voice from the... strata-SPHERE®

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ADMINISTRATORS vs. ARBITRATORS

Gerry Fanaken, President
VANCOUVER CONDOMINIUM SERVICES LTD.

Get used to hearing the term "Administrator". Over the next five years you will see and hear more and more about administrators. By contrast, you will see and hear less and less about Arbitrators (and arbitrations).

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

First, let me explain the difference, briefly. Both appointments are provided for by the *Strata Property Act*, as they also were under the previous *Condominium Act*. An arbitrator is a person who will listen to a dispute and, upon consideration, render a decision. Such a dispute might be between two or more strata lot owners within a strata corporation or between one or more owners and the strata corporation itself. Typically it is the latter. There is a comprehensive and cumbersome process prescribed by the *Act* to appoint an arbitrator. In fact, the process is so complicated that, frequently, arbitrations do not happen because the parties become totally mired in the set-up protocols. In any event, an arbitrator will adjudicate a specific dispute and render a decision. Such decisions are binding and enforceable by the Courts, though subject to appeal to the Courts in some circumstances.

"The administrator is responsible to the Court, not to the owners, and may only be discharged by the Court"

An administrator is appointed pursuant to an action brought in the Supreme Court of British Columbia. While arbitrators do not need the sanction of the Court, an administrator must be approved by the Court. Further, the reason or purpose for having an administrator also must be sanctioned by the Court.

The administrator may be requested to resolve a specific (narrow) issue, although commonly it is not used for this purpose but rather to effect overall control of all aspects of the strata corporation. The administrator is responsible to the Court, not to the owners, and may only be discharged by the Court, not directly by the owners. Arbitrations are usually concluded within a relatively short period of time, i.e., six months to one year, whereas administrations tend to be ongoing over a period of one or more years. (I have been involved as an Administrator five times and few have concluded quickly. In one instance the matter was resolved within one month. This, however, is unusual.)

"Dysfunctional" is a word that one typically hears when there is a need for an administrator (as opposed to "disagreement" which is associated with arbitrators). Dysfunctionality can occur

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in a strata corporation at two levels. First, it could be the strata council itself. This would be a situation where council members are fighting with each other and "nothing gets done". In other words, instead of addressing and attending to the duties and obligations vested on them under the *Strata Property Act* and the strata corporation's bylaws, the members of council are more focused on hurling insults at each other. The legitimate business of the strata corporation falls aside and the owners generally suffer the consequences. The appointment of an administrator in this instance would effectively be to remove the strata council and replace it with an individual who would then attend to the real needs and business of the corporation. In this type of appointment, the administrator would be given the powers of the strata council, not the powers of the strata corporation. For example, an administrator could not implement new bylaws. That would require a 3/4 vote of the owners.

The second type (or area) of appointment of an administrator would be, not as a strata council, but as the strata corporation in the whole. Here, the strata council might very well be working cohesively and harmoniously as a team but the problem is that the owners do not comply with the recommendations of the strata council. A very common example of this type of situation is in leaky condos. The strata council has a solid grasp on the problem, knows the solution, but is unable to convince the owners to support a remediation program. Although there are other solutions to this type of situation (such as a Court order under Section 72(1) of the *Act* compelling the strata corporation to repair and maintain common property, as happened in the Tadeson case), the appointment of an administrator is designed to give control of the overall strata corporation to an independent manager – in other words, to usurp the voting authority of the owners and to consequently allow the administrator to act in the best interests of all owners. Other examples would be a fight between owners over use of common property or the creation of bylaws, sections or other governance issues.

The Courts are reluctant to grant an administrator such wide authority (and some lawyers would argue that the *Act* does not even allow the Courts to do so), as there is a general notion that "governance" ought to be left to owners to work out. Unfortunately, it is not that simple as in some strata situations it is the very governance structure that has irreparably failed and cannot be resurrected. It is the ultimate humpty-dumpty. In such a situation, appointing an administrator as a council merely propagates that failure. Having an administrator replace a competent and functional strata council is a wasted effort and the chaos continues. In these circumstances the appointment of an administrator must be at a broader level to bring about compliance with the statute and to effect good management practices of the strata corporation. Courts have to make this distinction notwithstanding their reluctance to interfere with governance. Lawyers applying to the courts for the appointment of an administrator are well-advised to plead their cases very precisely, failing which they might find their efforts somewhat circular.

There are many strata corporations in large urban areas of the province that have turned to the *Strata Property Act* for the appointment of administrators to rescue them from ongoing dysfunctionality. There will be more. Many more.

An Owner & the Right to Vote

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

A strata corporation is not only a creature of statute, but it is a creature of democracy. Denial of the right to vote hits at the heart and soul of the collective community. This right must only be denied based on just cause and clear unambiguous statutory authority.

