

VANCOUVER ISLAND STRATA OWNERS ASSOCIATION

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WHO PAYS?

A REVIEW OF EXPENSE ALLOCATION AND RESPONSIBILITY UNDER
THE STRATA PROPERTY ACT

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General Principles

The *Strata Property Act* (“SPA”) does not address specific expenditures. That is left to the bylaws (whether they be the Standard Bylaws or bylaws created specifically by the strata corporation). Rather it deals with expenditures in broad terms, outlining general principles which are applied to specific situations. These principles, as interpreted by the court on occasion, are then applied to common expenses of the Strata Corporation.

The SPA defines “common expenses” as expenses:

- “(a) relating to the common property and common assets of the strata corporation, or
- (b) required to meet any other purpose or obligation of the strata corporation;”

It then establishes specific funds to pay for those common expenses as they arise. The SPA permits three types of funds:

- Operating Fund
- Contingency Reserve Fund
- Special Levies

There cannot be separate funds for painting or roof repairs (see *McGowan v. Strata Plan NW1018* 2002 BCSC 673). Separate funds for distinct purposes, however, can be raised by way of a special levy pursuant to s.108 provided that there is an identifiable purpose for the levy (i.e. roof repair). The funds raised by way of a levy cannot be used for any purpose other than that specified in the resolution approving the levy.

The expenses which the Operating Fund is for are identified in s.92(a) of the SPA. They are:

- “... expenses that
 - (i) usually occur either once a year or more often than once a year, or
 - (ii) are necessary to obtain a depreciation report under section 94,”

The Contingency Reserve Fund (“CRF”) is for “common expenses that usually occur less often than once a year or that do not usually occur” – s.92(b) SPA.

Special levies are governed by s.108 of the SPA and can be for any type of common expense.

Subject to certain exceptions, the allocation of common expenses amongst the owners is done on the basis of “relative unit entitlement”. The Schedule of Unit Entitlement

determines a strata lot's share of the Operating Budget, CRF contributions and a special levy. (In most cases the Schedule of Unit Entitlement is based on the "habitable area" of a strata lot. For strata corporations created under the *Condominium Act* the allocation was done on the basis of 'square footage'; although the Superintendent of Real Estate, when approving the schedules, applied principles similar to those found under the definition of "habitable area" in Regulation 14.2 of the SPA).

The fact that a strata corporation has not followed the proper schedule in the past does not mean the owners are entitled to a retroactive reallocation of monies paid for common expenses – *Christensen v. Strata Plan KAS 468* 2013 BCSC 1714; *Heliker v. Strata Plan VR 1395* 2005 BCPC 500; *Large v. Strata Plan No. 601* (2005), 45 B.C.L.R. (4th) 345;

It is open to the owners within a strata corporation to adopt a formula other than relative unit entitlement to allocate expenses. S.100 of the SPA provides:

- "(1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.
- (2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.
- (3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote."

Although s.100 does not refer to the formula applying to special levies, it arguably does since s.108(2)(a) refers to determining each strata lots' contribution in accordance with s.99 or s.100 of the SPA.

The exceptions do not stop there however. Regulations 6.4 and 6.5 provide further statutory means of allocating expenses by a method that is not strictly based on relative unit entitlement. The most notable exception pertains to "types" of strata lots. Regulation 6.4(2) allows the strata corporation to allocate certain expenses among one "type" (or group) of strata lots where the expense "relates to and benefits only one type of strata lot". The "types" of strata lots must be identified in the bylaws of the strata corporation.

In order for strata lots to constitute a "type" they must be substantially "different in character or form of structure" or a class of things having common characteristics" – *Lim v. Strata Plan VR2654* [2001] BCJ No. 2040 (QL); *Coupal v. Strata Plan LMS2503*

[2002] BCJ. No. 2313 (QL). Townhouses versus apartments are a typical example. Commercial (non-residential) versus residential is another. However, other differences in strata lots have been found not to be significant enough to constitute different types: different buildings; different phases; townhouses with basements versus those without.

The fact that a certain type of strata lot consumes a disproportionate amount of a certain common expense does not mean that the expense can be allocated entirely or disproportionately to those strata lots – *Yang v. Strata Plan LMS4084* (2010), 93 R.P.R. (4th) 111 (BCSC). If an expense benefits all strata lots in some way, it is a common expense borne by all – *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259* (2004), 34 B.C.L.R. (4th) 229 (C.A.)

The most important thing to remember about a “types” designation is that the allocation of expenses applies only to the Operating Fund. It cannot be used as a means to reallocate special levies or contributions to the Contingency Reserve Fund. To achieve a different allocation of those types of expenses, the strata corporation must create sections whereby an expense which relates solely to the strata lots within that section can be allocated to those strata lots only.

Regulation 6.4(1) is an often overlooked exception which applies to limited common property expenses. Like the “types” exception, it allows expenses to be allocated to only certain strata lots. Where an expense “relates to and benefits only limited common property” only the strata lots which have the use of the limited common property share in the expense. The extent of the regulation is unclear and it has not been the subject of judicial consideration. For example, would it allow the expenses related to annual maintenance of patios (as opposed to balconies on the upper floors) to be allocated only to the patio owners? Clearly it would apply where an area (such as residential hallways in a mixed use building) are allocated as limited common property for the use of the residential strata lots.

Regulation 6.5 applies where a strata corporation has, by way of bylaw, taken responsibility to repair to certain portions of certain strata lots (as permitted by s.72(3) of the SPA). For example, if certain of the strata lots had solariums which were part of the strata lot and other did not, if the Strata Corporation took responsibility for the solariums, only the solarium strata lots would bear those costs related to the solariums which are paid for from the Operating Fund.

Utilities

One often encountered area of contention in relation to common expenses is utility expenses (natural gas, water, etc). Relative unit entitlement does not always seem fair in this regard. However, as the court has said on more than one occasion, one of the governing principles in strata corporations is that owners are “all in it together”.

