THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

STRATA PROPERTY—2017 UPDATE
PAPER 1.6

Strata Corporation Bylaws: Recent Issues in Validity and Enforcement

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STRATA CORPORATION BYLAWS: RECENT ISSUES IN VALIDITY AND ENFORCEMENT

I. Introduction

This paper will provide an overview of the major developments over the last two years relating to the validity of strata corporation bylaws and their enforcement. A number of cases have looked at both the procedural issues in adopting bylaws as well as the power of strata corporations to adopt certain types of bylaws. In terms of enforcement, the courts continue to deal with owners who are a menace to their strata community as well as the issues that make enforcement procedurally tedious.

II. Bylaw Validity

A. Subject Matter of Bylaws

Every strata community has bylaws. They are the rules by which that community has agreed to live. The bylaws provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation [*Strata Property Act*, S.B.C. 1998, c. 43 (the "Act"), s.119]. In short, a strata corporation has a broad mandate in terms of the types of bylaws it can create. Despite that breadth, there are limits. For example, section 121(1)(a) provides that a bylaw is not enforceable to the extent the bylaw contravenes the Act, the regulations, the *Human Rights Code* or any other enactment or law.

The limit of that power was considered in ***The Owners, Strata Plan VIS4686 v. Craig***, 2016 BCSC 90. The strata corporation was established by the developer as a for-profit "Care-a-Minium", whereby certain support services for the benefit of residents were contracted out to a third party.

Each resident chooses how much or how little they wish to avail themselves of the support services. Before the first conveyance, the strata corporation amended its bylaw to include the following:

> 116(i) The Strata Corporation shall at all times retain the services of a support services company who shall provide to the Owners at least those services set out in Schedule "A" attached hereto.
>
> 131(3)(b) No person shall own or occupy a residential strata lot unless the Owner pays to the strata corporation the amount required to be paid by the strata corporation to the support services company for the prevision of personal the services [sic] referred to in section 116(i).

The respondent owner argued that bylaw 116(i) was *ultra vires* the Act in that it contravened section 121(1)(c) which renders any bylaw that prohibits or restricts the right of an owner to freely sell their strata lot unenforceable. The owner argued that the bylaw making the support services contract mandatory impacted their ability to sell their strata lot. The court held that bylaw 116(i) set out the services that residents could freely use. Those services do form part of the use and enjoyment of strata lots and common property. Therefore, these bylaws were of the subject matter contemplated under s.119(1). The court also concluded that the bylaw was created for a legitimate and valid purpose and relied on the decision in *Kok v. Strata Plan LMS 463*, [1999] B.C.J. No. 921 (S.C.). In Kok, the bylaw at issue was a restriction on the ability to change the nature of their business that was similar to that of another owner in a strata corporation that was a shopping mall. A bylaw that restricts use or how a strata lot can be used is permissible provided that it is created for a proper purpose even if it does make the strata lot less desirable or more difficult to sell.

B. Rental Limitation Bylaws—Requirements Revisited

The Act imposes significant limits on the ability to adopt bylaws that restrict the rental of residential strata lots (the Act, ss. 121 and 141). Where the strata corporation adopts a bylaw limiting the number or percentage of strata lots that may be rented, the bylaw must include the procedure to be followed in administering the limit (the Act, s. 141(3)). In ***Carnahan v. The Owners Strata Plan LMS 522***, 2014 BCSC 2375, the court held that s. 141(3) of the Act required the rental limitation bylaw to include, among other things, the criteria that will be applied in deciding whether permission to rent would be granted. A year later in ***Mathews v. The Owners, Strata Plan VR 90***, 2015 BCSC 1801, the court upheld a rental limitation bylaw that set out the procedure for administering the limit but was silent on how the strata corporation would decide whether to grant permission to rent. Mathews appealed. The Court of Appeal held that ***Carnahan*** was incorrect to the extent that s.141(3) required the bylaw to include the substantive decision making criteria in determining who would be granted permission to rent. In addition, the Court of Appeal went on to say that in light of the wording of section 141 which prohibits the establishment of screening criteria, the only way fair way to determine who can rent, practically speaking, is by adopting a wait list system.

