CCI Vancouver Chapter
Condo News

President's Message

President's Message – September, 2013

The Fall is generally a very busy time for CCI Vancouver and our board members. We are putting the finishing touches on the educational seminars and lunch and learn sessions scheduled for the fall and winter. First up will be a lunch and learn on Wednesday, October 16 with storage lockers and parking stalls being the topic. As of January 1, 2014 all Form B's prepared for a strata corporation are required to disclose the allocation of storage lockers and parking stalls to strata lot owners. This will be an important seminar to attend to understand how to identify and record storage locker and parking stall allocations as required by the Strata Property Act.

Next up will be a seminar on October 26 which will feature Kevin Grasty of Hallsall Engineering who will update us on how the introduction of depreciation reports in B.C. is being received in the Lower Mainland. The seminar will be combined with our annual general meeting which everyone is invited to attend. There will also be a lunch and learn on November 16, 2013 on the topic of asbestos and asbestos removal in condominiums. Come and find out what you need to know if you have asbestos in your building and the safe and legal way to deal with asbestos removal. The lunch and learn and seminar flyer announcement for these three events can be found in this newsletter along with dates for future events in 2014. Please sign up for one, two or all three events. There are also sponsorship opportunities so if you would like to be a sponsor please complete the form and return it to CCI Vancouver.

We reported earlier this year that CCI Vancouver received an award for our newsletter. We are very proud of our newsletter and were honoured to be recognized. However we think that we have a long way to go in the circualtion department and want to encourage everyone who receives a copy of our newsletter to "pass it forward". If you are a strata manager and have finished reading this newsletter please feel free to pass it along to a fellow manager so that it circulates around your office. If you are a strata council member please encourage your fellow council members to read it and if possible, put it into your strata library. If you are one of our sponsor members and have finished reading our newsletter we encourage you to pass it along to any of your strata clients or self-managed strata corporations who you think might benefit from the contents. While we would be tickled pink to see our circulation increase each and every edition what we would ask at this time it to simply help CCI Vancouver

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pass along the information contained in our newsletter and help us not only spread the word about CCI Vancouver but also more importantly help us with our goal to educate as many strata counil members and owners as possible.

We also reported that we had held a strategic planning workshop to look at the delivery of our educational programs and who our target market for these programs is. We have taken the next step of providing our condo 101 materials to two educational institutions and will shortly be sending it to a third institution with an offer to provide volunteers to teach our condo 101 course to strata council members, owners and any other individuals who wish to take part. Stay tuned for more inforamtion as it comes available.

Jamie Bleay – President of CCI Vancouver

CASE LAW UPDATE

Susan Linda Christensen v. The Owners, Strata Plan KAS 468, August2, 2013 B.C. Supreme Court

In this case Ms. Christensen sought a number of orders in connection with special levies approved by the strata corporation. The orders sought included setting aside certain special levies as being contrary to the Strata Property Act (the "Act") and that flowing from her allegations that she not be charged interest, penalties and legal fees in connection with steps taken by the strata corporation to recover the special levies from her. She also sought an accounting in connection with the amounts charged against her alleging that the charges were not imposed in accordance with the Act.

Briefly the facts related to special levies in the approximate amount of five million dollars to fund building remediation work. Among the issues for the Judge to decide was whether Ms. Christensen had standing to bring the petition as the special levies that were being challenged had been voted on and passed prior to July 30, 2010 which was the date she became an owner.

By way of background the strata corporation is a resort condominium development in West Kelowna. After considering options to either redevelop the property or remediate, a decision was made to undertake a building remediation and upgrade.

On October 13, 2007 the strata corporation approved a special levy in the approximate amount of $4 million and based on its bylaws, which identified three different types of strata lots in the complex for the purpose of allocating common expenses, the ¾ vote resolution provided for "costs to be allocated by unit entitlement, unit type, and limited common property allocation in a manner consistent with the current practice of the resort." There was some opposition to the increase in the special levy which had initially been pegged to be approximately $2 million dollars. On August 1, 2008 the strata corporation held a special general meeting and increased the cost for the remediation and retrofit to $4.292 million "with costs to be allocated by unit entitlement, unit type, and limited common property allocation in a manner consistent with the current practice of the resort."

