CCI Vancouver Chapter

CONDO NEWS

President's Message

What began as a rather wet and cold summer has turned into one of the hottest and driest Vancouver summers on record! I think the same can be said for the condominium housing market (both new and used) in Vancouver and the Lower Mainland. The portion of the Municipal tax base that is defined by condominium ownership in the Lower Mainland has been growing by leaps and bounds. According to CMHC, the total number of multi-dwelling housing starts for the first half of 2010 almost doubled the number recorded during the same period in 2009. Vancouver, New Westminster and Surrey lead the way in multi-dwelling housing starts as developers have brought more units to the market with "projects that were either on hold or in the planning phase during the last two years."As you know CCI National has revamped its governance model. We will be asking our members to approve a number of bylaw amendments to our own bylaws to bring them in line with the National bylaws. The amendments will not impact on the day to day governance of our chapter board. We will continue to have chapter representation at the National level and will be relying on our representative to report back to the chapter. Our chapter will be appointing our National representative at our next board meeting and thereafter, that person will be traveling to Markham, Ontario in November to take his/her place around the National council table.

Why am I referring to multi-dwelling housing starts and Municipal tax bases? At the recent mid-year CCI conference held in Toronto CCI National put together a two-part chapter clinic. The first part of the clinic focused on strategies used by three CCI chapters to get more influence with their local governments. Bill Thomson of CCI Toronto and a member at large on the CCI National executive nicely summarized what each of the speakers had to say. You can read more about the chapter clinic at page 4 of the CCI National summer newsletter. The fact that these chapters had much to say about strategies to get more than a foot in the door of local governments speaks volumes about what condominium stakeholders in Vancouver and the Lower Mainland, who hold considerable voting power and who make up a considerable portion of the tax base of the local governments in the Lower Mainland, can do to have their local governments stand up and take notice of issues affecting their strata corporations. CCI can and is willing to assist strata lot owners in Vancouver and the Lower Mainland identify areas that need to be addressed by our local governments, including garbage collection and property taxes to name a few. As elected officials, local government representatives need to know what our strata lot owners, as tax payers and voters, have to say about condominium living and what should be happening with their tax dollars. If you have a local government issue that you think is not being heard, perhaps it is time to rally other strata lot home owners who, with the help of CCI Vancouver, might be able to get "more influence" with the Vancouver and Lower Mainland local governments.

Jamie Bleay

- INSIDE THIS ISSUE -

Coming Events:

CCI Vancouver will be hosting a 1/2 day seminar on Saturday, October 23, 2010. The topics will include:

i) hot button legal issues,

ii) strata insurance; and

iii) recent important amendments to the Strat Property Act

Venue - TBA

Speakers - To include experienced strata lawyers, insurance professionals and strata management professionals.

Check the website for more details as they become available.

Are You Insured? Owners, Tenants and Occupants may not be … depending on the policy wording

Some owners, tenants and occupants do not take out personal liability insurance. One reason for that decision may be the belief that they are covered under the strata corporation's liability policy. In that regard, section 155 of the Strata Property Act (the "SPA") provides that:

Despite the terms of the insurance policy, named insureds in a strata corporation's insurance policy include

a. the strata corporation,

b. the owners and tenants from time to time of the strata lots shown on the strata plan, and

c. the persons who normally occupy the strata lots.

Under section 150(1) of the SPA, a strata corporation is required to take out liability insurance against liability for property damage and bodily injury. Under the Strata Property Regulation, the liability coverage must be at least $2 million.

A recent decision of the BC Supreme Court, Economical Mutual Insurance Company v. Aviva Insurance Company of Canada, raises concerns about the extent of the liability coverage that an owner, tenant or occupant may actually receive under a strata corporation's liability insurance policy, depending on the policy's wording. The outcome of this decision (which is likely to be appealed) is the possibility of increased and uninsured liabilities for strata corporations, council members and property managers.

The Accident

On March 30, 2008, Mr. Rattan, an owner at Strata Plan LMS 3927, hosted a party at his home within the condominium complex. One of the party guests, a Mr. Hiebert, was involved in a car accident with another vehicle, operated by a Ms. Sidhu, as he was leaving the party. The three passengers in Ms. Sidhu's vehicle commenced legal proceedings against Mr. Rattan and Mr. Hiebert, each claiming personal injury. The claim against Mr. Rattan alleges "social host liability" – a failure to supervise Mr. Hiebert's alcohol consumption at the party and a failure to take steps to prevent Mr. Hiebert from operating a motor vehicle upon leaving the party. [It should be noted that none of the allegations have yet been proven in court.]

