voice from the... strata-SPHERE®

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Inside This Edition

Committee Operations & Development

Antonio Gioventu, Executive Director
CONDOMINIUM HOME OWNERS' ASSOCIATION OF B.C. (CHOA)

Committees may perform a valuable role in a strata corporation. They can ease the burden of responsibility from the strata council, increase the involvement from the ownership and assist in the implementation and long term planning of the strata corporation.

Antonio (Tony) Gioventu, the Executive Director and Strata Property Advisor for the Condominium Home Owners' Association of B.C. (CHOA), brings 18 years' of experience in property management, development and strata property legislation to his position.

A common example of a committee is a landscaping or garden committee. To understand the structure of the committee, we first have to understand the structure of the corporation. The strata corporation is the collective interests of all the owners. They all have an undivided interest in the common property assets and facilities of the corporation, thereby, they also have an interest in how those areas are maintained and operated. Each year the strata corporation approves an operating budget which in turn establishes the strata fees for the coming year. Additionally, the strata corporation may also pass a special levy or resolution for monies to be spent from the contingency reserve fund for additional projects that do not normally occur each year. Once those amounts have been approved, the elected strata council has the obligation to proceed with the maintenance and repairs of the common facilities, property and assets of the corporation in accordance with the approved budget or the special levy.

Take for example, a situation where a budget approval authorizes expenditures of $25,000.00 for landscaping. In a large townhouse complex this may be a common amount for annual maintenance. What to do with those funds becomes the decision of the strata council if the expenditures are not stipulated in the budget. Alternatively, this is where a committee could play a role. If the council opts to approve a committee, it should follow the procedure set out in Standard Bylaw 20 of the *Strata Property Act*, which reads:

Delegation of council's powers and duties

20 (1) Subject to subsections (2) to (4), the council may delegate some or all of its powers and duties to one or more council members or persons who are not members of the council, and may revoke the delegation.

(2) The council may delegate its spending powers or duties, but only by a resolution that
(a) delegates the authority to make an expenditure of a specific amount for a specific purpose, or
(b) delegates the general authority to make expenditures in accordance with subsection (3).

(3) A delegation of a general authority to make expenditures must
(a) set a maximum amount that may be spent, and
(b) indicate the purposes for which, or the conditions under which, the money may be spent.

(4) The council may not delegate its powers to determine, based on the facts of a particular case,
(a) whether a person has contravened a bylaw or rule,

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(b) whether a person should be fined, and the amount of the fine, or
(c) whether a person should be denied access to a recreational facility.

Once the corporation has approved the amount of $25,000.00 for landscaping, the decision process and the delegation of powers or duties to a committee begins. Before you start, you require a checklist, such as the following:

- How are you soliciting members of the committee?
- Who is on the committee?
- Who is eligible?
- Do your bylaws have any stipulations for the committees?
- If the committees hold meetings, does the council set any guidelines, such as time, location, process for notifying the owners, etc.?
- Who is performing the contract work? Is it resident owners, or is the work being contracted?
- What is the breakdown of the costs? Is there a percentage of allocation for maintenance? A portion for replacement of plants and materials? Any upgrades to landscaping?
- Who is responsible for administering the contract? Is the work tendered each year? Who performs monthly reviews? Who is the supervisor of the contractors or volunteers?
- If there is a problem with the landscaping, who is the contact person?
- Is this the role of council, or has council delegated these duties to a committee?
- If the duties have been delegated, what authority is the committee granted? Supervision? Budget allocations? Alterations? Maintenance and repairs?
- What system of reporting is undertaken? Financial reports, maintenance reports, or alteration requests?
- Does the council require a monthly report from a representative of the committee? If so, in what form?
- What obligation does the committee have for long term planning and budget planning for subsequent years?

For council or committees that are undertaking implementation of budgets or special projects, there are critical questions to be answered before the undertakings can begin. If your committee is reviewing a contract for recommendation to the council, it is important to remember that only the council can sign the contract and determine whether the contract should undergo a legal review prior to completing the agreement.

Joint & Several Liability Will It Become a Thing Of The Past?

Cora D. Wilson, Editor
STRATA-SPHERE CONDOMINIUM SERVICES INC.

The Civil Liability Project is one of three major law reform projects currently underway. New legislation is expected as early as the spring of 1993. There is speculation that the law of joint and several liability for negligence is one of the areas which will be modified (likely not abolished). How will this affect the thousands of "leaky condo" victims who have not yet completed litigation?

There is no doubt that the scope of recovery in negligence actions for pure economic loss has been expanded. Municipalities are at risk of bearing more than their several share of the loss in Leaky Condo cases where one or more of the key players is without assets. The recent "Leaky Condo" decision dubbed as "The Delta Case" is an example. (See *The Owners, Strata Plan NW3341 v. Canlan Ice Sports Corp.* [2001] B.C.J. No. 1723, 2001 BCSC 1214, Vancouver Registry No. C965848 (B.C.S.C.).) .

Pursuant to the *Negligence Act* of BC, in the absence of fault on the part of the Strata Corporation, all defendants are jointly and severally liable for the whole amount of the loss, regardless of their individual or several degree of fault.

In the Delta Case, Grist J. awarded the Strata Corporation $3.2 million in damages. He held that the municipality was 20% at fault or liable to pay $640,000.00. He found that the strata corporation was not contributorily negligent. Therefore, if one or more of the defendants are incapable of paying their share of the judgement, the municipality, which has deep pockets, will be responsible to pay the shortfall.

A motion to apportion fault in the Delta Case pursuant to Section 4(1) of the Negligence Act resulted in an allocation of fault of 30% to the owner/developer, 25% to the architect, 25% to the general contractor and 20% to the municipality.

Grist J. stated that, the municipality's "failing or blameworthiness was an abdication of the responsibility to enforce the relevant part of the Building Code, leaving the public unprotected ... ... (This role was described) as secondary to those who had a hand in the construction of the defective buildings themselves; ..."

The Civil Liability Review - Consultation Paper published by the Ministry of Attorney General argues that joint and several liability is potentially unfair. The law protects the innocent plaintiff while "deep-pocket" defendants face enormous liabilities, and rising insurance premiums, to pay entire damage awards that are out of proportion to their degree of fault." The paper states that Canada is out of step with other jurisdictions such as Australia and the United States, which have mitigated against this unfair impact on defendants with "deep pockets".