Owners paid their special levy allocations, as well as two additional "cash calls" on the basis of the practice utilized by the strata corporation over a period of time. There was some uncertainty in the evidence as to the total amount of the remediation and renovation costs but the Judge assumed that the total amount approved by special levy and cash calls was $4,838,295.

In addressing the issues before him the Judge considered the relevant provisions of the Strata Property Act, including section 99, section 100 and section 108. He also looked at the bylaws in the Condominium Act (repealed July 2000) and the manner in which costs could be allocated under that Act compared to the allocation of costs provided for under the Strata Property Act. The Judge then considered sections 164 and 165 of the Act for the purpose of identifying which of the sections, if any, applied to support the claims of the petitioner.

The Judge first determined that Ms. Christensen was not an owner for the purpose of bringing on an application pursuant to sections 164 or 165 of the Strata Property Act. He then considered whether she was entitled to an order pursuant to s. 164 to remedy a significantly unfair action or decision of the strata corporation in relation to her and considered the recent two-part test for "significant unfairness" enunciated in Dollan v. The Owners, Strata Plan BCS 1589, 2012 BCCA 44 which was:

Welcome New Members

Gerry Fanaken

Janice Pynn

Sean Michaels

Kevin Thom

Sutton Select Property Management

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?

2. Does the evidence establish that the reasonable expectation of the [owner] was violated by action that was significantly unfair?

Based on the totality of the evidence, including the discussions and debates over the method of allocation of the expenses and the passage of the resolutions based on the approval of the ownership the judge stated that "When that test is applied to the case at bar, it can be seen why Ms. Christensen initially did not base her case on s. 164. She cannot establish that she, or more properly, Mr. Scott, had a reasonable expectation that was contrary to the resolution passed by the owners. Further, she cannot say that her expectations were violated by any action that was significantly unfair." He went on to say that when the resolutions were passed in favour of the remediation and repair budget this signified the acceptance of this approach which was not objected to at the time by any owner.

After considering the application of section 165 of the Act the Judge found that Ms. Christensen's position that the allocation and calculation of the special levies contravened the Act fit within the language of section 165(b) in order to remedy a breach of the statute by way of a mandatory injunction. However, given that the alleged contravention of the Act occurred several years ago and the monies levied and raised had been expended the Judge concluded that there was no evidence of a current contravention of the Act that required the imposition of a mandatory injunction.

The Judge then looked at the prospect of ordering the strata corporation to remedy a past contravention and stated first that "It would be inappropriate and unfair to make an order at this time because there were steps that the respondent could have taken when the resolutions in question were passed had Ms. Christensen or, more properly, her predecessor, raised the complaint that is now advanced. Under s. 108(2), the strata corporation could have sought to establish a fair allocation of expenses using the formula it had applied for years by way of passage of a unanimous resolution. If Mr. Scott had objected, the respondent could have applied to court for approval of the proposed resolution. By waiting to raise this issue for many years, the owner of Lot 45 has prevented the respondent from taking advantage of provisions in the Act directed at precisely the kind of issue which has arisen in this case."

Considering next the doctrine of estoppel by contravention the Judge relied on a quote from Spencer Bower and Turner, Estoppel by Representation, 3rd ed. (London: Butterworths, 1977) as quoted at para. 72 in Norenger:

> An estoppel by convention] is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of fact so assumed.

The Judge concluded that the common assumption that was acted upon for the purpose of allocating the special levies, although a mistaken assumption, nonetheless resulted in monies being paid and expended for the intended purpose and as such the Judge found that "it would be unconscionable and unjust to permit Ms. Christensen to resile from the common assumption" and dismissed the petition.

The Judge subsequently directed the strata corporation to provide a full accounting of monies assessed, including special levies and cash calls to Ms. Christensen based on his earlier statement that he was not "satisfied with the accounting presented to me."

Editor's note: This case is likely an example of how many strata corporations with types of strata lots have approached the allocation of special levies. It is important to know and appreciate the limitations imposed by the Act on types of strata lots vis-à-vis common expenses and special levies as doing so will greatly help to avoid the problem encountered by KAS 468.

