

The Case of the 'Not so Secret' Secret Ballot

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A recent decision of the British Columbia Supreme Court has significantly impacted the way strata corporations conduct secret ballot votes at general meetings.¹

In March 2010 the owners in NW 971 approved a special levy in the amount of \$3,000,000 to fund an extensive program of repairs and renovations to the property. The special levy was to be paid in five annual installments. Although it was approved, the resolution was highly contentious.

A group of owners applied to the Court for an order declaring that the vote approving the special levy was null and void for the reason that the meeting had not been conducted in accordance with the bylaws of NW 971, that the distribution of ballots during the sign-in was improper and that a private location to mark ballots had not been arranged.

The Judge concluded that the vote was null and void because of the failure of the Strata Corporation to make proper arrangements for a secret ballot including private locations to mark ballots and to submit them. After reaching this conclusion the Judge did not consider the owners' other complaints.

The bylaws for NW 971 provided that if a precise count was requested the chair must decide whether it will be by show of voting cards, by roll call, by secret ballot or some other method. Prior to voting on the special levy an owner requested a precise count of the votes and the chair determined that the vote would be by secret ballot. However, no private voting booths were provided where ballots could be marked. The owners advised the Court that when the voting ballots were collected the collectors and persons sitting around the

voter could see the ballot. The owners argued that the lack of privacy may have intimidated some owners and prevented them from voting.

The Judge noted that secrecy of ballots is one of the most fundamental principles in elections. If a secret ballot is conducted in a manner that does not provide secrecy such a breach is serious and substantial.

The Judge concluded that the vote was not conducted in secret and as a result the approval of the special levy resolution was declared null and void.

As a result of this decision if a vote at a general meeting is to be conducted by secret ballot the strata corporation must insure that voting booths and ballot boxes are available for the owners so that they may mark and deposit their voting ballots in private.²

Although the Judge was not required to consider the additional complaints presented by the owners, strata corporations should also be alert to the possibility that a vote may be challenged on other grounds.

If a strata corporation has filed a comprehensive set of bylaws the bylaws will often address matters such as the order of business at meetings, the ability of owners to request precise vote counts, and who is permitted to chair a general meeting. If a strata corporation has not filed such bylaws at the Land Title Office the Standard Bylaws of the *Strata Property Act* will apply.

Standard Bylaw 28 sets out the Order of Business for every general meeting of a strata corporation. When preparing the agenda for the meeting the Strata Council should follow the Order of Business contained in the applicable bylaw.

The Standard Bylaws provide, in section 25, that the president of the council will chair the general meetings and that, if the president is unwilling or unable to act, the meeting will be chaired by the vice-president. Standard Bylaw 25 also provides that if neither the president nor the vice-president chair the meeting the chair must be elected by the eligible voters present in person or by proxy from among those persons who are present at the meeting. Some strata corporations have amended this bylaw to require that the chair be elected from among persons eligible to vote. Despite these requirements strata managers, on occasion, simply proceed to chair a general meeting without being elected. If a strata corporation has amended its bylaws to require that the chair be an eligible voter strata managers are unable to be elected to chair meetings for such strata corporations.

Vote counting is another area that can provide the potential for a Court challenge. Very often strata corporations forget to count the abstentions when counting a vote. A majority vote is defined in the *Strata Property Act* as a vote in favour of a resolution by more than one half of the votes cast by eligible voters, present in person or by proxy at the time the vote is taken and who have not abstained from voting. A three quarter vote is calculated in a similar manner and requires at least three quarters of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting. Thus, whether a majority or three quarter vote is achieved is calculated by deducting the abstentions from the total number of eligible votes. Put another way, whether a majority or three-quarter vote is achieved is determined based only on the number of votes that have been cast. For example, if 150 eligible votes are in attendance at a meeting and every vote is cast, a majority vote would require 76 votes and a three-quarter vote would require 113 votes to be approved. However, if ten people abstained, the 10 abstentions must be deducted from the 150 eligible votes. Whether the vote passes is determined based on the 140 votes. In such a case a majority vote would require 71 votes and a three quarter vote would require 105 votes.

The decision in NW 971 emphasizes the importance of voting procedures and the need for voting booths and ballot boxes if a secret ballot is required. The case also serves as a reminder for strata corporations that votes may be challenged on other grounds and as a consequence the strata corporation should ensure that all aspects of general meetings and voting procedures comply with the applicable bylaws of the strata corporation and the provisions of the *Strata Property Act*.

¹ *Imbeau v. The Owners, Strata Plan NW 971* 2011 BCSC 801

² Voting booths and ballot boxes are available from the Condominium Home Owners Association of BC