

NEW LIMITATION ACT ALTERS COLLECTION PROCEDURES FOREVER

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Many strata council's believed that registering a lien against a defaulting owner's strata lot was sufficient to collect the arrears. The Strata Corporation could then simply wait for payment. This practice involved minimal expenditures of money and little administrative time once the lien was registered. This practice is about to come to a screeching halt. The new *Limitation Act* became law June 1, 2013 and changed the limitation period for collections from six years to two years.

The luxury of time which permitted councils to sit back and wait was abruptly altered with this new legislation. The new order of the day will require a council to commence court proceedings for current arrears within two years failing which the ability to collect the Strata Corporation's financial life blood will be lost forever. Subject to transitional exceptions, an appropriate claim for arrears from June 1, 2013 under new legislation must be filed with the court before June 1, 2015 failing which the limitation clock will run out for that month of common expenses.

This could be a tough bullet for cash strapped corporations. Strata fee arrears could be small in size and may not exceed more than a few thousand dollars even after two years of arrears. It is not unusual to find councils reluctant to budget for legal costs to collect small amounts.

However, there will be consequences for missing a limitation period. Residential strata corporations operate on a "not for profit basis" and in theory must balance their budget annually. In the absence of a budget line item for legal, arguably there is no mandate to make related expenditures. Some councils try to squeeze such expenditures under the permissible excess budgetary expenditures category. However, this practice is not viewed as solid fiscal practice and could be offside the *Strata Property Act*.

A council facing inadequate operating funds may be reluctant to authorize legal expenditures to file a petition in the Supreme Court and stop the limitation clock since they could face personal exposure to liability for authorizing improper expenditures. Also, such expenditures may not be an emergency expenditure since council would have known about the arrears for almost two years before the requirement for a Petition. Whether a Court considers expenditures made for collection proceedings under the emergency provisions of the Act meet the statutory test to "prevent significant loss or damage" remains to be seen.

What is clear is that the prudent annual budgetary practice of inserting a reasonable line item for collection expenditures avoids this whole debate and removes any constraints otherwise facing a council wishing to undertake legal action to preserve collections rights.

The failure to adopt reasonably prudent fiscal practices, including failing to budget for collection purposes, could result in allegations of irresponsibility and possibly even negligence on the part of the council.

The inability to collect arrears owing by one owner means that the remaining owners in the strata corporation must pick up the shortfall proportionately. Owners who understand this concept are content to approve interim funding on the understanding that recovery will eventually be forthcoming from the defaulting owner.

The *Strata Property Act* was designed to insulate compliant owners who religiously pay their fees against the negative consequences created by defaulting owners by granting extraordinary collection remedies for certain common expenses. These remedies include the right to lien and sell an owner's strata lot for nonpayment and to adopt bylaws designed to facilitate collections such as an interest bylaw, for example. The interest bylaw shields the strata corporation to a certain extent against the lost time value of money created by arrears and may assist with legal expenditures.

Once a lien is registered, the lien performs a magical legal feat by jumping over most encumbrances registered prior in time on title to the strata lot of a defaulting owner, including most mortgages, and taking first priority position. This means that once a strata lot is sold or refinanced, the strata corporation with a valid lien will be paid out before the lender. This creates a significant legal advantage to the strata corporation.

Although the banks view strata fee arrears as an act of default on the mortgage, this does not mean that the bank will automatically take foreclosure proceedings if the mortgage is not in default. In this event, the ball will be placed directly

in the court of the strata corporation and it must act to preserve its collection rights or face the consequences. The average cost of a strata corporation foreclosure is between \$5,000.00 - \$8,000.00. It could be more. A good portion of these expenditures tend to be recoverable priority legal costs of the proceeding.

It is recommended that the strata corporation annually budget a reasonable amount to address anticipated collections based on historical default ratios. If significant increases to common expenses are contemplated, then the budget should be further revised to address any default-related projections and concerns.

What are the consequences of missing a limitation period?

1. The non-defaulting owners will be required to subsidize the defaulting owner. This drives the fixed costs up for every single owner, including those that are least able to afford to pay the increase such as retired persons living on a fixed income or the disabled living on a small pension. Increased costs could result in those least able to pay falling into arrears. Prudent fiscal action minimizes this risk and levels the fiscal playing field over time creating smoother operations from year to year.

2. Councils and individual council members could be exposed to lawsuits for any shortfall from angry owners alleging negligence while carrying out the financial duties of the strata corporation as elected officials. The council should make inquiries to determine whether Directors and Officers liability insurance is available to cover such allegations.