ADMINISTRATORS IN STRATA CORPORATIONS

By Gerry Fanaken

Let's be clear at the outset of this article: having an administrator appointed by the Supreme Court of British Columbia to take over from a strata council is expensive. Very expensive. During the past two decades I have been appointed as an administrator about a dozen times. At the end of each appointment I come away just shaking my head at the thought of how much it cost the owners. I will explain further below.

There are a few general misconceptions about administrators. First, they do not provide mediation services, nor do they act as arbitrators. Second, they do not replace "The Owners"; they only replace the strata council. Third, an appointment does not necessarily mean that all the powers and duties of the council are transferred from the existing strata council to the administrator. It is quite possible that only some of the functions are given to the administrator and the elected strata council continues its responsibilities for the remaining functions. Fourth, just because there is disagreement within the strata corporation over various issues does not mean that an administrator is required. Disagreement is part of the democratic governing process and that does not automatically trigger the need for an administrator. A fifth misconception is that an administrator replaces the management company that is under contract to the strata corporation. Not so: the existing management contract simply continues and the company and the property manager take instructions from the administrator instead of the strata council.

If there is disagreement (it can be within council, between council and the owners, or just among the owners and not necessarily the council) and the disagreement leads to what is generally referred to as "governing dysfunctionality" that scenario opens the door for the appointment of an administrator. A single owner can apply to the court for an administrator. There is no threshold to meet such as a 20% vote (the level for owners to call for an SGM) or a 75% vote (the level to approve a ¾ resolution). The Strata Property Act simply provides at Section 174 that "an owner, tenant, mortgagee or other person having an interest in a strata lot" may apply to the court for the appointment of an administrator. The court will then decide, upon hearing the facts and evidence, whether or not an administrator should be appointed. The court relies on the Lum test (Lum v. Strata Plan VR-514) and, if all the conditions that are cited in Lum are met, the court can then make an appointment if the judge so decides. The judge will, at this time, set the term of the administrator. Commonly it is one year; however, there is no restriction and a term could be set for six months, or 18 months or whatever length of time the judge believes to be a reasonable term to get things back on track. Note that, at the end of a term, the term can be extended and this frequently occurs as the disputing parties continue to dispute and there is little hope for a return to self-governance. (Did I mention that having an administrator is very expensive?) The term can actually be extended also by consent of the owners: in other words, it is not necessary to return to court to have the matter heard and a decision rendered by the judge. Although it is uncommon to see the owners agree to an extension, it can and does happen occasionally. More often than not, however, an extension is decided by the court.

Typically the remuneration for the administrator is set by the court but only in very broad terms. There is no way at the outset (when an application is made) to know what budget allowance is necessary to fund the administrator. Applicants for the appointment usually simply cite an hourly rate for their services. Sometimes (not often) the court will, at the outset, set a fixed budget and order that the funds be raised by a special levy on the owners. More typically, however, the administrator will convene a Special General Meeting very soon after the appointment and raise a special levy based on some broad estimate of what it will cost to pay for his or her services. An administrator will always retain legal counsel; therefore, the cost of such legal services is included in the special levy calculation. Owners always support the initial requests for a levy as they see the administrator as a long-awaited saviour who will see it their way and solve the problem. Later on, once the administrator has made some decisions which no one likes, it is much more difficult to pass a special levy for further funding. On these occasions then, if a levy fails to pass (a ¾ vote of the owners at an SGM or AGM) the administrator applies to the court (using legal counsel) to have the court sanction and order the levy. This process is, of course, expensive and simply adds further and unnecessary cost to the process.

Payment of the special levy for administrator and associated legal counsel must be paid by each owner (in proportion to unit entitlement). If any owner is not involved in the dispute, there is no relief; he or she must still contribute to the cost. Under the Strata Property Act, when litigation is afoot there is a provision (Section 167) that an owner who is being sued by the strata corporation or is suing the strata corporation does not have to contribute to the cost. This principle does not apply in respect of the appointment of an administrator. Every owner pays.