Even if the principle of joint and several liability is potentially unfair - the fact remains that this is currently the law. Would it be fair to change the rules midstream? For example, compulsory insurance by the construction industry is an important component of the Australian legislation which abolished joint and several liability. A scheme of proportionate liability (ie. pay for your share of the loss) makes sense in this context.

The horse is out of the barn in the Leaky Condo context. It is too late to require that the construction industry obtain mandatory insurance to cover losses. It is unclear as to whether such insurance is available and if it is, on what terms and at what cost. This is not the time to victimize the victims. If legislative changes are inevitable, then status quo ought to prevail for mid-stream Leaky Condo actions.

Public input on law reform is requested by no later than October 1, 2002. You are encouraged to provide your views. The Consultation Paper and questionnaire can be found at http://www.ag.gov.bc.ca/liability-review.

You may contact Civil Liability Review, Policy, Planning and Legislation Branch at PO Box 9287 STN PROV GOVT, Victoria, BC V8W 9J7 By fax: 250 953-5182 Or by email: AGCLR@gems8.gov.bc.ca.

Civil Liability Review

CHOA and CASH

The Condominium Home Owners' Association of BC (CHOA) and Compensation and Accountability to Soaked Homeowners Society (CASH) respectfully ask you to consider the issues facing owners of defective homes in its recommendations to the provincial government on the Civil Liability Review.

Preamble

We believe that the current review, particularly as it may pertain to protecting a consumer's legal rights in his/her largest lifetime purchase – a home, appears premature and ill founded. We agree that something needs to be done to balance fairness and accountability more equitably in construction legal suits. However, better public policy would be demonstrated by the enactment of stronger legislation to deal with the root causes of major construction defects, rather than by altering the few laws that provide housing consumers a measure of recourse.

Changing our present liability statutes would do very little, if anything, to address the serious underlying problems that have led to the unprecedented recent increase in legal actions initiated by owners of defective homes. 'Liability' issues did not create BC's residential construction disaster. CHOA and CASH had observers present at the Barrett Commission hearings. Despite the Commission being branded in the media as 'politically motivated', our own non-partisan observations concur with the Commission's findings that this crisis arose from a systemic industry/government failure that allowed defective homes to be constructed and sold. We would encourage support for consumer protection mechanisms such as improved building science research, improved building standards and materials certification and more comprehensive industry and consumer education. We believe these mechanisms would restore consumer confidence and act as a profitable enhancement to the development community to build safe and durable homes while at the same time alleviating the practices that lead to litigation.

Until government deals with what failed, liability issues will continue to flourish. The only foreseeable difference, if the proposed changes go through, will be the degree of difficulty consumers and their legal counsel will face in seeking justice and restitution.

Access to justice for homeowners or occupants of BC homes

For homeowners, litigation is already extremely difficult. The UBC Faculty of Law conducted a study, 'The Dispute Resolution Project', (Prof. John Hogarth, Project Director) in 2000 – 2001, confirmed that when it comes to residential construction disputes, consumers consistently faired poorly against deeper pocketed development companies, professionals and government.

Many owners cannot raise the funds to litigate. Under the law, owners must mitigate damages or risk paying for problems resulting from inaction. The *Strata Property Act* also requires that appropriate action be taken to protect the common interests of all strata owners. This means that costly repairs must be done and in as timely a manner as possible. With repair assessments averaging more that $23,000 per strata titled property and $31,000 for co-op units, few owners are left with the financial resources to pursue litigation. Justice, even under the present joint and several liability provisions, seems to be only for the wealthy.

It is our concern that without changes to the *Companies Act*, and all parties bearing their fair share of the homeowners' losses, proportionate liability will effectively disarm any practical, albeit expensive, consumer recourse. Mandatory mediation was introduced under the *Homeowner Protection Act* in 1999 with the intent to provide a more streamlined and cost effective means of dispute resolution. Thus far the legislation has failed to meet its stated goals. The UBC Law Faculty study found that, "Early indications are that socio-economic factors do play a significant role in the access to and effectiveness of mediation and other dispute resolution."

COMMENTS ON PARTICULAR AREAS OF REVIEW:

The Limitations Act

The largest and costliest construction disaster in Canadian history, the media-dubbed 'BC leaky condo crisis' presents some very unique factors that may not be captured under a lessening of the ultimate limitation period (ULP). Many components of a home constructed using 'accepted building practices' should last well beyond a 10-year time period, i.e. foundations, structural components of buildings, roofs, plumbing, electrical and fire suppression systems, windows etc. Would it be

acceptable for any of these major systems to fail prematurely and for the homeowners to have no legal recourse? It is common to have warranties on building components such as windows, roofing and siding that run for period of 15, 20 or even 50 years. The expected life cycle of a building envelope according to architects and engineers is 50 years. The Attorney General's consultation paper does not clarify when time would begin to run under the ULP. This appears to be an area where the Attorney General is looking for input from the law community. Assuming that the ULP starts to run from the time of the original transfer of title of a new home, a 30 year period would be a fair time period to deal with major structural and building envelope failures.

Under the *Homeowner Protection Act*, a mandatory 2-year material and labour, 5-year water penetration and 10-year structural warranty is required on homes constructed under permits issued after June 30th, 1999. Warranty protection periods fall significantly short of the intended life cycle of major components of a home. We have a serious concern that, while these warranty provisions are undoubtedly the strongest in Canada, they are being interpreted by some in the building community as setting the outside longevity standards for current construction – i.e. a home that will last for 10 years. Similarly misconceived interpretations of the BC Building Code – a minimum standard – were applied to many of the homes which are presently experiencing catastrophic failures.

Warranty companies reserve the right to require securities from builders for losses against construction defects. It is not known to what extent this requirement is being exercised in our competitive warranty market environment, as information regarding this matter is not made available to the public or to government agencies. Once a warranty has expired, if defects arise, consumers will be limited to recovery from whatever parties are still in operation. Generally speaking, developers are still creating corporate veils for each project they are involved in. Under the present legislated warranty regime, the onus is on the homeowner to ascertain their building's condition prior to the warranty expiry date, which is in itself a costly undertaking. If the warranty companies decline a claim, which was the experience of many homeowners under the now defunct New Home Warranty Program (86 % of claims submitted were declined), their only recourse remaining is to pursue legal action against the warranty provider. We have yet to reach any of the key 5-year and 10-year milestones of the newly legislated warranty protection. We have no basis on which to determine whether they will provide the consumer protection envisioned – without a court battle.

