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AN OVERVIEW OF STRATA PROPERTY ISSUES IN BRITISH COLUMBIA

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I. INTRODUCTION

With over 29,000 registered strata corporations, and over 350,000 strata units in British Columbia, strata properties are an important and growing form of land development in British Columbia. In an effort to keep up with the growing influence of strata properties, legislation governing strata corporations has received substantial updates every 15-25 years historically.

This paper addresses several legal issues arising from the interaction between property insurers, strata corporations and strata unit owners. We focus in particular on the substantive and practical problems property insurers and adjusters face dealing directly with the insured strata corporation, including the following:

1. Stratified properties include both common areas, insured by the strata corporation, and individual areas, insured by individual unit-holders. Losses affecting both common and individual areas often raise complex analytical problems, such as whether the common or individual insurance policies should respond to the loss. In Section II of this paper we explore the ambiguities that can arise from this separation of the obligation to insure.

2. Strata corporations are required by statute to "repair and maintain" common property. In Section III, we examine the extent of this duty, and how strata corporations can fulfil that duty.

3. Strata corporations are communities of (often diverse) neighbours. Like any other community, disputes often arise between unit-holders and their elected strata councils. In response to a perceived lack of an appropriate forum to address strata property disputes, the British Columbia government created a new "Civil Resolution Tribunal". In Section IV, we examine how strata disputes have historically been handled, and consider whether the new Tribunal will provide a simpler, more efficient method of dispute resolution than the Courts have provided in the past.

4. The new *Limitation Act* came into force on June 1, 2013. The *Act* attempts to rationalize the calculation and application of limitation

periods for the commencement of a wide array of legal disputes. In Section V, we consider the effect that the new *Limitation Act* will have on strata property disputes.

5. Finally, in Section VI, we discuss the procedural problems that can arise when strata corporations – or their property insurers - attempt to sue third party wrongdoers in the name of a strata corporation. Those problems stemmed from the *Strata Property Act*'s requirement that strata corporations pass a special resolution before commencing a subrogated action in the strata corporation's name. This paper addresses the legislative response to situations where the necessary resolution has not been obtained.

II. THE OBLIGATION TO OBTAIN INSURANCE FOR THE STRATA CORPORATION AND UNIT OWNERS

Before the proclamation of the *Strata Property Act* in 2000, it was unclear where the boundaries lay between the responsibilities of property insurers of a strata corporation and of its individual strata unit owners, respectively. The *Act*'s predecessor legislation, the *Condominium Act*, mandated that the strata corporation provide coverage for *"buildings, common facilities and any insurable improvements owned by the strata corporation"*. It was often confusing and difficult to determine whether certain portions of a strata property belonged to common property or to an individual strata unit. This created the potential for overlapping coverage, or for uninsured gaps between the corporation's and unit owner's insurance policies.

To address this confusion, the drafters of the *Strata Property Act* added a definition for *"fixtures"*. This new definition was designed to differentiate between *"original"* and subsequently-installed fixtures, and was supposed to enable the property insurers of the strata corporation and the strata unit owner to better appreciate their respective indemnity obligations.

However, the question of how the property insurers of a strata corporation and strata unit owner should respond to a loss involving both building and contents damage continues to generate considerable industry discussion and confusion, particularly when the loss adjustment involves a fixture *"originally installed by the developer"* that has subsequently been altered in some way by the strata unit owner.

In the pages below we highlight the ambiguities and resulting analytical problems that continue to confront both insurers and insureds when dealing with strata property

losses involving both the building and unit contents. At the same time, we will highlight the obvious need for judicial and/or legislative guidance to address this uncertainty. Finally, we will also offer practical suggestions for resolving this type of problem.

A. INSURANCE COVERAGE REQUIRED OF STRATA CORPORATION

Section 149 of the *Act* requires strata corporations to obtain property insurance covering common property, common assets, and any buildings shown on the strata plan. As well, the strata corporation's insurance must cover any original *"fixtures"* installed by the developer of the condominium project as part of the original construction on the strata plan. Fixtures are defined in section 9.1 of the *Act*'s Regulations as follows:

> *9.1 Definitions for Section 149 of the Act*
>
> *(1) For the purposes of Section 149(1)(d) of the Act, "fixtures" means 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.*

The key consideration is whether the fixture was installed at the time of the original construction or during a unit owner's subsequent renovations. The definition of *"fixtures"* is meant to avoid any confusion as to whether fixtures must be insured by the strata corporation or individual unit owner.

To satisfy the legislative requirements outlined above, strata corporation property policies typically cover both *"buildings"* and *"contents"*. The word "building" is usually further defined by the property policy to include *"permanent fittings and fixtures attached to and forming part of the building(s)"*. With respect to *"contents"*, coverage is usually only afforded to the *"contents"* that the strata corporation either owns or is legally obligated to insure and that are situate on the *"premises"*. Of particular importance, however, strata corporation policies typically exclude coverage for loss or damage to *"property belonging to strata plan owners"* as well as to *"improvements and betterments to individual units made or acquired by the owners of such units"*.

