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# BC STRATA AND CONDOMINIUM LAW NEWSLETTER

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### Strata Basics and Tips

#### **Recovery of Fines - Proper Bylaw Enforcement Procedure is Required**

Taeya C. Fitzpatrick and Matthew Fischer

The Courts have become increasingly vigilant in ensuring that a strata corporation is collecting only the arrears that the strata corporation is technically and legally entitled to recover. Specifically, where a strata corporation is seeking to collect fines from an owner; the Kelowna Court now specifically looks to ensure that the strata corporation has properly assessed the fines against the strata lot - even in cases where fines are incidental to other issues and even where the owner hasn't specifically challenged the validity of the fines.

The Strata Property Act contains mandatory bylaw enforcement process, and the Courts have long established that perfect compliance with those procedures is required before the exceptional remedy of a fine can be imposed. The Court is increasingly scrutinizing fines to ensure that the strata corporation validly and properly followed the procedure set out in **section 135 of the Strata Property Act** before assessing those fines. Section 135 provides the following mandatory procedure which **must** be followed **before** a fine can be assessed against an owner:

1. The council receives a complaint that a bylaw has been breached;
2. The strata corporation notifies the owner, in writing, that a complaint has been received and provides the owner with particulars of the complaint; and

3. The council provides the owner with an opportunity to respond to the complaint in writing or by requesting a hearing before council.

Only once council has followed the above procedure, can council make a decision to issue a fine and then must notify the owner that a fine has been levied against them. In the case of **Dimitrov v. Summit Square Strata Corp., 2006 BCSC 67 Strata Corporation**, the Judge stated: "**section 135(1) of the Act** clearly contemplates that the opportunity to answer the complaint must be given before any decision is made on the issues of guilt or penalty."

A strata corporation must be able to document that the procedure has been correctly followed, or risk being denied recovery of fines from the owner, even if the bylaws have clearly been breached. Other consequences can arise for incorrect procedural practices in serious circumstances.

There are also additional complications and slightly modified procedures and additional remedies where a tenant has breached the bylaws.

A fine is not the only option available to a strata council when faced with the breach of a bylaw. The strata council has less adversarial options and discretion on how to enforce a bylaw breach.

Bylaw enforcement can be complex and controversial. We strongly recommend legal advice be obtained if the strata corporation hasn't historically been enforcing bylaws consistently or properly; if the enforceability of a specific bylaw is unclear; or if the owner in question is likely to challenge the strata council's decision to enforce a bylaw.

## **Legal Pitfalls**

## **Bylaw Drafting and Strata Managers**

Matthew Fischer and Taeya Fitzpatrick

It is absolutely essential that a strata corporation obtain professional legal advice and assistance when preparing or amending its bylaws. There are self-help resources available; however, we commonly see serious problems where strata managers or strata councils draft bylaws and bylaw resolutions. Those problems can prevent the strata corporation from enforcing its registered bylaws, can prevent the strata corporation from collecting fines or bylaw enforcement costs, and can result in monetary penalties against the strata corporation, costs and other consequences.

Common mistakes include:

1. False certification and registration of bylaws which weren't approved correctly.
2. Improper substantial amendment of bylaw resolutions at a meeting without fresh notice to the ownership.
3. Inclusion of clearly unenforceable and unlawful bylaws of various descriptions.
4. Accidental repeal of some or all bylaws based on reusing older resolutions.

There is no substitute for engaging a lawyer with significant strata bylaw drafting experience. Strata managers are not permitted to draft bylaws and have a very restricted role in assisting strata corporations with bylaw amendment or enactment.

In the case of **Kwai-Lok Lan (Re), 2013 CanLII 23800 (BC REC)**, the strata managers and their strata management company were found to have contravened the Real Estate Council Rules when they:

1. Failed to advise their strata corporation that it should seek independent legal advice for matters outside of the strata manager's expertise; and
2. For drafting a bylaw that was outside of their expertise and included screening criteria for tenants that is in contravention of the Strata Property Act.

They were each fined and ordered to complete remedial courses as a result of their breaches of the rules.

While this case did not deal with the issue of whether the strata managers were providing legal advice for a fee, which is outside of the jurisdiction of the Real Estate Council, this case provides clarification on the dangers for strata managers of acting outside their area of expertise. Strata managers are not required to know all pitfalls for strata councils. However, a strata manager needs to know enough so that they can advise their strata councils that they should seek legal advice. In this case, when the strata council was requesting a bylaw be drafted, the strata managers should have referred the strata council to seek legal advice. The Real Estate Council of BC agrees that strata managers are required to advise their strata council to seek legal advice with respect to bylaw drafting. For more information from the Real Estate Council of BC on this topic, click **here to see the part 2 of the Practice Standards Manual**.

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## **Wrong Dispute Resolution Venue**

Taeya C. Fitzpatrick and Matthew Fischer

In the case of **Beckett and Kuan v The Owners, Strata Plan NW 2603, 2016 BCHRT 27**, the owners made a claim against the strata corporation in the BC Human Rights Tribunal claiming that the strata corporation discriminated against the Claimants by failing to enforce the bylaws against an owner who smoked below their strata lot. The Claimants

said that they had physical disabilities and that no amount of second hand smoke was safe. The Complainants then amended their claim; claiming that the strata corporation was retaliating against the Complainants with fines in response to the BCHRT proceeding being commenced.