The Issue

Economical Mutual is Mr. Rattan's homeowners insurer and there is no question that Mr. Rattan is an insured under that policy. Aviva Insurance is the strata corporation's liability. The question before the Court in this decision was whether Aviva Insurance was required to participate in defending Mr. Rattan against the claims being made by the passengers of the Sidhu vehicle.

The Policy Wording

The Aviva Insurance policy contains wording regarding liability coverage not uncommon in the typical strata corporation liability policy. In particular, on the issue of who the "insured" under the liability policy is, the policy says:

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner. (the "Individual Clause")

b. A partnership or joint venture, you are an Insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.

c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds but only with respect to their liability as stockholders. (the "Organization Clause")

The liability policy wording does not refer to "strata corporations" or "condominium corporations" at all.

The Argument

In applying for a ruling that Aviva Insurance should be required to participate in the defence of the claim against Mr. Rattan, Economical Mutual referred to section 155 of the SPA and argued

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that, regardless of what the policy says, the SPA requires that the strata corporation's policy must extend liability coverage to Mr. Rattan as a strata lot owner.

> In response, Aviva Insurance submitted that, while the SPA may impose an obligation on a strata corporation to take out liability coverage for the owners, the SPA cannot act to amend the wording of the policy actually taken out by the strata corporation. Aviva Insurance further argued that the strata corporation's policy only provided Mr. Rattan with liability coverage as follows:
>
> a. Under the Individual Clause, coverage related only to claims arising from "his business of which he was a sole owner"; and
>
> b. Under the Organization Clause, coverage related to liabilities arising from Mr. Rattan's position as a "stockholder" of the strata corporation.

Aviva Insurance's conclusion was that, since the social host claims did not arise from either a business in which Mr. Rattan was a sole owner or from his "stockholder" position, Mr. Rattan was not entitled to liability coverage under the strata corporation's insurance policy.

The Court accepted Aviva Insurance's argument and held that Mr. Rattan was not entitled to any coverage under the strata corporation policy. In reaching this conclusion, the Court made no reference to the 1992 decision of the BC Supreme Court in Ghag Enterprises Ltd. v. Strata Corporation K-68, in which the Court held that, by virtue of a similar provision in the Condominium Act, a strata lot tenant was entitled to the benefit of the strata corporation's liability policy when the tenant was sued with respect to an accident occurring on the limited common property.

The Potential Risk for Strata Corporations, Council Members and Property Managers

In ruling against coverage for Mr. Rattan under the strata corporation policy, the Court noted that it was the responsibility of the council members to comply with the SPA and a failure to do so may give rise to liability on their part. Although the Court did not make any final rulings regarding possible council liability to Mr. Rattan, the judge stated:

… If the coverage which the Strata Corporation obtained is inadequate, or not in compliance with a requirement imposed by the SPA, that is an issue between the Strata Corporation and Mr. Rattan as an owner and does not impose a duty to defend on Aviva.

The presiding judge then went on to comment:

In this case, the Strata Corporation enjoys coverage as an organization other than a partnership or joint venture. The organization's executive officers and directors, who are insureds, could likely claim coverage for damages resulting from their omission to fulfill their duties as officers or directors, one of which is to ensure that appropriate insurance is acquired and maintained by the Strata Corporation.

It should be noted that a typical directors' and officers' insurance policy (which provides some coverage to council members associated with mistakes they may make in their council capacity) will provide that there is no coverage for claims arising out of the failure to obtain any or adequate insurance coverage. This leaves strata council members, property managers (when assisting strata corporations to obtain insurance coverage) and strata corporations potentially exposed to claims by owners, tenants or occupants for alleged failures to obtain insurance coverage on their behalf. With claims for inadequate or no insurance coverage likely to be uninsured, the strata lot owners may ultimately be held personally liable to pay for the absence of insurance coverage.

