A Commentary on Bill 8*

(*Known as the Strata Property Amendment Act, 2009 - First Reading on September 21, 2009)

Introduction

This commentary is provided as information for strata owners and others interested in improving the legislation that affects owners of 460,000 strata properties in British Columbia.

In November 2003 the provincial government promised a review of the Strata Property Act, a review that never occurred. In spite of many calls for a review based on public consultation with strata owners, in late 2008 the government engaged in private and "confidential" communication with selected developers, property managers, lawyers and others. The product of those very restricted communications was Bill 12, introduced in the legislature in March 2009. After a brief debate, it died on the order paper when the provincial election was called. During that debate the Minister responsible for the Bill made the following statements:

> "We should go out and invite feedback from organizations rather than pushing this bill through to a conclusion in a rushed manner.
>
> I certainly invite that feedback in the weeks and months to come. This is a bill that obviously will not complete all of its stages before this House rises. But it is certainly a piece of legislation that if we are re-elected as government, we are committed to bringing back into this House. We're committed to assessing the constructive feedback that comes from condo owners and strata property associations, property managers, the general public and anybody with regard to what's in the bill.
>
> If there are changes that are desirable, then we would certainly consider incorporating those changes before this bill would be reintroduced." (Hon. C. Hansen in Hansard, March 31, 2009)

On September 21, 2009 the government re-introduced Bill 8, The Strata Property Amendment Act, 2009. Contrary to the above pre-election statements of Minister Hansen the government did not initiate a public consultation process to involve strata owners in improving the Bill. In spite of that, many individual strata owners from across the province as well as the Vancouver Island Strata Owners Association made the case to government for needed improvements to the Bill, including the process used to develop it. We now see that Bill 8 is virtually the same as the previous Bill 12 meaning that "constructive feedback" to government has had no impact.

This commentary on the Bill is provided in three parts:

- Highlights of Bill 8 – "What's Good About It" and "What's Not Good About It"
- Summary of Bill 8 and its Proposed Changes
- Ten recommendations for improving Bill 8

Strata owners are encouraged to contact their MLAs, the Premier and the Minister of Housing and Social Development asking for amendments to Bill 8 that better reflect their needs.

HIGHLIGHTS

What's Good About Bill 8

1. Provides broader access to the **Provincial Court** to resolve many types of strata disputes. The use of this court is more affordable for strata owners than the BC Supreme Court that is presently the only court (with rare exceptions) that can hear a strata dispute.
2. Adds the requirement for a **depreciation report** for a strata corporation (unless exempted under regulations). This has the potential to better inform owners and prospective buyers about the financial position of the strata corporation.
3. Adds the requirement for an **audit of the financial statement** of a strata corporation (unless exempted under regulations). This has the potential to ensure that the financial statement of a strata corporation has been audited by a qualified person and according to appropriate standards. The Bill also provides for regulations to exempt some strata corporations from the audit requirement. An exemption will be important for small strata corporations where the annual audit fee (perhaps $3000 or more) could be very large in proportion to the amount of finances being audited.

What's Not Good About Bill 8

1. The Bill is the **product of a "closed door" process** and has relied on input from private meetings between government officials and its selection of developers, property managers and others in the real estate industry. There has been no public consultation with strata owners. Before the Bill was drafted there was no discussion paper inviting feedback and there were no public meetings for strata owners to attend. Even after the initial Bill 12 was tabled in March 2009 there was no government invitation to the public to propose improvements to the Bill. Furthermore, the Vancouver Island Strata Owners Association presented a summary of owner concerns to the BC Liberal caucus and the government in May 2008 but has never received any substantive response to the concerns included in that presentation. (One of the main concerns included in the VISOA submission was the need for public input from strata owners.) The process used by the government with its heavy reliance on private communication with developers, property managers and others making a living from strata owners is telling strata owners that they are mere "subjects" and have nothing to contribute to the legislation that affects their property. This **lack of public consultation is undemocratic and taints the Bill**. It means that many needed changes to the SPA will neither be heard nor acted upon.

2. The Bill does not address the pitifully **weak licensing standards for strata managers**. Unethical or unprofessional conduct of strata managers is a significant source of conflict in strata corporations. The Real Estate Council of BC (that licenses strata managers) has been unresponsive to the concerns of strata owners. As a result, a strata manager who controls a strata council through intimidation of dissenting owners or provision of false or misleading information is not held to account by the RECBC or anyone else.