An example of typical wording in a strata corporation property insurance policy is:

> *Improvements and betterments, as defined, made by, or for, or at the expense of an owner or tenant of a strata unit or dwelling unit.*

A typical definition of betterment and improvement would be:

> *...physical structural changes, up-grading or enhancing of an individual strata lot or dwelling unit made by or for an individual owner of said strata lot or dwelling unit. For the purposes of this definition, improvements and betterments does not include:*
>
> *i. physical structural changes, up-grading or enhancement declared by the said owner and the value of which is included in the most recent appraisal available to the Insurer;* [or]
>
> *ii. fire protective equipment.*

B. INSURANCE COVERAGE AVAILABLE TO THE STRATA UNIT OWNER

Section 161 of the *Act* permits, but does not require, unit owners to purchase insurance covering any or all of the following:

- loss or damage to the owner's strata plan and fixtures not otherwise insured by the strata corporation (*i.e.*, back-up insurance if the strata corporation does not obtain the required insurance);
- fixtures in the owner's strata plan that were not built or installed by the owner developer as part of the original construction;
- improvements to fixtures built or installed on the strata plan by the owner developer as part of the original instruction;
- loss of rental value of the owner's strata plan in excess of any insurance maintained by the strata corporation; and
- liability for property damage and bodily injury, whether occurring on the owner's strata plan or on common property.

Section 162 of the *Act* allows for a right of contribution between the strata corporation property policy and a strata unit owner's property policy, if the policies cover the same property. While this section attempts to avoid overlapping coverage between the strata corporation's property policy and that of the strata unit owner, the potential for overlap remains.

Most strata unit owners purchase property insurance, although not required by the *Act* to do so. The typical strata unit owner property policy provides coverage for personal property as well as *"unit improvements and betterments made or acquired by the strata plan owner"*. Often coverage for such improvements and betterments is extended to items like materials and supplies on the premises for use in such improvements and betterments, as well as to items such as wall to wall broadloom (carpeting), light fixtures, and wallpaper. Typical wording in unit owner policies includes:

> *With respect to Condominium Unit Owners, this Insurance includes an additional amount of coverage of up to 100% of the limit in Coverage C, for unit improvements and betterments installed, made or acquired by the Insured, including*
>
> *1) any building, structure or outdoor domestic water container, including swimming pools, hot tubs, saunas and attached equipment on the premises;*
>
> *2) materials and supplies on the premises for use in such improvements and betterments.*
>
> [...]
>
> *We insure improvements and betterments to your Unit made or acquired by you, including any building, structure or swimming pool as well as materials and supplies intended for use in such improvements and betterments, all while on the premises reserved for your exclusive use or occupancy. We insure only damage directly resulting from an Insured Peril.*
>
> *If you repair or replace the damage to the improvements and betterments within 180 days from the date of the occurrence, we will pay the actual expenses incurred by you. Otherwise, we will pay the actual cash value of the damage at the date of the occurrence. However, we will not pay more than an additional 25% of the dollar amount showed under "Value" in the corresponding Condominium Section of your Certificate of Property Insurance.*
>
> [...]

We insure unit improvements and betterments made or acquired by you, for an additional amount of up to 100% of the sum insured for Coverage C – Personal Property as shown on the Declaration page, including:

a) any building, structure or swimming pool on the premises;
b) materials and supplies on the premises for use in such improvements and betterments;
c) items such as wall-to-wall broadloom, light fixtures and wallpaper.

Unit owner policies also typically provide three other distinct types of coverage:

- coverage for the strata corporation's property insurance deductible assessed against the unit owner;

- coverage for special assessments levied by a strata corporation; and

- contingent excess coverage if the strata corporation's policy does not cover an entire loss, whether because the limits are inadequate or because the loss is excluded under the policy.

Examples of typical wordings for deductible and special assessment coverage are:

1) Loss Assessment Coverage – This Insurance covers up to 250% of the limit in Coverage C, for the Named Insureds share of any valid special assessment levied against the Named Insured by the Condominium Corporation in accordance with its governing rules when such assessment is made necessary by direct loss or damage to the collectively owned condominium property arising from a peril insured in this Insurance. When the assessment is made necessary by a deductible in the insurance policy of the Condominium Corporation, this Insurance covers up to the full limit of Loss Assessment.

[...]

We will provide an additional amount of insurance up to 25% of the dollar amount shown under "Value" in the corresponding Condominium Section of the Certificate of Property Insurance for your share of special assessments levied against the Unit Owners by the Condominium Corporation if the assessment is:

a) valid under the Condominium Corporation governing rules, and
b) made necessary because of direct loss by an Insured Peril to the condominium property owned collectively by the Unit Owners.
c) We will not pay more than $500 for that part of an assessment made necessary by a deductible in the insurance policy of the Condominium Corporation.