Often, owners in a strata corporation that has an appointed administrator hold the belief that the administrator will either attempt to mediate the dispute(s) or provide arbitration services. Neither of these functions fall to an administrator although a good administrator will make his or her best efforts to get the owners to consider compromise over their disagreements and try to work together. In fact, an administrator is simply a replacement for the strata council. As such the administrator can only do what the Act permits the strata council to do. An administrator cannot take away the rights of general ownership. So, if a ¾ vote resolution is required to amend a bylaw, cancel a management company contract, use money from the CRF and so on, the administrator must call a Special General Meeting and pass a ¾ vote in the same fashion as would be done under the normal strata council protocols and procedures. Again, if such a vote fails and the administrator feels it is in the best interest of the strata corporation that the proposed resolution should be implemented, he or she then returns to court (via legal counsel) to have the court decide on the matter. (Note the continuing legal costs for such rejections.)

Although the vast majority of appointments are ordered to entirely replace an elected strata council, there are times when a court will conclude that there is only one narrow issue that has created a dysfunctional state, rather than a total collapse of the governing structure. In such cases, the judge will then appoint an administrator for only that one narrow matter. A good example is "leaky condo". A strata corporation may be functioning in a perfectly normal fashion in all its administrative and governing responsibilities but, in respect of a necessary repair program for the building envelope ("leaky condo") or some similar issue, the owners just cannot come to any reasonable agreement as to what ought to be done. (Remember Section 72 of the Act requires a strata corporation to repair and maintain, but there is no prescription as to what constitutes a minimum standard: that is left up to the owners.) Although there are other legal remedies available to force compliance with Section 72, it is not unusual to see the appointment of an administrator to take responsibility for the matter. Ironically, however, despite the best efforts and recommendations of an administrator in such circumstances, the owners generally reject the recommendations and the administrator then has to return to court to seek an order.

As noted at the outset of this article, administrator appointments are staggeringly expensive.

CHILDREN PLAYING – THE SOUND OF JOY OR NUISANCE EH?

Even if I do say so myself, I consider myself an expert on the sounds children make – I have eight children of my own.

Increasingly, and particularly in Greater Vancouver, families with children have only one option for a home: a suite or townhouse in a strata corporation. Single family homes, ideal for families with children, are financially out of reach for most Vancouverites.

So, if children are now required to live in smaller living areas that are strata units, and 'need' to play in common property areas, instead of in their own backyards, what will happen?

If you have children, you are glad to have a place for them to play and run and 'let off steam.' If you don't have children – they can be just plain noisy. Both families with, and without children, in a strata, must live within the bylaws of the strata.

Virtually every strata in BC incorporates standard bylaw 3 into their own bylaws.

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

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

(b) causes unreasonable noise,

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

(d) is illegal, or

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

(2) An owner, tenant, occupant or visitor must not cause damage, other than reasonable wear and tear, to the common property, common assets or those parts of a strata lot which the strata corporation must repair and maintain under these bylaws or insure under section 149 of the Act.

(3) An owner, tenant, occupant or visitor must ensure that all animals are leashed or otherwise secured when on the common property or on land that is a common asset.

(4) An owner, tenant or occupant must not keep any pets on a strata lot other than one or more of the following:

(a) a reasonable number of fish or other small aquarium animals;

(b) a reasonable number of small caged mammals;

(c) up to 2 caged birds;

(d) one dog or one cat.

As far as excessive noise is concerned, the law considers it an actionable nuisance if the noise "significantly impacts the quiet enjoyment of property."

Nuisance law is a very interesting area of law in that to 'test' whether a nuisance claim is founded, a judge need only consider the impact of the nuisance on the plaintiff, not the intention of the dependant.

By way of opposite example, if you are charged with a crime, the crown must show that you both committed the crime and intended to commit the crime.

In nuisance, what a noise maker/nuisance maker intends is irrelevant. So, in nuisance law, activities that are completely legal and performed without malice may still be found to be a nuisance at law.

If a nuisance is determined by a judge, the usual remedy is an injunction; that is a court order that says "the defendant must stop making the noise and not do it anymore."

When nuisance law becomes more nuanced however, is when there is a question as to whether the interference with quiet enjoyment of property is 'significant' or not. If this is the question before a judge, and more often than not, it is, the judge then must not only consider the impact of the alleged nuisance on the plaintiff's quiet enjoyment of property but must also consider the "utility" of the defendant's activity. How important to the defendant, is the activity that is alleged to be a nuisance to the neighbours?

When the nuisance is the sound of children playing, this is clearly not

an easy balance to strike.

If a judge simply says there is no "utility" to children playing, and it is just unnecessary noise and imposes an injunction, that decision creates a number of problems.