3. The Bill does nothing to improve the **accountability of strata developers** for non-compliance with the SPA or for misrepresentations made to strata buyers. Non-compliance or misrepresentations made by developers are a significant source of conflict in strata corporations.

4. The Bill would still leave the SPA without the **offence and penalty provisions** needed to hold persons (including developers and individual strata council members) responsible for non-compliance with specific provisions of the SPA. This is quite unlike condo legislation in Alberta

and Ontario where there are specific offences and penalties. The lack of a deterrent to knowing breaches of the Act gives rise to many disputes. This omission is egregious and severely limits accountability under the Act.

5. The Bill **does not clarify the meaning of "common property"** in the case of townhouse attics and crawl spaces and in the case of windows in strata apartment-style buildings. This lack of clarity is a source of many strata disputes. Greater clarity is needed to both prevent such disputes and to give a court clearer direction where disputes occur.

6. Greater clarity of **"conflict of interest"** is badly needed under the Act. Bill 8's proposed expansion of **section 32** adds some clarity but does not go far enough where an "owner developer" is a council member and uses his position to enhance his financial position at the expense of other strata owners. Where the council member is the "owner developer" there should be specific matters where the "owner developer" shall not be present for discussion or voting, including any contract, proposal or covenant to which the "owner developer" is a party. Furthermore, even with improved clarity in section 32 there is still no offence or penalty to deter a person from acting in conflict of interest.

7. Section 6 of Bill 8 fails to embed **the right of an owner to attend a strata council as an observer** as provided in section 17(3) of the Standard Bylaws. This right can and has been removed from the bylaws of some strata corporations. This right should also be included within the Act itself but Bill 8 has ignored this need. Section 8 of the Standard Bylaws regarding Repair and Maintenance of Property by the Strata Corporation should also be in the body of the SPA. Some strata corporations have amended these bylaws to assign **common property maintenance** to owners in ways not contemplated by the SPA.

8. The Bill does not remove the requirement for a ¾ vote of owners under section 39 of the SPA before a strata corporation can give 2 months notice **to cancel a contract for strata management services**. The current requirement for a ¾ vote is an anachronism and undermines the power of a strata council to govern the affairs of the strata corporation. Neither Alberta nor Ontario has any such requirement for a ¾ vote. The effect of the requirement is that it is unreasonably difficult for a strata corporation to terminate a strata management contractor who is either incompetent or unprofessional.

9. The Bill does not address **strata fee inequities** arising from the limited options for unit entitlement available to a developer under section 246(3) when a strata plan is established. Where an inequity is later discovered it is virtually impossible to correct it because of the SPA requirement for unanimous consent of all owners.

10. The Bill relies heavily on regulations yet to be disclosed that could allow for exemptions from depreciation reports and audited financial statements. **Weak regulations could compromise** the reliability and availability of this key financial information to owners and prospective strata buyers.

11. The Bill would not come into effect until a regulation is passed by an Order in Council. As a result there is **no effective date** toward which a strata corporation and its owners can work to implement any changes required to comply with the new law.

Summary of Bill 8

(In order of amendments proposed)

1. Sections 1, 5 and 10 of Bill 8 would provide **access to the Provincial Court** (under sections 52(2), 58(1), 59(6), 164(1) and 165 of the Act) and has the potential to make dispute resolution more accessible to strata owners. However, the present Rules of the Court do not contemplate a strata corporation as an entity to be served with a notice of claim. A special application to the Court registrar is necessary to determine what is adequate service on a strata corporation. This omission from the Rules of Court will confuse many strata owners and impede their access to the Provincial Court.

2. Section 2 of Bill 8 attempts to clarify the manner in which resolutions requiring a ¾ vote may be passed **before the first annual general meeting** of a strata corporation.

3. Section 3 of Bill 8 places **new limits on the ability of strata owners to pass a resolution to restrict the strata council** in determining whether a person should be required to pay remedial costs or determining whether an owner should be exempted from a bylaw that prohibits or limits rentals.

4. Section 4 of Bill 8 attempts to add some clarity regarding what constitutes **"conflict of interest"** for a strata council member on a matter under consideration at a strata council meeting.

5. Under section 6 of Bill 8 the **right of an owner to request and receive a hearing** before the strata council (within 4 weeks) would be embedded in the Act rather than in the **Standard Bylaws** that can and have been amended in some strata corporations to remove such a right.