The BCHRT determined that there was no discrimination with respect to the second hand smoke because the Complainants were unable to establish that they had any disabilities that made them especially vulnerable to second hand smoke. The BCHRT stated that the fact that second hand smoke is dangerous to everyone is not discrimination. Because there was no discrimination on the basis of a disability as alleged, the BCHRT had no jurisdiction to intervene and that complaint was dismissed because it should have been brought in BC Supreme Court.

The Complainants, however, succeeded on the retaliation complaint. The BCHRT found that the council had started fining the Complainants in response to the BCHRT proceeding being commenced and were not being fined consistently with how other owners were being fined. The BCHRT declared that the fines were void. The Tribunal ordered the council to stop issuing such retaliatory fines and to take a 1 day seminar on the Human Rights obligations of strata corporations. The strata corporation then had to pay \$1,000 to each Complainant for injury to dignity, feelings and self-respect as a result of council's actions.

This case highlights several important principles:

1. The need to choose the correct venue for any claim or complaint - the smoking issue was unresolved because the complainants chose the wrong venue.
2. The importance of maintaining fairness and objectivity, and avoiding punitive or retaliatory actions against owners or tenants who take unpopular actions.
3. The power of the BCHRT to override strata governance decisions, and the need for strata councils to be well informed about obligations under the BC Human Rights Code.

Even some summary legal advice can be very helpful before making a formal complaint or claim, to help ensure that you have a viable case and have chosen a dispute resolution venue that actually has jurisdiction to address your complaint. If you are concerned about a Human Rights issue or any claim or complaint, you should seek prompt legal advice before taking any formal steps.

**Legal Update**

## **How does a Postal Strike affect Strata Corporations**

Matthew D. Fischer and Taeya C. Fitzpatrick

With the looming threat of a strike from Canada Post, strata councils may be worried about how to provide notices and receive strata fee payments where postal mail has been the normal means of sending those documents.

Most likely the postal strike will be resolved in a matter of weeks as has happened historically. A rotating strike may be less disruptive than a complete strike, in which case simply providing additional time for notice of receipt of payments may be sufficient. However, there are issues which arise if there is a full stoppage of postal mail delivery for even a short period of time.

### **Receiving Payments**

Unless the strata corporation has bylaws which require pre-authorized payments or otherwise doesn't permit payment by mailed cheque, the strata corporation may need to be somewhat more lenient than usual in relation to payments which are due during a blanket postal strike and not received on time. Absent specific legal advice to the contrary, before placing a lien or taking other formal collections steps, the strata corporation should wait until the backlog of mail delivery resulting from the postal strike has been delivered before taking such steps.

It might be wise to informally encourage owners to provide payment by other means of delivery to avoid cash flow disruption. Some strata corporations have bylaws which make the owner responsible to ensure payment is received.

In the event of a possible protracted strike (now or in future), some strata corporations may wish to consider amending their bylaws in ways which reduce reliance on postal mail, including adopting a properly drafted pre-authorized payment bylaw or a bylaw which puts the onus on owners to provide payment by some other means.

### **Providing Notices to Owners**

Notices provided to owners during the strike (including but not limited to any notice of bylaw complaints, notice of arrears, or notice of annual or special general meetings) will need to be handled differently in the event of a postal delivery disruption. No strata corporation should rely on deemed delivery by mail pursuant to section 61 of the Strata Property Act when the strata council is aware that postal distribution of notices may be disrupted or significantly delayed. Strata corporations will need to make the decision of whether to provide additional notice, postpone sending out notices, or provide notices to owners by a different method as permitted under section 61 of the Strata Property Act.

The alternative methods available to strata corporations depend on whether the owner has provided an address within or outside of the strata plan. If only a postal address has been provided for an owner that is outside of the strata plan, the only alternative method available during a postal strike is to hand a copy of the notice to the owner in person. This is awkward if the Strata Council cannot easily confirm who all of the owners are, or where they may be located.

If the address is within the strata plan, there are several alternative methods available:

1. Leaving it with the person;
2. Leaving it with an adult occupant of the person's strata lot;
3. Putting it under the door of the person's strata lot;
4. Putting it through the mail slot or in a mail box used by the person for receiving mail;
5. Faxing it to a fax number provided by the person; or
6. Emailing it to an email address if the person has specifically provided an email address for the purpose of receiving the notice.

There is no method that permits the notice to be validly sent by standard courier.

Unless the notice is left with the person, the notice is not deemed to be delivered for four days. Therefore, the strata corporation must still provide at least 20 days' notice for most delivery methods.

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**Fischer & Company**

Fischer & Company, located in the heart of the Okanagan, Kelowna, has provided a wide range of legal services to individuals, strata corporations and management companies in Kelowna, the Okanagan, and throughout the entire Province of British Columbia, since 2007. Fischer and Company is comprised of two lawyers, Matthew Fischer and Taeya Fitzpatrick, and a dedicated support team.

For more information on our Services Offered, to review our online Strata Basic Tips or New updates, or to see how we can assist you with your issue, please visit our website at [www.fischerandcompany.ca](http://www.fischerandcompany.ca)

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