At stake is freedom - freedom to vote to elect governing councils and participate in one's own destiny. Freedom to exercise the right to remove council members who do not serve the needs of the majority. This is balanced against the right to demand accountability from a council member who acts in a conflict of interest situation.

Some would replace the fundamental right to vote with the tyranny of an oppressive minority. The path may dwindle into confusion, deception and political divisiveness. Ignoring the wishes of the majority in the absence of illegality, improper motive or significantly unfair conduct is a dangerous path to follow. History bears this out.

When should an owner be denied the right to vote at both general meetings and council meetings? The Strata Property Act ("SPA") expressly denies the right to vote in very limited circumstances, as follows:

1. An owner in arrears of common expenses is not an eligible voter at general meetings where a valid bylaw is registered to that effect and the strata corporation is in a position to register a lien against that owner;
2. An owner is not an eligible voter at a general meeting called to approve a resolution authorizing a suit by the strata corporation against that owner (s. 171(2) & (3), SPA);
3. If an owner sues the strata corporation, then that owner does not have the right to attend general meetings or council meetings where the suit is dealt with or discussed, but that owner is not expressly denied the right to vote at such meetings (s. 169, SPA).
4. A council member with a conflict of interest defined as a direct or indirect interest in a contract or transaction with the Strata Corporation must abstain from voting on that contract or transaction (s. 32, SPA);
5. A council member who votes while in a conflict is not an eligible voter at a general meeting called to ratify the council resolution (s. 33(2));

There are those who would argue that if an owner brings a suit against the strata corporation, then that owner cannot vote in connection with any matter related to that suit. SPA sets limits on the right to vote, but does not completely shut the door (s. 169, SPA). This issue will be open to interpretation until this issue is addressed by the Courts.

Owners must be free to resolve disputes through the political process. The battle boils down to democracy verses legal tyranny. The courts should be loathe to interfere with democracy.

Where SPA requires the strata corporation to authorize a suit against an owner by 3/4 vote at a general meeting, the affected owner cannot vote. However, once a suit is authorized, then an argument that all voting rights at all meetings dealing with the suit are gone seems extreme. Clearly that owner cannot be present at meetings where the suit is being dealt with or discussed (s. 169, SPA.). However, the statute does state that owner cannot vote. These simple words would have been so easy to insert if that was the intention of the legislature.

The governing body is comprised usually of owners elected by other owners. If the governance is unpopular or inadequate, then the ultimate political weapon is to remove and replace unwanted council members. Similarly, political circumstances may exist where a council member is elected with a mandate of owners to address a legal suit. If that council member cannot carry out an election mandate, then democracy collides head on with SPA. What is the result?

The duty of an owner is to vote. The duty of the council member is to govern. Members must act in accordance with the prime directive (SPA and related legislation). Basic respect promotes harmony, which is, after all, one of the advantages people envision when buying into the strata corporation. If the legal arena is grey, then democracy, being the foundation of our system, should not be undermined.

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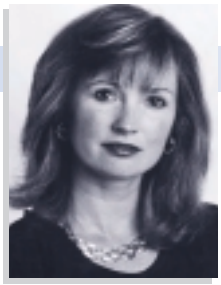

When to Appoint an Administrator

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

An Administrator may be appointed by the Supreme Court pursuant to Section174 of the *Strata Property Act* ("SPA") to exercise the duties and powers of the strata corporation and the strata council if the appointment is in the best interests of the strata corporation. The scope of any appointment should form the subject matter of the Court Order and arguable should remedy the alleged evil and no further.

The democratic operation of the strata community is suspended. The vacuum is filled by a court appointed administrator. As a result, this avenue should be viewed by the courts as a last resort.

In *Lum v. Strata Plan VRS519* [2001], B.C.J. No. 641 (Q.L.) (B.C.S.C.), Harvey J. considered the factors to be considered in exercising the Court's discretion, including:

(a) whether there has been established a demonstrated inability to manage the strata corporation,

(b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,

(c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,

(d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,

(e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

The Courts have addressed the appointment of an administrator in the following circumstances:

(a) An administrator has been appointed in several cases to conduct repairs where a struggle existed between competing groups which thwarted efforts by the strata corporation to carry out its' statutory duty. The Courts have consistently appointed an administrator in these circumstances effectively highlighting the importance of the duty to repair and the corresponding intolerance towards owners who stand in the way.

(b) An administrator was appointed where funds and use of assets in an hotel complex were allegedly improperly allocated and mismanaged.

(c) The alleged failure by a property manager to perform duties directed by the strata council, although questionable, did not warrant the appointment of an Administrator.