[...]

We will pay that portion of the common expense to a total of $10,000 made necessary by a deductible in the insurance policy of the "Condominium Corporation" for damage caused to the owner's unit which is charged back as a result of an act or omission on the part of the "unit" owners contributing to an insured loss.

[...]

We will pay an additional amount of up to 250% of the sum insured for Coverage C – Personal Property, as shown on the Declarations page, of your share of any special assessment if:

a) the assessment is valid under the Condominium Corporations' governing rules; and
b) it is made necessary by a direct loss to the collectively owned condominium property caused by an Insured Peril in this form.

We will not pay more than $25,000 for that part of an assessment made necessary by a deductible in the insurance policy of the Condominium Corporation.

Typical wording in a unit owner policy for contingent excess insurance include:

Unit Additional Protection – This Insurance covers up to 250% of the limit in Coverage C for Unit (excluding improvements or betterments) if the Condominium Corporation has no insurance, its insurance is inadequate or it is not effective, arising from a peril insured in this Insurance. "Inadequate" includes a deductible in the insurance policy of the Condominium Corporation. Any amount recovered from any insurance covering the collective interests of the Unit owners is deducted from the amount of the loss prior to the application of this insurance.

[...]

We will provide an additional amount of insurance up to 25% of the dollar amount shown under "Value" in the corresponding Condominium Section of the Certificate of Property Insurance to insure your interest in your Unit, excluding improvements and betterments, against direct loss or damage caused by an Insured Peril and glass which constitutes part of your Unit, including glass in storm windows and doors, against damage caused by accidental breakage to the limit stated above for Contingent Insurance, but only to the extent that:

a) the Unit is not insured by the Condominium Corporation; or
b) the insurance placed by the Condominium Corporation does not insure against the peril causing the loss or damage or the limit of insurance is inadequate to cover the loss or damage.

We will pay as follows:

- if the property is repaired or replaced within 180 days from the date of the occurrence, using similar materials, we will pay the actual expenses incurred by you for such repairs or replacement;

- otherwise, we will pay the actual cash value of the damage at the date of the occurrence.

We will no pay any portion of the loss resulting from a deductible in the insurance Policy of the Condominium Corporation.

Any recovery you are entitled to for loss or damage to your Unit from any insurance covering the Unit Owners collective interests, will be deducted from any amount payable under the Contingent Insurance.

[...]

We will pay the amount shown on the Policy Declaration Page for damage to the condominium "unit" described, excluding your improvements and betterments to it, if the "Condominium Corporation" has no insurance, its insurance is inadequate, or it is not effective.

[...]

We insure your unit, excluding your improvements and betterments to it, if the Condominium Corporation has no insurance, its insurance is inadequate or it is not effective, for an additional amount of up to 250% of the sum insured...

We do not insure losses or increased costs of repair due to the operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services.

C. RESULTANT AMBIGUITIES AND THE TRADITIONAL APPROACH TO PROBLEM

Above we discussed the respective obligations of the strata corporation and the rights of the strata unit owner with regards to insurance, along with the typical coverage afforded to them by their property insurers. To highlight the ambiguities and resulting analytical problems that remain, consider the following hypothetical scenario:

- A defective toilet causes flooding that damages both flooring and carpeting within a strata unit.

- The original carpeting installed by the building developer at the time of construction cost $20.00 per square yard.

- Five years later, the strata unit owner had replaced the original carpet with better quality carpet that cost $40.00 per square yard.

Which of the two property insurers involved will be responsible for restoring the unit to good repair, and in what measure?

In this scenario the following outcomes are possible:

a) The entire carpet is still considered a "fixture" and the replacement cost is borne entirely by the strata corporation's property insurer.

b) The entire carpet is considered a "betterment" because it is (i) more expensive; and (ii) was not installed by the original contractor. The replacement cost is borne entirely by the unit owner's property insurer.

c) The repair costs are split – the strata corporation's insurer pays the cost it would have paid to restore the original carpet, and the strata owner's insurer pays the difference between that amount and the cost of restoring the more expensive carpet.

While it is clear that the strata corporation property insurer is not required to insure improvements or betterments made or acquired by strata unit owners, unfortunately, neither the *Act* nor the respective policies define the terms "*betterment*" or "*improvement*".[1] To further complicate matters, no British Columbia court has yet considered this ambiguity, so the issue as to when the replacement of a fixture will be considered a betterment or improvement currently remains unresolved.

In *Boychuk v. Essex Condominium Corp. No. 2*,[2] the Ontario District Court dealt with the meaning of "*improvement*" in a different context. In this case, the Court was examining the statutory duty of the board under the Condominium Act of Ontario to obtain approval of strata unit owners for "*improvements*" to the common property. In this context the court stated that:

> *Improvement carries with it the idea of betterment of an existing facility or enhancement in value, not merely replacement of something which was already there and worn out.*

Here, we see the court providing some guidance as to when a qualitative change to a fixture so fundamentally alters its essential characteristics that it moves from mere "*replacement*" to being an "*improvement*".

