

STRATA INSURANCE – WHAT YOU NEED TO KNOW
PRESENTED FOR THE VANCOUVER ISLAND STRATA OWNERS
ASSOCIATION

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Introduction:

My first strata insurance file landed on my desk in 1987. At that time the area of strata/condo law was in its early years (as was I as a newly minted lawyer) and it certainly appeared, at least from my perspective, that not much was really known about insuring condominiums/strata corporations or providing legal advice with respect to insurance claims, including recovery of insurance deductibles. Dating back some 57 years statutory requirements have been in place for strata corporations to obtain and maintain insurance on buildings, common facilities and any insurable improvements owned by a strata corporation to their replacement value against fire and perils that were usually the subject of insurance in respect of similar properties and against other perils, including liability, to the amount a strata corporation considered advisable. This type of language dates back to the days of the *Strata Titles Act* (per sections 19(1)(a) and section 30)) and the *Condominium Act* (per section 54).

Various professionals play various roles when it comes to strata insurance. There are brokers negotiating for the necessary insurance coverage, appraisers who are retained to identify what the full replacement value is. There are the adjusters who are called on (by strata corporations and owners/tenants) when insurance claims are filed and the restoration companies who are hired to facilitate the cleaning up of damages caused by an insured peril. Then of course there are the lawyers who are retained when it comes to dealing with and defending claims against strata corporations by owners/occupants subjected to property damages and losses, or to try to negotiate coverage in situations where coverage has been initially denied and or to pursue the recovery of insurance deductibles. You only have to listen to someone like Shawn to know that it also appears to be a growth industry for the insurance industry as premiums and deductibles, especially for water damage claims, are rising at an alarming rate.

A “day” in my life when it comes to strata insurance matters either involves phone calls or e-mails from a strata manager advising me that someone has injured themselves in a strata building (such as a slip and fall), an owner’s vehicle has been damaged by a defective overhead gate or their client’s strata building has just experienced a significant amount of water leakage from a strata lot and water damage to strata lots and common property has happened. I am usually asked for one or more of the following:

- A legal opinion on the strata corporation’s liability/responsibility for the damages/losses that have been reported;
- Who may be responsible for the costs of the resultant damage and/or the strata corporation’s deductible;
- Can the strata corporation charge back the cost of the insurance deductible;
- Does the strata corporation have to file an insurance claim for the damages/losses that have happened; and
- How much will cost to recover the insurance deductible?

My answers and advice as legal counsel may vary depending on the type of claim involved. However sometimes it is evident from the e-mail or the conversation that the insurer has not yet been put on notice and is not aware of the claim. Whatever you do when it comes to insurance claims be sure that one of the first things you do is to put the insurer on notice of the claim.

THE STRATA PROPERTY ACT:

For me and my clients the starting point when it comes to strata insurance and insurance claims is the *Strata Property Act* (the “Act”). So what does the Act say about insurance?

First off strata corporations are required by section 149 of the Act to obtain and maintain property insurance for:

- (a) common property,
 - (b) common assets,
 - (c) buildings shown on the strata plan, and
 - (d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.
- (2) For the purposes of subsection (1) (d) and section 152 (b), "fixtures" has the meaning set out in the regulations.

Subsection (1) (d) does not apply to a bare land strata plan

Section 149(4) of the Act says that property insurance must

- (a) be on the basis of **full replacement value**, and
- (b) insure against major perils, as set out in the regulations, and any other perils specified in the bylaws.

In order to fully identify what fixtures are to be insured by strata corporations, section 9.1 of the regulations define fixtures (for the purposes of sections 149(1)(d) and 152 (b) of the Act) to mean “items attached to a building, including floor and wall coverings and electrical and plumbing fixtures, but **does not include, if they can be removed without damage to the building, refrigerators, stoves, dishwashers, microwaves, washers, dryers or other items.**”

Major perils! What are these? The regulations (section 9.1(2)) says that “for the purposes of section 149(4)(b) of the Act “major perils” means the perils of fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft and vehicles, vandalism and malicious acts”. You will note in reviewing section 9.1(2) of the regulations that there is no mention of “earthquakes” as a major peril. Nothing is said about earthquake coverage – which we really should have on the west coast so as part of the insurance “purchase” process, make sure this peril is included and perhaps also make sure the bylaws require the strata corporation to obtain insurance against earthquakes.