It is not open to strata corporations to arbitrarily allocate utility expenses between strata lots (whether that is individual strata lots or groups of them or even types) either through

the budget or the bylaws. For example, some strata corporations allocate the costs of common property electricity on a percentage basis between the commercial strata lots and the residential based on what the relative consumption is believed to be. Absent a resolution under s.100 of the SPA that type of bylaw is not permissible (even in a sectioned building).

The problem of excess usage by one or more owners cannot be addressed by way of a bylaw. In *B.P.Y.A 1163 Holdings Ltd. v. Strata Plan VR2192* (2008), 84 B.C.L.R. (4th) 381 the court struck down a bylaw which imposed excess user charges for higher water usage, garbage and caretaker time.

The issue of excessive water consumption was addressed in *Shaw v. Strata LMS3972* (2008), 71 R.P.R. (4th) 255. In that case the building consisted of 7 residential strata lots and 16 commercial. Two of the commercial strata lots were coffee shops which consumed an excessive amount of water (99% of the water was consumed by the commercial strata lots who paid only 62% of the cost). The court exercised its authority under s.164 of the SPA [significant unfairness] to pass a resolution pursuant to s.100 of the SPA which allocated 6% of the water costs to the residential strata lots.

Utility allocation can be addressed in a couple of different ways:

- Passage of a resolution under s.100 of the SPA using a different formula than unit entitlement;
- Creation of a “types” bylaw
- Installation of individual meters

A typical situation where a “types” bylaw *might* be applied is in regard to natural gas. On occasion a strata corporation might have some strata lots which have gas fireplaces and some which don’t. Arguably (although it might be pushing the envelope somewhat) the existence or absence of a fireplace could be a difference in the character of a strata lot. Thus natural gas costs (assuming the gas is not used for anything else – ie. to heat boilers) could be allocated just to the strata lots with fireplaces.

Repair and Maintenance

The starting point for any discussion regarding repair and maintenance is s.72 of the SPA. It establishes the basic framework for the division of those responsibilities. That section provides as follows:

- “(1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
- (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
 - (a) limited common property that the owner has a right to use, or

- (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.
- (3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.”

These basic responsibilities can be further delineated and, in the case of limited common property, altered by way of a strata corporation's bylaws. The Standard Bylaws address repair and maintenance as follows:

- “2 (1) An owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws.
- (2) An owner who has the use of limited common property must repair and maintain it, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws.

8 The strata corporation must repair and maintain all of the following:

- (a) common assets of the strata corporation;
- (b) common property that has not been designated as limited common property;
- (c) limited common property, but the duty to repair and maintain it is restricted to
 - (i) repair and maintenance that in the ordinary course of events occurs less often than once a year, and
 - (ii) the following, no matter how often the repair or maintenance ordinarily occurs:
 - (A) the structure of a building;
 - (B) the exterior of a building;
 - (C) chimneys, stairs, balconies and other things attached to the exterior of a building;
 - (D) doors, windows and skylights on the exterior of a building or that front on the common property;
 - (E) fences, railings and similar structures that enclose patios, balconies and yards;
- (d) a strata lot in a strata plan that is not a bare land strata plan, but the duty to repair and maintain it is restricted to
 - (i) the structure of a building,
 - (ii) the exterior of a building,
 - (iii) chimneys, stairs, balconies and other things attached to the exterior of a building,
 - (iv) doors, windows and skylights on the exterior of a building or that front on the common property, and
 - (v) fences, railings and similar structures that enclose patios, balconies and yards.”

The definition of “repair” was established in *Taychuk v The Owners, Strata Plan LMS744* 2002 BCSC1638 and is as follows:

“It is true that the primary meaning of the word “repair” is to restore to sound condition that which has previously been sound, but the word is also properly used in the sense of ‘to make good’. Moreover, the word is commonly used to describe the operation of making either good or sound, irrespective of whether the article has been good or sound before.”

The definition of “maintain” was established in *Rettie v The Owners, Strata Plan LMS2429* 2011 BCSC 1611 as:

“Maintain” is defined in *Black’s Law Dictionary*, in part, as: “acts of repair and other acts to prevent decline, lapse or cessation from existing condition”; “keep in good order”; “keep in proper condition”; “keep in repair”.

Taychuk also established the principle that in carrying out its repair and maintenance obligations a strata corporation must act reasonably. In *Weir v The Owners, Strata Plan NW17* 2010 BCSC784, the court held that a strata corporation, so long as it is acting within the scope of reasonableness, can determine the method of repair (which is often a source of contention).

In *Hnatiuk v Condominium Corp. No. 032* 2411 2014 ABQB 22, the court clearly recognized an obligation on the part of the strata corporation to investigate whether something in fact needs repair. In *Paul v Riding* 2013 BCPC 292, the failure to investigate the extent of damage contributed to the Strata Corporation’s liability for repairs.

One of the difficulties a strata corporation will often face in relation to repair and maintenance issues is that the way in which the building is constructed does not correspond neatly to a legislative framework. In *Okrainetz v Condominium Plan No. 82R42988* (1992), 102 Sask R. 225 (which was cited with some approval in *Elahi v. Strata Plan VR1023* 2011 BCSC 1665) the Saskatchewan Court of Queens Bench held that the realities of the construction of the building must be taken into account when assessing repair and maintenance responsibilities.

It is important to note that s.72(2)(a) allows the strata corporation to delegate the responsibility for common property to owners only as permitted by the Regulations. Since there is no regulation passed in relation to s.72(2)(a) that delegation is not possible. As such, the strata corporation will always be responsible for repairing and maintaining common property (even if the costs can be allocated to certain strata lots by way of a “types” bylaw or a s.100 resolution).

The one exception to this principle is where an owner asks for and receives permission to alter the common property and is then asked to sign what is commonly referred to as an “Assumption of Responsibility Agreement.” The obligation to enter into such an agreement is imposed by the bylaws. Standard Bylaw 5(2) provides an example of such a bylaw:

“(2) The strata corporation must not unreasonably withhold its approval under subsection (1), but may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.”

Such agreements cannot be used to make an owner responsible for the actual repairs. Simply because an owner alters common property (even if they do so for their own use), that does not change the nature of the property; it remains common property. However, the effect of the agreement is to permit the strata corporation to charge the costs of the repair back to the owner. It is important then that such agreements are properly drafted and contain the necessary provisions to legally obligate the owner to pay those costs.