Cora D. Wilson, LL.B., 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.

(d) An administrator was not appointed where acrimony existed regarding the termination and hiring of a new resident manager combined with an arbitrator's decision to reappoint the manager.

Not every circumstance warrants the appointment of an administrator. The costs of an administrator must always be considered. The bottom line is that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.

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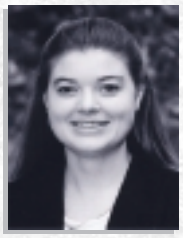

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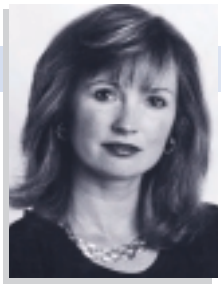

Steps To Appointing An Administrator

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

1. WHY APPOINT AN ADMINISTRATOR?

- inability to manage the strata corporation;
- substantial misconduct or mismanagement or both in relation to affairs of the strata corporation;
- the appointment is necessary to bring order to the affairs of the strata corporation;
- there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation; and/or,
- only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

2. WHEN TO APPOINT AN ADMINISTRATOR:

- 3 consecutive failed votes of owners at general meetings to conduct major repairs to common property or less if situation clearly impossible;
- clear deadlock between owner groups and evidence that all political options have been exhausted in relation to mandatory duties of the strata corporation;
- substantial and serious mismanagement over an extended period of time resulting in declining market values of the strata lots and/or evidence of prejudicial or oppressive conduct in relation to expenditures, voting and governance activities;

A legal opinion should be sought regarding the feasibility of bringing an application to appoint an administrator. Although administrator appointments are more commonplace, they are a last resort remedy given the democratic rights of owners are suspended and the enormity of the costs.

3. WHO CAN BRING THE COURT APPLICATION?

- The strata corporation with a majority vote of council.
- A person having an interest in a strata lot

4. WHAT CAN AN ADMINISTRATOR DO?

- exercise the powers and perform the duties of the strata corporation and/or the council provided it is in the best interests of the owners, such as:
  - approve a budget
  - approve a special levy
  - approve bylaw amendments
  - approve any 3/4 vote otherwise requiring a 3/4 vote of owners
  - enter into contracts ie. repair, insurance, etc.

The Court of Appeal recently granted leave to appeal the scope of the powers and duties which may be granted to an Administrator by the Supreme Court. In other words, can an administrator dispense with a majority or 3/4 vote of owners otherwise required by the Strata Property Act?

5. WHAT ORDER CAN YOU REQUEST?

- Appoint the administrator for an indefinite or set period.
- Set the administrator's remuneration and order the Strata Corporation to pay.
- Order that the administrator exercise or perform some or all of the powers and duties of the strata corporation and relieve the strata corporation of such powers and duties.
- Grant the administrator the ability to approve a budget, special levy or any other matter otherwise requiring a vote of owners at a general meeting providing the approval is in the best interests of the strata corporation.
- Permit the administrator to delegate a power.
- Remove or replace an administrator or vary an order.

6. WHAT ARE THE PROCEDURAL REQUIREMENTS FOR COURT PROCEEDINGS TO APPOINT AN ADMINISTRATOR?

- A majority vote of the strata council is required to bring the Petition to appoint an Administrator (a 3/4 vote of owners is not required s. 171).
- The Strata Corporation must serve all affected owners with an interest in a strata lot in accordance with the Rules of Court ie. personal service or mail in the event of a corporate owner. (Service cannot be effected pursuant to section 61 of the Strata Property Act.) This can be a very costly step.
- An owner commencing the petition must serve the strata corporation and deliver a copy of the proceedings to all other affected persons pursuant to s. 61 of SPA.
- A group of owners wishing to appoint an administrator must sign a joint retainer and deal with the law society conflict guidelines for multiple clients.
- Parties should expect to pay a substantial retainer prior to proceeding.

7. WHAT DOES IT COST?

- Contact an experienced condominium lawyer for an opinion regarding the feasibility of proceeding and a budget for costs.
- Canvass how the legal costs will be paid by the Strata Corporation ie. special levy, budget or emergency administrative expenditure out of the contingency reserve fund.
- If the Petitioner is a group of owners, how will each owner contribute? Equally or otherwise.
- The application is very costly and the feasibility of proceedings should be closely reviewed.
- Cost recovery is likely limited ie. party/party costs (25% - 33% of fees, plus reasonable disbursements).
- Special costs or full indemnity costs are rare.