C. Procedures for Adopting Bylaws

A strata corporation can amend its bylaws. Generally, in a strata plan composed of residential strata lots, it requires a ¾ vote (the Act, s.128(1)(a)). In strata plan consisting of non residential strata lots, the default is also a ¾ vote unless the bylaws provide a different voting threshold (the Act, s.128(1)(b)). There are exceptions. For example, any amendments to the bylaws prior to the second annual general meeting in a strata plan that is bare land or comprised entirely of residential strata lots requires a unanimous vote (the Act, s.127(1)). Where the strata corporation is comprised of both residential and non-residential strata lots, any amendment before the second annual general

meeting must be approved by a unanimous vote unless separate sections are formed (the Act, s.127(3)(a)).

One of the most common errors in amending bylaws on or after the second annual general meeting involves strata corporations consisting of both residential and non-residential strata lots. Section 128(1)(c) of the Act provides that such an amendment needs to be approved by:

(1) ¾ vote of the residential strata lots; and

(2) ¾ vote or such other threshold set out in the bylaws of the non residential strata lots.

The requirement to amend the strata corporation's bylaws by two groups of owners applies regardless of whether the strata corporation has formed separate sections or not. In other words, even where there are no sections, a resolution with separate voting of residential strata lots and non residential strata lots is required.

Recently, the court was asked to consider the validity of registered bylaw amendments where the separate voting was not undertaken in two different cases. In ***Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)***, 2016 BCSC 2147 (at para 147 – 150), the strata corporation, which consisted of residential strata lots and non residential strata lots approved amendments to its bylaws at an annual general meeting by calling for a single vote. Interestingly, the preamble to the resolution included in the notice of annual general meeting package noted that two votes were required to approve the amendment. However, at the meeting, a single vote was called and the results of the single vote were recorded in the minutes as having approved the amendment by a ¾ vote. The court, in this case, upheld the bylaw amendments despite the lack of two votes. There was evidence from the proxy that voted all of the votes of the non residential strata lots. The proxy's evidence was that she voted all of the non residential strata lots in favour of the amendments. Therefore, both the residential and non residential strata lot votes would have met the ¾ vote threshold had the two votes been called.

On the other hand, in ***Omnicare Pharmacy Ltd. v. The Owners, Strata Plan LMS 2854***, 2017 BCSC 256, the court held that the registered bylaws were invalid on the basis that the strata corporation had not called for two votes. The strata corporation argued that to invalidate the bylaws would result in significant prejudice given the number of years it had relied on the registered bylaws to govern the community and enforce the bylaws, including the levying of fines. The court held that there was no evidence of actual prejudice or reliance on bylaws that would be held invalid. The court concluded that the failure to comply with section 128(1) was not a mere technical breach. Section 128(1) of the Act grants substantive rights to both groups of owners. The court held at paragraph 118:

> …the court cannot exercise a "discretion" in favour of upholding the validity of the Current Bylaws in the face of non-compliance with s.128(1)(c).

The decision in *Omnicare* did not consider the decision in *Yang*. However, despite the different outcomes, a key distinction is that in *Yang*, there was clear evidence that the non residential owners had voted unanimously to adopt the bylaw amendments. There was no evidence in *Omnicare* on how the non residential owners had voted. In ***Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428***, 2010 BCCA 474, the Court of Appeal stated at paragraph 16:

> …Section 128 recognizes that different uses of lots within a Strata Corporation may invoke different interests, and that those interests must be separately recognized for the purpose of voting on proposed bylaw amendments. In Butterfield v. The Owners, Strata Plan LMS 1277, 2000 BCSC 1110, Mr. Justice

> Preston recognized that one of the purposes of s.128 was to "protect" residential and nonresidential groups from each other.