Item (c) on the Form B Information Certificate makes reference to agreements of this nature. It says:

“(c) Are there any agreements under which the owner of the strata lot described above takes responsibility for expenses relating to alterations to the strata lot, the common property or the common assets?”

It is very important then that strata corporations keep proper track of these agreements and that they are noted on the Form B. The failure to do so can have consequences. The Form B acts an “estoppel certificate”. S.59(5) of the SPA provides that the information contained in the Form B is binding on the strata corporation if a person, acting reasonably, relied on it.

In *Orr v. Metropolitan Toronto Condominium Corp.* No. 1056 2014 ONCA 855 the condominium corporation and the strata manager were both found liable for damages resulting from an error in the estoppel certificate issued by the corporation. The court found the strata manager liable for not making proper enquiries of the condominium corporation before issuing the certificate.

Form B certificates are also a means of alerting a potential new owner to the existence of an unauthorized alteration. While there are minimum requirements for what the form must include, the strata corporation is not precluded from referring to other matters. While the new owner could not be fined for the alteration (they didn’t breach the bylaw) they are nonetheless responsible to restore it.

In *Elahi v. Strata Plan VR1023* 2011 BCSC 1665 the court considered the responsibility of an owner with respect to repairing doors and windows which adjoined a solarium

constructed (with permission) on the common property. In doing so it cited the earlier decision in *Lim v. Strata Plan VR2654* 2001 BCS 1386, and held that:

53 In fact, the most succinct statement of the proper, applicable underlying principle is as articulated by Boyd J. in *Lim* at para. 63, cited previously, where she stated that "Owners will be responsible for maintaining limited common property only to the extent their use of it creates additional expenses."

54 There is a striking consonance between that principle and the thrust of s. 72 (2) of the Act:

Repair of property

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

(2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of

- (a) limited common property that the owner has a right to use, or
- (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

55 I recognize, of course, that there has been no bylaw passed to make the petitioners responsible for the door and windows. Nevertheless, applying the general principle to the discussion and decision set out earlier respecting the solarium, it is my conclusion that the cost of repairing the windows and door should be borne by the petitioners to the extent that they are a consequence of the removal of the solarium structure. Problems or damage created by that removal process are properly characterized as having a sufficiently close relationship to the construction and maintenance of the solarium. However, where the need to effect repairs is a consequence of general wear, tear and deterioration of the building structure, the obligation should fall upon the Strata Corporation, just as it would for any other exterior door or window of the building. Such repairs are clearly within the contemplation of Bylaw 3.5(c)(ii). It is not reasonable to conclude that the fact that the petitioners had a solarium located there at some point in time should permanently exempt the area from the responsibilities of the Strata Corporation.

...

57 The practical effect of the Court's ruling in this regard will require the parties to consult and discuss the specifics of the circumstances surrounding the required repairs for the windows and door, and, in all probability, to reach a reasonable agreement which may entail some sharing of the expenses.

There is some support then for the proposition that the strata corporation can, even absent an Assumption of Responsibility Agreement, make an owner pay for costs which the strata corporation would not have had to pay, but for the alteration.

Repair and maintenance which is the responsibility of the strata corporation will be a common expense which must be allocated amongst the owners on the basis discussed at the beginning of this paper. However, the issue isn't always about who pays. Often it is about raising the money to pay. Common expenses will fall either within or without of the Operating Fund. Operating Fund expenses are contributed to by way of strata fees payable monthly (or at such other interval as the bylaws state). Expenses which are not Operating Fund expenses can be paid for in one of three ways (or a combination of them):

- From the Contingency Reserve Fund
- By way of a Special Levy
- By borrowing

Until recently, expenditures from the Contingency Reserve Fund required approval by way of a $\frac{3}{4}$ vote. Amendments to s.96 of the SPA have changed that. Where the expenditure is for one of the following purposes it only requires approval by way of a majority vote:

“(A) a majority vote at an annual or special general meeting if the expenditure is
 (I) necessary to obtain a depreciation report under section 94, or
 (II) related to the repair, maintenance or replacement, as recommended in the most current depreciation report obtained under section 94, of common property, common assets or the portions of a strata lot for which the strata corporation has taken responsibility under section 72 (3)”

The pivotal phrase in subparagraph (II) is “as recommended in the most recent depreciation report”. What does that actually mean? Depreciation reports aren’t required to “recommend” work. They identify service life and future expenditures. The logical interpretation is that it refers to work which the depreciation reports requires to be done in the very near future. The alternative interpretation is that it is any work referred to in the depreciation report, no matter when it might need to be done.

The other recent amendment to the SPA is s.173(2) which provides:

“(2) If, under section 108 (2) (a),
 (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
 (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4

vote required under section 108 (2) (a), the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section”

This section was recently considered by the court in *The Owners Strata Plan VIS114 v. John Doe* 2015 BCSC 13. In that case the court approved work to the roof. It relied on a number of engineering reports to deem the work as “necessary to ensure safety or prevent significant loss or damage”.

Pursuant to s.111 of the SPA a strata corporation may borrow money by way of a $\frac{3}{4}$ vote. The payment toward the loan (including interest) becomes part of the Operating Fund.

Whether a strata corporation is responsible to repair or maintain a certain portion of the building or grounds will therefore depend on the nature of the item in question (i.e. is it common property, limited common property or part of a strata lot) and whom the bylaws say is responsible to maintain and repair it.

The definition of “common property” plays a significant role in that process. Whereas what constitutes limited common property and what is part of a strata lot can be determined by looking at the strata plan, common property is not so simple. Some areas of the common property are shown on the strata plan. However, there are parts of the building which are common property but not shown on the strata plan. For example, main waste discharge pipes and main water supply lines.

The SPA defines “common property” as follows:

- “(a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
- (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
 - (i) within a floor, wall or ceiling that forms a boundary
 - (A) between a strata lot and another strata lot,
 - (B) between a strata lot and the common property, or
 - (C) between a strata lot or common property and another parcel of land, or
 - (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;”

It is the second part of the definition which can be the most troubling to apply. For example, where does a pipe transition from part of the strata lot to common property? Who is responsible for in floor heating? What if a pipe, which services only one strata

lot, leaves the strata lot boundaries temporarily? The answers to these questions can be difficult to determine and depend heavily on the particular facts.