Our recommendations: That companies' limitation period and the Ultimate Limitation Period for all parties involved in housing construction remain status quo; that the *Limitations Act* and the Ultimate Limitation Period for the City of Vancouver and BC Municipalities be extended to equal the same liability period as companies and warranty providers which would require changes to the *Municipal Act* and the *Vancouver Charter*; that binding arbitration similar to the landlord/tenant dispute resolution process replace the mandatory mediation under the *Homeowner Protection Act* with a predetermined time limit for reaching a resolution.

Joint and Several Liability

To give an example of what proportionate liability would mean to future owners of defective homes, we will use the Riverwest vs. Delta (et al) case. The owners of Riverwest were awarded $3.2 million. Under joint

and several liability, the owners will be able to collect this money, even though some of the parties named in the lawsuit have dissolved or have no assets. The Municipality of Delta – one of the parties sued – will end up paying most of this award.

Under proportionate liability, Delta would only pay the proportion attributed to their negligence. In this case, that is 20%, which would be $640,000. The proportionate liability award for Riverwest would be roughly what the owners spent to litigate. The proportionate fault of Delta is probably higher that it would be for most other municipalities due to the fact that Delta failed to require a signing professional to design and supervise the construction of the project. This is not a common occurrence and municipalities in other actions would probably be assigned a lesser degree of fault. Therefore it would be less viable for owners to pursue repair cost recovery from municipalities and others through litigation if proportionate liability replaced joint and several liability. This is especially true if other responsible parties could avoid their financial responsibility by hiding behind corporate veils, dissolving their companies, or opting not to carry any liability insurance. (A representative of a group of professionals actually stated at a recent meeting, "If you don't have insurance, you're less likely to be sued.")

The parties bearing the payout brunt of the 'leaky condo crisis' under joint and several liability are municipalities and insurers. This, we believe, is the result of the shortsightedness of the *Companies Act*. To truly proportion liability and protect the interests of consumers and taxpayers, government should consider revisions to the *Companies Act* to disallow the creation of corporate veils for liability purposes and require company directors to be personally responsible for any defective product, fraud, negligence or misrepresentation. Allowing companies to create corporate veils or to dissolve their assets prior to their product's life cycles expiring, is what has caused the unfair apportionment of settlements to parties with 'deep pockets'. This solution does not appear to be a consideration put forward in the Attorney General's Civil Liability Review.

A project by the BC Law Institute called 'Shell Companies, Lifting the Corporate Veil' was intended to look into this concern. Unfortunately, the project was shelved in January 2002 due to a lack of resources (*'Study of leaky-condo builders' liability shelved'* – Vancouver Sun / Jan. 4/02). We can't help but put the question, 'How does a legal review of a provincial billion dollar plus crisis affecting tens of thousands of citizens 'lack the resources' to find a viable solution? What possible explanation could there be for so critical a project not to be funded and staffed, if not by government then by the legal community itself?

According to an article in the Vancouver Sun dated September 26, 2001, the minister responsible for 'leaky condos', George Abbott, told Municipal Insurance Association members and the Union of BC Municipalities "… Courts will determine who ultimately foots the bill for BC's leaky condo repairs." The Courts did decide in the Riverwest case and now the provincial government is trying to change the outcome of such rulings.

Should proportionate liability replace the current system, another major concern is the possibility that actions filed, but not yet heard, may fall under the new legislation. This would create a great injustice to homeowners who raised funds to litigate with few parties left to hold accountable. The litigation costs to pursue proportionate liability may be too prohibitive for homeowners to proceed. As a result, homeowners may have to drop their litigation mid course and absorb, in some cases, hundreds of thousands of dollars in legal fees for cases that would not be fruitful under proposed proportionate liability standards.

Our recommendations: That, if enacted, the proportionate liability changes would only apply to writs filed after the change enactment date and not to cases filed but not yet heard; that the *Companies Act* be amended to disallow the creation of corporate veils for liability purposes and require that directors of companies be personally responsible for any defective product, fraud, negligence or misrepresentation; requiring all parties involved in a residential construction project to pre-purchase a minimum 10-year insurance policy for construction defects. (Note: The Ontario government, based on its BRRAG report, C.2, is recommending this insurance requirement to deal with increased construction defect claims.)

The Class Proceedings Act

The costs to have an action certified under the Class Proceedings Act are borne by the plaintiff. If justice is the true objective in any action, in particular, when a group of plaintiffs is significantly financially or physically harmed, that group is rightfully entitled to be compensated for the costs of undertaking their action against the defendant(s), if the Court deems they were wronged.

What appears to have been overlooked in the Attorney General's Review paper is that the party harmed is already at a disadvantage. British Columbians should continue to support costs of actions that serve the overall public's interests. Without a fully financially accessible justice system, many public and societal interests will not be addressed.

Our recommendations: If joint and several liability is left unaltered, then the Ontario or Quebec guidelines for apportioning legal costs of class proceedings could fairly prevail; if proportionate liability legislation is implemented, then the status quo should prevail.

Vicarious liability for intentional wrongs

The hiring and supervision of professionals, contractors and sub-contractors is fully within the control of residential construction developers. As such there should be no 'watering down' of the ultimate authority of developers over their 'employees' actions with regard to building deficiencies. The housing consumer did not sign an offer to purchase from 'abc stucco company'; he entered into a legal contract with 'Jorgy, the house builder'. While this proposal may have merit in other business contexts, it is totally out of place in a scenario as complex as residential home construction.

Our recommendations: Whether joint and several or proportionate liability statutes are in force, the status quo on vicarious liability for intentional wrongs should prevail.

Non-Delegable Duty

Recent case law on non-delegable duty indicates that the Courts expect government agencies and private corporations to shoulder responsibility for activities conducted under their jurisdiction and control. A case in point with residential construction is the requirement that 'signing professionals' ensure that housing projects are constructed in accordance with applicable (minimum) building code provisions. We have yet to see an engineering report where a 'failed building' had not had multiple minimum building code infractions. While municipalities may profess that they are not responsible for ensuring that their building codes are

adhered to, they nonetheless collect building permit fees and sign off on building component inspection forms. As one housing professional so succinctly phrased the matter at a recent meeting, municipalities must be prepared to either "Lead, follow or get out of the way!" It was believed by the group present that this was taken to mean, "If you're going to set the rules, then be prepared to enforce them. If you're not prepared to do so, then remove yourself from this role."

