly obstacles that should be managed appropriately; therefore, RJC has developed the following step by step considerations that a Strata Council can follow to have the best chance for a successful balcony restoration project.

Step 1: Get internal documents in order

1. Review the current provincial legislation and regulations, the Strata Corporation's bylaws, and the Strata Corporation's rules, which provide the legal framework and limitations for a particular Strata and their property [1]. An example of the established provincial legislation for projects located in British Columbia (BC), Canada is the *Strata Property Act*, which can be found on the Government of BC's website [2]. When reviewing these documents, ask yourself the following questions:
    - o Do the bylaws and rules allow for balcony enclosures?
    - o If so, when was this requirement originally established?
    - o How has the Strata Council managed/enforced the installation of balcony enclosures in the past? If possible, the Strata should look to maintain consistency with past processes and approvals.
2. Obtain a copy of the original drawings and make note of the initial balcony designs. If applicable, include the number and location of the original enclosed balconies.
3. Obtain any reports, alteration contracts, and drawings related to the balconies/existing enclosures that have been prepared over the years.

Strata Councils should be aware there is not a single source that describes all of the legal requirements related to balcony enclosures. The documents mentioned above interact with each other, and should be read in conjunction with one another. In the event of a conflict between legislation and regulations, the legislation shall govern [1]. If any of the documents are unclear, the Strata Corporation should seek legal advice.

Step 2: Review with the Municipality

1. Contact the authority having jurisdiction (the Municipality) and determine the submission requirements for planning, zoning, and permits.
2. Ask the Municipality if a Building Permit is required and if a Coordinating Registered Professional (CRP) should be retained. If required, the CRP would prepare the design documents (drawings and specifications) and the Letters of Assurance for the project.
3. Check the Municipality's website to ensure the Strata Corporation has all of the appropriate documents and drawings needed to apply for a Development/Building Permit.
4. Specifically, ask the Municipality about the building floor space ratio (FSR) requirements and how balcony enclosures might affect the FSR and zoning.

The FSR is the ratio of the total floor area to the area of the strata lot, which is used to calculate the building density [3]. Zoning uses the density of a building, as well as its use, size, location, and shape, to regulate the buildings within an area. Enclosing balconies (if defined as interior space) can change the calculated density of a building and cause several zoning issues, such as use, fire protection requirements, parking, etc. To change these requirements means changing the zoning, which can be a very long and costly application process with no guarantee of approval.

Step 3: Consider retaining a Consultant and legal counsel

1. Arrange the services of a consulting firm(s) that can provide expertise during the project. There is rarely a one size fits all solution and each building requires specific detailed planning and preparation. Municipalities will also view each project on its own merit. Hiring a consulting firm does

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PITFALLS IN COMMUNICATIONS AGREEMENTS

by David Liden

David A. Liden
David A. Liden was called to the BC Bar in 1981 and works in the areas of strata law, real estate and business law. He has extensive experience working on complex commercial agreements.

More and more businesses and consumers in communities across British Columbia are using the fibre optic network of a major Canadian telecommunications company. The network consists of cables containing flexible, transparent fibres of glass that are slightly thicker than a strand of human hair. The principal advantage of fibre optic technology is blazing fast Internet access and use, as these fibres transmit data as particles of light, which allows large volumes of data to be sent at close to the speed of light.

As many consumers live in strata projects, this telecommunications company continues to offer its fibre optic network to strata corporations, on the condition that the strata sign the company's standard form Contract. I was contacted recently by one of my strata corporation clients, and asked to review the Contract. Here is what I told my client:

- the company, which is a public corporation listed on the Toronto Stock Exchange, has changed its standard form Contract to make it more fair to a strata corporation that signs it because the Contract is now with this publicly traded company. Previously, when the company began to offer its fibre optic network to strata corporations in British Columbia, the Contract the company put forward for signature was not in fact with this publicly traded company, but rather a partnership, whose partners were unknown.

  This was a very, very significant problem for a strata corporation from a legal perspective: it meant the strata's legal rights and remedies under the Contract could not be enforced against the publicly traded telecommunications company; instead, the strata's legal rights and remedies could be enforced solely against the partnership. The fundamental problem was that, in all likelihood, neither the partnership nor its partners held any financial assets, in which case these legal rights and remedies of the strata did not have any financial value.