1. It may be said to de-value children's play and perhaps children themselves.

2. The injunction would issue against the parents of the children causing the noise, creating a difficulty of enforcement both for the parents concerned and for the court if the injunction is breached. Whose fault is it if an eight year old forgets the rule about walking down the corridors quietly and he screams and sings all the way to his unit?

3. As a policy, it sets a dangerous precedent, suggesting children are to be "seen and not heard" in all strata buildings.

Conversely, if a judge simply says, "They're just kids playing; leave them alone," does that immediately devalue the strata as a 'ghetto' for hundreds of screaming kids? Clearly, neither decision is ideal; and a court must find a middle ground. Stratas must be places where as many people as possible can be allowed to be potential buyers; that way, prices can be maintained and strata owners' investments protected.

In Popoff v. Krafczyk, 1990 CanLII 589 (BC SC) the court made some very helpful general observations about nuisance law and about noise as a nuisance in particular:

> In Hourston v. Brown-Holder Biscuits Limited (1936) 10 MPR
>
> 54, Mr. Justice Harrison of the Supreme Court of New Brunswick, at p. 547, quoted from the 8th edition of Salmond on Torts (p. 239) as follows:
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> > The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives.

As a starting point, then, the nature of the locality is of significance.

> The most interesting evidence is that of Dr. Norman Thyer who, although having a very interesting background in mathematical physics, meteorology and surveying engineering, is not trained in audiology. However, his report was well prepared, persuasive and dispassionate. He made a number of sound recordings of birds. In short, he found that bird squawks and traffic noises, while varying in intensity, were in much the same range. He also observed the frequency of vehicles passing the Popoff residence

to be two vehicles per minute. He offered some observations which I believe have application to the situation before me:

> 1. Annoyance is greater for sounds of a higher frequency (and thus higher pitch) than for those of lower frequency.
>
> 2. Annoyance increases with increasing intensity level of a sound.
>
> 3. The noise of screeching parrots is, on the whole, of a much higher frequency than that of traffic on the highway.
>
> 4. Noise is less annoying if one has control over it.
>
> 5. Noise which is abrupt, sudden or unexpected has a startling effect and is more insidious than noise which builds up gradually. Consequently, the screech of a parrot is more annoying than the rumble of a passing car.
>
> 6. Vehicle traffic is a noise that one normally expects in a house near a highway in Canada whereas the calls of parrots are an unexpected intrusion.
>
> 7. The effect of noise is psychological as much as physical.
>
> 8. In general ... the annoyance produced by a given noise is very subjective and difficult to relate to physical measurements.

These observations made by Dr. Thyer point to the very reason why courts have applied an objective, rather than a subjective, test in determining whether the discomfort or inconvenience being experienced by an individual constitutes a legal nuisance.

In *Royal Anne Hotel Co. Ltd. v. Ashcroft*, [1979] 2 W.W.R. 462, Mr. Justice McIntyre, in speaking for the British Columbia Court of Appeal, stated at p. 467:

> What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. it has been said (see McLaren, 'Nuisance in Canada') that Canadian judges have adopted the words of Knight Bruce V.C. in Walter v. Selfe (1851), 4 De G. & Sm. 315, 64 E.R. 849 at 852, affirmed on other grounds 19 L.T.O.S. 308 (L.C.) to the effect that action-ability will result from an interference with:
>
> > ... the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober ... notions.

These words were approved by Middleton J.A. in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at 535 36.

In reaching a conclusion, the court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances ....

Also there was some clear direction given as to how a court will adjudicate nuisance claims in Northern Light Arabians v Sapergia, 2011 SKPC 151 (CanLII):

> [13] The law of nuisance does not provide a remedy for trifling or small inconveniences, but only for those which sensibly diminish the comfort, enjoyment or value of the property affected. Legal intervention is warranted only where the Defendant's excessive use of property causes inconvenience beyond that which other occupiers of property in the vicinity can reasonably be expected to bear.
>
> [14] Courts must recognize that, in organized society, people are expected to put up with a certain amount of discomfort and annoyance from the legitimate activities of their neighbours. The tort of private nuisance is not established every time one's neighbour does something that is bothersome. In order to be actionable, the interference in question must be intolerable to an ordinary person. Compensation will not be awarded for trivial annoyances. The invasion or interference complained of must be substantial, serious, and clearly unacceptable according to accepted concepts of the day.
>
> [15] Deliberate, significant, and unjustifiable interference with

a neighbour's property (including such actions as harassment, intimidation and invasion of privacy), can amount to nuisance.