What to do in Light of this Decision

Although this decision is likely to be appealed, and may be overturned, the appeal process can take many months. It is recommended that council members and property managers undertake the following steps in light of this decision:

a. Speak to the strata corporation's insurance broker to identify who is a named insured on the strata corporation's insurance policy and for what coverage. If owners, tenants and/or occupants are not being afforded liability insurance coverage or the coverage is limited (in a manner similar to that discussed here or in some other manner), the strata corporation needs to investigate the available options to ensure that these persons are insured in accordance with the requirements of the SPA.

b. Do not make representations to owners, tenants and occupants about the extent of the strata corporation's insurance coverage. While the SPA does require an annual report on insurance at the annual general meeting, council members and property managers must take care not to overstate the extent of coverage generally, and particularly with respect to coverage for owners, tenants, occupants and council members.

c. Communicate to owners, tenants and occupants the importance of obtaining personal insurance associated with their own strata lots, in part to protect them from any gaps in the liability coverage that the strata corporation does have.

This article is originally written by Allyson Baker of Clark, Wilson, LLP, has been reprinted with the permission of Clark,Wilson, LLP.

Nuisance Roles, Duties

Reasonable Expectations

In the life of a strata corporation, each participant often finds themselves playing different roles. One day, you are an owner minding your own business, the next you are on the strata council apparently minding everyone else's business. On another day, you are defending yourself against breach of a bylaw complaint; or passing a special levy with your neighbours that imposes thousands of dollars of costs upon all owners

In each role that an owner may play however, it is essential that in that role the legal duties and obligations are clear. In our experience, many problems arise in a strata corporation because:

1. Owners do not understand the expectations of the Strata Property Act on how they live and use their home in a strata complex; and

2. Owners do not differentiate well between their personal roles in the strata and the corporate roles and legal obligations that are imposed upon them when they take on a legal responsibility.

Let me give you an example:

Mr. A walks by a ground floor unit in his building and sees two owners Mr. and Mrs. B sitting in their living room smoking pot and playing AC/DC heavy rock music at an extremely high volume. Mr. A lives on the 10th floor of the building. Mr. and Mrs. B's unit is on the south side of the building Mr. A's is on the north side. Upon returning home, he cannot hear or smell anything of what was going on in Mr. and Mrs. B's unit. What should he do?

Setting aside the issue for the moment about what Vancouverites think about the legality of pot smoking; let's presume it is still actually illegal to smoke pot and it is certainly a breach of the bylaws of the strata to play AC/DC at a very high volume.

If he is, only an owner, Mr. A may wish to call the Vancouver Police Department regarding the pot smoking, but otherwise there is not any impact upon him personally.

If however, Mr. A is a member of the strata council; he has an obligation imposed upon him: Section 31 of the Strata Property Act reads

> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

Now, as councilor Mr. A must consider what actions if any, he must take in the "best interests of the strata corporation" that a reasonably prudent person would take in the same circumstance. Remember too that "strata corporation" is defined in the Act as the corporation created under the Act whose members are the strata lot owners. What should he do in the best interests of all the owners?

There may be a different answer to that question depending on the nuances of the circumstance; but obviously, acting under the duty imposed upon him by s.31, Mr. A cannot simply ignore the situation. Even if he chooses to do nothing, his duty is to consider the best interests of the owners and decide to do nothing because he has evaluated that as the best course of action for everyone. He does not need to be right – but he must be reasonable in that decision making process. Usually the courts will determine a range of actions that may be reasonable, and assume that as long as a councilor acted within the range, then no liability flows to the council member personally. Turning on a garden hose or calling 911 may be reasonable responses to finding a fire (depending on its size) but doing nothing is not a reasonable response to a fire.

In this scenario he might; speak to Mr. and Mrs. B directly about his concerns; meet with Mr. and Mrs. B's neighbours to inquire if they have any concerns; or perhaps report to council what he saw and have it noted in the minutes as to what action council chose take up receiving such a report. [In my estimation such a 'report' would be a complaint under s. 35 of the Act and the council would then be bound by s. 135 of the Act to begin a process to investigate the complaint.]

Things that bother neighbours are issues of "nuisance" in law. Councilors and owners alike must be aware of their rights and responsibilities for nuisances to be avoided. A nuisance is defined as anything that unreasonably disturbs the quiet enjoyment of land. The courts consider the effect of a defendant's behaviour on the plaintiff not the defendant's intentions. So in our scenario, if Mr. and Mrs. B are well meaning hippies who want peace and love for everyone, that does not concern a judge who may be hearing from Mrs. C who has to live above Mr. and Mrs. B and listen to their music and be made ill by their pot smoke.