As mentioned above, In *Okrainetz v Condominium Plan No. 82R42988* (1992), 102 Sask R. 225, (which was cited with some approval in *Elahi v. Strata Plan VR1023* 2011 BCSC 1665) the Saskatchewan Court of Queens Bench said that “the provisions of *The Condominium Property Act* must be interpreted in light of the realities of what actually happens between developers, purchasers and condominium corporations” It then determined that air conditioners which serviced individual units were not the responsibility of the condominium corporation simply because they were attached to the common property balcony of which only the owner had use.

Although not yet applied in its full scope by a British Columbia court, the reasoning in *Okrainetz* has some appeal. The definition of common property, when applied strictly to the design and construction of a building, can produce results which make the strata corporation responsible for things which are truly not common.

There are, throughout almost all strata corporations, certain items which are almost universally contentious or at least, confusing when it comes to determining who is responsible for them.

Windows and doors

Many strata corporation enact bylaws which make individual owners responsible to repair and maintain windows and doors. Passing responsibility for windows and doors completely to owners would appear not to be possible under the SPA. The reason for this lies in s.68 of the SPA which provides, in fact, as follows:

- “(1) Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot, the common property or the other parcel of land.
- “(2) If a strata lot is not separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is as shown on the strata plan.”

However, in *Matthews v. Strata Plan NW1874* 2009 BCPC 66 the court gave a non-binding opinion that an owner was responsible under the strata corporation’s bylaws to repair their own windows. The bylaws made the strata corporation responsible for common area windows only. In reaching his decision the Small Claims judge said the following:

20 It is clear that the bylaws intend that all owners should share the cost of repairs to common property, while repairs to limited common property should generally be the expense of those owners who have the exclusive use of that property. Here, the exterior of the Claimant's windows can not be said to be the benefit of the owners as a whole. It is the Claimant who has the exclusive benefit of looking out of them, or of restricting their view with appropriate covering. Unlike something like a hallway or a common room which many owners might reasonably be expected to use and access, other owners could not reasonably be expected to use the exterior of the Claimant's windows, without being considered to be invading his privacy or otherwise acting unreasonably.

21 From this it follows that the Claimant's windows are, at best, limited common property. According to the bylaws, their repair is the obligation of the Claimant, pursuant to section 9 of the Bylaws.

Since the midway point of the wall is the boundary between strata lot and common property, windows and doors (except in the rarest of cases) will be at least one-half common property. The strata corporation cannot pass responsibility for the portion of the window which is common property on to an owner. Although it can arguably do that for at least the portion of the window that is part of the strata lot, it may not want to. Dividing responsibility for an item which does not divide easily can be problematic.

While the obligation to physically carry out the repair cannot be passed along to individual owners, the *costs* to repair windows arguably can if there is a resolution passed pursuant to s.100 of the SPA. However, the bylaw must be expressed as a formula for allocating the costs.

It is important to note that taking responsibility to repair windows and doors does not make the strata corporation liable for damage that an owner, tenant or occupant causes to those items. For example, if an owner throws an object through a window and breaks it, the strata corporation is required to fix the broken window. However, the cost of doing so can be charged back to the owner. The basis for doing so starts with Standard Bylaw 3(2) which prohibits an owner, tenant, occupant or visitor from causing damage to the common property (other than reasonable wear and tear). S.133 of the SPA provides that the reasonable cost of remedying a bylaw contravention can be charged back to an owner. The cost of repairing damage would fall within the scope of that section – see *Pham v Strata Plan NW2003 2007 BCSC 519*.

Door hardware

Door hardware (i.e. door knobs) and in particular the equipment and apparatus associated with garage doors can pose a quandary. While they may be universal in that every strata lot has them, they are unique in that only one key fits in each lock. The same principles behind the responsibility for the doors themselves would apply. However, it is clear that each lock only services a single strata lot. In that sense the lock

is closer in nature to common property. The reasoning in *Okrainetz* could be applied here to justify making owners responsible for the locks. (It is commonly accepted that owners are responsible for replacing their mailbox locks).

Garage door openers in townhomes would clearly be the responsibility of the owner if the garage is part of the strata lot (as is most often the case). On occasion, however, garages are designated as limited common property. In that case, the opener would be the responsibility of the strata corporation under Standard Bylaw 8(c)(i). That responsibility can be altered by way of the bylaws, however.

The responsibility for the tracks for an overhead garage door would fall along the same lines as the opener.

Pipes

The definition of common property can play a significant role in determining responsibility for the repair and maintenance of pipes. Generally speaking the location of the pipes determines who is responsible for them. That was the basis on which liability for an insurance deductible was determined in *Strata Plan KA1019 v. Keiran* 2007 BCSC 727. In *Hallport v. Strata Plan NW2471* 2014 BCPC 299 the strata corporation was found to be liable for a pipe which was held to be limited common property (for which the strata corporation was responsible under the bylaws). The pipe serviced only the owner's strata lot. However, the pipe was held to be limited common property because it was located in a shed which was designated on the strata plan as limited common property. In reaching its conclusion that the strata corporation was liable, the court said the following:

“18 Based on the evidence, the failed water pipe is limited common property. The obligation to maintain and repair it is on the claimants as the owners of unit 10 except for maintenance and repair that ordinarily occurs less often than once a year. The evidence is that this development is approximately 25 years old. Similar water piping to several other units has failed in the last few years. The agreed cause has been wear and tear and gradual deterioration. Clearly inspection, maintenance, or replacement of this water pipe is not something that would occur annually in the ordinary course of events. Accordingly my conclusion is that the obligation to maintain and repair this water pipe does fall upon the strata corporation. My understanding of the scheme of the Standard Bylaws for repair and maintenance of limited common property is that the unit owner with entitlement to use of the limited common property is responsible for repair and maintenance of things that need to be checked of things that need to be checked annually but the strata corporation is responsible for repair and maintenance of items with a longer life expectancy. If the strata council does not agree with this statutorily

imposed division of responsibility, I note that section 72(2)(a) of the Act provides that:

The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of limited common property that the owner has a right to use..."