3. The proposed Dispute Resolution Tribunal may provide disgruntled owners with an inexpensive and streamlined process to air disputes against a strata corporation and council members. This could create a more litigious and disharmonious environment within the Strata Corporation with negative spin off effects on all owners. No-one wants to live in a place mired in conflict and negativity.

Such results can be virtually eliminated by creating well thought out fiscal policies and implementing solid and consistent financial, legal and budgetary practices.

The council should ensure that the budget is reasonable to address collection matters. Also, it should adopt a policy to take reasonable collections steps within a reasonable period of time designed to maximize recovery of arrears and minimize any subsidy from the non-defaulting owners at the end of the day. There are several ways to accomplish this goal including the budget process, administrative procedures, collection procedures and practices, bylaw amendments and legal proceedings.

Please note that collection procedures and practices and legal proceedings are addressed in detail elsewhere in this publication. Please review the article prepared by lawyer Kelly Bradshaw for further information.

Budget Process

1. The council should include a reasonable amount in the annual budget for legal costs to address collections. What is reasonable will vary from strata corporation to strata corporation based on past history, unit mix, location, economic conditions, proposed special levies and other factors. Seek direction from the strata manager or other qualified persons when determining what is reasonable. If the funds are not used, then they can be carried forward into the following year's budget. This tends to level the owners' contributions from year to year and avoid huge spikes in strata fees which could be devastating to those on fixed or limited incomes.

Administrative Procedures

2. Jerry Fanaken, retired strata manager, and long-standing high profile author and educator recommends in his article, "Collecting those Arrears!" that "early education" when a new owner takes possession of his or her strata lot, "is an excellent tool for the collection process".

3. A statement of arrears should be provided to the council by the strata manager or the treasurer on a regular basis. It is recommended that this be addressed as an agenda item of business at every scheduled council meeting.

4. In the Article entitled, "How is our Council Managing our Receivables under the Short Periods of the Limitation Act Amendments?", Tony Gioventu, Executive Director of CHOA and industry leader and educator states: "Strata

corporations and strata agents need to employ an active method of decision making, monthly accounting and reporting, and a record keeping system that ensures the strata corporation proceeds with action in the court system to protect the ability of the strata to collect."

5. The council should as a matter of customary practice approve a resolution authorizing the delivery of a demand letter to all owners in default. This should be addressed at every scheduled council meeting. Any council decision to send a demand letter must be recorded in the minutes.

6. Since council minutes are delivered to the owners, the council should always be cognizant of privacy issues. Highlighting the fact that an owner is in arrears for the purpose of embarrassing an owner is an improper purpose. How the minutes are prepared is typically a matter of discretion. If it is clear that an owner is in the hospital recovering from a major illness or temporarily out of the country, then there is no need to refer to the person's strata lot in the minutes. The minutes could simply state, for example, that the council authorized demand letters to be delivered to those defaulting owners shown on the Arrears Statement presented at that meeting. The council decision is binding even though the detail is absent since the details may be obtained from a review of the Arrears Statement. What is important is that the decision is made by the council and that decision is recorded in the minutes.

Collection Procedures & Practices

7. The council should prepare a checklist of steps to be addressed during the collection process. The checklist should address timelines, due process, budgetary responsibility and administrative authorization.

Bylaw Amendments

8. Every strata corporation should ensure that it has the following bylaws:

(a) interest bylaw not to exceed the maximum interest rate set by the regulations for arrears;

(b) full indemnity legal bylaw;

(c) Small Claims Court bylaw;

(d) unapproved expenditure bylaw authorizing unbudgeted, unauthorized expenditures in an amount that is reasonable for that strata corporation (to address any legal shortfall); and,

(e) a fine bylaw addressing arrears referring to a specific amount for a fine.

9. If a strata corporation has a bylaw that places a time limitation on collection proceedings, then it should repeal that bylaw. For example, some strata corporation have a bylaw which states that a strata corporation must not register a lien until the strata fees are at least three months' in arrears. This bylaw could create a financial loss to the strata corporation in the event of an intervening bankruptcy in circumstances where the lien has not been filed.

The changes to the *Limitation Act* will change the customary practice related to collections. Those councils who adopt solid fiscal policies and practices will hardly notice the waves caused by the changes. However, those councils who do not may be blindsided by the recent legislative changes resulting in lost fees subsidized by the remaining owners creating potentially stormy seas.