The 'golden rule' is probably good for councilors and owners alike to remember when thinking about avoiding nuisance behaviours: "do unto others as you would have them do unto you".

In law if one person has a right that means a corresponding person has a duty. If I say I have a right to enjoy a clean beach at the seaside; I had better be willing to take up the duty to be tidy myself and perhaps clean up after others (or pay the City with my tax dollars for someone else to clean up) otherwise the assertion of my right becomes meaningless.

In a strata, each owner promises to abide by the law and the bylaws so that everyone can enjoy the building together. If we all ignore the bylaws, all owners lose the rights the bylaws create to protect our quiet enjoyment of our property.

Maintaining a clear delineation of what are personal rights and what are corporate responsibilities also can come out in other ways, particularly if you are on strata council.

The minutes of strata council meetings or from AGMs and SGMs are the most significant communications and record keeping tool the strata has to inform its owners and maintain a continuity over the decisions the council or owners make collectively. The minutes must

remain on the records of the strata for six years, and many potential purchasers will review at least two years of minutes before placing a binding offer to purchase a strata unit forward.

Therefore, it is key that the minutes carefully outline decisions made and money spent; complaints heard and remedies imposed; concerns raised by owners and responses from the strata. In doing all this, the best interests of the strata corporation are key. It is highly unlikely that less information is going to be good idea for owners to know about decisions that involve the spending of their money. Let me suggest that they may never be too much clarity given around money issues.

However, it may be quite the opposite if Mr. A did feel it his duty to 'report' Mr. and Mrs. B to council. In that instance, privacy should probably be the concern that is in the best interests of the owners. A minute of Mr. A's complaint might read, "A complaint was received regarding owners potentially involved in illegal or nuisance-like behaviour. Particulars of the complaint have been sent to the owners in question and council will delay any decision regarding the complaint until they have heard directly from the owners."

Compare that to: "Mr. A reports that the no-good hippies Mr. and Mrs. B (if in fact they are even married) in unit 101 have been breaking the criminal code (again) and annoying everyone within a five mile radius with their obnoxious music. Council warns the B's to cut it out or else!"

In a case called *McGowan v. Strata Plan NW1018 (Owners)*, 2002 BCSC 673 (CanLII) the Judge commented on minutes that were not helpful;

> [69] The fact that the petitioner's position is that of a distinct minority does not relieve the strata ownership or the Council from a careful and respectful consideration of the views that that minority has put forward. It does appear from some of the minutes of Council meetings that occasionally comments tending to personalize the debate with those of different views are allowed to be included. In my view, comments that can be taken as critical or derogatory of individuals within the organization tend to detract from a sense of professional management and only add to antagonisms. The minutes should be carefully vetted to ensure that no such comments are included.

At law, any comment that would lead a reasonable person to think less of a person about whom the comment is made (in spoken word or in print in the minutes) is defamatory. Do not say anything that is not necessary, true, and in the best interests of all owners. If you are the source of the defamatory comments, even if you are a council member, expect to be sued personally. Section 31 controls your role in corporate governance; if you step outside what is in the best interests of the owners, do not expect the *Strata Property Act* to protect you.

This article is written by Philip James Dougan, an Associate at Access Law Group. It is intended for information purposes and is should not be taken as the provision of legal advice.

Nuisance and Strata Corporations

Carrying on with the theme of private nuisance as that term relates to strata corporations, a private nuisance at common law occurs when there is an unreasonable interference with the use and enjoyment of land. The "Plaintiff', ie. the person or party who alleges there has been a private nuisance, must be the owner or tenant of the property being affected and must establish, on a balance of probabilities, that someone has conducted himself/herself in a such a way that they have unreasonably or excessively interfered with the Plaintiff's right to use and enjoy his or her property. Some examples of private nuisance include:

1. Sewer back –up;
2. Broken water pipes;
3. Fire/smoke;
4. Vibration/noise;
5. Smells;
6. Overhanging trees;
7. Subsidence of land; and
8. Obstruction to access to property.