In light of the purpose of section 128, it is not surprising that the bylaws were upheld in the decision in *Yang* given that the non residential owners had voted in favour of the amendments. In that case, the residential and non residential groups did not need protection from each other. *Yang* suggests that procedural errors where the voting outcome would not have changed will not always sufficient to result in bylaws being invalidated. In ***The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.***, 2016 BCSC 332 had to consider whether the fact that the strata corporation had exercised votes it controlled to support a resolution to amend the bylaws would be sufficient to invalidate those bylaw amendments. Although the law is clear that a strata corporation is not entitled to use its votes except on a unanimous vote resolution, the court upheld the vote, as it did in ***Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428***, 2010 BCCA 474. This was because in both cases, the outcome of the vote would have been the same even if the strata corporation's votes had not been exercised. It seems that while procedural voting errors can lead to bylaws being invalidated, where there is evidence that the result would not have changed if the proper procedure had been followed, the bylaws will be upheld.

Another interesting issue is who has the right to seek a declaration that bylaws are invalid. Typically, such remedies are brought under sections 164 or 165 of the Act. However, those remedies can be limiting in certain circumstances. For example, in ***The Owners, Strata Plan NW 499 v. Louis***, 2016 BCCA 494, Mr. Louis asked the court to set aside all the votes, including those amending bylaws, at every general meeting since the strata corporation deliberately stopped sending him notice of those meetings. He inherited an interest in his mother's strata lot when she passed away. However, the strata lot remained in the name of the estate. The executor requested that notices be delivered to Mr. Louis and granted him the estate's proxy. The strata corporation refused to do both. The strata corporation and Mr. Louis had a strained relationship and history of litigation. The Chambers Judge held that Mr. Louis had no standing under section 164 or 165 of the Act to seek declarations to invalidate the votes held at general meetings as he did not meet the definition of "owner" under the Act. Both sections 164 and 165 refer to "owners" as having the right to bring these sorts of proceedings. The Court of Appeal disagreed and held that such declaratory relief can be brought under section 163 of the Act. Section 163 allows for the strata corporation to be sued with respect to "any matter relating to the common property, common assets, bylaws or rules…". Unlike sections 164 or 165, section 163 of the Act does not limit who can bring such proceedings. As such, it appears that persons other than owners or tenants can seek declaratory relief to have bylaws held as invalid.

III. Enforcement:

A. Injunctions as Enforcement

While a person's strata lot may be their castle, the strata corporation has significant power in creating bylaws that limit or prohibit activities in their strata lot. Given the effects of second hand smoke and the decline in the prevalence of smokers, more and more strata corporations are adopting bylaws that limit or ban smoking. The *Tobacco and Vapour Products Control Act* and many municipal bylaws already ban smoking in enclosed common property areas and at least six metres from an air intake, doorway, or window. Some strata corporations go further and ban smoking inside strata lots and the associated exclusive use balconies. In ***The Owners, Strata Plan NW 1815 v. Aradi***, 2016 BCSC 105, the strata corporation had a bylaw that banned smoking in a strata lot. The owner admitted that he continued to smoke in his strata lot despite knowing about

the bylaw, and having been issued warnings and fines. The strata corporation asked the court for an injunction under section 173 of the Act so that the owner would be ordered to stop contravening the smoking ban bylaw. The court concluded that section 173 of the Act confers a broad discretion, which is to be guided by a consideration of the scheme of the legislation, its overall objectives, and the circumstances giving rise to the application. Ultimately, the court must balance the interests of the strata corporation against the interests of the owner who is contravening the bylaws. The court noted that while the strata council has some discretion not to require strict enforcement, that discretion is limited given that the statutory scheme contemplates that the bylaws will be consistently enforced. While there was some evidence of the owner having some mobility difficulties which may make it difficult for him to smoke outside, the court noted that without an adequate export report addressing his addiction and the limitations on his mobility and in light of the impact on other owners, the court was not prepared to exercise its discretion to decline the granting the injunction. To do so would have the effect of allowing the owner to continue to breach the no smoking bylaw for an extended period.