Hallport illustrates the importance of bylaws which take into account the unique aspects of the development.

However in *Fudge v. Owners, Strata Plan NW2636* 2012 BCPC 0409 the court followed an earlier decision of the Supreme Court and concluded that pipes within a strata lot which connected to a larger system which serviced all strata lots were the responsibility of the strata corporation. It said the following:

"[46] In 2002, Gray J. heard a case involving a claim that pipes supplying fresh water to condominium units for the consumption of owners were in some way contaminating the water they carried, discolouring it and possibly making it a health risk: see *Taychuk v Strata Plan LMS744*, [2002] B.C.J. No. 2653 (S.C.). Her Ladyship had no difficulty finding in that case that the network of pipes distributing water throughout the complex at issue there was common property under s.1 of the *Strata Property Act*. At para. 28 she stated:

"...Here, the pipes are connected to the pipes that service all the units, and so they are intended to be used in connection with the enjoyment of another strata lot. Therefore these pipes are subject to the duty [under s.72] to repair and maintain.

[47] For all of these reasons, for the purposes of the statutory definition of common property, I find that the WPI comprises "pipes...and other facilities for the passage...of...drainage...located...within...wall[s]...that form...boundar[ies]...between...strata lot[s]...[and] between...strata lot[s] and the common property." Similarly, I find that the Discharge Pipe in Ms. Fudge's unit, being integrated with and thus a part of the WPI, is a pipe "...for the passage...of...drainage...located wholly or partially within a strata lot...[which is]...capable of being and intended to be used in connection with the enjoyment of...the common property that is, the other components of the WPI".

The decisions in both *Fudge* and *Taychuk* involved problems with the larger system which manifested themselves in the individual strata lots. In that sense, they cannot necessarily be taken to mean that all plumbing which is connected to a larger system. That ignores the requirement that the pipe be necessary for the enjoyment of the common property or another strata lot. If the supply tube in one strata lot fails to supply

water to a sink in that strata lot, the other strata lots will still receive water. How then can it be said to be connected to the “enjoyment” of another strata lot?

Dryer vents, chimneys and other vents

These items are generally not contentious issues because typically the strata corporation carries out the maintenance (read “cleaning”) of them because of the safety risk posed to all strata lots should they become clogged. That is a very logical approach which can be applied to windows, doors and balconies as well since all of those items, if not uniformly repaired and maintained, can lead to bigger problems.

A technical and strict application of the definition of common property would make that portion of the duct work which is situate within a strata lot the responsibility of the owner (provided that its not located within a floor, wall or ceiling which forms a boundary under s.68 of the SPA). The portion from the middle of the exterior wall onward would be common property and the responsibility of the strata corporation. That type of division makes little practical sense.

In *Legault v. Torcan* [1993] BCJ No. 2647 (QL) the court held that heating/air conditioning ducts which service only one unit were not common property.

Although it might be possible to make an owner responsible for the maintenance of things such as dryer vents, the strata corporation may wish to consider whether doing so creates larger problems. Given the safety issues involved it becomes incumbent then to make sure owners have done the required maintenance. That means having to implement a system of inspections, follow ups and enforcement.

Balcony Enclosures

Owners, often in older buildings, obtained permission in the past to enclose their balconies. Before the introduction of the SPA this was often done without the owner agreeing to be responsible for the costs to repair and maintain the enclosure. Several owners later it is discovered that the enclosure must be replaced. The question then arises; who will pay for those costs?

Simply because a balcony which was designated as common property is enclosed, does not make it part of a strata lot. It remains common property. Absent an Assumption of Responsibility Agreement, the strata corporation is responsible for the costs to remove the enclosure and repair the damage. That is particularly the case where the strata corporation has the Standard Bylaws in place. Bylaw 8(c)(ii)(E) refers to “similar structures that enclose... balconies...” (see *Geunther v Strata Plan KAS431* 2011 BCSC 119). The bylaw cited in that case would arguably oust the principle established in *Lim* and cited in *Elahi* that owners are responsible for extra costs as the result of an alteration.

Decks

The responsibility to repair and maintain decks is determined by the strata plan and the bylaws of the strata corporation. Is the deck common or limited common property? Who is responsible for limited common property under the bylaws?

In *Moure v. Strata Plan NW2009* 2003 BCSC 1364 the court held that while a strata corporation was not required, in the course of carrying out repairs to the roof, to replace ceramic tile which had been installed on a roof top deck by the owner, it could not prevent the owner from paying for and installing the tiles themselves.

Insurance deductibles and chargebacks for damage

Prior to delving into the particular issues associated with insurance claims and damage, a review of the general provisions regarding insurance is in order as it sets the broad framework for the discussion. Pursuant to s.149 of the SPA the strata corporation is required to insure:

- (a) the common property;
- (b) buildings shown on the strata plan; and
- (c) fixtures (ie. carpeting, plumbing fixtures, lights, etc) installed by the owner-developer;

In summary terms, the strata corporation must insure the buildings as originally built.

Damage to any of these (provided that it arises from an “insured peril” as defined in the insurance policy) brings the strata corporation’s insurance coverage into play. (Owners may elect, but cannot be required, to insure for improvements to a strata lot and deductible which may be payable to the strata corporation).

Section 155 of the SPA makes the strata corporation and each owner, tenant and occupant of the various strata lots a named insured on the policy. In other words, each of these people has the right to make a claim under that policy. It also means that the strata corporation’s insurer cannot bring a claim against them under its right of subrogation.

Since an individual owner is a named insured on the strata corporation’s insurance policy by virtue of s.155 of the SPA, the strata corporation cannot prevent them from making a claim against the policy. In *Lalji-Samji v. Strata Plan VR2135* (January 13, 1992) Doc. Vancouver A913001 (BCSC), the court held that an owner could not be sued for the cost of repairing damage against which the strata corporation was required to have insured. Although this case was decided under the *Condominium Act*, it reinforces the concept of the owner being able to rely on the protection of the strata corporation’s insurance policy. If the strata corporation wishes to avoid a claim, it would have to pay the costs above the deductible.