Generally speaking, strata corporations are confronted with "nuisance" in the context of a complaint by an owner/occupant of one strata lot about another owner's use of his/her strata lot or common property such that the "use" is allegedly causing a nuisance or is unreasonably interfering with the right of another person to use and enjoy common property or another strata lot. I am often asked by strata councils for legal advice on what constitutes nuisance or is an unreasonable interference. Until recently I had never been asked by a strata council to give legal advice on whether or not the actions of a strata corporation constituted nuisance or an unreasonable interference with a person's right to use and enjoy his or her property.

Several months ago a strata council came to me for legal advice after having been accused of committing a nuisance which allegedly caused damage to one of its neighbours which happened to be a restaurant. The strata corporation in question is located in Yaletown and needed a new and very expensive roof. However, it was not practical to access the roof via the building's elevator for hauling up supplies, disposing of old roofing material and for worker access nor was it practical, because of the location of the building, to put a crane on strata corporation property until the roofing project was complete. The solution was to install a four-storey stair tower, complete with hoarding, so that workers could access the roof as they pleased without interfering with the day to day affairs of the owners and occupants in the building. When it came time to start hauling material and supplies up to the roof and remove old building material, the strata corporation's roofing contractor had a material lift installed adjacent to the stair tower. The stair tower and material lift were placed adjacent to the exterior of the building and within the footprint of the filed strata plan. While the structure did not block pedestrian sidewalk" access to the businesses within the immediate vicinity of the strata corporation's building, the restaurant owner

complained that the structure was a nuisance and that the structure was having a negative financial impact on the restaurant's operations. The restaurant alleged that structure had adversely and negatively affected the quiet enjoyment of its property and further, the structure discouraged its patrons from accessing its premises which resulted in loss of business.

The law suit did not end up proceeding to trial but maybe the next one will. When you look at the number of condominium developments in "mixed use" communities in the Lower Mainland, it will only be a matter of time before one of these developments is confronted with building envelope remediation or perhaps a major roof replacement project. This will undoubtedly require extensive scaffolding and/or equipment on site and could very well impact on traffic and pedestrian access to businesses in the vicinity. Is the strata corporation's obligation to repair and maintain common property a "defence" to a claim by a neighboring business that the construction structures and construction activities associated with the repair constitute a nuisance and have had a negative financial impact on the business? While I am not sure that there will ever be a fool-proof way of avoiding a "nuisance" law suit similar to the one I described, strata corporations should ensure that any repair/remediation work being performed is carried out expeditiously in an effort to minimize any negative impact on businesses and adjoining land owners. Should there still be a complaint that the activities constitute a "nuisance", the complaints should be taken seriously and dealt with as soon as possible in order to minimize any financial/legal ramifications down the road.

This article is written by Jamie A. Bleay, a partner at Access Law Group. It is intended for information purposes and is should not be taken as the provision of legal advice.

Carrying Out Repairs

Every strata corporation will, at some point in time, be faced with carrying out a significant repair project. As with many things in life, there may well be more than one way to undertake the repairs in question. That in turn may lead to disagreements amongst the owners as to which method should be chosen. Even when the majority of the owners have selected a method of repair, there may still be those who would rather see a different method used. Those who disagree with the approach chosen by the strata corporation may even go so far as to launch a court action challenging that choice. This was the case in the recent decision of *Weir v. Owners, Strata Plan NW17* 2010 BCSC 784 and in which the writer acted as legal counsel for the strata corporation.

Before reviewing the court's decision in *Weir* it is perhaps best to review the underlying obligation on the part of the strata corporation to carry out repairs and maintenance as that sets the basis for the decision in *Weir*.

Section 72(1) of the Strata Property Act (the "Act") makes the strata corporation responsible for the repair and maintenance of the common property (which includes limited common property). Section 72(2) allows the strata corporation, by way of a bylaw, to make individual owners responsible for the repair and maintenance of limited common property. In turn, each owner is responsible for repairs and maintenance to their strata lot (except those parts for which the strata corporation is responsible pursuant to a bylaw – which is typically the structural portions or the building and doors and windows). (It should be noted that the duty to repair common property is the same whether the repairs arise by way design defect or general deterioration - see *Strata Plan 1229 v. Trivantor Investments* (1995)(BCSC)).