8. WHAT IS THE PROCESS?

- Prepare and file the Petition & supporting affidavits requesting an order to appoint an administrator,
- Outline the history justifying the appointment together with sufficient affidavit evidence in support.
- The Affidavits should include the following exhibits:
  - relevant council minutes
  - relevant special general meeting minutes
  - relevant correspondence
  - expert reports
  - political status
  - reason why the appointment of an administrator is in the best interests of the strata corporation
- Serve documentation on all affected persons
- Timing:

i. Prepare and file Petition	3 weeks
ii. Serve Petition	1 month
iii. Substitutional Service	3 months, if required
iv. Court Appearance	1 - 2 months after service if unopposed
v. Opposed Court Appearance	6 months or longer

- Obtain a budget for legal costs
- Example of significant disbursements:
  a. title search print - budget $20/search
  b. service - budget $100 per affected person

9. WHO SHOULD BE THE COURT APPOINTED ADMINISTRATOR?

- Only experienced and qualified administrators with a significant background in strata corporation affairs should be considered.
- An administrator is an officer of the court and not an agent or employee of the owners.

10. CONCLUSION

It is anticipated that there will be more and more applications to the Supreme Court to appoint an Administrator to address serious governance and management issues.

Tread cautiously when moving in this direction and only proceed once the ramifications of suppressing democracy and the related costs have been fully canvassed and appreciated.

Think seriously about only retaining an experienced strata lawyer and administrator to carry out the appointment. Chaos created the need for the appointment. CONSIDER PAYING A HIGHER PRICE FOR EXPERIENCE, QUALITY AND RESULTS - AVOID ADDING FURTHER CHAOS TO THE EXISTING CHAOS.

Jurisdiction of an Administrator - Caselaw Update

Sharla Haney, Lawyer
C.D. WILSON & ASSOCIATES

Is there a limit to the jurisdiction of an administrator? When a strata corporation is unable to exercise its powers and duties under the *Strata Property Act* ("SPA") as a result of an inability to manage the strata corporation, misconduct, mismanagement, lack of order in the affairs of the strata corporation or political turmoil, an administrator may be appointed under section 174 of the SPA to exercise the powers and perform the duties of the strata corporation.

Ms. Haney, LL.B., Lawyer with C.D. Wilson & Associates, graduated from UBC Law School in 1999 and was called to the Bar in 2000. She is not only a lawyer, but an award winning former franchise owner and scholastic achiever.

An administrator is appointed by order of the Court. Therefore, the authority of the administrator and any powers or duties that the administrator exercises on behalf of the strata corporation must be set out in the court order for the appointment. The debate involves the nature of the order that may be sought.

"any powers or duties that the administrator exercises on behalf of the strata corporation must be set out in the court order for the appointment."

Section 174 of the SPA states that the court may:

(A) appoint the administrator for an indefinite or set period;

(B) set the administrator's remuneration;

(C) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation; and,

(D) relieve the strata corporation of some or all of its powers and duties.

However, this provision doesn't specify the extent of the powers and duties that can be conferred on the administrator.

"the law is unsettled and the extent of the jurisdiction of an administrator under the SPA is uncertain."

In *Charles Toth v. The Owners, Strata Plan No. LMS1564*[1] , the court adopted reasoning found in a case decided under the old Condominium Act and held that the court wasn't empowered to permit an administrator to pass resolutions which would otherwise require a majority vote or 3/4 vote of the owners at a general meeting. The court held that "the duties and powers of the strata corporation are independent of the rights and powers of the owners." In other words, the court could not override the democratic and statutory rights of the owners to vote, where a vote was required under the SPA.

The court in *Toth, supra* further held that in circumstances where there was a stalemate or an inability to procure a 3/4 vote, the more appropriate remedy may be found under section 165 which permits the court to order:

(A) a strata corporation to perform a duty it is required to perform under the SPA, the regulations, the bylaws or the rules;

(B) a strata corporation to stop contravening the SPA, the regulations, the bylaws or the rules; and,

(C) make any other orders it considers necessary to give effect to an order under a or b.

More recently, however, in *Avia West Resort Club v. Strata Plan LMS1863*[2] the court made an order which authorized an administrator to "impose a special levy, to approve a special budget and to pass any other resolution normally requiring a majority, or 75%, if such resolution is in the best interests" of the strata corporation. The British Columbia Court of Appeal has recently granted leave to appeal a portion of this decision.

At the present time, it is clear that the law is unsettled and the extent of the jurisdiction of an administrator under the SPA is uncertain. I look forward to the resolution of this issue in the British Columbia Court of Appeal, given the significance of the issue to the entire strata community. In the meantime, any owner, strata council, or other interested person considering the appointment of an administrator should seek legal advice as to the appropriate course of action in their particular circumstances.