In view of the liability of municipal governments carry for the developers they have permitted, often invited, to operate in their communities, we may be at a crossroads where municipalities are fearful of overseeing construction projects because of the risk it attaches. Such a decision would leave housing consumers in a very precarious position. If no one in government is responsible for enforcing 'government standards', i.e. minimum building codes, who will? The professionals who have no legislated requirements to carry liability insurance? The developer who is operating under a numbered company with no attachable assets? Someone must be responsible for failures to meet minimum standards. If not the governments that set the standards, then who? If you set the standards, can you 'delegate' their adherence to another party? Custom has typically found that that responsibility lies with the statute maker – government. If government finds fault in how this responsibility has been carried out, it can take the offending parties to court – that's the principle joint and several liability is based on. The onus for such an action should not rest with the end consumer who believed, in good faith, that their interests were being protected through government standards.

Our recommendation: that the non-delegable duty remains status quo.

Structured Damage Awards

Although actions from homeowners who have suffered significant health consequences are thus far rare, there may be future litigation stemming from exposure to health-damaging mould. Structured damage awards could be more favourable to all parties. However, much like maintenance for child support, the courts should reconsider awards for damages if the injuries extend beyond a predetermined time or if the injured party requires costs to support additional needs that were not considered at the time of award.

Our recommendation: That structured damage awards be a consideration to the Courts with the ability of the Court given the leeway to review an application by an injured party to request more funding if needed as described above.

Closing Statement

Our consumer associations are extremely concerned that the far reaching ramifications of the statutory changes under review cannot be fully evaluated under the process or time frame outlined in the Attorney General's discussion paper. We are hopeful that there will be further consultation, including meetings, where these matters can be adequately weighed, prior to any action being taken.

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What Risks Do You Take by Serving On Council?

Peter Nordlinger, Associate Lawyer
C.D. WILSON & ASSOCIATES

Some council members will take up their duties without much thought about the risks to them personally of carrying out the business of the corporation. They may not be comforted to note that s. 151 of the Strata Property Act makes insurance coverage for errors and omissions by council members optional, not mandatory.

Council members are held to the same standard of care as directors and officers in a company. S. 31 of the Act says that members must "act *honestly and in good faith with a view to the best interests of the strata corporation, and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances*." Members should keep this standard in mind at all times, especially during council meetings. They should conscientiously have recorded in the minutes any reservations or dissenting views they hold about an issue, and should maintain records and copies of the materials reviewed before a decision is taken (or have the secretary of the council do so). Basically, they should "paper" the decision process, and their individual positions in it, so that they can prove later, if necessary, that they joined in a decision or action after diligent enquiry, and in honesty and good faith. It's some comfort to recognize that while a decision may turn out over time to have been misguided, the council members may not be exposed if it was defensible and reasonable when taken. Proving that latter point is a matter of evidence of the materials reviewed, and enquiries made.

Peter Nordlinger was born in Victoria, B.C., and has lived in Montreal, Toronto, and Tokyo. He has a Masters degree in English and has been practicing law since 1990, with an emphasis on commercial matters, including commercial litigation.

Council members should also watch carefully for any conflict they may have in any contract or transaction with the strata corporation (ss. 32 and 33 of the Act). If a member may have an interest in any arrangement the corporation is contemplating, he or she should disclose that interest and abstain from voting on it. Sometimes conflicts are hard to recognize, and, even if patent, may seem harmless. For example, if a member has a business selling generators, and the building needs a new generator, it may seem reasonable for the corporation to buy one from that business, perhaps at a reduced price. Indeed that may be fine, but the member involved should not vote on the purchase and should be absent during the discussion and vote in accordance with s. 32. The other members, in exercising their duties under s. 31, should make diligent enquiries about the best generator to buy, availability from competitors, and other relevant matters any prudent person would review.

What happens, though, if a member is sued, either by another owner or an outsider to the building? The council member will be required to prove that they met the standard discussed above. The corporation's insurer will step in to make that argument if directors and officers liability insurance is in place, and will pay any amounts over the deductible awarded in court. All strata corporations should have this coverage in place, and council members should review its terms, particularly the exclusions. For example, the policy may not cover decisions made or actions taken out of dishonesty, failures to comply with the Act, breaches of contract, or property damage. The details of the policy should be discussed regularly with the corporation's insurer, and, again, each council member should take an interest in that discussion.

The bottom line for council members is to bear in mind two points:

1. always abide by the standard set by ss. 31-33 of the Act, keeping accurate records not only of decisions and actions taken, but of the materials and enquires that underlay them; and
2. make sure insurance coverage is in place for council members, and review that coverage periodically.

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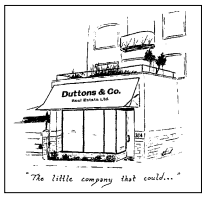

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Governance

Roy Jensen
CONVERGENT SOLUTIONS

Part four of the *Strata Property Act* outlines the duties and responsibilities of strata council members and property managers. Implicit within the Act are several guiding principles for those entrusted to manage the strata corporation: *honesty*, *fairness*, and *openness*.

Read and Abide by the Strata Property Act

The *Strata Property Act* is the law. It cannot be ignored or over-ruled. The Act is written in plain English and is very readable. At every meeting, have someone who is knowledgeable on the Act.

Duties of Strata Council (s. 31)

The sole duty of strata council is to work in the best interests of the strata corporation.

Council members must constantly differentiate between the interests of individual owners, their personal interests, and the interests of the strata corporation. Council should only consider the latter. For example, a council member trying to sell their strata lot is probably not interested in contributing more to the contingency reserve fund.

Conflict of Interest (s. 32)

If you are the council member trying to sell, you are in a potential conflict of interest when the council discusses long term planning. Other examples where potential conflicts exist include: you own a painting company and the council is looking at getting the building painted, your close friend has applied to rent under hardship, or a complaint has been received about your strata lot.

When a potential conflict of interest arises, the council member *must* disclose it and *must* leave the meeting while the issue is discussed. These actions protect council from being perceived as an "Old Boys Club" (and breaking the law).