- the Contract states that the initial term is for a period of 10 years, after which the Contract is automatically renewed for periods of one year each unless the company elects to not renew the Contract. The strata does not, however, have a reciprocal right to end the Contract.

- the Contract contains the following representation and warranty by the strata: "it has full right, power and authority to enter into this Agreement with the Company, including having passed the required resolution(s) authorizing it to enter into this Agreement with the Company". The potential harm to the strata of this representation and warranty needs explanation.

  Section 80(2)(a) of the *Strata Property Act* states in plain English that if a strata corporation intends to "dispose" of the common property in a certain way, the strata does not have the legal authority to do so unless the intended disposition has first been approved by a ¾ vote resolution of the strata lot owners. In the *Strata Property Act*, the word "dispose" means "to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things".

  Given the initial 10 year term of the Contract, its automatic renewal for one year periods thereafter and no reciprocal right of the strata to end the Contract, a legitimate, bona fide legal argument can be made that the grant of the rights described in the Contract to the company is a "disposition" of the common property which requires prior approval by a ¾ vote resolution of the owners, failing which the Contract is not legally valid.

  It is common knowledge that some strata corporations have entered into the Contract without a ¾ vote approval of the owners. An owner may file a claim with the Civil Resolution

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Existing Glazed Balcony... *continued from page 8*

come with its costs; however, it can be well worth the investment. An experienced consultant, in conjunction with a lawyer, can guide a Strata Corporation through balcony restoration options, limitations, estimated costs, etc., so the Strata Corporation will be in a position to make an informed decision.

2. Determine what the Owners want out of the balcony replacement; ask about their expectations in terms of enclosures and budget. Many Owners typically prefer to replace their balcony with a similar design because they want the system that they had originally paid for and expect.
3. Work with the Consultant towards a reasonably developed plan. Remain engaged and check in at least once every 2 weeks to review progress, answer questions, etc. Ask the Consultant questions about the proposed balcony replacement (clarify deliverables, timelines, scope, etc.).
4. Strata Corporations should consider hiring an experienced strata lawyer to work with the ownership and the Consultant, create and review strata bylaws and rules, mitigate disputes, etc.
5. Consider retaining an architect for specific aesthetic guidance if substantially changing the exterior appearance of the building, whether installing new enclosures or removing the existing ones altogether.
6. As discussed in Step 2 – Item 2, determine whether a Coordinating Registered Professional (CRP) is required. If so, the Consultant (either an engineer or architect) can fulfill this role.

Strata Corporations, in conjunction with a lawyer, should review the Strata Plan and determine whether their balconies are considered common property or limited common property (LCP). Typically common property is any part of the land and buildings shown on the Strata Plan that is not part of a strata lot; whereas limited common property is common property designated for the exclusive use of the Owners of one or more strata lots [2]. The Strata Corporation must typically repair and maintain common property including LCP; however, the Strata Corporation can make Owners responsible for LCP repair and maintenance per their bylaws [1]. Generally, RJC recommends for Strata Corporations to have control of the maintenance and repair of the balconies and enclosures.

Step 4: Disseminate information with all Owners and Parties having an interest in the property

1. Hand out questionnaires that ask about the Owners' balconies and suites, as well as allow their opinions and concerns to be heard.
2. Provide as much information as possible to the Owners to decrease the potential for frustration and conflicts. Strata members typically prefer to be informed on both the good and the bad to make the appropriate decisions. Being kept in the dark can be when the most frustration is generated.
3. Distribute any reports, information or presentations prepared by the Consultant, which should include multiple balcony replacement options, Opinion of Probable Costs (OPC's ~ project cost estimates), recommendations, etc.
4. Prepare to vote and fund one or more of the scope-of-work options. After a successful vote and once the funding has been approved, Owners will now be in a position to commence with design documents, tender, and construction.

Additional Considerations

Structural Requirements

Strata Corporations should consider retaining a structural engineer during the planning phase to perform a load check on the existing balcony structure. The load carrying capacity of the system should be capable of supporting live and dead loads defined in the Building Code. A structural assessment would confirm whether or not the base structure can support the added loads from new materials, including new imposed glazing enclosure, guard wall, and guardrail loads.