[1] (19August 2003), Vancouver L025502 (B.C.S.C.)
[2] [2004] B.C.J. No. 2077, 2004 BCCA 520, Vancouver Registry No. CA032059

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Do Strata Corporations Have the Right to Limit Proxies ?

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

A number of bylaws have recently surfaced that limit the number of proxies a person may hold for general meetings. Now the same strata corporations are in disputes with owners as a result of refusing to certify proxies and allow owners to vote by proxy. The disputes have resulted in chaos in several Vancouver Island and Lower Mainland Resort Properties.

A proxy is a private matter between the owner of the strata lot and a proxy holder. The Act does not give Strata Corporations the power to impose any conditions or limitations on the proxy. At times the strata corporation can stop an owner from voting if allowed by the Act. For example, if the strata is entitled to file a lien via a bylaw enact, or section 171 relating to 3/4 votes for courts actions against an owner(s).

Consider what would occur if a strata were to limit the number of proxies a person could hold, how they would exercise limitations on the proxy, or influence the outcome of the voting proceedings.

A proxy is a private matter between the owner of the strata lot and a proxy holder. The Act does not give Strata Corporations the power to impose any conditions or limitations on the proxy.

By limiting the number of proxies a person could hold, the strata corporation would be influencing & controlling the outcome of voting results if anyone exceeded the number of proxies that were allowed, and was prohibited from holding more than the bylaw granted. Who would want to accept the substantial liability of determining which proxies would be allowed to vote and which were disallowed ? Would a manager, agent of the corporation or council member consider certifying a select number of proxies and ignoring others? Considering most bylaws do not allow the council to delegate their authority to enforce bylaws, and council would not be capable of convening a council meeting to consider whether the bylaw is being violated, how would the decision be made without violating the rights of the owner assigning the proxy to have their vote represented ? Section 56 (4) provides that " A proxy stands in place of the person appointing the proxy, and can do anything that person can do."

Would the decision be made to allow the number votes allowed by the bylaw or would no proxy votes be allowed ? If a single owner held more units than the number of proxies allowed, how could they assign 1 representative to represent their interests ? In some resort communities single owners or single corporations can hold hundreds of units. They usually rely on one trusted voice, by proxy, to proclaim their interest. If a bylaw limited the number of proxies a person could hold to two, would a one hundred unit owner have to find fifty proxy holders at two each ? What if there were only One hundred and twenty units and only five people available to attend the meeting willing to hold proxies ? Does the owner have to find fifty proxy holders at their cost ?

Consider the owners' perspective. If a bylaw limited the number of proxies a person could hold, how would an owner know if the person they are assigning complies with the bylaw ? Should they obtain a written disclosure from the person ? What if that person doesn't declare all the proxies they hold ? What if that person intentionally exceeds the number allowed to nullify a number of votes to influence the outcome ? If the strata cannot enforce the bylaw on site, it may prevent them from enforcing the bylaw at the general meeting, and if the ballots are secret, the strata would have no way of enforcing the bylaw in the future. As a result, the bylaw could not be enforced retroactively and the council do not have the authority to nullify any votes because decisions are made at general meetings by a majority vote of the owners pursuant to section 50 of the Act and that would exceed the authority of the council.

How can the strata corporation prevent one person from unfairly holding an excessive number of proxies and controlling the corporation ? Typically most stratas have adopted the standard bylaws of the Act which require under section 28 if any person requests a secret ballot, a secret ballot must be held. To record the proxy holders accountable, strata corporations may consider amending this bylaw requiring a majority vote for a secret ballot, and if there are a substantial number of proxies held by one person the strata may consider polling significant decisions. If a proxy holder acts unfairly against a corporation, the corporation then has the ability to seek redress through the courts or arbitration.

Before your strata considers a bylaw that affects the personal property rights of owners, CHOA recommends that the strata corporation obtain a written legal opinion that the bylaw is enforceable.

Tony Gioventu is the executive Director of the Condominium Home Owner's Association, serving over 50,000 members across BC since 1976. For further information please call toll free 1-877-353-2462 or tony@choa.bc.ca

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. CHOA currently enjoys over 1,000 members.

Strata Collections Procedures Clarified

by Recent British Columbia Supreme Court Decisions: And a few collections tips

Bruce Wardhough, Lawyer
C.D. WILSON & ASSOCIATES

Two recent decision of the British Columbia Supreme Court: *The Owners, Strata Plan No, VR1008 v. Oldaker* 2004 BCSC 63, Blackmore et al. v. Owners, Strata Plan VR274, 2004 BCSC 1121 and a recent amendment to the *Strata Property Act* have clarified the procedures which are required to enforce *Strata Property Act* liens.