Privileges of Strata Council

Strata council members have no greater privileges than any other owner.

Although council members have keys to access restricted areas, they should only do so on strata corporation business. They cannot, for example, let their family onto the roof to view a fireworks show. Nor can they let a visiting friend use the guest suite for free.

Roy Jensen, B.Sc., M.Sc., is a strata owner and former strata council member. Since 1999, he has been advising and assisting owners and councils with asset management, strata management, and community-living issues.

Access to Records (s. 35 & 36)

Section 35 is an inclusive list of the records that must be kept by the strata corporation. The activities of the strata corporation affect every owner. As such, *s. 36 gives every owner the right to see all the records of the strata corporation.*

The BC Freedom of Information and Protection of Privacy Act (FOIPOP) and the federal Privacy Act do not apply to strata corporations. FOIPOP and the Privacy Act apply to public bodies: government, police, hospitals, schools, etc. If you file a complaint against another owner, every owner is entitled to see that letter. The same applies to quotes, contracts, legal opinions, etc., which the strata corporation has obtained. The only exception is records pertaining to legal action against an owner (s. 169(1)(b)); however, every other owner has a right to see these records.

Strata Council Meetings

Why should owners be excluded from meetings that pertain to their investment? Owners are after all entitled to see every record (letters, bills, reports, etc.) presented at the meeting. Closed meetings and "in camera"sessions are often used to protect the privacy of individual owners. The question arises, is this in the best interest of the strata corporation? Probably not. Closed meeting should not be held.

Owners must be given the minutes of every meeting within two weeks of the meeting being held (unless changed by bylaw). It is a good practice to give the minutes to tenants as well. This keeps them informed and makes them feel like part of the community.

Burying Information will come back to haunt you.

Owners are entitled to know what is happening in the strata corporation. Water leaks, vandalism, break-ins, problems with strata lots, etc., should be documented in the minutes. The owners need to be informed because they may have similar problems or pertinent information. Buyers rely on the minutes to learn about the building; withholding information can open the strata corporation to liability.

Complaints and Fines (s. 135)

Strata council cannot act until a complaint is received. The complaint should be in writing and must be specific. The person named in the complaint must be told the particulars of the complaint and must be given a reasonable opportunity to answer before the bylaw is enforced (e.g., a fine).

As noted above, *the person named in the complaint has the right to see the complaint letter.*

Bylaw and Rule Enforcement (s. 26)

The strata corporation approved all the bylaws; strata council cannot selectively enforce them.

Once a complaint is received, council *must* enforce the bylaws and rules. The enforcement must be applied uniformly to all owners. Non-uniform enforcement may lead to accusations of favoritism.

It has been suggested that s. 129 gives council the ability to choose whether or not to enforce a bylaw. This is incorrect. Section 26 defines the duties of the council whereas s. 129 lays out enforcement options. Council may choose from the enforcement options in s. 129 or decide on an alternate way to enforce the bylaw. The option "do nothing" is not a valid enforcement option C it violates s. 26. *Council must enforce the bylaws.*

Repairs and Maintenance

Assume a problem exists that is the responsibility of the strata corporation to maintain (plumbing, roof, or foundation leak, dryer vents, etc.). If that problem causes damage to a strata lot or to personal property, *the strata corporation*, or its insurance, *is responsible for the costs of the repairs to the strata lot.*

Similarly, if people from a strata lot damage the common property or another strata lot (hot water tank rupture, fish tank leak, damage to walls when moving, fire, etc.), that strata lot, or its insurance, is responsible for repairs to the common property and other strata lots. The strata corporation and all owners should have third party liability if the offending party has insufficient insurance.

Long-Term Planning

The Act allows strata corporations to use a depreciation report to determine the annual contribution to the contingency reserve fund required to meet the foreseeable needs of the strata corporation.

Is it reasonably prudent for strata councils not to budget for foreseeable repairs and maintenance?

Failure to budget results in current owners paying, through a special assessment, for more than their fair share of the wear and tear to the system. Furthermore, preventative and cosmetic maintenance may be postponed if a special assessment is required.

Micromanagement

How far can strata council dictate what is done within a strata lot? It is common to have a bylaw requiring the buildings have a uniform external appearance (doors, windows, window coverings, etc.). Another prudent bylaw requires owners to obtain permission before completing any renovation or alteration that may allow access to another owners property, to the common property, or affect the integrity of the building, even temporarily.

There should *not* be restrictions other that those listed above. Paint, flooring, ceiling fixtures, etc., are at the sole discretion of the owner. An owner should be able to install a garburator, dishwasher, washer, or dryer as long as it uses the *available* power and drains.

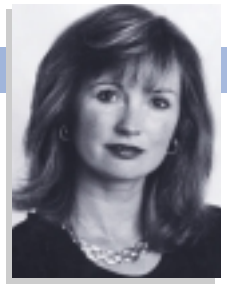
Errors

We are human. We make mistakes. Strata council and property managers should admit their errors, along with the steps being taken to correct the error. This is positive, proactive, and shows openness… all of which promote trust in the council.

Property Managers

Any company employed to assist with the management of a strata corporation should itself employ licensed accountants and licensed property managers. The property manger should attend meetings, handle correspondence, coordinate repairs and maintenance, liaise with owners and prospective owners, advise on the Act and related legislation, and maintain the strata corporations records.

Licensing of strata property managers is forthcoming. Currently, only rental property managers must be licensed through the Real Estate Council of BC. Since most property managers manage both, it is reasonable to choose a licensed property manager. Visit www.realestatecouncil.bc.ca or call 1-877-683-9664 to enquire about licensed property managers.



Failure to Obtain 3/4 Vote of Owners before Commencing a Legal Suit - IS IT FATAL?

Cora D. Wilson, Lawyer
C.D. WILSON & ASSOCIATES

There is no time to call a special general meeting to obtain the requisite 3/4 vote of owners before filing legal proceedings in the Supreme Court. The strata corporation finds itself caught between a rock and a hard place.

There are many examples where this kind of a conundrum may arise. For example, the strata council obtains a building envelope condition assessment report which concludes that the strata corporation is suffering from wet building syndrome. After a lengthy delay, the council consults with legal advice. The lawyer informs council that the limitation clock is about to run out unless legal proceedings are immediately commenced by filing a Writ in the Supreme Court. There *may* be postponement or other saving provisions, but why incur the expensive legal costs associated with the argument if this can be avoided?