Use of Enclosed Balconies

RJC has encountered specific cases where Strata Corporations were unable to remove balcony enclosures and replace them with

Existing Glazed Balcony... *continued from page 10*

guardrails because of substantial changes to the interior of the units. For example, an Owner changed their balcony into interior living space by opening up the wall between the inside of the unit and the balcony, thus increasing the size of their living room. This type of situation could pose a problem if the majority of the Owners decide not to allow balconies to be re-enclosed. RJC recommends discussing the overall layout and setup of the owners' balconies during the planning stage.

Enclosed balconies also have a tendency to attract greater use because they are more protected, private, and comfortable. One of the issues that can arise is an Owner of a unit can begin to store heavy belongings out on the enclosed balcony, such as bookshelves and even freezer chests. They will typically place these heavy objects at the outer edge of the balconies, where they have the greatest effect on most balconies, especially cantilevered wood frame systems. This creates an undesirable condition where the dead loads (weight of the heavy objects), live loads (people), and the enclosure itself bears on a balcony system that likely was not designed for that purpose. These overloading conditions can result in excessive deflections, damage, and serviceability issues.

Retractable Frameless Glass Weather Deflectors

Many Municipalities across Canada are accepting specific retractable glazed balcony weather deflectors, such as the Lumon glass windbreaks, as systems that do not trigger a change to the FSR (please refer to Step 2 – Item 4) [4]. The exception allows for units to have some of the benefits of enclosed balconies without going through the process of rezoning. These Municipalities allowed an exception to the FSR calculation because they do not consider the glass weather deflectors to be an "Environmental Separator", as defined in the BC Building Code and other related standards, as they have little R-value, are not weather tight, and are not always in a closed position. Therefore, many Municipalities do not consider these systems to be a full enclosure, but instead a weather barrier, which does not require rezoning.

In addition to not triggering a change to the FSR in most Municipalities, the glass weather barriers can in some circumstances reduce energy consumption, lower noise levels, withstand high winds, increase safety, extend the lifespan of balcony components, and limit pollutants from entering the balcony space. When deciding upon a glazing system, Owners should also be aware that the glass weather barriers may be considered a fire barrier. Since the balconies could have the potential to be an area of refuge, there may be requirements to provide additional fire protection upgrades on the balconies, depending on the Municipality.

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The Civil Resolution Tribunal... *continued from page 4*

4. This decision will impact future judicial review with an emphasis on deference to CRT findings.
5. The interests of justice and fairness is multi-factored including precedential value, importance of the issue to the parties (not just one party) and proportionality among other things.

Be careful when deciding whether to appeal from a CRT decision. The new world order suggests that the bar has been raised thus reducing your chances of success. A CRT decision challenge could expose unsuccessful CRT litigants to significant and avoidable legal costs if you are unsuccessful in the Supreme Court.

This case marks a shift in culture in favour of the CRT that provides a quick and less expensive form of decision making as compared with litigating in the Supreme Court. There is a trade off. Legislative amendments effective January 1, 2019, consistent with the new world order, altered the current appeal process in favour of judicial review for claims filed in the CRT after January 1, 2019. It is anticipated that this legislative change combined with deference message from the Court of Appeal will impact the number and success rate for future CRT challenges in the Supreme Court.

You have a very short period of time to file an appeal to stop the appeal clock. You should seek legal advice immediately if you are considering an appeal or a judicial review.

Recovery Of Actual Legal Costs - Life After Baettig... *continued from page 7*

in the absence of appropriate evidence establishing a breach of the bylaws or a breach of a court order. In other words, cost recovery depends on the degree of success enjoyed by the Strata Corporation.

In *Strata Plan NWS3075 v. Stevens, [2018] B.C.J. No. 3410*, the Supreme Court refused to award actual reasonable legal costs to the Strata pursuant to section 133 of the *SPA* for proceedings related to an age bylaw and abusive conduct in the absence of evidence of a breach of the court order requiring compliance with the bylaws by the owner.

The Strata Corporation in this case sought an extreme order to force the sale of the strata lot in reliance upon *The Owners Strata Plan LMS 2768 v. Jordison, 2013 BCCA 484*. Jordison stands for the proposition that s. 173(c) of the *SPA* empowers the court to order the sale of a strata lot in an extreme case where an owner has demonstrated an unwillingness to comply with a court injunction. This was a contempt of court application.