Establishing who is responsible for repairing and maintaining something is one thing, but what does that actually mean? What does the duty to "repair" actually look like? This issue was considered in the case of *Taychuk v. Strata Plan LMS744* 2002 BCSC 1638. In *Taychuk*, the owners of the strata lot began experienced ongoing problems with the hot water supplied to their bathtub. The water was always a yellow-brown colour. (No health risk appeared to have existed). The problems began in 1994. Various tests and investigations were done and some attempts at fixing the problem were made; all to no avail. In 1998 there was a proposal by the strata corporation to install an "under-fixture water filtration system". The strata corporation would pay for the installation with the owners paying for the filters as time went on. The owners rejected this proposal and no other methods to solve the problem were pursued.

The question before the court was whether or not the strata corporation had in the past and was currently, living up to its duty to repair and maintain the common property (the water supply system clearing falling within the definition of common property). In order to answer this question, the court had to determine what was meant by "repair". For that it turned to the definition cited in a previous case, *Sterloff v. Strata Corp. of Strata Plan No. VR2613* (1994)(BCSC) That definition read:

> "It is true that the primary meaning of the word "repair" is to restore to sound condition that which has previously been sound, but the word is also properly used in a sense of to make good. Moreover, the word is commonly used to describe the operation of making an article good or sound, irrespective of whether the article has been good or sound before."

The court also referred to the case of Wright v. Strata Plan No. 205 (1996), 20 BCLR (3d) 343 (BCSC) aff'd 103 BCAC 249 (BCCA) which held that the strata corporation had to act reasonably in its attempts to undertake the repairs but were not guarantors of a perfect outcome. As the court in Wright put it, the strata corporation's duty "is to do all that can reasonably be done in the way of carrying out their statutory duty; and therein lies the test to be applied to their actions."

Applying the decision in Wright to the facts in Taychuck, the court in the latter case found that the strata corporation, for the most part, acted reasonably. The only instance where it didn't was where it refused to install the "under-fixture water filtration system" unless the owners paid for the filters. Here the court found there was a viable solution which the strata corporation should have undertaken, even

if that meant paying for the filters. The strata corporation was also found to be in breech of its duty when it chose to do nothing about the problem. As long as reasonable steps as flushing the system were taken, the strata corporation was carrying out its duty.

In Weir the issue surrounded how to go about repairs that were required to the perimeter drainage system surrounding a townhouse block. The strata corporation had received a detailed proposal from a contractor and had approved a levy to carry out repairs based on that proposal. The petitioners (being the owners of the strata lots in the block in question) didn't agree with that approach and wanted engineers to assess the problem and propose a fix. The strata corporation resisted that approach on the basis that the contractor's suggested approach was likely to fix the problem with much less cost than an engineered solution. The issue before the court was whether the strata corporation was acting reasonably in relying on the recommendations of a tradesman and not bringing in an engineer to design a fix. The court held that the strata corporation was acting reasonably. In reaching that conclusion it said:

> [28] In resolving problems of this nature, there can be "good, better or best" solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted.
>
> [29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: Sterloff v. Strata Corp. of Strata Plan No. VR 2613, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and Browne.
>
> [31] It may even prove to be the case that the approach of the petitioner is the wiser and preferable course of action. Again, that does not render the approach of the respondent unreasonable.
>
> [32] Disagreements between strata councils and some owners are not infrequent. However, courts should be cautious before inserting itself into the process, particularly where, as here, the issue is the manner in which necessary repairs are to be effected.

The important principle recognized by the court in Weir was one of deference to the strata council, particularly where the question is one of how to meet an obligation under the Act. It is a decision which clearly recognizes the majority rule aspect of strata corporations and strengthens the ability of strata councils to govern the affairs of the strata corporation for the benefit of the whole.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is a member of CCI Vancouver and practices, writes and lectures in the area of strata property law. He is a partner with the law firm Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@cleveland-doan.com.

How to Pay for Retrofits

They say that death and taxes are inevitable. Another certainty is that all strata properties will eventually require major repairs to, or replacement of, their common elements. How does the strata corporation, whose constituency is constantly changing as people buy and sell units, prepare for this expense? What are the options when there is not enough money available?

The Limits and Imperfections of the Contingency Reserve Fund

The people responsible for the legislation that is the foundation for condominium as a mode of real estate ownership in Canada have understood that this was an issue from the beginning, although each province deals with the issue in its own way. A common thread, however, is that, in no jurisdiction has the issue been taken seriously enough.