Why can't the strata council simply instruct legal counsel to file the legal proceedings and deal with the approval of owners at general meeting later? Clearly, the strata council would be undertaking the risk that the action is a nullity on grounds that the statutory preconditions were not met. Alternatively, even if the proceedings are capable of being cured, there is no guarantee that the owners will ratify the proceedings by special resolution after the fact. However, if the writ is not filed, all owners may suffer prejudice as a result of the delay - particularly if the claim is held to be statute barred. What does the strata council do?

Cora D. Wilson, LLB, Lawyer with C.D. Wilson & Associates. Cora was called to the Bar in 1986. She is a condominium lawyer, an educator and a condominium arbitrator. Cora currently represents strata corporations suffering from the "Leaky Condo" crisis.

The first step is to review the *Strata Property Act*. Leaving aside the issue of "unauthorized expenditures", section 171 of the *Strata Property Act* provides that *before* a strata corporation sues in a representative capacity on behalf of all owners, (for damages to the common property caused by wet building syndrome, for example), "the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting."

Section 172 provides that if the strata corporation sues on behalf of one or more owners about matters affecting *only* their strata lots, then the strata corporation must obtain the written consent of the owners in question and the suit must be authorized by a resolution passed by a 3/4 vote at a general meeting. These preconditions must be met before commencing the legal proceedings.

The statutory provisions are mandatory. Further, there does not appear to be any saving provision in the *Strata Property Act*, nor is there any discretion granted to the strata council to proceed without having first met the statutory conditions.

Leaky Condo issues generally affect the building envelope, which is common property. However, some strata lots may also have suffered water penetration damage. Given potential confusion regarding the identity of the Plaintiff, it is not unusual to find that legal proceedings are drafted to cover both bases.

What are the consequences if the strata council chooses to proceed with the action which constitutes the lesser of the two evils? In other words, it authorizes the filing of the writ without a special resolution so as to preserve the legal claim, knowing that doing so flies in the face of the statutory preconditions.

In Owners, Strata Plan NO. NW651 v. Beck's Mechanical Ltd. (1980), 20 B.C.L.R. 12 (B.C.S.C.), Esson J. (now J.A.) held that the "condition precedent of a special resolution and consent is entirely procedure. Failure to comply with it affects the right to proceed in the name of the strata corporation for damages suffered by individual owners; but failure to meet the condition precedent does not affect the cause of action. It is a defect which can be cured by amendment ...". The answer is simply - add the owners individually.

In *Strata Plan LMS1468 v. Reunion Property Inc.* [2001], B.C.J. No. 1126, 2001 B.C.S.C. 788, Vancouver Registry No. S002936 (B.C.S.C.), Claney J. was reluctant to dismiss the action where the preconditions had not been met. The evidence showed that the strata corporation was attempting to correct the procedural difficulties after the fact by getting a

3/4 vote of the owners. He concluded that, "Investigation of serious questions of law and fact are to be known before rights are definitively decided." He refused to dismiss the strata corporation's claim.

Garson J. addressed this issue again recently in *Strata Plan LMS1468 v.Reunion Properties Inc.*, [2002] B.C.J. No. 1637, 2002 B.C.S.C. 929, Vancouver Registry No. S002936 (B.C.S.C.). A writ had been filed in the Supreme Court commencing the action pursuant to the provisions of the *Condominium Act*. A 3/4 vote of the owners was not required under the old Act prior to filing a Writ claiming damages to the common property. However, there was also damage to the units themselves, which required the 3/4 vote, as well as consents of owners as preconditions to proceeding. These preconditions were not met.

Garson J. concluded that the "leaky condo" claim included damages to common property and to individual strata lots. Therefore, the action, as framed, required a 3/4 vote of the owners. However, he concluded that the lack of authorization was an irregularity capable of being cured by amending the Writ to limit the claim solely to damage to common property. The plaintiff was provided 120 days to cure the irregularity.

The court did not squarely address the issue of what happens in a case where the statutory precondition of a 3/4 vote of owners at a general meeting is not first obtained prior to filing the Writ.

The courts appear to bend over backwards to treat these types of failures as technicalities or procedural irregularities, which are capable of being cured. However, if the principle against retroactive application is applied, legal actions commenced without first obtaining proper authority could be subject to dismissal. This is a harsh and prejudicial result.

The issue is not yet clearly and definitively resolved. We will have to wait until either the courts address the issue yet again or until the legislature intervenes to solve the problem.

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Speakers: Cora D. Wilson, Lawyer
Antonio Gioventu, *Executive Director CHOA*

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22 - Year Old Condo Building Envelopes
False Comfort Due to a Building's Age Syndrome

Martin Gevers, P. Eng. - Building Science Division
LEVELTON ENGINEERING LTD.

When the term "Leaky Condo" is mentioned, what type of building comes to your mind? I presume that the most common image of this dubious asset includes the following characteristics:

- built somewhere between 1985 and 1998
- wood frame building
- three-storey or higher in height
- probably covered in stucco
- no (or small) overhangs
- could exhibit minor signs of algae or deterioration

While these types of buildings have typified the Leaky Condo that has been repaired in large numbers, purchasers should not place a lot of confidence in a building just because it is "old enough not to fit this stereotype."

While it is true that older buildings may have 'stood the test of time' to some degree we must ask ourselves, "What life expectancy was this building being designed and built for?" Current experience tells us that placing more confidence in pre-1985 buildings because of their age or 'experience' or building code changes in airtightness requirements, is wrong. The unfortunate reality about most larger multi-residential complexes is that their walls are inadequately protected and rely far too much on maintenance to last for a reasonable period. In the writer's personal view, fifty years is a reasonable lifetime for an inexpensive building whose purpose will probably be obsolete before its function. But many twenty year old buildings require much more expense to keep in service than ordinary dwellers can raise without extraordinary assistance. So, I ask: "Is this premature failure?" I believe it is.

In 1976, I contracted the construction of my parent's home. With the exception of a few coats of paint and window pane replacements, it is the same assembly of components put into service twenty-five years ago, without problems. This is true of most 'seventies-style' homes due to their simplicity and low exposure (two storeys maximum under a two foot overhang). This is not true of their three and four storey multi-residential counterparts.