The Court was unable to find that Ms. Stevens continued to occupy the strata lot in violation of the Court Order and the contempt application failed. The Court determined that this was not an extreme case requiring a court ordered sale of the strata lot sought by the Strata. A request for an order to recover legal fees of $81,885.02 based on a "legal fees charge back" bylaw was dismissed. Strata Corporations should be careful to ensure that the facts of the case stand on solid legal ground when seeking an extreme remedy to minimize the risk that the Court will not award recovery of the related legal costs.

The caselaw clarifies that compliance with the due process requirements of s. 135 of the *SPA* is required to recover legal costs under s. 133 of the *SPA*. It also clarifies that a second legal application for recovery of reasonable legal costs is not required to recover the costs of remedying a bylaw contravention. However, an order is required for a reference to the Registrar to quantify the legal costs and to assess the reasonableness of the legal costs claimed. The superior expertise and experience of Registrars in assessing costs is well recognized: *Gichuru v. Smith*, 2014 BCCA 414.

The Registrar will address the reasonableness of legal costs based on the principle of proportionality and the degree of success. In the *Stephens* case, the Strata was unsuccessful on the contempt application and an order for forced sale was not granted.

The take away is that legal costs under the *Baettig* regime are recoverable as long as the proceedings are supported by the evidence and the quantum is reasonable and proportional. This has always been, and will continue to be, the legal standard for the recovery of legal costs. Any reduction in legal costs may be disappointing, but the caselaw is not surprising.

Voice from the Strata-sphere

Voice from the Strata-sphere
is published annually by

Strata-sphere Condominium Services Inc.

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Nanaimo, BC V9S 4K2

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Pitfalls In Communications Agreements... *continued from page 9*

Tribunal and seek an order against a strata corporation that has signed the Contract. If the owner's claim were to be successful, the strata would be exposed to the consequences of the CRT's order against it.

- the Contract contains the following two clauses:

  "Apart from a public Wi-Fi Network, nothing in this Agreement will be construed as granting the Company any exclusive right, license or privilege relating to the Building(s) or Property(ies) to install and/or market telecommunications, to the exclusion of any third parties."

  "The Strata agrees that without the prior consent of the Company, it will not enter into an agreement with another service provider relating to the provision of a public Wi-Fi network (or any other similar technology) on the Property(ies) or in the Building(s), with the understanding that multiple Wi-Fi networks could cause service interruption or interference with the Equipment."

  These clauses are not legally valid because they contravene the "MDU access condition". I will explain.

  The Canadian Radio-television and Telecommunications Commission ("CRTC") issues decisions on cases from time to time, just like a Court does. On June 30, 2003, the CRTC issued decision 2003-45. In this decision, the CRTC established what is commonly referred to in the telecommunications industry as the "MDU access condition". This condition is set out in paragraph 141 of the CRTC decision (note that "LEC" is a telecommunications service provider, and "MDU" is a multi-dwelling unit). Paragraph 141 reads as follows:

  "As noted earlier, pursuant to Decision 97-8, all LECs are required, as a condition of providing service, to ensure that the end-users they serve are able to have direct access, under reasonable terms and conditions, to services provided by any other LEC serving in the same area. Based on the record of this proceeding, the Commission considers that it is necessary to amplify the condition imposed in Decision 97-8 in order to ensure that existing and potential end-users in new and existing MDUs can have direct access to the LEC of their choice. Accordingly, pursuant to its powers under section 24 of the Act, the Commission requires that the provision of telecommunications service by a LEC in an MDU be subject to the condition that all LECs wishing to serve end-users in that MDU are able to access end-users in that MDU on a timely basis, by means of resale, leased facilities or their own facilities, at their choice, under reasonable terms and conditions (the MDU access condition)."

Separate and apart from the pitfalls described above, the strata does not receive any financial benefit from the Contract, and yet virtually all risks of the Contract are allocated to the strata.

The Contract does not contain the usual clauses (an indemnity from the company in favour of the strata, and an agreement by the company to maintain appropriate insurance) that mitigate these kinds of risks. The absence of an indemnity from the company and an insurance obligation on its part increases the likelihood the strata will experience legal problems and conflict with the company arising from the Contract's operation.

As everyone well knows, legal problems and conflict arising from the Contract's operation would be a drain on the resources of council members, staff and a strata property manager, not to mention the potential out-of-pocket expenses that the strata may have to incur to address these kinds of problems.

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