Part Six, i.e. sections 112 through 118, of the *Strata Property Act* permits a Strata Corporation to file a lien at the appropriate Land Titles office when an owner in arrears with his or her monthly or special assessments and enforce the lien through a process akin to a mortgage foreclosure proceeding. Prior to the *Oldaker* decision there was doubt as to whether or not it was necessary to have a three-quarter vote of the owners to approve the strata corporation's proceeding with such litigation. This was due to s. 171(1) of the Strata Property Act which required: "Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting."

The uncertainty was further intensified with the decision of Mr. Justice Cohen in *The Owners, Strata Plan LMS 888 v. The City of Coquitlam* et al. 2003 BCSC 941, which held that any legal action commenced by a Strata Corporation without the prior requisite three-quarter vote was void.

The immediate effect of Mr. Justice Cohen's decision in *The Owners, Strata Plan LMS 888* was to cast doubt on the legitimacy of numerous suits by Strata Corporations, including many so-called "leaky condo" lawsuits. (Indeed, it should be noted at the "winner" of the *The Owners, Strata Plan LMS 888* decision was a group of defendants in many of these suits, including a window manufacturer whose products have been alleged to have caused ten—if not hundreds—of millions of dollars to strata corporations' buildings.) Although the *The Owners, Strata Plan LMS 888* decision was immediately appealed, the machinery of politics worked faster than the machinery of the courts, and in December of 2003, the *Strata Property Act* was amended to add s. 173.1 which provides:

> ***"if the Strata Corporation wished to use ss. 112 through 118 of the act to enforce a lien, it could do so without the requirement of seeking a three-quarter vote."***

(1) The failure of a strata corporation to obtain an authorization required under section 171 (2) or 172 (1) (b) in relation to a suit or an arbitration

(a) does not affect the strata corporation's capacity to commence a suit or arbitration that is otherwise undertaken in accordance with this Act,

(b) does not invalidate a suit or arbitration that is otherwise undertaken in accordance with this Act, and

(c) does not, in respect of a suit or arbitration commenced or continued by the strata corporation that is otherwise undertaken in accordance with this Act, constitute

(i) a defence to that suit or arbitration, or

(ii) an objection to the capacity of the strata corporation to commence or continue that suit or arbitration.

(2) Despite any decision of a court to the contrary made before or after the coming into force of this section, subsection (1) applies to a suit and an arbitration commenced or continued before or after the coming into force of this section.

(3) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.

Section 173.1 therefore legislatively repeals the decision in *The Owners, Strata Plan LMS 888 v. The City of Coquitlam* et al. And any victory achieved was certainly short-lived.

However, during the time it took the Provincial legislature to repeal Mr. Justice Cohen's decision, another Supreme Court Judge, Mr. Justice Crawford, had an opportunity to consider the lien enforcement provisions of the *Strata Property Act* in *Oldaker*. He held that Part Six (i.e. sections 112 through 118) of that act set up an independent procedure for the enforcement of liens. He held that if the Strata Corporation wished to use ss. 112 through 118 of the act to enforce a lien, it could do so without the requirement of seeking

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a three-quarter vote. And even more clearly, now with the addition s. 173.1 to the *Strata Property Act*, a Strata Corporation is not required to obtain this vote before proceeding with lien enforcement in the Supreme Court.

There are of course additional practical considerations involved when a Strata Corporation wished to collect monies owing to it. First, according to s. 116 of the *Strata Property Act*, the corporation can only place a lien on the owner's property for: (a) strata fees; (b) a special levy; (c) a reimbursement of the cost of work referred to in section 85 of the *Strata Property Act* (i.e. expenses incurred as a result of a work order); or, (d) the strata lot's share of a judgment against the strata corporation. Notably, a Strata Corporation cannot lien for fines. And, second, since any proceedings to enforce a lien by sale of the debtor-owner's unit is akin to a foreclosure action, all statutory requirements must be strictly complied with, otherwise the collection action will fail or be adjourned. Indeed, in *Oldaker*, Mr. Justice Crawford refused to give immediate judgment on a *Strata Property Act* lien when, as he noted "that the monies owing at the present time are not the monies that were owing and certified in the Certificate of Lien originally filed in December 2002" due to subsequent payments by the owner and further unpaid assessments. An agreement as to the amount owing was therefore necessary, in order for that disputed fact to be set down for an expensive trial of the issue.

"After all was said and done, it is likely that the Strata Corporation spent well over $100,000.00 to collect $2,236.82 owed to it. This was hardly a wise use of the Strata Corporation's financial resources."

However, when a lien is placed on an owner's unit, a Strata Corporation is in an excellent position to collect on it. If the unit is mortgaged, the Strata Corporation should realize that it is a standard clause in all institutional lenders' mortgages not to permit their borrowers to allow liens (in particular, *Strata Property Act* liens) to encumber the borrowers' properties.