Further guidance can be found in *Black's Law Dictionary* which provides the following definition of "*improvement*":

> *A valuable addition made to property (usually to real estate) or an amelioration in its condition, amounting to more than mere repairs replacement, costing labour or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."*

Applying the foregoing factual scenario to the relevant legislative and property policy provisions, and keeping in mind Black's definition, as well as the court's comments respecting the idea of "*improvement*" in the *Boychuk* decision, it could be argued that the "*upgraded*" replacement carpet should properly be construed as a "*betterment*" or "*improvement*" for which the strata corporation property insurer need not respond pursuant to the property policy exclusions.

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[1] The *Condominium Act* contained a definition of "improvements" which incorporated the definition used by the *Assessment* Act, R.S.B.C. 1996, c. 20. This definition read "'*improvements' means any building, fixture, structure or similar thing constructed or placed on or in land, or water over land, or on or in another improvement …*". However, the *Condominium Act* did not define "betterments".

[2] [1987] O.J. No. 1443

The insurance industry has addressed this issue through its "Agreement of Guiding Principles (Property Insurance)" which was developed in 1984 and is administered by the Insurance Bureau of Canada.[3] Section E of the Agreement provides guidelines for payments under condominium insurance policies, and in particular states that the strata corporation property policy should pay for the cost to restore the unit to its original condition, and that the strata unit owner's property policy should cover any excess cost associated with replacing a replacement fixture of higher value or better quality.

Presumably then, many insurance companies have been collecting premiums based upon the expectation that the strata corporation's property policy may at any time be called upon to replace an improvement to its original condition, and that the strata unit owner's property policy would only be called upon to contribute to any excess cost.

On this basis, some argue that to change the nature of these policies so that the burden of coverage falls exclusively upon the strata unit owner would mean that property insurers of strata corporations might experience a windfall, and property insurers of strata unit owners might experience a shortfall.

However, using the combined approach adopted in the Agreement will, in most loss situations, make the strata corporation's insurer responsible for the majority of the cost of strata unit owner's fixtures, even after they have been replaced with an improvement. One wonders whether the drafters of the *Act* intended this result. One also wonders whether a judiciary directly confronted with this result will condone it.

D. IN ABSENCE OF JUDICIAL OR LEGISLATIVE REFORM, HOW CAN PROPERTY INSURERS RESOLVE THE AMBIGUITIES?

It should be apparent by now that the root of this problem lies in the failure of the majority of strata corporation and unit owner policies to provide a comprehensive definition of the term "*improvement and betterment*." This omission is particularly apparent in the case of unit owner policies which fail to provide even a cursory definition of the term.

On the whole, strata corporation policy wordings do not fare much better. A typical property policy will provide the following definition [emphasis added]:

> *"Improvements and Betterments" means physical structural changes, up-grading or enhancing of an individual Strata Lot or Dwelling Unit*

[3] Although these Guiding Principles are binding on member insurers, they are not binding on the Court.

> *made by or for the individual owner of said Strata Lot or Dwelling Unit." For the purposes of this definition, Improvements and Betterment's does not include fire protective equipment."*

While providing some guidance through inclusion of the words "*upgrading*" or "*enhancing*" the above definition is nonetheless unable to resolve the ambiguities discussed earlier on in the paper. This is more evident upon comparison to a second, more comprehensive definition contained in yet a differing wording [emphasis added]:

> *"Improvements and Betterments" means physical structural changes, up-grading or enhancing of an individual Strata Lot or Dwelling Unit made by or for the individual owner of said Strata Lot or Dwelling Unit. For the purpose of this definition, Improvements and Betterments does not include:*
>
> *i) Physical structural changes, up-grading or enhancement declared by said owner and the value of which is included in the most recent appraisal available to the Insurer;*
>
> *ii) Any physical structural changes, up-grading or enhancement made prior to the purchase or acquisition of the said Strata Lot or Dwelling Unit by the present owner at the time of loss or damage.* [emphasis added]

Why is the latter definition more helpful? Let us revisit the factual basis behind our original scenario and add one twist: the unit has since been sold to a second owner who purchased the unit *after* the original carpeting had already been replaced by the first owner. Applying the latter policy definition to this circumstance, it is clear that the strata corporation insurer is solely responsible to respond to the loss given that the renovation took place "*prior to the purchase or acquisition of the Strata Lot by the present owner.*"

Further, by expressly excluding those unit owner renovations whose value has been declared and included in the strata corporation's most recent appraisal, the latter definition is also helpful to the extent that it contemplates and addresses the industry concern that strata corporation insurers might experience a windfall where the replacement is deemed an improvement and betterment and the unit owner insurer is called upon to cover the entire loss.