[16] In considering whether the interference with the use and enjoyment of the Plaintiff's property is severe enough to be actionable, the Court must consider the following:

(1) the severity of the interference, having regard to its nature, duration and effect;

(2) the character of the location;

(3) the utility of the Defendant's enterprise; and

(4) the sensitivity of the Plaintiffs.

[footnotes omitted]

Often when I attend strata meetings, I begin my remarks with a recitation of the Golden Rule "Do unto others as you would have them do unto you." Variously, this can be interpreted as "Live and let live," "If you wouldn't like it done to you, why would you do it to others?" or "Do your best to keep the peace" and "Be reasonable."

The trouble is, parents often become oblivious to the noise their children make, because they are surrounded by the sound all the time. Those without children have either forgotten what it was like to have little children, or have never had them, and live in a rather rarified air of 'Adults Only.'

This can cause friction.

There has to be practical and realistic options. Here are a few suggestions:

1. If you simply cannot stand the sights and sounds of children at all and you are old enough – sell and move to a 55 plus complex. Remember that a complex that has more restrictive bylaws also restricts the number of people who can and will buy into such a complex. So before doing this, consider how long you will live there and who will buy it from you. If you are not sure about an easy resale, evaluate whether the sound of children is worth the loss in equity you might ultimately incur.

2. If you are highly stressed by your own wishes to keep your children quiet, and the implied, or actual, complaints of your neighbours, consider buying a house with another family. A home with a legal suite and a yard may be a better option than constant pressure to keep the children quiet. Alternatively, sell and invest your equity and rent until your children are older.

3. If you are the complaining party, consider moving.

4. If you are the complaining party, but many others share your point of view, canvas your neighbours and call a meeting of all the owners to consider options going forward. Options for a future must be inclusive to be successful. That is, any option must consider how to let children and their playful noise coexist with quieter adult neighbours. Can the strata designate a common property area as a play area, and other areas as quiet places? Can 'playtimes' be arranged for weekdays, weekends and school holidays when the impact on others can be minimized (because most are at work, for example) and that noise is specifically curtailed at certain hours of the day – after 8pm, for example. Can an arrangement be made with a local recreation centre or school for the children in a complex to be allowed to play sports or other activities at a community facility every day?

5. Think very hard about whether the problem you are dealing with is "interference"…that is "intolerable to an ordinary person." And is it an "invasion or interference complained of…" that is "substantial, serious, and clearly unacceptable according to accepted concepts of the day." If you can get people that are completely disinterested in your situation to say that what is complained about would be unacceptable to a reasonable person in your community; you may have an actionable nuisance claim to bring or defend. If that is true, if you are the complainer – consider the costs involved in bringing the action [both financial and relational, for you and all your neighbours]. Is a law suit going to give you the remedy you seek? Will it be at too high a price? It may be best to consult a lawyer before you begin anything. Conversely, if you are the complainee [a parent of loud children] also count the cost. Is thousands of dollars of legal fees and acrimony worth it, to argue your children have a right to play in the lobby? You could take half the money used to defend a law suit and pay for all sorts of extra circular activities and holidays for your children that will be much more fun than a law suit!

6. If you are a strata council member, remember you have a duty to enforce the bylaws. If council receives a complaint that alleges a breach of the bylaws, then the process under s. 135 must be followed: write to the accused bylaws breaker setting out the particulars of the complaint and asking for a written or in person response from the accused at a council meeting. Upon hearing the evidence, council must make a decision as to whether a breach has occurred, and if so, what penalty will apply. Usually fines are a strata's main enforcement option. Remember however, you cannot simply keep fining the same owner for the same problem; the courts will often strike out measures that are punishments [thousands of dollars in fines] not enforcement measures that bring a change of behavior. Clearly, noisy children could quickly turn into many thousands of dollars of fines, but with no real resolution of the problem either for parents or quiet-seekers. Conscientious councils will need to be creative problem solvers and diplomatic peace-makers. Taking sides will likely simply create a divided community.