In British Columbia, the law requires strata corporations to maintain a Contingency Reserve Fund ("CRF") for expenses that usually occur less than once a year, and guidelines are provided for how much should be contributed to the CRF in any given year. But otherwise the issue is left up to the unit-owners. They decide the amount of the annual contribution to the CRF, if any, and, except in the case of an emergency, the unit-owners must approve expenditures out by a three-quarters majority vote at the Annual General Meeting or a Special General Meeting called for the purpose. The unit-owners may obtain professional assistance in this exercise, but they are not required to do so. This is somewhat surprising, given that most laypeople would not be qualified, without professional assistance, to assess the physical condition of a building of any material proportion, and to formulate a long-term plan for maintenance of the major components. By comparison, at least one other province (i.e., Ontario), obtaining this type of assistance in the form of a Reserve Fund Study has become mandatory, as is periodically updating it. Although, even there, the legislation does not say what happens if the corporation fails to comply, and in fact many do by either not obtaining or updating the study as required, or by not following the recommendations therein.

Many strata corporations have encountered the situation where there is simply not enough money saved in the CRF to pay for a required repair, with the shortfall, at times, being quite substantial. This most often occurs because the fiscal planning process has failed or been ignored altogether, which is perhaps to be expected given the lack of legislated standards and the legislative teeth to enforce them. Apart from the fact that such planning is not an exact science, it is extremely susceptible to political influence from unit-owners who wish to keep the monthly contributions as low as possible. A shortfall can also occur because the expense relates to a latent defect in the construction of the building that was unknown and could not have been anticipated until it declared itself in some way. Sometimes there may be enough money in the CRF, but the use of all or a substantial portion of it for the particular project would leave the fund short for future needs. In all of these situations, corporations have had to consider how to pay for the necessary work.

The Typical Thought Process

Strata corporations encountering these types of situations invariably go through the same thought process. The first inclination is to delay the work until sufficient funds to pay for it can be accumulated. If this is an option, fine. But, more often than not, it is the type of thinking that got the corporation into the predicament in the first place. Buildings tend to do better with constant maintenance to the infrastructure. Postpone work for too long and problems tend to

become deeper and the associated costs of repair larger. Along with that, it becomes much more difficult to project fiscal needs since, in extreme cases, the corporation will be operating in emergency mode.

Closely allied to delaying the project is staging it out. In other words, do part of the work now, part later, spreading it over, say, three years. Again, if this is an option, fine. The problem, however, is that, if you are asking the contractor to mobilize three times, as opposed to once, the cost will invariably go up. In addition, the unit-owners may have to confront the idea of living in a construction zone for three years. Generally speaking, it is cheaper, and everyone is happier, when the contractor is able to get in and get out, completing the work as quickly and efficiently as possible.

For the purposes of the current discussion, then, we will assume that any further postponement, or staging, of the work is simply not an option. Otherwise, we assume away the problem.

Another option, again part of virtually every corporation's thought process when dealing with this sort of issue, is to impose what is referred to in the British Columbia legislation as a "special levy". Think of it as sending a bill to each and every unit-owner for his or her proportionate share of the cost. While the legislation contemplates that corporations may have to impose special levies from time to time, the process of doing so is cumbersome and fraught with political uncertainty because it requires the corporation to obtain the approval of the unit-owners by a significant majority. Sometimes the blow can be softened by spreading the requirement to pay over several months, thereby enabling the corporation to achieve a consensus.

While certainly no way to win friends and influence people, a special levy constitutes a quick and efficient way for the corporation and the unit-owners to address a large unplanned cost and get it behind them. In many cases, it will be determined to be the best option, and the requisite vote will pass. But consider this: What if a large number of the unit-owners who opposed the special levy did so simply because they could not afford it. So, rather than default, they put their units up for sale. Or, alternatively, they default in payment, and the corporation is forced to lien the subject units and, again, they end up for sale. The law of supply and demand dictates that, if too many units are for sale at one time, the price drops. This, in turn, hurts all of the unit-owners, including those who can afford to honour their share of the special levy. Generally, therefore, it is in everyone's best interests for the corporation to seek out a solution that accommodates the largest number of unit-owners. It is at this point that, in many cases, consideration will be given to what is usually, and properly, the last resort -- borrowing.