Apart from property insurance is the requirement to obtain and maintain liability insurance. Section 150(1) of the Act says that liability insurance coverage for property damage and bodily

injury is mandatory for a minimum amount of \$2,000,000.00 (per the regulations). Section 151 of the Act says that errors and omissions insurance coverage for council members “against their liability and expenses for errors and omissions made in the exercise of their powers and performance of their duties as council members is mandatory”.

Section 152 of the Act makes it optional to obtain and maintain insurance that is not referred to in section 149 or 150 of the Act (and not defined as a major peril) and for fixtures built or installed in a strata lot that were not built or installed by the developer during the original construction of the building. Hands up for anyone who has purchased this optional insurance and how much fun it was deciding what “fixtures” were not built or installed by the developer?

It is important to keep in mind that the obligation to purchase insurance is not a one off requirement; section 154 of the Act states that a strata corporation must review annually the adequacy of the strata corporation’s insurance AND report on the insurance coverage at each annual general meeting!

It may seem like a rhetorical question but who receives the benefit of the strata corporation’s insurance coverage (assuming it’s available)? I am often asked this question which suggests that a presentation like this should take place over and over again! Pursuant to section 155 of the Act, the strata corporation, the owners and tenants in a strata lot and persons who ordinarily occupy the strata lots are all entitled to receive the protection of the strata corporation’s insurance coverage.

Note: There are at least a few court decisions confirming that the beneficiaries of the strata corporation’s property insurance coverage are “immune” from prosecution for recovery, by the strata corporation’s insurer or the strata corporation, for repayment of any insurance paid out to repair property damage which they are responsible for.

The exception to this however is found in section 158(2) of the Act vis-à-vis recovery of the insurance deductible that has been paid.

When the strata corporation’s insurance policy is called into action, section 158(1) of the Act states that the amount of the insurance deductible paid pursuant to a claim against a strata corporation’s insurance is a common expense of the strata corporation. Section 158(3) of the Act states that strata corporation approval is not required for a special levy (?) or for an expenditure from the contingency reserve fund to pay for the cost of the insurance deductible unless the strata corporation has decided not to repair or replace the damaged property.

Subsequent to the payment of the insurance deductible as a common expense, a strata corporation can, pursuant to section 158(2) of the Act, sue an owner to recover the insurance deductible payment made on account of an insurance claim if the owner is responsible for the damage that resulted in the insurance claim.

Much has been made in the media and in our courts in the past few years about the recovery of insurance deductibles and of chargebacks relating to work undertaken by a strata corporation when the cost of the work is less than the insurance deductible. We all know that insurance

deductibles, mainly as they relate to water damage claims, are quite often one of the main topics of discussion around the council table and involve the application and interpretation of section 158(2) of the Act. There are a few cases, one as recently as last year that have considered a strata corporation's ability to sue an owner to recover the insurance deductible from an owner. Presumably each strata corporation actually had the authority to sue the owner before legal proceedings were commenced. Check the strata corporation's bylaws (do they have a section 171(4) bylaw or will a $\frac{3}{4}$ vote required) before commencing legal proceedings.

To date the case law around the issue of deductibles has supported the ability of a strata corporation to recover insurance deductibles. The seminal case that we all turn initially look to is the case of *Mari v. The Owners, Strata Plan LMS 2835*, BCSC 740, 2007 (an appeal from a decision of the Provincial Court (Small Claims) of B.C.), there had been water damage to the owners' strata lot as well as to common property caused by a faulty water level switch in the washing machine located in their strata lot, causing the machine to overflow. The strata corporation filed an insurance claim. The cost to repair the damage exceeded the amount of the insurance deductible, which was paid by the strata corporation as a common expense pursuant to section 158(1) of the Act. The owners were not asked to undertake or pay for any of the repairs in the first instance. The strata corporation subsequently presented the owners with the bill for the insurance deductible, which the owners refused to pay. The strata corporation proceeded to sue the owners in Provincial (Small Claims) Court (presumably pursuant to sections 170 and 171 of the Act) for recovery of the deductible of \$5,000.00, relying on section 158(2) of the Act. When the matter was heard before Judge Yee in Provincial Court, the issue before him involved the interpretation of the word "responsible" found in section 158(2) of the Act. Judge Yee concluded that the word "responsible" did not require a finding of negligence but rather only a finding that the Mari's were legally accountable or answerable for the event(s) that gave rise to the water leak that caused the damage.