Whatever solution is going to work in your community, do your best to understand how the law will analyze your circumstance and try to craft a solution that address the priorities of the law, and accommodates children and quiet adults as much as you can. Children's playful banter is not going away; neither is the desire for a few quiet moments at the end of the day. Balancing these diverse priorities is no easy task; and duct tape for children's mouths and ear plugs for adults is probably not right!

My thanks to Elizabeth Benoy for her assistance with the legal research for this article.

By Phil Dougan

EARTHQUAKE DEDUCTIBLES

By Gerry Fanaken

Condominium owners are unfortunately and naively ill-prepared for the financial consequences of an earthquake in British Columbia – even a small one. Very few strata title owners realize that, in the event of an earthquake that results in even minimal damage, they will have no coverage for the deductible portion of the insurance policies carried by their strata corporations. Such deductibles are sizeable and will mean significant special levies upon condo owners before their buildings can be restored and reoccupied. Most condo owners assume that there are sufficient contingency reserves on hand.

Virtually all strata corporations include earthquake as a "peril" in their standard insurance programs; however, all policies have sizeable deductibles for earthquake damages. These deductibles range from 10 to 20 percent of the insured value of the strata corporation, (technically called the Cost of Replacement New). For example, if a strata corporation is appraised at $80,000,000 ("CRN") and the earthquake deductible is 15 percent, the strata corporation is essentially uninsured for the amount of $12,000,000 and this amount (a very lot of money) will have to be raised by the owners to fund any repair program. If the strata corporation in this example contains 150 strata lots, that would mean an average special levy of $80,000 per household. (Levies and normal monthly strata fees are actually determined on the basis of "unit entitlement" – a measure based on size; therefore, some strata lots pay more than the average and some pay less.) If, in this example, the strata corporation consists of 200 units, the average levy would be $60,000 – still a lot of money. Many condo owners believe that their strata corporations have adequate contingency reserve funds ("CRF") which will absorb the heavy hit of the EQ deductible. In fact it is rare to find a strata corporation with adequate reserves of this magnitude. The reality is that only special levies will be the source of funding and most condo owners are unaware of this significant financial burden.

Condo owners also need to realize that they will have no vote in respect of raising special levies to fund the earthquake deductible. Normally, strata lot owners have a statutory right to vote for or against special levies (which require ¾ votes to approve). In the case of an EQ deductible, such a vote is not required: the strata council alone has the statutory authority to simply declare a special levy and it is certain that strata councils will do this very quickly in order to secure contractors for the reconstruction task as soon as possible following an earthquake that causes even minimal damage.

Concerns about earthquakes in British Columbia have increased significantly in recent years for insurance underwriters. Advanced technology has permitted that industry to develop probable models of what damages might be expected. These models are sophisticated to the point where they can pinpoint specific geographic areas that will be heavily impacted. Consequently, some strata corporations have insurance policies with 10% deductibles while others have 15% or 20%. Not surprisingly, areas such as Richmond are in the 20 percent category. It is not unreasonable to predict or assume that, in the coming years, these deductibles will increase.

Apart from the deductibles issue, condo owners are also generally unaware that standard strata corporation insurance policies do not provide for "hotel expenses", meaning that, if an earthquake severely damages a strata building and it cannot be occupied until it is repaired (which could take many months) there is no hotel benefit. The owners are not beneficiaries for out-of-pocket living expenses such as hotel accommodation. They would have to absorb that expense themselves. Strata lot owners should, therefore, always obtain and maintain personal policies for such benefits. Few actually do. In 2006, an aircraft departing YVR crashed into a strata corporation in Richmond and dozens of occupants were displaced for months while the building was repaired. The strata corporation's insurance paid for the full restoration (several million dollars) but did not provide for hotel expenses. This scenario will play out in similar fashion in the event of an earthquake.

It is important to remember that all of this doom and gloom applies notwithstanding the size of the earthquake and the amount of damage that results. The deductible applies in every event, large, medium or small.

Following every minor earthquake in BC that rattles nerves, there is considerable advice to the public about "being prepared" (i.e. bottled water, first aid kits, etc.). While true, it should be noted that condo owners are also ill-prepared for the significant financial impact they will face in respect of the insurance policy deductibles.