Section 158(1) of the SPA provides that any deductible payable by the strata corporation is a common expense to be contributed to by all owners on the basis of unit entitlement. Section 158(3) allows the deductible to be paid from the Contingency Reserve Fund or raised by way of a special levy, all without a 3/4 vote.

Relevant to any discussion about insurance coverage for damage to a strata lot or the common property are the provisions of the SPA which relate to the duty to repair and maintain property. This is particularly true when the cost to repair the damage is less than the amount of the deductible under the strata corporation's insurance policy. Those particular responsibilities are discussed above and need not be repeated here.

Simply because the strata corporation must insure the building (including the strata lots) it is not obligated to repair all parts of the building in the event of damage occurring. The obligation to insure is distinct from the obligation to repair. The two may overlap, but that does not result in altering the responsibilities established by s.72 of the SPA and the bylaws.

Put another way; while the strata corporation is responsible to insure a strata lot, it is not responsible to repair a strata lot. As such, where damage is caused to a strata lot and that damage comes from another adjoining lot and there is no insurance coverage (i.e. it is either under the deductible limit or the damage was not caused by an insured peril) then the strata corporation has no obligation to repair the damaged strata lot. The owner must repair their own strata lot and pursue the owner who caused the damage for the cost of doing so.

The strata corporation must always respond to the emergency (whether that be a report of water flowing or something else). It is after doing so that the strata corporation should then determine what further involvement on its part, if any, is required.

Should the strata corporation pay to repair damage where the insurance is not invoked, it is not necessarily precluded from recovering the costs of so doing. That particular principle was established in *Pham v. Strata Plan NW2003* 2007 BCSC 519. In *Pham* the strata lot owned by Ms. Pham was rented out and was being used as a marijuana grow operation. The grow operation caused damage to a neighbouring strata lot and the common property. There was no insurance coverage available due to the illegal activity involved. The strata corporation decided to carry out repairs to the strata lots and to the common property totaling \$106,000.00. It then sued Ms. Pham for the cost of the repairs. The court held that the strata corporation could recover the monies spent for the repairs on the basis of s.133 of the SPA. Interestingly, the court held that Ms. Pham was liable under that section because she rented her strata lot out without permission contrary to the bylaws. No mention was made of a breach of the bylaws due to the fact that an illegal activity took place in her strata lot.

Pham stands then for the principle that where there has been a breach of a bylaw which gives rise to a need to carry out repairs, the strata corporation can do so and recover the costs. However, where no such breach has occurred caution should be taken lest

the strata corporation finds that it cannot recover the monies spent because it has no statutory authority to spend them in the first place.

The strata corporation, to the surprise of many, is not liable for damage to a strata lot simply because the damage originated from the common property. There is no corresponding strict liability standard when it comes to damage arising from common property (as there is for damage originating in a strata lot) – *John Campbell Law Corp v. Strata Plan 1350* [2001] BCJ 2037 (QL) (SC). Nor is the strata corporation an insurer - *Wright v. Strata Plan 2050* (1998), 43 B.C.L.R. (3d) 1(CA) affirming 20 B.C.L.R. (3d) 343 (SC). The strata corporation becomes liable only if it were negligent by having breached its duty to repair and maintain the common property by not acting reasonably, *Basic v Strata Plan LMS0304* 2011 BCCA 231. Negligence typically arises where the strata corporation knew of a problem and failed to address it as was the case in *Fudge v. The Owners, Strata Plan NW2636* 2012 BCPC 0409. In *Radcliffe v The Owners, Strata Plan KAS1436* 2014 BCSC 2241, the court dealt with a claim by owners for damages resulting from three separate floods. It said the following:

“71 While I am satisfied that the remediation costs of \$7,016.11 related to the First Event were reasonable, for the reasons that follow I am not satisfied that the respondent is liable for the costs of the First Event. The evidence is that the respondent was unaware of water ingress issues associated with 1201’s balcony until after the First Event. Within a reasonable period of time, the respondent agreed to pay on Side to repair the source of the problem in 1201.

[72] Had this been the end of the water ingress issue, the respondent would have been correct to deny the petitioner’s claim. I agree with the respondent that that a strata corporation is not an insurer against all damages suffered or losses incurred by the individual unit owners (*Basic*). In this case, the respondent is not an insurer against all risks of flooding or water ingress into 1101.”

Section 158(2) of the SPA is often relied on to assess against and recover from an owner an insurance deductible paid by the strata corporation. The section provides as follows:

“(2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.”

The application and meaning of Section 158(2) was first considered by the court in *Strata Corp. VR 2673 v. Comissiona* (2000), 80 B.C.L.R. (3d) 350 (BCSC). The issue in *Comissiona* was whether or not the strata corporation could sue an owner for deductible paid by it as a result of water coming from the owners’ strata lot. The decision is in the context of an application brought by the defendant owners to dismiss the case on the

basis that there was no claim in law against them. Hence, several important questions pertaining to such claims went unanswered. However, the court held that there is nothing which prevents an insured person or entity (ie. a strata corporation) that has made a claim under an insurance policy from suing the person who caused the damage for the amount of the deductible. The court also held that s.158(2) does not create a right to sue an owner for deductible paid by them. That right already exists at law. Rather all that subsection does, is not restrict the strata corporation's ability to do so. Thus the action brought by the strata corporation was permissible at law. Whether the strata corporation would succeed at the end of the day depended on a number of things, including the bylaws of the strata corporation.

What *Comissiona* did not address was the standard by which an owner becomes liable to pay the deductible. Section 158 uses the word "responsible" instead of "liable", "negligent" or any other word which is similar in nature. Must an owner have been negligent? Or was some sort of overt act required? Was it a strict liability standard to be applied? Or was it another standard? The question is not unimportant by any means. "Negligence" requires the establishment of a specific standard that the reasonably prudent strata lot owner must meet (ie. inspect the connections to your appliances twice per year) and then showing that the standard was not met. "Strict liability" requires no standard to be established. If the cause of the damage arose from a certain strata lot, the owner is responsible for it.