The Mari's appealed the decision to the B.C. Supreme Court. Mr. Justice Burnyeat heard the appeal in May, 2007 and affirmed the decision of Judge Yee. Mr. Justice Burnyeat found that section 158(2) of the Act allowed the strata corporation to recover the insurance deductible it had paid from the Mari's without the need for a finding of negligence. Mr. Justice Burnyeat agreed with the Small Claims Court Judge who had stated that the owners had a duty to repair and maintain their strata lot and as such, they were responsible for the loss within their strata lot regardless of fault or negligence on their part. The Small Claims Court Judge had said that the matter could be viewed as if there were no strata corporation involved and that whether the repairs paid by the strata corporation were "paid as part of the deductible under the policy (of insurance) or otherwise, they relate to damage for which in my view, under the Act and the bylaws, the owner is responsible." The Small Claims Judge had also said that "there would arguably have been no legal obligation on the strata corporation to pay for repairs, absent the duty under the bylaws to insure against it."

Most recently Judge Merrick of the Provincial Court of B.C. has affirmed the ability of strata corporations to recover insurance deductibles (with a bit of a twist) in *In Strata Corporation LMS 2723 v. Ann Sharon Morrison*, 2012 (BCPC 300). In this case the court was asked to determine whether Ms. Morrison was responsible to pay the \$2,500.00 insurance deductible the

strata corporation paid as a result of a fire caused by Ms. Morrison's tenant that caused damage to her unit and to the strata corporation's common property.

The issue before the court was whether section 158(2) of the *Strata Property Act* (the "Act") entitled the strata corporation to sue Ms. Morrison to recover the insurance deductible caused by the actions of her tenant.

The court had to consider whether Ms. Morrison was "responsible" as that word is used in section 158(2) of the Act when it was the tenant who had caused the damage that resulted in the insurance claim and insurance deductible.

The Judge considered the decisions of Mr. Justice Burnyeat in *Mari v. Strata Plan LMS 2835*, and *Wawanesa Mutual Insurance Company v. Keiran*, both of which were 2007 B.C. Supreme Court decisions. In particular, Judge Merrick agreed with Mr. Burnyeat's statement in the *Mari* case that:

It would be unfair to impose liability on all owners for what would ordinarily be insured by an owner of a particular unit if that owner owned the unit as a single family dwelling. The forced sharing of deductible deprives all owners as a group of imposing discipline on a particular owner and also allows the Strata Corporation to sue an owner to recover the deductible portion in order that all of the owners do not have to bear that cost.

He continued:

I am satisfied that the legislation is clear and that no finding of negligence is required. The Legislature used the term "responsible for" in s. 158(2) rather than terms such as "legally liable, liable, negligent". The choice of the term "responsible" provides the owners with the opportunity to allocate to a particular owner the cost of an insurance deductible in cases where an owner was thought to be responsible for a loss. The presence of washing machines, dishwashers, air conditioners, and water dispensing refrigerators are examples of items that pose a risk for water escape. Unless there is a mechanism to direct the payment of the deductible by an owner who keeps or installs an appliance that has the potential for water escape, owners are free to act without the consequence that affects homeowners in single family homes where the homeowner's insurance will repair the damage but the homeowner will be responsible for the amount of the deductible. The owner will be responsible for the deductible notwithstanding that the owner was not negligent. Section 158(2) simply allows the Strata Corporation to set the same standard for the payment of a deductible as would exist in a single family residence.

Judge Merrick went on to review the *Kieran* case and stated at paragraph 9 of his decision that:

In my view, Justice Burnyeat determined that "responsible for" should be interpreted broadly because, one, owners of a strata unit are responsible for what occurs within their unit, and, two, unless there is a mechanism to direct the payment of the deductible by an owner, an owner is free to act without consequence that affects homeowners in a single

family home, where the homeowner's insurance will repair the damage but the homeowner will be responsible for the amount of the deductible.