III. THE DUTY TO 'MAINTAIN AND REPAIR' AND RELEVANT INSURANCE ISSUES

A. INTRODUCTION

On July 1, 2000, the *Strata Property Act* and *Strata Property Regulation*,[4] (the "Regulations")[5] repealed and replaced the *Condominium Act*, significantly revising the strata property legislation that had governed strata developments in British Columbia for over 35 years. The provisions in the *Act* and Regulations dealing with insurance represent a significant part of the overall reforms introduced by the relatively new legislation.

This portion of this paper will outline the insurance provisions in the *Act* aimed at increasing accountability, and clarifying and expanding upon the duties, powers, and obligations of the strata corporation, which have impacted:

(a) the obligation of the strata corporation to obtain and maintain property insurance; and

(b) the respective obligations of the strata corporation and the strata unit owners to repair and maintain the common elements and individual strata units.

The purpose of this portion of the paper is to discuss in detail how these expanding duties, powers, and obligations of the strata corporation have altered how property insurers manage strata corporation claims.

B. STRATA CORPORATION PROPERTY INSURANCE

1. The Insurable Interest

According to general principles of insurance law an entity must have an insurable interest in property before it can insure that property. The authority of a strata corporation in British Columbia to insure strata property arises from s. 153 of the *Act*. Section 153 of the *Act* simply states that a strata corporation has an insurable interest in any property insured under sections 149 or 152. The rationale for imposing the duty to

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[4] B.C. Reg. 43/2000

[5] Also on July 1, 2000, B.C. Reg. 43/2000 repealed the *Condominium Act Regulations,* B.C. Reg. 534/74, the *Miscellaneous Forms Regulations,* B.C. Reg. 74/78, and the *Condominium Act Definition Regulation,* B.C. Reg. 248/93. However, the *Bare Land Strata Regulation,* B.C. Reg. 75/78, and *Bare Land Strata Plan Cancellation Regulation,* B.C. Reg. 556/82. were not repealed and continue in force.

obtain insurance on the strata corporation is to provide an efficient means to ensure that all owners have adequate, affordable insurance and to avoid the risk of prejudice to other owners which would result if an owner failed to obtain insurance or was unable or unwilling to pay for the repair of his own premises.

The *Act* empowers and obliges the strata corporation to maintain certain types of insurance for the benefit of the named insureds.[6] Sections 149(1)(a)-(d) of the *Act* require a strata corporation to obtain and maintain property insurance on common property, common assets, buildings shown on the strata plan[7] and fixtures built or installed on a strata plan, if the fixtures are built or installed by the owner developer as part of the original construction on the strata plan ("original fixtures").

"Fixtures" are defined in Section 9.1(1) of the Regulation as including the original floor and wall coverings and the electrical and plumbing fixtures, but excludes appliances, furniture, and other items that can be removed without damage to the building. Regulation 9.1(1) states:

> ***9.1*** *(1) For the purposes of sections 149 (1) (d) and 152 (b) of the Act, "fixtures" means 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.*

Although there has been no case law on the question of what constitutes a "fixture" under the Act, s. 99(1) and (4) of the Ontario *Condominium Act, 1998*,[8] states that the obligation of a corporation to obtain and maintain insurance on its own behalf and on behalf of the owners for damage to the units and common elements does not include insurance for damage to improvements made to the unit. By analogy, it would seem that section 149 of the *Act* and section 9.1 of the Regulations obligate a strata unit owner to insure improvements, or anything installed, put down, put up or upgraded by, or on behalf of, the strata owner, and the strata corporation is obliged to obtain and maintain insurance on all original fixtures installed by the developer.

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[6] According to s. 155 of the *Act*, the named insureds in a strata corporation's insurance policy include: the strata corporation; the owners and tenants from time to time of the strata lots shown on the strata plan; and the persons who normally occupy the strata plans.

[7] Although it was common practice under the *Condominium Act*, for a strata corporation to insure buildings on bare land strata plans, such practice is clearly not required under the Act unless the buildings are shown on the strata plan. The strata corporation has no insurable interest in the buildings on bare land strata plans and no legal obligation to insure them unless they are shown on the strata plan.

[8] S.O. 1998, c. 19

Whereas section 54 of the *Condominium Act* required strata corporations to insure "*insurable improvements owned by the strata corporation*," no reference was made to the "fixtures" within a strata unit. This omission in the *Condominium Act* left it unclear whether the original fixtures in the strata unit owned by an owner fell within the strata corporation's insurance or the owner's insurance. Section 149(1)(d) clarifies that the strata corporation is only responsible to insure the original fixtures built or installed by the owner developer as part of the original construction of the strata unit.