6. Under section 7 of Bill 8 a strata corporation would be required to **retain copies of depreciation reports** and any reports relating to repair or maintenance of major items in the strata corporation in addition to other items under section 35(2) of the Act. As section 36 of the Act gives an owner the right of access to such reports this amendment would help inform owners as to the condition of strata corporation buildings.

7. Section 8 of Bill 8 would extend the right to access some information items under section 35(2) of the act to a former owner or former **tenant**.

8. Section 9 of Bill 8 would reduce from 25% to 20% the **percentage of owners required** to petition for a meeting of owners or to propose a resolution (under sections 43(1) and 46(2) of the Act). This reduction is a step in the right direction but a change to 10% is needed to ensure that owners can place an item on the agenda of a general meeting. This would enable significantly more involvement of strata owners in decision-making and make strata councils more accountable to owners. One must remember that a petition from owners merely puts a matter before a properly constituted meeting of owners. The matter is still to be decided by all owners present at the meeting, not just the percentage of owners who signed the petition.

9. Section 11 would enable the strata president to cast a deciding vote (under section 53 of the Act) in the case of a tie vote at a meeting of owners. A major issue neglected by Bill 8 is the large **number of votes controlled by the "owner developer"** (for unsold strata units) and their use by some developers to elect a "tame" strata council in order to evade responsibilities under the Act. Limiting the "owner developer" to **<u>one</u>** vote in strata council elections would support accountability of the developer to the strata corporation.

10. Section 12 of Bill 8 would add more items to be disclosed on the information certificate provided to a strata lot purchaser (under section 59), including the most recent depreciation report. However, the other reports required under section 35(2)(n.2) could be equally important to a purchaser and Bill 8 would still not require the strata corporation to disclose them to a purchaser. Also, Bill 8 still does not require the disclosure of strata council minutes to a purchaser. Information in strata council minutes and the reports under section 35(2)(n.2) can be the only written information that a building is a "leaky condo" and one that the purchaser may want to avoid.

11. Sections 13 and 14 of Bill 8 would empower a strata corporation to use email as a means of giving a notice to a person under sections 61 and 63 of the SPA. This would help reduce administrative costs for strata corporations. For example, an email of a notice of a general meeting of owners would reduce paper and postage costs.

12. Section 15 of Bill 8 repeals the present section 94 of the SPA that <u>permits</u> a strata corporation to prepare a depreciation report and replaces it with a new section 94 that <u>requires</u> a strata corporation to obtain a depreciation report prepared by a "qualified person". "Qualified person", content of the report and the frequency of the report are yet to be defined by regulations. Also, a strata corporation need not comply with the requirement for a depreciation report if a ¾ vote of owners so decides or if the strata corporation is a member of a class of strata corporation prescribed under regulations yet to be developed. Although Bill 8 appears to provide for more transparency in tracking and reporting the condition of strata corporation assets it could all be undermined if the "regulations" provide too many loopholes.

13. Section 16 of Bill 8 clarifies that the budget presented to an annual general meeting of owners is a "proposed" budget rather than a budget being dictated to the owners. However, the more important part of section 16 is a new requirement that a "qualified person" audit the financial statement distributed with the proposed budget. A strata corporation need not comply with the new requirement for an audit if a ¾ vote of owners so decides or if the strata corporation is a member of a class of strata corporations. "Qualified person" and "prescribed class" of strata corporations are yet to be defined by regulations. Although Bill 8 appears to provide for more transparency in tracking reporting the condition of strata corporation assets it could all be undermined if the "regulations" provide too many loopholes.

14. Section 17 of Bill 8 would amend section 108 of the SPA to require separate accounting for money collected from owners by means of a special levy and sets out parameters for how that money can be invested. This amendment would improve transparency in financial reporting where special levy funds are involved. It would also clarify the degree of risk acceptable in the investment of such funds and how excess money collected by a special levy must be returned to strata owners.

15. Section 18 of Bill 8 would amend section 123 of the SPA to affirm that a strata corporation may pass a bylaw that restricts the age of persons who may reside in a strata lot. This ability to pass and age restriction bylaw was previously contemplated by this section but was not completely clear.