The standard clause allows for the lender to pay off the lien (and add the amount to the mortgage balance) or—at the lender's option--to declare the mortgage in default and permit the commencement of foreclosure proceedings. (In the event that the lender forecloses, since according to s. 116(5) of the *Strata Property Act* a *Strata Property Act* lien takes priority to a mortgage, the Strata Corporation will receive its share of the sale before the lender.) Thus a simple letter to the Owner's bank sent at the same time as the letter sent to the Owner warning the Owner that a lien will be placed in his/her unit in two weeks unless payment is sent forthwith (see s. 112 of the *Strata Property Act*), and another letter sent to the bank a couple of weeks later with a copy of the lien registered at Land Titles, will often have the desired effect.

The enforcement of fines is a much more difficult proposition. They cannot be enforced through the lien mechanism, so the Strata Corporation must use the courts or an alternative dispute resolution procedure to enforce them. Indeed, it is my recommendation to use the courts, particularly the Small Claims courts, to enforce the payment of fines.

The above mentioned decision in Blackmore illustrates the my point. In, Blackmore, the Strata Corporation sought to enforce fines, expenses and late fee levies in the amount of $2,236.82 through the use of an arbitration process. This process was permitted by the Strata Corporation's bylaws. At the end of the process, the Arbitrator held that (1) the owner indeed breached the bylaws which led to the fines, (2) upheld the fines etc., and (3) awarded costs to the Strata Corporation. These costs amounted to 75% of the Strata Corporation's legal bills and the costs of the arbitration. The costs awarded to the Strata Corporation (representing 75% of its legal bills) was $101,030.30, and the arbitration cost was $41,891.70, for a total sum of $142,922!

Needless to say, given the amount of the costs award, the arbitrator's decision was subjected to judicial review. Mr. Justice Goepel was critical of the use of arbitration in these circumstances, and noted:

> *It should be noted that it was the strata corporation that forced this matter to resolution through the relatively expensive mechanism of arbitration. Although alternative dispute resolution is a much heralded concept, its benefits can be limited where the process is not consensual and it can often cost much more than court proceedings. If the strata corporation had simply sought a mandatory injunction in this court to enforce its bylaws, then sued in Provincial Court to recover its fines, this matter likely could have been resolved at a fraction of the present cost. At a minimum, the costs of the arbitrator would have been saved.* [paragraph 79]

Although, Mr. Justice Goepel held that the Owner indeed committed those acts giving rise to the fine (thus upholding the fine), he was very critical of the costs involved. He held there were no legal provisions to award costs of this magnitude in the circumstances of that case and reduced the costs to party and party costs for all of the surrounding litigation and the arbitration (for which we note there are few provisions in the Court Rules), and made no order of costs for the judicial review. After all was said and done, it is likely that the Strata Corporation spent well over $100,000.00 to collect $2,236.82 owed to it. This was hardly a wise use of the Strata Corporation's financial resources.

Accordingly, the best means of enforcing fines is through Small Claims Actions. As this is not a lien enforcement action, it is preferable that a Strata Corporation approve court action with a three-quarter vote prior to beginning the suit or having a bylaw enacted pursuant to s. 171(4) of the *Strata Property Act*. (Such a bylaw permits the commencement of Small Claims Actions by the Strata Corporation with out the necessity of a three-quarter vote.) Although, s. 173.1 of the *Strata Property Act* allows actions to be commenced without the three-quarter vote; given the intention of this section was to legislatively repeal Mr. Justice Cohen's decision in *The Owners, Strata Plan LMS 888 v. The City of Coquitlam* et al., the effect of s. 173. 1 on Small Claims Actions is not clear, nor has been judicially tested. So having a three-quarter vote (or a bylaw) will ensure that your collections action does not become the next "test case."

Furthermore, before commencing any action to enforce fines owing to the Strata Corporation, the Corporation must ensure that it has strictly complied with s. 135 of the *Strata Property Act*. Failure to be in strict compliance with this section is almost a certainly a complete defence to the collections action by the Owner/Defendant.

Finally, before commencing a Small Claims action, we recommend consulting a lawyer. It may not be cost effective to retain the lawyer to prosecute the action, but he or she is an invaluable source of advice for the drafting of the court documents and advising for preparation for appearances before a judge. We note that although a Strata Council member is entitled to appear in Small Claims court on behalf of the Strata Corporation, it is contrary to the provisions of the Legal Profession Act for anyone other than a lawyer to be paid to represent the Strata Corporation or give legal advice to the Strata Corporation. Additionally, any insurance held by a non-lawyer giving legal advice to, or appearing in court for, a Strata Corporation, would not cover that person for this activity.