Sections 149(4)(a)-(b) of the *Act* require the strata corporation to obtain full replacement value property insurance against major perils as defined in s. 9.1(2) of the Regulations and any other perils specified in the bylaws. The obligation to insure to "replacement value" means replacement cost. Replacement cost is defined as the amount it costs to actually repair and/or replace the damaged structure at the date the damage occurred with new materials of like kind and quality without physical depreciation that may have occurred over time.

If a strata corporation does not comply with its obligation to actually repair and/or replace a damaged structure, the coverage reverts to "actual cash value". The concept of "actual cash value" reflects replacement cost after physical depreciation and may also take account of other economic factors.

2. The Definition of Major Perils

"Major perils" is defined in s. 9.1 of the Regulations as 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. Although the definition of major perils includes most perils that one might expect, it does not include floods or earthquakes. It is up to the strata corporation to decide if those perils should also be insured.

As a matter of commercial reality, insurance against "major perils" to the replacement value required by s. 149 of the *Act* is invariably subject to a deductible. Replacement cost insurance can exist with a deductible provided the deductible is reasonable in the circumstances. However, if the deductible is excessive it could be argued that the strata corporation failed in its duty to obtain insurance. [9]

[24] The amount of the deductible should be a significant consideration for strata corporations insuring against a water damage claim of any kind. In some instances, especially in buildings that have had previous water damage claims the amount of the deductible can be as high as $25,000.00.

Ultimately, Part 9 of the *Act* only makes it the responsibility of strata corporations to bear the risk of damage to property from a "major peril" and liability for bodily injury. A strata corporation *may* also obtain and maintain insurance with respect to a peril or liability not referred to in s. 149 or 150, but it is mandatory to do so.[10]

C. THE OBLIGATION TO MAINTAIN AND REPAIR

Analysis of the respective rights and duties of the strata unit owners and the strata corporation to repair and maintain the strata property in relation to insurance and liability for claims falling within Part 9 of the *Act* is facilitated by consideration of three distinct duties:

a) the duties of repair reflected in s. 72, as may be altered by the strata corporation bylaws;[11]

b) the duty to obtain and maintain insurance placed upon the corporation by s. 149 of the *Act*, discussed above; and

c) liability for the costs of repairs which is dealt with by the condominium bylaws, rules and regulations.

1. Section 72 of the *Act*

Section 72(1) of the *Act* states that the strata corporation must repair and maintain common property and common assets. However, section 72 also permits a strata corporation to pass bylaws either specifying portions of a strata lot for which it will take responsibility or making an owner responsible for the repair and maintenance of limited common property. Section 72 also contemplates permitting a strata corporation to delegate repair and maintenance of common property to a unit owner, but only if identified in the Regulation.[12] However, to date, there are no enacted Regulations which permit a strata corporation to delegate the obligation to maintain and repair common property.

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[10] Section 150 states that a strata corporation must obtain and maintain liability insurance to insure the strata corporation against liability for property damage and bodily injury.

[11] Section 72(2)(b) of the *Strata Property Act* was amended prior to the *Strata Property Act* coming into force on July 1, 2000 (BC Reg. 43/00). Section 72(2)(b) was effective October 12, 2001 (BC Reg. 241/2001).

[12] B.C. Reg. 43/2000

Accordingly, the strata corporation has some ability to establish a regime for liability for the costs associated with the obligation to repair and maintain the common property.[13] Bylaw 8 of the Schedule of Standard Bylaws, appended to the *Act*, suggest a standard bylaw which addresses everything from chimneys to stairs and balconies. Ultimately, section 72 of the *Act* can be used by a strata corporation as a tool to establish who is responsible to maintain and repair common property before a conflict arises.

However, a strata corporation cannot shift its statutory obligation to obtain and maintain property insurance as required by s. 149 of the *Act* indirectly to the strata unit owner through subrogation. In *Strata Plan No. NW651 v. Beck's Mechanical Ltd.*,[14] the court barred a subrogated claim by a property insurer against a negligent owner. In that case, the building suffered fire damage due to the careless use of a torch during plumbing repairs. The named insured under the policy was the strata corporation, acting in its capacity as trustee for the individual owners. As an insured, the Court determined, the owner was immune from a subrogated claim premised on the principle that a property insurer cannot commence a subrogated claim against its own insured.

Further, in *Lalji-Samji v. Strata Plan VR-2135*,[15] a strata corporation advanced a subrogated claim against a strata unit owner for the total cost to repair carpet on which the owner had spilled bleach. The strata corporation did not but should have insured for the loss. The strata corporation's claim was disallowed because, had the strata corporation insured for the loss as it was obliged to, the owner would have been a named beneficiary under the property policy.

A 2007 Alberta Court of Appeal decision, *Condominium Corp No. 9813678 v. Statesman Corp.*,[16] confirms that a strata corporation's property insurer cannot maintain a subrogated action against a strata unit owner even if the unit owner's liability arises solely by reason of conduct unrelated to the ownership of the unit. In other words, mere ownership provides full tort immunity regardless of the precise role exercised by the unit owner that ultimately gives rise to legal liability provided that the ensuing damage is to the common property.