B. Missteps in Section 135 Compliance

The strata corporation has the power to impose fines, among other remedies, to enforce its bylaws (the Act, ss. 129(1)(a) and 130). Before imposing a fine, the strata corporation must comply with section 135 of the Act. Despite a number of judicial pronouncements about the importance of complying with the Act [see ***Dimitrov v. Summit Square Strata Corp.***, 2006 BCSC 967; and ***The Owners, Strata Plan VR19 v. Collins et al.***, 2004 BCSC 1743], it appears that strata corporations continue to make errors in complying with section 135. It is a fairly common practice for strata corporations to impose "late" fines or "late penalties" on arrears of strata fees or special levies automatically. They are often applied to an owner's account without notice. Then, if the owner tries to sell their strata lot, the strata corporation, unless the fines are paid, withholds providing the Form F – Certificate of Strata Corporation needed for the registration of the transfer to the buyer. This is what occurred in ***Terry v. The Owners, Strata Plan NW 309***, 2016 BCCA 449. The strata corporation had a fairly long history of communications regarding various issues with Ms. Terry and her mother, some of which involved the outstanding strata fees and special levies. However, it appears that most of the correspondence notified Ms. Terry of the fines after they had been imposed. The Chambers Judge, however, upheld the fines on the basis of the ongoing communications, noting that Ms. Terry understood why the fines were levied and that Ms. Terry did provide her views on the fines. As such, the court took the view that there was compliance with section 135. Ms. Terry appealed. The Court of Appeal took a different view of the strata corporation's "compliance" with section 135 noting that the letters did not particularize the alleged contravention except beyond making an "erroneous assertion" that strata fees that had been paid remained outstanding. While Ms. Terry's account was in arrears, the cause arose because the owner had not paid the increase in strata fees. In addition, the letters justified the fines that had been levied by stating that Ms. Terry should have been aware that fines would be imposed for late payment of strata fees. None of the letters gave the owner fair notice that the strata corporation was contemplating future fines or that she would have an opportunity to respond prior to those future fines being levied. As a result, all the fines levied by the strata corporation were set aside.

Strict compliance with section 135 of the Act requires a strata corporation to take three steps:

(1) Issue a letter or notice of the alleged bylaw contravention based on a complaint received by the council. The letter or notice needs to include particulars of the complaint and make it clear that the owner has an opportunity to respond;

(2) After the owner has been given an opportunity to respond, the council decides by majority vote, at a properly convened strata council meeting and taking into account the owner's response, if any, whether the bylaw has been contravened and, if so, whether a fine will be levied.

(3) As soon as feasible, the council must give notice in writing of its decision about the bylaw contravention allegation and the fine levied, if any.

Given that most strata corporations only meet monthly and some meet even less frequently, compliance with section 135 can take a lot of time. In the meantime, the owner may be continuing to contravene the bylaw. In addition, in some situations, the contravention is clear, such as the late payment of strata fees. While there may be a mistake a misunderstanding, for the most part these types of bylaw contraventions are fairly straight forward. To deal with these types of scenarios, some strata corporations come up with creative procedures to streamline this process.

In ***The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.***, 2016 BCSC 32, the strata corporation adopted a "standard bylaw violation notice form". The form allowed the management staff to tick off the applicable bylaw that was alleged to be violated. In this case, the particulars of the complaint were: "Failure to maintain Signage & Display in a first class condition in Violation of Bylaw #24. This was one of the options on the form that could be ticked. No details were included. The form also stated:

> If you do not within 7 days of the date below dispute this allegation and/or request a hearing with the Strata Corporation, a fine will be assessed against you forthwith as provided by the Bylaws of the Strata Corporation.

There was evidence that prior to the establishment of the new form, the strata corporation had provided a number of written warnings and photographs of the offending signage when the owner requested particulars. In light of the details provided in correspondence before the form was issued, the court upheld the fines. The court concluded that in this case, the strata corporation had provided both particulars of the complaint and given the owner an opportunity to respond or request a hearing. While ostensibly, the court allowed a strata corporation to rely on a "ticket" like form to impose a fine, to meet the requirement to provide the particulars of the complaint, the strata corporation needed more information than a generic statement of the bylaw being violated. As such, despite the outcome, this case should not be taken as endorsement of creative procedures to bypass the requirements of section 135 of the Act.