Borrowing

There is nothing in the Strata Act that prohibits borrowing by a strata corporation, and indeed, there are many corporations that have had to resort to this option in order to deal with a large unplanned expense. Notwithstanding that strata corporations must, because of their assessment powers, be regarded generally as good credits, the major banks in Canada, with limited exceptions, have not really warmed to the idea of lending to them. Where banks have shown some willingness to lend, conditions are often imposed which a strata corporation would have difficulty meeting. There are logical reasons for this, but an explanation of them is beyond the scope of the article. Suffice it to say, that lending to strata corporations in Canada has thus far been dominated by niche finance companies that have created specific products for this purpose.

In order to borrow, the corporation must have passed an appropriate borrowing by-law, approved by a resolution passed by a three-quarter majority vote of a valid quorum at an Annual General Meeting, or at a Special General Meeting call for the purpose. If such a by-law is not already in place, the corporation's counsel can advise on the procedure for implementing one. After that, if you are dealing with a lender experienced in the area, the process is quite simple. The lender is likely to ask a few general questions, such as how much is required; for what is the money being used; how many units comprise the property; what is the average value of a unit; and how quickly does the corporation wish to repay the loan. Generally, however, credit approval will come relatively quickly and easily, with the loan being refused in only rare situations.

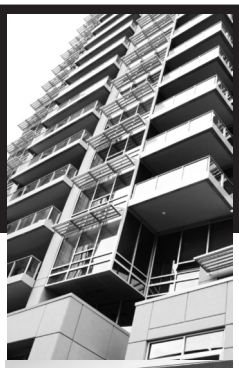
At the time of making the loan request, the corporation will have to choose how quickly it wishes to repay the loan, otherwise known as the amortization period. Repayment over five years will obviously require much larger monthly payments than repayment over ten years or more, but of course in the latter case the payments will go on much longer. In most situations, the corporation will opt for an amortization period that results in a monthly payment that the widest group of unit-owners can afford, but without dragging the loan obligation on longer than is reasonably necessary. It is possible, albeit not necessarily advisable or encouraged, to have two or more loans going, each amortizing over different terms. Unit-owners can then elect to participate in the loan that best suits their level of monthly affordability.

The documentation for a loan to a strata corporation will be comprised of little more than a Loan Agreement and what is known as a General Security Agreement. The latter grants a charge over the corporation's assets in support of repayment of the loan. Since most strata corporations do not have any assets, what is really being charged is the corporation's cash-flow, represented by the monthly contributions of the unit-owners. This makes sense because, in the end, what the lender is relying on primarily is the power and the obligation of the corporation to require each unit-owner to pay his or her proportionate share of all common expenses, including the loan payment, and to enforce payment, using its super-priority lien rights, in the event of any unit-owner defaults.

The act of borrowing by a strata corporation is an act of the corporation, not the unit-owners. Thus, the documents will be executed by those who are empowered from time to time to execute documents on behalf of the corporation, and the lender will invariably require a written opinion from the corporation's counsel that everything has been properly authorized and approved. The unit-owners are not required to sign the documents or guarantee the loan individually, and no mortgage is registered against anyone's unit. Just as in the case of all other common expenses, however, each unit-owner will, through the corporation, be responsible for his or her proportionate share of the loan obligation.

Borrowing should never be regarded as a substitute for prudent fiscal planning. You do not say, "We don't need to save for our roof replacement, we'll just borrow the money when we need it". It can, however, be a solution when there is no other workable answer to a large unplanned expenditure.

David M. Morrison *is a non-practicing lawyer and President of* ***Morrison Financial Services Limited****, a company which, through its* ***CondoCorp Term Financing™*** *product, has for over seventeen years been providing financing to condominium corporations to assist them in meeting unplanned major expenditures. The content of this article is intended as general business and legal advice only. For specific situations, readers are encouraged to consult with their own counsel.*



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Vancouver, B.C. V6E 4E6
or to the chapter’s e-mail address at: contact@ccivancouver.com

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Phone: ( ) _____ Fax: ( ) _____ Email: _____

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City: _____ Province: _____ Postal Code: _____

Phone: ( ) _____ Fax: ( ) _____ Email: _____

President: _____
Name *Address/Suite*

Vice President: _____
Name *Address/Suite*

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Name *Address/Suite*

Please forward all correspondence to: ❒ Management Company address ❒ Strata Corporation address

Fee: $ 110.00

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Name: _____

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City: _____ Province: _____ Postal Code: _____

Phone: ( ) _____ Fax: ( ) _____ Email: _____

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