16. Section 19 of Bill 8 would amend section 124 of the SPA to prevent a bylaw from restricting a person's right to mediation and to prevent specific information created for purposes of voluntary dispute resolution from being used in mediation.

17. Section 20 of Bill 8 would amend section 127 of the SPA to require unanimous consent for amendment of bylaws in some types of strata plans prior to the second annual general meeting.

18. Section 21 of Bill 8 would amend section 128 of the SPA to clarify that a bylaw amendment has no effect until it is set out in the prescribed form and filed in the land title office.

19. Section 22 of Bill 8 would amend section 142 of the SPA to exclude both a rental of a strata lot to a member of the owner's family and a rental resulting from an exemption granted by the strata corporation as a rental for purposes of a rental restriction bylaw.

20. Section 23 of Bill 8 would amend section 143 of the SPA to prescribe when a rental restriction bylaw is effective where there is a Rental Disclosure Statement applicable to a strata lot.

21. Section 24 of Bill 8 would amend section 144 of the SPA to grant an exemption from a rental restriction bylaw if the strata corporation does not give its decision within one week of a hearing (if a hearing is requested) or within 2 weeks after the application is given to the strata corporation (if no hearing is requested). The change would also extend the time allowed for a strata corporation to hold a hearing, from 3 weeks to 4 weeks after the date the application is given to the strata corporation.

22. Section 25 of Bill 8 would amend section 173 of the SPA to permit either the BC Supreme Court or the Provincial Court to order a special levy where the number of votes cast in favour of the resolution was more than ½ of the votes cast but less than the ¾ vote required under section 108(2)(a). This change would break the "stalemate" that exists in several strata corporations in completing necessary repairs. However, it does not protect strata owners from the poor business practices of some strata councils or strata managers (e.g. failure to get competitive bids or failure to explore options for major repairs) that cause many strata owners to oppose a special levy and prevent a 3/4 vote.

23. Section 26 of Bill 8 would amend section 174 of the SPA to enable the BC Supreme Court to empower the court appointed administrator to take certain actions without approval of a resolution passed by a majority vote, a ¾ vote or a unanimous vote. This would enable the Court to extend the power of an administrator where the court finds that strata property owners are unable to make decisions in the best interests of the strata corporation.

24. Section 27 of Bill 8 would amend section 175 of the SPA to apply new regulations respecting mediation and arbitration to disputes under this section.

25. Section 28 of Bill 8 would amend section 177 of the SPA to clarify that a matter cannot be referred to arbitration once a court proceeding under section 178(1) has been commenced.

26. Section 29 of Bill 8 would amend section 178 of the SPA to complement the amendment to section 177 and clarifies that a dispute must not be referred to arbitration once a court proceeding has been commenced. It would also clarify that a court must stay its proceedings on application, unless the court is satisfied there is good reason to continue its proceedings.

27. Section 30 of Bill 8 would repeal sections 179 to 186 of the SPA which are sections dealing with mediation and arbitration. These matters would be covered by new regulations governing mediation and arbitration.

28. Section 31 of Bill 8 would amend section 187 of the SPA to refer to "an arbitrator" instead of "the arbitrator".

29. Section 32 of Bill 8 would amend section 216 of the SPA to clarify that leasehold restrictions under section 206 cease to apply when a leasehold is converted to a freehold strata plan.

30. Section 33 of Bill 8 would amend section 292 of the SPA to clarify the scope of regulations that may be made under this section. Specifically, it would allow regulations to be made regarding:
    a. the maximum interest rate payable on an overdue special levy payment,
    b. requiring a strata corporation to establish a voluntary dispute resolution of disputes,
    c. defining a qualified person for purposes of a depreciation report or financial audit,
    d. prescribing a period for the purposes of a waiver of a depreciation report or waiver of an audit,
    e. prescribing classes of strata corporations exempt from the requirement for a depreciation report or exempt from the requirement for a financial audit,
    f. prescribing information to be included in a depreciation report, and
    g. prescribing standards for purposes of an audit.

31. Section 34 of Bill 8 would add a new section 292.1 to the SPA under which regulations may be made governing mediation and arbitration of disputes under section 177 of the SPA. This section provides such regulations to prevail over "<u>any other enactment</u>" where there is a conflict between the regulations and the other enactment.

32. Section 35 of Bill 8 would amend the Schedule of Standard Bylaws by repealing section 15 that governed a request for a council hearing. The proposed new section 34.1 of the SPA would make this section redundant.