Relying on this approach Judge Merrick took the position that tenants, like washing machines, dishwashers, etc., pose risks that go along with their occupation of a unit. In the context of who was responsible for the insurance deductible the Judge acknowledged that the Ms. Morrison was not in a position to have control over the candle that caused the fire but it was her strata lot and it would be “unfair to impose liability on all owners for what would ordinarily be insured by an owner of a particular unit if that owner owned the unit as a single family dwelling.” Ms. Morrison was therefore required to reimburse the strata corporation for the insurance deductible it had paid on account of the fire in her unit.

While on the topic of insurance and insurance deductibles I often see a “chargeback” bylaw. One example I often see is as follows:

“Where any claim has been made against the insurance policy of the strata corporation as a result of a violation of any of the bylaws or any rule or regulation which may be established from time to time by the council pursuant to the Act or the bylaws, by any owner or any occupant, guest, employee, agent or invitee of such owner or occupant, a sum equal to the amount of the deductible charged by the insurer of the strata corporation as a result of the claim shall be payable by the owner of the strata lot and shall become due and payable on the first day of the month next following.”

While I am all in favour of making it easier than it currently is to recover an insurance deductible it is my view that this bylaw is not enforceable. A section 158(2) law suit is, in my view, the only way to recover the insurance deductible from an owner.

One section of the Act that I have not mentioned yet is section 161 which states:

161 (1) Despite the *Insurance Act* or any other law, an owner may obtain and maintain insurance for any or all of the following:

- (a) loss or damage to the owner's strata lot and the fixtures referred to in section 149 (1) (d)
 - (i) against perils that are not insured by the strata corporation, and
 - (ii) for amounts that are in excess of amounts insured by the strata corporation;
- (b) fixtures in the owner's strata lot, other than the fixtures referred to in section 149 (1) (d);
- (c) improvements to fixtures referred to in section 149 (1) (d);
- (d) loss of rental value of the owner's strata lot in excess of insurance obtained and maintained by the strata corporation;
- (e) liability for property damage and bodily injury, whether occurring on the owner's strata lot or on the common property.

(2) Despite this Act, the *Insurance Act* or any other law, an owner of a strata lot in a bare land strata plan may obtain and maintain insurance on buildings or fixtures built or installed on the strata lot.

I would think that the owners in the *Mari* and *Morrison* decisions would have not had to endure the stress and costs of a law suit if they had obtained and maintained insurance coverage for their strata lots, including purchasing whatever endorsement or rider required to cover off payment of the cost of the insurance deductible! It would certainly improve the odds of a strata corporation being able to fully recover an insurance deductible without having to spend time and money chasing the owner responsible for the loss or damage that gave rise to the claim!

I briefly referred to section 149(4)(a) of the Act and the obligation to obtain property insurance on the basis of full replacement value. Shawn Fehr is far better qualified than I to speak on what to know when shopping for your insurance coverage. From a legal perspective the consequences of not obtaining property insurance on the basis of full replacement value could pose serious financial consequences to a strata corporation and perhaps to the members of the strata council. In a 2008 article written for CCI Vancouver by Natalia Szubocsev of Valuations Ltd. she defined “Replacement Cost” as “the monetary amount required to reproduce property of like kind and quality at one time in accordance with current market prices for materials, labour, manufactured equipment, contractor’s overhead, profit and fees, but without provisions for overtime, bonuses for labour, or premiums for materials.” The article went on to say that “considering today’s significant construction cost increases – due to the increased cost of construction materials and labour shortage – having an accurate, substantiated and updated insurance value for the strata property is very important.”

