

Canceling Caretaker's Contracts

by

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Many strata corporations employ caretakers or an independent contractor/manager to perform maintenance and management functions. Some strata corporation's have resident caretakers or managers living onsite in a suite owned or managed by the strata corporation.

This article deals with the issues that arise when a strata corporation decides to cancel its contract with a caretaker or independent contractor/manager. In this article I will use the term "caretaker" to refer to both types of contracts.

A strata council wishing to cancel a contract with a caretaker needs to consider the following legislation:

1. The *Strata Property Act* (the "SPA");
2. The *Employment Standards Act* (the "ESA"); and
3. The *Residential Tenancy Act* (the "RTA").

The SPA

Section 39 of the SPA sets out the procedure for cancelling a contract for strata management services. Under section 39, a strata corporation can cancel a contract for strata management in one of two ways:

1. on 2 months notice following a 3/4 Vote Resolution at a special general meeting; or
2. in accordance with the terms of the contract.

The phrase "strata management services" is not defined in the SPA. Although there is no doubt that section 39 applies to the cancellation of a contract with a property management company, it may also apply to other management contracts, including a caretaker's contract.

The ESA

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The ESA may apply if the contract creates an employment relationship between the strata corporation and the caretaker. It may not matter if the strata corporation considers the caretaker to be an independent contractor, even if that understanding is expressly stated in a written a contract. This is important, because if employment law governs the caretaker's contract, the strata corporation can only cancel the contract with notice, unless it has cause to cancel the contract.

The ESA sets out the minimum standards for employment contracts in British Columbia. Under the ESA, an employment contract can only be canceled on the following *minimum notice periods*:

- Up to 3 months' service – no notice;
- 3 to 12 months' service – 1 week's notice;
- 12 to 36 months' service – 2 weeks' notice; and
- 36 months' service and more – 3 weeks' notice, plus 1 week additional notice for each additional year of service **up to a maximum of 8 weeks**.

It is important to note that the notice periods required by the ESA are lower than the “reasonable notice” periods awarded by courts under the common law.

Whether the caretaker's contract is an employment contract is a question of law that will ultimately be determined by a court or tribunal if the caretaker presses the issue. As a general rule, the more control the strata corporation exercises over the caretaker, the more likely it is that the caretaker will be deemed to be an employee of the strata corporation.

The RTA

The RTA only applies to resident caretakers. A strata corporation that terminates a resident caretaker's contract will also need to terminate the caretaker's tenancy agreement. Under the RTA, a resident caretaker will be entitled to 1 month's notice to terminate his/her tenancy. The tenancy can only be terminated with the use of a special form under the RTA called a Notice of Termination of Residential Tenancy.

Notice of termination under the RTA runs concurrently with notice to terminate under the ESA. That means that a residential caretaker with one year on the job will be will entitled to 1 month's notice to terminate her tenancy, even though she is entitled to only two weeks notice under the ESA.

Conclusion

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The following tips should reduce the strata corporation's legal risks when canceling these types of contracts:

1. The caretaker's contract should be in writing and contain clearly worded clauses governing termination. If your caretaker's contract is not in writing, consider switching to a written one;
2. Strata council should review written contracts and the applicable laws before Notice of termination is given;

3. Notices of termination must be in writing;
4. Be sure to follow or at least exceed the minimum notice of termination requirements under the ESA;
5. Where possible, offer payment of “severance” or “termination pay” instead of notice; and
6. If you offer payment, make sure it is secured with a carefully worded release of liability in favour of the strata corporation.

In all cases, a strata corporation that is considering canceling a caretaker’s contract should get legal advice before doing so.