C. Court Ordered Sales

It appears that the court is warming up to the idea of having extremely troublesome owners effectively evicted from strata communities. In ***The Owners, Strata Plan NW 1245 v. Linden***, 2017 BCSC 852, the Court ordered the sale of a strata lot where the owners had breached an injunction granted by Mr. Justice Ehrcke, which provided, in part, as follows at paragraph 12:

> The Respondents are specifically restrained from:
>
> > a. communicating with or visiting members of Strata Corporation, as well as their families and guests, that have given affidavit evidence in support of the Strata Corporation's Petition or such other members of the Strata Corporation that have asked the Respondents to refrain from having contact with them;

> b. uttering any abusive, obscene, or threatening comments or making obscene gestures directed at any member of Strata Corporation, their families or their guests;
>
> c. intentionally listening into other strata lots in the Strata Corporation;
>
> d. vandalizing common property, limited common property or other strata lots of the Strata Corporation;
>
> e. slamming or pounding on the doors in their strata lot or anywhere else in the Strata Corporation;
>
> f. allowing or encouraging their dog to bark incessantly in their strata lot or on the common property of the Strata Corporation;
>
> g. leaving dog feces anywhere on the common property of the Strata Corporation;
>
> h. yelling, screaming, singing or otherwise raising their voice on the common property of the Strata Corporation or on the outside deck of their strata lot; and
>
> i. yelling, screaming, singing or otherwise raising their voice in their strata lot in a manner that constitutes a nuisance between 8:00 pm and 8:00 am;

The uncontested evidence was that the owners continued their disruptive behavior after the injunction was granted. The significant breaches of the bylaws involved bullying, harassment, making derogatory and vulgar remarks to, and disturbing other residents. The disturbances included yelling, banging, slamming doors, playing loud music, singing loudly, screaming, and swearing. The strata corporation's injunction had been obtained in accordance with section 173(1)(a) and/or (b) of the Act. The strata corporation was relying on section 173(1)(c) of the Act to ask for orders "to give effect to" that injunction in the form of a court ordered sale. That remedy is essentially a motion for contempt of court requiring proof beyond a reasonable doubt. The court relied on the decision in ***The Owners, Strata Plan LMS 2768 v. Jordison***, 2013 BCSC 487 to hold that the only practical remedy in *Linden* to give effect to the injunction was to order the sale of the strata lot.

D. Impact of the Civil Resolution Tribunal on Enforcement

With the doors to the Civil Resolution Tribunal open as of July 13, 2016, many of the types of claims that would typically have to been brought to BC Supreme Court, can now be dealt with at the Tribunal. The jurisdiction of the Civil Resolution Tribunal includes claims related to certain bylaw issues. For example, a strata corporation can request an injunction similar to the one as in *Aradi.* In fact, the Tribunal has granted an order prohibiting smoking in the decision of ***The Owners, Strata Plan LMS 2900 v. Hardi***, 2016 BCCRT 1. In addition, the Tribunal has made orders for owners to pay fines in ***The Owners, Strata Plan KAS 2014***, 2017 BCCRT 30 and ***The Owners, Strata Plan NW 1340 v. Gounder***, 2017 BCCRT 24 . This will be particularly useful for strata corporations since an authorized member of the council could initiate the Dispute Notice and represent the strata corporation throughout the process at little to no expense. Given that a monetary judgment can be filed in either the Provincial Court or Supreme Court for enforcement purposes, the Tribunal can be used to collect fines in even small amounts where previously the legal expenses to do so would not be justified [see ***S.M. v. The Owners, Strata Plan ABC***, 2017 BCCRT 23] or obtain what would normally be a very costly injunction.

IV. Conclusion

There have been a number of developments relating to both procedural issues in adopting bylaws and the enforcement of bylaws. While traditionally these disputes would have been handled in Supreme Court, many will now fall to the Civil Resolution Tribunal to resolve. It will be interesting to see how the law will evolve as a result.