The question of what test applies was answered by the British Columbia Supreme Court in the cases of *Strata Plan KA1019 v. Keiran* 2007 BCSC 727 and *Strata Plan LMS 2835 v. Mari* 2007 BCSC 740. Both cases were appeals from decisions of the Provincial Court (Small Claims Division) wherein the court, in essence applied a strict liability standard and, held that where the cause of the damage which gave rise to claim originated in a strata lot, the owner(s) of that lot were responsible for payment of the deductible.

In *Keiran* the damage covered by the insurance claim came from a pipe which burst in the wall in the Keirans' unit. The burst was as a result of a coupling that failed due to the high acid level of the local water and "not to a negligent act or omission of the owner". The main question before the Provincial Court was whether or not Ms. Kieran was liable for the costs of the repair, which fell well short of the deductible of \$10,000.00.

In determining whether or not Ms. Kieran must pay for the whole of the repairs, the Provincial Court first looked at the repair and maintenance responsibilities of the strata corporation and the individual owners under the bylaws of the strata corporation. The pipe was not within the scope of what the strata corporation was responsible to repair and maintain since it was not common property. It was clearly the owner's responsibility.

Next the Provincial Court looked at the wording of s.158(2) of the Act. Although, the case did not involve the recovery of deductible, the principles behind that section were nonetheless applicable. The court noted that the section uses the phrase "responsible for the loss". Without going into any real analysis, the court concluded that "because

the damage occurred within the unit and not to common property, this is a situation where the homeowner had the duty to repair and maintain and is therefore ‘responsible for the loss’ regardless of the absence of fault or negligence on their part” [emphasis added]. Ms. Kieran was liable to pay the whole cost of the repairs.

On appeal the Supreme Court agreed with the decision reached by the Provincial Court concluding that “being responsible is not the same as being negligent” and that “owners of a strata unit are “responsible” for what occurs within their unit. Since the Legislature used the term “responsible” rather than “liable” or “negligent”, it obviously meant for a different standard to apply. The stricter standard therefore was to apply.

In *Mari* the claim also involved water damage, this time from a faulty water level sensor in the washer located in the Maris’ unit. The trial judge in the Provincial Court determined that the Maris were responsible to pay the deductible because they “were clearly the people who allowed or ‘caused’ the washer to be used.” On appeal the Supreme Court upheld the decision reached by the Provincial Court that the Maris were responsible to pay the deductible. In reaching this decision, Burnyeat, J. stated:

“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 owner will be responsible for the deductible notwithstanding that the owner was not negligent. Section 158(s) simply allows the Strata Corporation to set the same standard for the payment of a deductible as would exist in a single family residence.”

In *Mari* the court also determined that there was a policy rationale behind making an individual owner pay, as opposed to sharing it amongst all the owners. That rationale is one of the “disciplining effect of a deductible”. In other words, if an owner is made to pay the full deductible (or knows that he or she will have to) it will cause them to be more cautious.

In both instances the court has made it clear that a strict liability standard will be applied. If the cause of the damage arises from inside a unit (for which the owner is responsible to repair and maintain) then the owner is liable for the deductible.

The principles established in *Mari* and *Keiran* are also applicable where the amount required to repair the damage is below the deductible.

Strata corporations should make sure that their bylaws do not conflict with the reasoning in these two cases. In other words, if a strata corporation’s bylaws talk about “negligence” or “omissions”, the owners will be held to have imposed a standard different than that under Section 158(2) and in turn loose the benefit of the strict liability

standard under that section. – see *The Owners, Strata Plan LMS2446 v Morrison*, unreported BCPC.

Section 158(2) refers only to the “owner” (a defined term under the SPA) being responsible for the damage giving rise to the deductible. What if it the strata lot is occupied by a tenant? Can the strata corporation still rely on Section 158(2) to recover the deductible? That question was answered in the affirmative in *Strata Corp. LMS2723 v. Morrison* 2012 BCPC 300 (BCPC). In that case the owner’s tenant had caused a fire by leaving a lit candle unattended. The court held that the owner was liable for the deductible because they are “responsible” for what goes on in a strata lot.

Bylaw enforcement

Strata corporations have three main options for enforcing their bylaws. They are:

- impose fines
- remedy a contravention
- seek injunctive relief pursuant to s.173(1) of the SPA

Fines can be imposed once the provisions of s.135 of the SPA have been complied with. Sections 130 and 131 of the SPA combine to make an owner responsible for all fines levied. They are collected either through volunteer payment, a Form F or suing the owner.

Section 133(1) of the SPA provides:

“The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including:

- (a) doing work on or to a strata lot, the common property or common assets, and
- (b) removing objects from the common property”

This section is a very versatile section for the strata corporation. It gives it broad powers beyond simply levying a fine, without the need to go to court. (Keep in mind that the actions taken by the strata council and/or the strata corporation may end up being reviewed by the court should the owner or tenant challenge them). While the section refers both to doing “work on or to a strata lot, [or] the common property” and to “removing objects from the common property”, this is not the extent of the strata corporation’s powers under this section. The strata corporation is entitled to “do what is reasonably necessary” including these two listed options. The only constraint is that the steps taken must be *reasonably necessary*. For example, the hiring of a security guard to monitor the activities of troublesome occupants may be “reasonably necessary”. In *Pham v. Strata Plan NW2003* 2007 BCSC 790 the strata corporation was able to

recover a significant sum of money spent by it to repair damage to strata lots arising from a marijuana grow operation.

Section 133(2) permits the strata corporation to recover the “reasonable costs” of remedying a contravention from the person whom it is entitled to fine in relation to the contravention. Ultimately those expenses are recoverable when the owner sells their strata lot or by seeking a judgment through the courts. The strata corporation is not entitled to register a lien against the strata lot in order to recover the costs.

Legal Fees

When strata corporations find themselves in a dispute with an owner, they often (very wisely) seek legal advice. The costs associated with that advice are a common expense paid for by all owners.