Mr. Gevers has 28 years of experience in the construction industry, including 18 years as an engineer. He has been involved in wood frame housing and hi-rise concrete and steel construction, performing tradework and providing professional engineering services. Having worked on Vancouver Island, Lower Mainland, the Canadian North and Labrador Coast, Mr. Gevers has been involved in the design and construction of building envelopes to suit these environments. Mr. Gevers is at the forefront of the building science industry and is recognised as a specialist with a practical approach to solving building envelope related problems.

In particular, buildings that were built pre-1985, are now showing signs of deterioration that is very expensive to repair. One reason for this is that many pre 1980's Stratas are now realizing that, like an old car, their buildings' envelope subsystems including roofing, flashing, siding, windows, subgrade waterproofing etc. are all nearing the end of their life expectancy together. To make matters worse, they were unaware of the tremendous cost to concurrently replace all of these systems and also the cost to repair the secondary deterioration that subsequent leakage has already caused. In addition to this they are finding out that they need a permit to repair the envelope and that the redesign professional required to be involved in that process will insist on an upgrade to a more expensive rainscreen cladding.

Many announce their false confidence in slightly older buildings quite openly and say things like: 'this old building breathes,' or "this isn't a Leaky Condo because it doesn't have a poly vapour barrier" or some other statement that takes it out of the category.

What people should really consider to avoid unpleasant surprises when investing in a home are the following:

- How long will I be living here?
- How much life is left in the roof, siding, flashing, windows, waterproofing membranes until the owner's will be obliged to replace each of them?
- How much does it cost to replace each of these subsystems?
- Will it likely be simple replacement with similar technology or will an upgrade be likely?
- If I want to or need to sell for any reason will I be able to recover my investment (within reason)?

Building science consultants have encountered the following problems that appeared without much awareness by the residents:

- Twenty year-old wood siding that had been repainted once or never.
- The sun, rain and wind had reduced it to cracked, warped, partially decayed, severely weakened, cladding that would now not 'bounce back' with re-painting.
- New cedar siding would be very expensive and probably have a shorter life expectancy than the original had.

- The nails of wood sided facades typically work themselves out of the wall and in some cases some of the siding boards have become completely detached.
- Regular restaining or painting is necessary and the sun is a worse offender to unprotected wood than rain.
- With the resulting increase in water ingress, decayed framing is often found in headers over windows, trimmer joists etc. where the ingressed water infiltrates and accumulates. The repair can be very costly.

The caulking on twenty-plus buildings very often has overlain beads that only serve to worsen the cosmetic detractions already presented by the deterioration. There are several problems with the most common types of sealant application. Here are a few that cause the owner's most grief:

- The sealants were never installed in a manner in which they could be replaced easily.
- Layers of secondary sealant coats have failed and hide the basic mode of failure of the whole mess.
- The sealants were relied upon to provide direct water penetration resistance. If a failure resulted as expected with age, the joint would readily admit water.
- When the man with the caulking gun had 'done his thing,' the residents were left to believe that they had dutifully attended to their maintenance work, but the sealant kept leaking.

Twenty years ago it was typical to roof a complex with a built-up roof. The quality of application varied tremendously. If a built-up (tar and gravel) roof makes it to twenty years, it is usually overdue for replacement. The replacement includes new flashings since most of the original metal would certainly have depleted its galvanic protection and will not last the next roofing application. Common practice would be an upgrade to a two-ply modified bitumen roof membrane.

Parking garage roofs were also commonly 'waterproofed' with built up layers of roofing felts and tar. They also deteriorate with time and require expensive rearranging of hard and soft landscaping to access and replace them.

In summary, a building that might be thought of as 'out of the range a purchaser worries about,' might very well be the next new wave of problem buildings. Don't suffer from false comfort due to a building's age.

Homeowner Protection Office: Providing No-interest Loans and PST Relief

THE HOMEOWNER PROTECTION OFFICE

The Homeowner Protection Office (HPO) administers the Homeowner's Reconstruction Loan Program which provides financial assistance to owners of leaky homes. This program provides no-interest loans to owners of leaky condominiums, housing co-operatives and other homes who are unable to pay for repairs related to premature building envelope failures. This ensures that owners do not lose their homes simply because they can't pay for repairs. As of July 31, 2002, the HPO has approved 7,306 loans, representing 9,122 homes, totaling more than $238 million in financial assistance.

When the HPO receives a no-interest loan application, it is assigned to an HPO Loans Officer who will call the applicant to discuss eligibility and repayment, should the owner qualify for a loan. Loan amounts are based on the cost to repair the building envelope plus any related legal costs. It is important to note that in many cases the applicant receives their no-interest loan through the financial institution that holds their first mortgage. The HPO is the actual lender only if an individual has clear title on their property or if the financial institution that holds the first mortgage is not part of the program. Homeowners make monthly, principal-only payments to the lending institutions at an affordable rate set by the HPO Loans Officer through discussions with the applicant. The HPO pays the interest portion of the loan directly to the financial institutions on behalf of the homeowners.

The Homeowner Protection Office is a provincial Crown corporation established to increase consumer protection for homeowners and bring about an improvement in the quality of residential construction. The HPO's program areas include: licensing of residential builders and building envelope renovators, setting the standards for and monitoring the third-party home warranty insurance system, a research and education function in the areas of consumer information and building science, and financial assistance for owners of leaky homes.

HPO no-interest loans can be in place for up to 40 years, but the initial term of the loan will be set for a date between three to five years that in most instances matches the renewal date of the applicant's first mortgage. If, at the point of renewal, the applicant has sufficient income and equity to combine the no-interest loan with the first mortgage on their home then they must do so. If they do not qualify for such refinancing, their no-interest loan may be renewed for a subsequent five-year term.

A question many no-interest loan applicants ask is, "What happens if I receive money back from a court case or if I get money back because I was over assessed in the first place?" The answer is fairly simple. When someone receives money as a result of litigation or an over-assessment, they must pay down their no-interest loan. When someone applies for the no-interest loan they are required to sign the HPO Declaration and Agreement on the Homeowner's Reconstruction Loan application form. The Declaration and Agreement states that the applicant agrees to pay to the lender any monies that are returned to the applicant as a result of any "part of a special assessment paid" or monies returned with "respect of any claim or litigation". This means the recipient of the no-interest loan is required to apply any proceeds from litigation or an over-assessment to their Homeowner's Reconstruction Loan.