In *Condominium Corp. No.* 9813678, a fire was negligently started during the construction of a condominium development by the developer's subcontractor. The insurer paid out

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[13] In *Strata Corp. VR2673 v. Commissiona* (2000), 80 B.C.L.R. 12 (S.C.) the Court held that according to the *Condominium* Act, R.S.B.C. 1996 c. 64, the statute in effect at the time the events occurred, a strata corporation can sue an owner for recovery of the deductible portion of a claim. Suing for the deductible was in no way a subrogated claim.

[14] [1980] B.C. J. No. 46 (Q.L.)(S.C.)

[15] [1992] B.C.J. No. 172.

[16] [2007] I.L.R. I-4610 (Alta. C.A.).

the claim and brought subrogated proceedings against the developer. A clause in the insurance policy stated that the insurer waived its subrogation rights against unit owners. The developer owned two units in the development.

The Alberta Court of Appeal determined that the law was well settled that an insurer has no subrogation rights against an insured and the insurer's claim was thus barred. However, the court went on to discuss whether there could be an exception to the rule that an insurer cannot subrogate against its insured. The insurer argued that the insured was the developer and contractor who happened to own units in the building. It argued that because the insured was not acting "in the capacity" of a resident, but as a contractor, the insurer should be allowed to subrogate. If not, the condominium policy would effectively act as a course of construction policy. The Court ruled that the subrogation waiver applied despite the multiple "hats" of the owner/developer and stated that in such cases the insurer can always negotiate exceptions to coverage or to subrogation waiver clauses before it issues a policy.

2. Liability Coverage for Unit Owners under the Corporations Policy

Since a unit owner is a named insured under a strata corporation's insurance policy, a unit owner is also covered by the liability coverage obtained by a strata corporation. In *Ghag Enterprises v. Strata Corp. K-68*,[17] a child residing in a strata unit owned by the plaintiff fell of her bicycle because of a large depression in the driveway of the unit. The child was successful at trial and the unit owner sought indemnity for its costs of defending the tort action and for any damages it was liable to pay in the tort action from the strata corporation's liability insurer. The Court decided that the liability insurer was required to indemnify the unit owner because it was deemed to be a named insured under the policy by virtue of s. 54(3) of the *Condominium Act*, which is essentially the same as s. 155 of the current *Act*.

In what was undoubtedly a large relief for insurers providing CGL coverage to strata corporations, the BC Supreme Court in *Economical Mutual Insurance Company v. Aviva Insurance Company of Canada*[18] narrowed the extent of liability coverage available to strata unit owners under the strata corporation's CGL policy.

The *Strata Property Act* mandates that all strata corporations must obtain $2,000,000 of property damage and bodily injury liability insurance. Section 155 of the *Act* further provides:

[17] (1992), 12 C.C.L.I. (2d) 49 (B.C.S.C.)
[18] 2010 BCSC 783

155. Despite the terms of the insurance policy, named insureds in a strata corporation's insurance policy include:

a. the strata corporation;
b. the owners and tenants from time to time of the strata lots shown on the strata plans, and
c. the persons who normally occupy the strata lots.

The underlying action concerned what is referred to as a "social host liability" claim. The plaintiffs in the underlying action alleged that the insured was negligent because he failed to supervise the amount of alcohol a guest was served and consumed at a gathering, and that the insured failed to take steps to ensure that upon leaving the gathering the guest would not operate a motor vehicle. An accident involving the guest subsequently occurred.

The insured had the benefit of a homeowners liability policy issued by Economical. The issue was the extent of coverage that may be available to the insured under the strata corporation's CGL policy issued by Aviva. Economical claimed that the CGL policy afforded coverage to the insured for personal injury sustained by another for which the insured may be found liable, and no exclusion in the policy applies to remove coverage. Therefore, Economical argued that Aviva had a duty to participate in the defence of the underlying action. Aviva argued that when properly construed, the contract of insurance did not extend coverage to the strata unit owner for any liability he may have as a consequence of the accident giving rise to the underlying claim or the circumstances leading to it.

Economical argued that because of the provisions of s. 155 of the *Act*, the Aviva policy must be read to include a unit owner as an insured, and to afford him coverage co-extensive with the coverage provided to the Strata Corporation. Economical claimed that the underlying action triggered the insuring agreement because it alleged bodily injury caused by an "occurrence".

In response, though agreeing that the strata unit owner was an "insured" under the Aviva policy, Aviva argued that its liability was circumscribed by the specific terms of the Policy, in particular the "Who is an Insured" clause which stated:

*"**Section II Who Is An Insured***

1. If you are designated in the Declarations as:

a. an individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner."

