

You're Not The Boss of Me: A Few Words About Council Member Liability

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*"Yes, no, maybe...I don't know
Can you repeat the question?"*

Boss of Me, music and lyrics by They Might Be Giants

Whenever I speak at a CHOA event I always start by asking the audience two questions:

"How many people here today are on strata council?"
As you would expect, most people will raise their hands. Then I ask, "And how many of you are here today because you have an axe to grind with your strata council?" This usually gets a few laughs, and at least one lonely raised hand.

Council members are right to be concerned about personal liability. When things go wrong at a strata, the first or second target of the owners' scorn will usually be the council¹. This is due, in part, to our natural propensity to blame others for our own mistakes. But it is also due to a fundamental misunderstanding about the council member's duty of care and how councils are held accountable under the *Strata Property Act*.

The Act presumes two things about council members: (1) they are lay people and (2) they are volunteers. As a result, the Act strictly limits the circumstances in which an owner can sue a council member. This usually comes as a great surprise to owners who sue their council members only to have those claims dismissed by the Court².

Every council member should read the Act, but the parts they need to read closely are sections 31 to 34. These sections set out the council member's standard of care (s. 31), the procedure for disclosing and dealing with conflicts of interest (s. 32), the procedure for making council members accountable when they are in a conflict of interest (s. 33) and the procedure required to pay remuneration to council members (s. 34).

My focus here is on section 33, which bears the ominous one word heading of "ACCOUNTABILITY".

Section 33 is important because it sets out the only situation in which a council member can be sued by an owner for a breach of duty under the Act. This section permits individual owners to seek relief from the court for a council members for a breach of s. 32, which deals with conflicts of interest.

I will try to make this clearer by using the same style of prose favoured by angry owners who threaten council members with lawsuits:

An owner CAN ONLY SUE A COUNCIL MEMBER for breaching the CONFLICT OF INTEREST provisions of the act!?!?! PERIOD!!!! FULL STOP!!!!!! If they want to sue over anything else they must SUE THE STRATA and not THE COUNCIL OR THE STRATA MANAGER!!!!!!?!?!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!³

¹ I will give you one guess for the other target of the owners' scorn. Hint, starts with "S" and ends with "rata manager".

² For two examples of lawsuits by owners against council members that have been summarily dismissed by the Court, see *Wong v. AA Property Management Ltd.*, 2013 BCSC 1551 and *Extra Gift Exchange Inc., et al v.*

Ernest & Twins Ventures (PP) Ltd., et al 2007 BCSC 426. These decisions can be found on the Canlii website.

³ By the way, if you have an axe to grind with your strata and you want to be taken seriously, don't write with ALL CAPS, and use multiple exclamation marks and questions marks in your writing. This tends to make you look silly.

While it is true that a strata functions through the council, and that the council must perform the duties of the strata including the enforcement of the bylaws, the Act restricts the circumstances in which an owner can sue a council member for things done (or not done) in the performance of the council member's duties.

This does not mean that a council member can never be sued for a breach of duty under the Act. What it does mean, however, is that apart from an owner's right to sue a council member over a conflict of interest, the only "person" who can sue a council member for a breach of duty to the strata is the strata corporation. This makes sense when you think about it, because the council owes its duties to the strata corporation and not to the individual owners⁴. The "boss" of the council is the strata corporation as a whole, and not any individual owner.

Section 33 says that a strata corporation or an owner can apply to the court for relief if a council member fails to comply with the conflict of interest procedures in s. 32⁵. If the court finds that the transaction was unreasonable or unfair to the strata, the court can do one or more of the following things (s. 33(3)):

- (a) set aside the contract or transaction;
- (b) require the council member to compensate the strata or any other person for a loss arising from the contract or transaction;
- (c) require the council member to pay to the strata any profit the council member made as a consequence of the contract or transaction⁶.

You will note that the damages contemplated by s. 33(3)(b) are intended to compensate the strata corporation and not necessarily the owner who brings the lawsuit. While an owner may meet the definition of "any other person" in s. 33(3)(b) it is entirely possible that the plaintiff owner's damages would be limited to her unit entitlement share of the council member's profits on the contract or transaction.

This will probably come as a surprise to owners who like to threaten their council members with lawsuits. There is no "pot of gold" at the end of the litigation rainbow for an owner who sues the council under s. 33. What little gold there is will probably go to the strata corporation and not the individual owner.

Although council members are right to be concerned about personal liability, they should not get too worked up about it. A prudent council should make sure that the strata has D&O coverage, and a prudent council will always seek independent professional advice on matters that are beyond the scope of their expertise, including questions about conflicts of interest. Taking these two basic steps, and keeping in mind the protections afforded them under the Act, should allow every council member to sleep soundly at night.

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⁴ This is not peculiar to strata law. The *BC Business Corporations Act* and similar legislation throughout the western world place limits on shareholders' rights to sue corporate directors.

⁵ For a good example of how s. 33 can be used by an owner, read *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183

⁶ There are three defenses to this type of claim written right into s.33: (1) that the contract or transaction was neither unreasonable or unfair, (2) that setting aside the contract would cause significant injustice to third parties, and(3) that the council member was acting honestly and good faith.