The Act does not make an appraisal mandatory but from a legal perspective it is my view that it is imperative to obtain an appraisal (as well as regular updates) to allow strata corporations to know the amount of insurance it will take to have insurance coverage on the basis of full replacement value. I became involved late in the day with a strata corporation (self-managed) that had not had an appraisal for several years and certainly appeared to be “under insured” because of that and because it did not have the municipal building code coverage endorsement but required significant upgrades, including sprinklers, wiring, etc. The article written by Ms. Szubocsev also referred to the following “real life” example which I think is worth repeating while on the topic of insurance/under-insurance from a legal perspective:

A condominium corporation had discussed the completion of an appraisal on their complex, however did not think it was necessary. Following confirmation from the insurance broker that an insurance appraisal was vital in substantiating the replacement cost values of the complex, the corporation and the property manager decided to proceed with the appraisal. The appraisal stated that the condominium corporation was currently under-insured by \$4,000,000. The corporation increased their replacement cost values on their property insurance policy by this amount and 8 months later (the complex had a 14 year claims free history) suffered a \$1,000,000 insurable loss. The cause of the loss was fire due to a halogen lamp which had fallen onto the living room couch in one of the suites. The resident of the suite did not have tenant or condominium insurance which would have allowed the corporation's insurance carriers to counter their claim.

As a result of the recent appraisal which was completed on the complex, the corporation's insurance adjuster simply asked for a copy of the appraisal and paid the claim out in accordance with the values stated. There were no questions whatsoever with regards to the co-insurance clause included in the insurance policy. If the appraisal had not been conducted, the corporation would have been under-insured and become a co-insurer on the loss responsible for \$290,000 to reconstruct the building. In the absence of the appraisal the strata council indicated they would have had to use the reserve fund for the co-insurance penalty of \$290,000. However, because the reserve fund did not have that amount of money, each unit owner would have been provided with a special assessment.

To quote the property manager "I am extremely grateful for not having to have learned this lesson the hard way. Anyone who disregards or makes little of a request for an insurance appraisal is walking into a peril with most serious consequences. In hind sight, the cost of our insurance appraisal for the subject property instantly became a non-issue once the strata council realized the extent of their exposure prior to the appraisal. It seems to me that insurance is an after thought to many people until the reality of an unexpected loss causes one to come to terms with short comings with respect to insured value. At that point, it's too late. With respect to insurance appraisals, fore-warned is fore-armed."

So is your strata corporation under-insured? All major perils, as that term is defined in section 9.1(2) of the Act, should be insured against and for full replacement value. Are you using the services of a qualified appraiser to ascertain the "full replacement value" for insurance purposes? Are you obtaining the "minimum" coverage that is required under the Act? Have you obtained insurance for earthquake coverage even though there is no mention of "earthquakes" as a major peril in the regulations? It would seem to me that if the required due diligence is undertaken by the necessary professionals everyone would be able to answer "yes" to the question. If not then, among other things, consider whether, in your capacity as a council member or strata manager, you are putting your building/your client at risk? As Ms. Szubocsev put it, "Remember if you are under-insured and suffer a loss, there could be serious financial and legal implications for your property owners, and specifically the strata council. On the other hand, if you are over-insured, you are wasting funds which could be put to better use elsewhere. Having an up-to-date insurance appraisal ensures that the strata corporations complies with its duty to insure the common property and assets to its "full replacement value" and avoids self-insurance exposure in case of a loss." The legal implications of being under-insured are numerous enough that they

could likely be the subject of another seminar on insurance. Suffice it to say that the strata council that does not make sure that section 149(4) of the Act is fully complied with could face the prospect of allegations of breach of the section 31 standard/duty of care and the unpleasant prospect of being sued for this breach and damages arising from that breach by owners who are faced with significant special levies to pay for the loss which the strata corporation, as a “co-insurer”, is required to pay!

CONCLUSION:

It has been my experience that insurance is one of the most talked about and misunderstood topics for the majority of my strata clients. In my view it is vitally important to be aware of all of the various statutory requirements in the Act as they relate to obtaining and maintaining insurance and make sure you seek the advice of qualified professionals should you have any questions or concerns about insurance coverage, insurance claims and purchasing the right insurance coverage. While I am not aware of any legislative changes to the Act that will impact on insurance and insurance coverage, the passage of the *Civil Resolution Tribunal Act* could end up driving disputes over demands for insurance deductible payments and recovery of insurance deductible payments to the Tribunal for resolution. Perhaps in the next year or two the Act will be amended to either make it mandatory for owners to have property and liability insurance coverage or to make it optional for strata corporations to put insurance bylaws in place.