33. Section 36 of Bill 8 provides for the transition from the existing section 127 of the SPA to the proposed amended section 127 respecting votes on bylaw changes before the second annual general meeting in a bare land strata or a strata where all units are residential units.

34. Section 37 of Bill 8 provides for the Bill's proposed amendments to the SPA to come into force by regulation. This leaves strata owners with uncertainty about when the amendments will come into effect.

(Please read Bill 8 directly before interpreting its application to a situation that concerns you. The complete Bill 8 can be viewed at http://www.leg.bc.ca/39th1st/1st_read/gov08-1.htm)

Ten Recommendations for Improving Bill 8

(It is intended that implementation of these 10 recommendations would be an intermediate step before the results of a complete review of the Strata Property Act can be implemented. A proper open and public review would likely produce many more recommendations.)

1. Amend the Real Estate Services Act to:
    a. Require compliance with a code of ethics and conduct as a condition of license for a strata management licensee,
    b. Require a strata management licensee to comply with the Strata Property Act as a condition of license,
    c. Require the Real Estate Council of BC to investigate complaints from individual owners,
    d. Establish a disciplinary committee consisting of 7 persons with 4 of those persons being strata owners and 3 of them being strata management licensees. The various strata owner associations would nominate the 4 owners. This committee would review all RECBC investigations and decide appropriate disciplinary action, and
    e. Make the activities of the RECBC subject to the Auditor General Act to ensure that the RECBC fulfills its responsibility to protect the public from unqualified or untrustworthy strata managers.

2. Amend the Real Estate Development and Marketing Act to:
    a. Increase the maximum administrative penalty to $1 million (from $50,000) to be consistent with the maximum for such penalties under the BC Securities Act,
    b. Establish fines and other penalties for misrepresentation by a developer, and
    c. Empower the Superintendent of Real Estate to take legal action against a developer for misrepresentation in a disclosure statement and for non-compliance with the Strata Property Act.

3. Amend the SPA to define offences and prescribe penalties for non-compliance with the SPA by an owner developer, strata corporation, strata management licensee, strata council member or owner. (This would provide a deterrent to actions that underlie many strata disputes and bring BC legislation more in line with Alberta and Ontario.)

4. Amend the SPA to include the substance of Sections 17(3) and (4) of the Standard Bylaws to ensure that an owner may attend a strata council meeting as an observer. (This would improve transparency in the operation of strata corporations while permitting a strata council to exclude observers for a portion of a meeting when private matters such as bylaw infractions are discussed.)

5. Amend section 39 of the SPA to:

    a. delete the words "if the cancellation is first approved by a resolution passed by a ¾ vote at an annual or special general meeting" in order to empower a strata council to cancel a strata management contract without a vote of owners, and
    b. make regulations governing:
        i. the duties that may be contracted to persons or companies providing strata management services,
        ii. terms to be included in or excluded from contracts for strata management services, and
        iii. procedures for entering into or terminating contracts for strata management services.

6. Amend the definition of “common property” in section 1 of the SPA to:
    a. Clarify that windows in a strata apartment building constitute “common property”, and
    b. Clarify that an attic or crawl space in a strata townhouse building constitutes “common property”.

7. Amend section 9 of Bill 8 by striking out “20%” and substituting “10%” to significantly improve access of owners to a demand for a special general meeting and to propose a resolution or raise a matter in the demand.

8. Amend section 171 of the SPA to exclude a small claims action for collection of strata fees and fines from the requirement for a ¾ vote of owners before the strata corporation may sue under the section. (This change would expedite recovery of amounts owing to a strata corporation.)

9. Amend the SPA to enable regulations that:
    a. Clarify what a strata council must record in the minutes and make available to strata owners, and
    b. Are not subject to the Privacy Act.

    This change would greatly improve the transparency and accountability within strata corporations and would greatly reduce attempts to use “privacy legislation” to cover up decisions that adversely affect a strata owner’s property interest.

10. Amend section 217 of the SPA to clarify that “common facility” includes a sewage treatment plant irrespective of who owns it or where it is located. This change would deter the practice of some developers to retain ownership of the plant while charging the full operating cost of a sewage treatment plant to strata lot owners in spite of the requirement for the developer to contribute to those costs according to the formula under section 227.

For further information on BC strata legislation issues and alternatives contact:

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