Where legal fees incurred relate to obtaining advice or dealing with the offending owner they are expenses recoverable under s.133. (*Hill v. Strata Plan NW2477* (1995), 47 R.P.R. (2d) 264 (BCSC); *Strata Plan VR243 v. Hornby* [1986] BCJ No. 2353 (BCSC); *Sidhu v. Strata Plan VR1886* 2008 BCSC 92). Where those legal fees relate to a court action, the strata corporation (assuming it was successful) would only recover its “taxable” costs which represent a portion of its total legal fees. However, in both *Blackmore v. Strata Plan VR 274*, 2004 BCSC 1121 and *Cheung v. The Owners, Strata Plan VR1902*, 2004 BCSC 1750 the court suggested that a separate action to recover the balance of the fees would be necessary. Doing so may be cost prohibitive in the end.

Sections 169(1)(a) and 171(5) of the SPA exempt an owner who is party to a lawsuit from paying their proportionate share of the strata corporation’s legal fees.

User Fees

Many strata corporations impose charges for owners, tenants and occupant to use common rooms, rent parking spaces and move into or out of a building. Such fees are permissible pursuant to s.110 of the SPA which provides:

“A strata corporation must not impose user fees for the use of common property or common assets by owners, tenants or occupants, or their visitors, other than as set out in the regulations.”

In turn Regulation 6.9 provides:

“For the purposes of section 110 of the Act, a strata corporation may impose user fees for the use of common property or common assets only if all of the following requirements are met:

- (a) the amount of the fee is reasonable;
- (b) the fee is set out

- (i) in a bylaw, or
- (ii) in a rule and the rule has been ratified under section 125 (6) of the Act."

The issue of what constitutes a “reasonable” fee was reviewed by the court in *The Owners, Strata Plan LMS 3883 v. De Vuyst* 2011 BCSC 1252 wherein the court upheld an arbitrator’s decision that the amount charged for a move-in fee must relate to the actual expenses incurred by the strata corporation as a result of the owner moving in.

What can be taken from this decision is the point that user fees are not to be a profit centre. In fact, creating excess revenue can result in a strata corporation losing its not-for-profit status.

Limitation Periods

On June 1, 2013 the government enacted a new *Limitation Act*. It provides for a basic limitation period of two years, commencing on the date the claim was “discovered”. (There is an ultimate 15 year limitation period after which no claim can be brought, regardless of when it was discovered). The time limit applies to court actions and arbitration proceedings. A “limitation period” is the time by which one must file a claim in court in order to assert a right or collect money, otherwise it disappears

Generally speaking, under the new legislation a claim is considered to have been “discovered” on the day a person knew, or ought to have known, the following:

- (a) that injury, loss or damage occurred;
- (b) that the injury, loss or damage was the result of someone else’s act or omission;
- (c) a court proceeding would be an appropriate means to seek a remedy for the injury, loss or damage.

In most cases this will be the date that the event happened.

The change from a six year limitation period to a two year limitation period will have an impact on strata corporations primarily in regard to collecting monies owed to it by owners. It will also affect claims it may have against third parties such as trades who may have improperly completed work.

In terms of strata fees and special levies that are unpaid, this means that strata corporations must take court action (either in Small Claims Court to obtain a judgment or in Supreme Court to enforce a lien) within two years of the date on which the fees/levy were first due and payable. If not, their right to claim those monies, whether through a lien or a Form F, will be lost. A failure to act in time, resulting in lost money, may give rise to questions as to whether the strata council met its duty under s. 31 of the SPA to act prudently.

Where the strata corporation agrees to a payment plan it will have to ensure that there is an agreement which postpones the application of the limitation period. That agreement must be in writing and signed by the debtor. An email exchange will not be sufficient.

With regard to fines, the two year period would arguably commence on the date the fines were imposed. This means that it is no longer a viable option (if it ever was) to simply impose fines for months on end for a bylaw violation. At some point they will become uncollectable, reducing their value as a deterrent. Additionally fines can no longer be left in anticipation of collecting them when an owner sells. If they remain on a ledger, uncollected, for more than two years, they will become uncollectible.

Steps to collect insurance deductibles and “chargebacks” will need to be taken within two years of the date of the incident that gave rise to the costs being incurred. This is important to keep in mind since the costs, particularly deductibles, are often not invoiced until several months afterwards. By then the limitation period may be almost half over.

Amounts charged to an owner under s.133 of the SPA are more difficult to deal with. Do they fall in the category of fines or are they more akin to chargebacks? Does the two year period run from when the costs were imposed? From the date they were incurred? Or from the date the strata corporation was aware of the breach of the bylaw? Since the new Limitation Act is not specific to strata corporations this question is unanswered by it. In *Channa v. Carleton Condominium Corp.* No. 429 2011 ONSC 7260, a case dealing with unauthorized alterations to common property, the Ontario Superior Court of Justice held that the limitation period began to run when the strata corporation became aware of the breach and that it would incur costs in relation to the same. Given the similarity between the British Columbia legislation and that of Ontario, the same decision would likely be reached by a court here.

Another common scenario faced by strata corporations is the discovery of defective work done by a contractor that has caused damage or that will have to be redone. It will be important to keep in mind that if the strata corporation intends to seek to recover those costs from the person who did the shoddy work, they will have to do so within two years of discovering the problem.

The $\frac{3}{4}$ vote requirement of s.171 of the SPA must also be kept in mind. A strata council cannot, if it wishes to comply with its duties under s.31 of the Strata Property Act, instruct a lawyer to commence action where that requirement applies but has not been met. Given the notice requirements for holding a general meeting strata councils should not wait until the 23rd month to give thought to suing. Strata corporations should consider passing a bylaw allowing the strata council to authorize actions in Small Claims Court to avoid the burden of having to seek approval for routine collections of fines and chargebacks.

Court proceedings to enforce a lien for unpaid strata fees or special levies do not require approval by way of a $\frac{3}{4}$ vote (see *Strata Plan VR1008 v. Oldaker* 2003 BCSC

1900). The costs of doing do (if based on the Tariff Scale) are collectible from the owner.

This paper is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is a lawyer whose practice focuses on strata property law. He frequently writes and lectures for a variety of strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.