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3/4 Vote Quick Reference Sheet

CONDOMINIUM HOME OWNERS' ASSOCIATION OF B.C. (CHOA)

According to the Strata Property Act a 3/4 vote "means a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting." A 3/4 vote only includes those who have voted for or against a resolution.

Example:
60 votes are cast, 30 in favour, 10 opposed and 20 abstentions.

Total votes = 40, 3/4 of 40 is 30 therefore the resolution is carried.

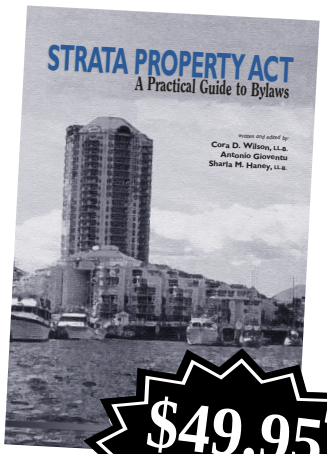
# of eligible votes cast for or against	# of votes needed infavour to pass a _ vote	# of eligible votes cast for or against	# of votes needed infavour to pass a _ vote	# of eligible votes cast for or against	# of votes needed infavour to pass a _ vote	# of eligible voters cast for or against	# of votes needed infavour to pass a _ vote	# of eligible votes cast for or against	# of votes needed infavour to pass a _ vote	# of eligible votes cast for or against	# of votes needed infavour to pass a _ vote
5	4	33	25	61	46	89	67	117	88	145	109
6	5	34	26	62	47	90	68	118	89	146	110
7	6	35	27	63	48	91	69	119	90	147	111
8	6	36	27	64	48	92	69	120	90	148	111
9	7	37	28	65	49	93	70	121	91	149	112
10	8	38	29	66	50	94	71	122	92	150	113
11	9	39	30	67	51	95	72	123	93	151	114
12	9	40	30	68	51	96	72	124	93	152	114
13	10	41	31	69	52	97	73	125	94	153	115
14	11	42	32	70	53	98	74	126	95	154	116
15	12	43	33	71	54	99	75	127	96	155	117
16	12	44	33	72	54	100	75	128	96	156	117
17	13	45	34	73	55	101	76	129	97	157	118
18	14	46	35	74	56	102	77	130	98	158	119
19	15	47	36	75	57	103	78	131	99	159	120
20	15	48	36	76	57	104	78	132	99	160	120
21	16	49	37	77	58	105	79	133	100	161	121
22	17	50	38	78	59	106	80	134	101	162	122
23	18	51	39	79	60	107	81	135	102	163	123
24	18	52	39	80	60	108	81	136	102	164	123
25	19	53	40	81	61	109	82	137	103	165	124
26	20	54	41	82	62	110	83	138	104	166	125
27	21	55	42	83	63	111	84	139	105	167	126
28	21	56	42	84	63	112	84	140	105	168	126
29	22	57	43	85	64	113	85	141	106	169	127
30	23	58	44	86	65	114	86	142	107	170	128
31	24	59	45	87	66	115	87	143	108	171	129
32	24	60	45	88	66	116	87	144	108	172	129

For more information on CHOA resources, and member benefits, please visit the website at www.choa.bc.ca. Questions may be directed to the Advisor by phone at 1-877-353-2462 or email your questions to advisor@choa.bc.ca.

STRATA PROPERTY ACT
A Practical Guide to Bylaws

"Every Strata should have a Copy!"

Written by Cora Wilson, Condominium Lawyer with over 18 years experience, Sharla Haney and edited by Tony Gioventu



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As of January 1, 2002 the Statutory Bylaws attached to the Condominium Act no longer Apply! The Standard Bylaws to the Strata Property Act automatically apply to every Strata Corporation in British Columbia.

Every Strata Corporation throughout British Columbia should completely review and overhaul its bylaws. This process may take between 3 - 5 months.

This comprehensive guide provides a Step-by-step, do-it-yourself format for the preparation of bylaws. The guide includes a description of what should be done at every stage of the bylaw process, including:

- how to deal with unit owners
- how to undertake the bylaw review process
- how to amend bylaws
- how to repeal bylaws
- how to draft bylaws
- how to deal with the presentation of bylaws at a general meeting
- how to register bylaws

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

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

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

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

Finally, Land Title Office registration forms are attached with instructions for completion.

The bylaw review, drafting, approval and registration process is an art. It is a complex, difficult and time consuming process which should not be taken lightly. It is hoped that this Bylaw Guide will minimize the pitfalls.

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