When a no-interest loan recipient receives a notice indicating that they will be receiving money back as a result of litigation or an over-assessment, they should let their HPO Loans Officer know. The HPO Loans Officer can let them know what to do next.

In addition to the Homeowner's Reconstruction Loan Program, the HPO administers the PST Relief Grant. This tax-relief rebate is available to all owners of leaky homes that complete building envelope repairs to their homes on or after June 28, 1998, the date the *Homeowner Protection Act* was passed. Unlike the Homeowner's Reconstruction Loan Program, strata councils and co-operative housing boards must apply for the grant as a group, not as individual homeowners. By July 31, 2002, the HPO approved 278 PST Relief Grant applications representing 13,176 homes, totaling more than $5.2 million in financial assistance.

Anyone interested in obtaining more information about the Homeowner's Reconstruction Loan Program, the PST Relief Grant or any other Homeowner Protection Office program can call the toll-free information line at 1-800-407-7757 or visit the Web site at www.hpo.bc.ca.

The Truth, The Whole Truth, Etc.

Gerry Fanaken, President
VANCOUVER CONDOMINIUM SERVICES LTD.

It was an angry message on my voicemail. Very angry. The woman rattled off a terse message about one of my strata agents killing the sale of her condominium by telling a purchaser that it was a "leaky condo". She demanded that I call her immediately - she intended to bring legal action against the property manager, me and the company I work for.

Luckily for me (I guess) I have had to deal with such calls before, particularly in the last ten years with the imposition of the leaky condo syndrome. As strata agents we walk a very fine line when dealing with information requests from prospective owners or real estate agents - always cognizant that anything we say might slide a potential sale one way or the other.

Tell the prospective buyer that it is a leaky condo and, it is highly likely the buyer will lose interest. The vendor will be mad. Tell the prospective buyer that "all is well" (when it is not) and expect a very angry new owner a few months after the sale completes when he or she discovers there is a big special levy pending for leaky condo repairs. Indeed, this is the precarious predicament faced by strata agents day in, day out.

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

Prospective purchasers often ask strata agents for an opinion on a particular property. Wise agents never offer opinions. They offer only facts. That certainly makes lawsuits easier to defend but it does not stop them, nor does it stop the angry calls.

A strata agent, acting as the property manager for a strata corporation, generally knows more about a given building than an owner who is selling. It is, therefore, reasonable that prospective buyers should expect to question the strata agent before concluding a possible purchase decision. A strata agent must, however, always tell the truth, and it is not adequate in my opinion to "play with the truth", that is to say not provide salient information even when not specifically asked by a prospective purchaser.

In my opening paragraph, I cite the (true) story of a recent episode. Before calling the owner back, I checked with the strata agent to find out what was said. The agent had not only provided relevant **and truthful** facts but also had checked with a strata council member to ensure that is was okay to release such information. Wisely, the strata council member had consented to release the facts - ie. the truth.

Councils and strata agents do not have any latitude in this matter. Whether it is a telephone conversation or the writing of minutes, the facts must be presented to prospective purchasers in a truthful manner. And if one of the parties to the sale gets angry because the truth is out, that's too bad.

Proposed Legislation and Strata Property Act
2002 Update Conference

OCTOBER 5, 2002
8:30 am - 4:30 pm
Laurel Point Inn
680 Montreal Street, Victoria B.C.

KEYNOTE SPEAKER:
Hon. Geoff Plant, *Attorney General for BC, M.P.P.*

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Professional Speakers

HON. GEOFF PLANT, *Attorney General for BC, M.P.P.*. The Hon. Mr. Plant was appointed as the Attorney General in British Columbia on June 5, 2001. Mr. Plant will discuss the proposed legislative changes which may abolish joint and several liability. This will affect all negligence actions, including "Leaky Condo" claims.

ANTONIO GIOVENTU, *Executive Director & Strata Property Advisor,* CONDOMINIUM HOME OWNERS' ASSOCIATION OF B.C. ("CHOA"). Mr. Gioventu brings over 18 years of experience in property management, development and strata property legislation to his position. CHOA enjoys over 1,000 strata corporation members.

GERRY FANAKEN, *Strata Manager, Author, Educator & President,* VANCOUVER CONDOMINIUM SERVICES LTD.. Mr. Fanaken has been actively involved in the administration of strata corporations for over 25 years. His company currently manages over 200 strata corporations, which represents approximately 13,000 units. He is the author of the Strata Property Act (Revised).

GARY MCINNIS, *Director and Chairman, Training and Education,* VICTORIA REAL ESTATE BOARD. Mr. McInnis has been licensed as a full time Realtor since 1991. Previously he was in the construction and development field for 24 years. He was the President of CHBA of Victoria in1981 and again in 1987.

Professional Speakers

IAN A. STUART, *Strata Manager,* NEWPORT REALTY PROPERTY MANAGEMENT. Mr. Stuart has over 12 years of experience working with Strata Corporations. He has significant experience dealing with strata corporation's in crisis, including "Leaky Condos".

CORA D. WILSON, *Lawyer, Educator & Author,* C.D. WILSON & ASSOCIATES. Ms. Wilson has been practicing law for 16 years with condominium law, litigation and development law being her preferred areas. She teaches condominium issues at Malaspina University - College, as well as at Camosun College.

CRAIG LABAS, *P.Eng. & Partner,* CHATWIN ENGINEERING LTD.. Mr. Labas is a Professional Engineer specializing in building envelope problems. He has over 18 years experience in both the construction and design of structures incorporating building envelope techniques.

PETER NORDLINGER, *Lawyer,* C. D. WILSON & ASSOCIATES. Mr. Nordlinger has a masters degree in English and has been practicing law since 1990, with an emphasis on commercial matters, including commercial litigation and "Leaky Condos".

SHARLA HANEY, *Lawyer,* C.D. WILSON & ASSOCIATES. Ms. Haney has been practicing condominium law since she was called to the Bar on May 19, 2000. She is a second generation lawyer who has worked in the legal field both as a legal secretary and paralegal before her call to the bar.

WHO: Strata Managers, Strata Council Members, Real Estate Agents, Insurance Agents, Appraisers & Lawyers

TOPICS: Civil Liability Review; Running the strata meeting; Legal caselaw update: Strata Manager's Role & Management Contracts; The need for a Building Envelope Report; Bylaw update & much more!!

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2002 Update Conference

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