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RULES OF ORDER
WHAT RULES?

With many strata corporations holding annual general meetings in the coming months, we thought this might be a good time to talk about rules of order at annual general meetings, some of which can be quite, well, unruly! It is true that most strata corporation AGMs run smoothly but there are many meetings that contain contentious budgets or special resolutions ("¾ vote resolutions") that give rise to heated debate. At times like these, controlling a general meeting can be quite challenging for a council president or property manager.

It seems that everyone has heard of Robert's Rules of Order although it is highly probable that only a very tiny fraction of meeting attendees have the faintest knowledge of what they are. When things go sideways at general meetings of strata owners, and the meeting chairperson loses control, it is not uncommon to have someone shout out "Let's stay with Robert's Rules of Order!" and everyone says yes, what a good idea. Even some judges ruling on strata corporation legal disputes have referenced the need to follow Robert's.

Well, not so fast. Robert's is an excellent parliamentary guide and is recognized as the leading authority on conducting general meetings. But that was before strata corporations were invented. First, Robert's is intended for use by "professional" organizations such as large unions or societies. It is very detailed and complex. It is simply impractical for use at strata corporation meetings where the environment is far less formal and not conducive to a precise and unyielding parliamentary process. This is not to say that strata corporation general meetings should be conducted in a willy-nilly unregulated fashion but it is to observe that relying on Robert's for control is not going to work either. Moreover, apart from some very basic prescriptions such as "I move that…" and "I second that motion," very few (very few) people know anything more than those basics. So to suddenly agree at a general meeting that is unravelling at the seams to now use Robert's is simply wishful thinking. Even when there is agreement to use the Robert's protocols, it is usually only a matter of minutes before it is abandoned.

It is vital to note that nothing in the Strata Property Act requires a strata corporation to follow Robert's Rules of Order or, for that matter, any other recognized parliamentary guidebook. In fact, the Act contains a number of prescriptive procedures which may very well conflict with such guidebooks on parliamentary procedures. For example, the manner in which ¾ vote resolutions are required, presented and voted on is specific to strata corporations. The process for reconsidering a vote taken at a general meeting as set out in the Act is contrary to such guides as Robert's.

Accordingly, it is generally good practice when conducting an owner general meeting to steer away from absolute reliance on Robert's or any other similar guidebook. It is certainly fine to use the very basic terms such as "I move that…" and "I second the motion" but beyond that a meeting chairperson should be very careful not to wander off and rely on some external guidebook which may conflict with the Strata Property Act. The best way to avoid this dilemma is to gain control of the meeting at the outset using some basic techniques as follows:

1. Allow only one person to speak at a time, without interruption from others.
2. Not allow that person to "hog the mike" and endlessly repeat his or her point.
3. Not permit a speaker to speak again until all others have had an opportunity to speak.
4. Require that a motion be a motion not a lengthy speech.
5. Require that a motion be clear and specific and repeated so that everyone present (especially the person taking the minutes) has a good grasp of what is being offered for consideration and a vote.
6. Allow contrary opinions to be voiced but not to the extent that alternate motions are inserted. An amendment is allowable.
7. Amendments must be amendments, not brand new motions.
8. Amendments to ¾ vote resolutions first require a ¾ vote to approve (Section 50).
9. Votes when called should be counted clearly and announced. The chairperson should call for "those in favour" and "those opposed" and "any abstentions". It is very common to see this process ignored.
10. A vote is a vote. Once it has been taken and announced, move on to the next business item. It is very common to see owners on the losing side continue to debate the matter. This can often lead to a request to "reconsider" the matter and someone will jump up and say "In Robert's you can reconsider a vote if you get approval from 50% of the attendees, or is it two-thirds, I can't remember but let's vote on this again because I don't think everyone really understood what we were voting on." Do NOT permit this to happen.

Some strata corporations have actually added a bylaw to mandate the use of Robert's Rules of Order at their meetings. This is quite dangerous as it is highly unlikely that in the ensuing years, there will be owners who don't know them and the strata corporation will be in violation of its own bylaws. And as pointed out above, there may be some conflicts with requirements of the Strata Property Act.

All said, Robert's is an excellent parliamentary guide, but not for strata corporations.

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