Aviva therefore argued that coverage for an individual is restricted to claims arising in respect of the conduct of a business of which the individual insured is the sole owner.

In accepting Aviva's argument, the Court noted:

> *The policy provides only the coverage that the insurer has agreed to provide. If the coverage … is inadequate, or not in compliance with a requirement imposed by the Strata Property Act, that is an issue between the strata corporation and Mr. Rattan as an owner and does not impose a duty to defend [or any other coverage obligations] on Aviva.*

The practical implication for underwriters is that the insurer should specifically delineate the terms and conditions of that coverage to the extent that liability coverage is extended to unit owners in a Strata Corporation. For example, the unmodified CGL policy issued to the strata corporation by Aviva leaves open the prospect that liability coverage would be provided to any owner or tenant in respect of a business he or she conducts, whether on the strata property or elsewhere. It would be far better for the insurer to specifically identify the extent of liability coverage to be provided to unit owners to avoid unintended consequences.

3. Recovery of Deductible from a Named Insured

Whether a strata corporation can maintain an action to recover a deductible from a strata owner depends upon all of the provisions of the applicable statute and the bylaws, rules and regulations of the strata corporation.

Section 158(1) of the *Act* states that subject to the Regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with sections 99(2) or 100(1). Further, section 158(2) specifically provides that 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 *strata lot owner* is "responsible" for the loss or damage that gave rise to the claim. However, section 158 does not create a right in the strata corporation to sue an owner; rather, it set outs expressly what was not previously addressed in strata property legislation.[19] See *Strata Corp. VR2673 v. Commissiona.*[20]

[19] Note that although a tenant is a "named insured" on a strata corporation's insurance policy according to s. 155 of the Act, s. 158(2) refers only to claims against an "owner" for the deductible and not to claims against a "tenant."
[20] [2000] B.C.J. No. 1681

However, section 158 merely permits a strata corporation to recover an insurance deductible from a unit owner who is "responsible for" damage to the common property. A strata corporation must also have a by-law which specifically permits this type of recovery in order to avail itself of the remedy contained in section 158.

In *Stevens et al. v. Simcoe Condominium Corporation No. 60*,[21] a case decided under the Ontario legislation, the air conditioner in one unit caused damage to another. The condominium corporation sought to recover the cost of the deductible from the owner of the air conditioner. Under a declaration of the condominium corporation the corporation had established a regime of liability for allocating the costs of repair. The condominium corporation was required to obtain and maintain insurance against major perils and the insurance was subject to a deductible clause. The strata unit owners were required to maintain and repair their units and to be responsible for the repairs of other units if their failure to maintain their own unit caused damage to another. Similarly, the declaration also required the owners to indemnify and save harmless the strata corporation for the costs and damage that the corporation may suffer from an act or omission of the owner. In this particular case the corporation had also adopted a specific rule with respect to damage caused by an air conditioner.

The Court in *Stevens* determined that the strata unit owner was responsible for the deductible. While the strata corporation had an obligation to obtain and maintain property insurance for the type of loss caused by the leaking air conditioner, the strata bylaws clearly made it the responsibility of the owner to pay the deductible. It is against this backdrop that all questions of liability for any deductible under insurance obtained by a strata corporation must be assessed.[22]

In considering whether the *Act*, bylaws, rules and regulations of a strata corporation bar a strata corporation's claim against a named insured for a deductible, the question to be answered is whether by contracting for insurance with a deductible the owners, through the strata corporation, implicitly agreed with each other to in effect self insure the amount of the deductible by paying the deductible as a common expense; or intended that the owner responsible for any damage would bear the cost of the deductible. If a strata corporation chooses to limit liability to losses caused by a strata unit owner's negligence, then that is what the courts will limit their ability to recover to.

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[21] [1998] O.J. No. 5843 (H.C.)

[22] The terms of Ontario strata property legislation are different from those of the B.C. legislation in that the duty of the strata corporation under the *Ontario Condominium Act* R.S.O. 1990, c. 26 does not specifically deem the owners to be included as "named insureds" under the policy of insurance. The Ontario Court states however that the owners are "primary beneficiaries" under the policy.

In *Reilly v. Freedom Gardens Condominium Assoc.*, a waterline supplying a toilet tank in the unit ruptured resulting in flooding. The flooding water did not escape into the adjacent units. The damage was confined to one unit. The ruptured line was the result of the defendant's dog chewing on the line.

Initially, the trial judge found that the strata unit owner was required to pay the insurance deductible because the sole damage was to his unit and he was obliged by Alberta's condominium property legislation to repair his own unit.[23] On appeal, the Court concluded that while the strata corporation had an obligation to insure for the loss, and the owner had an obligation to repair, if the strata corporation had intended that the insurance deductible was to be paid by and in proportion to who suffered the loss then it was the responsibility of the strata corporation to establish this clearly in their bylaws. [24]

In this case, the strata corporation required an owner to pay the deductible if the damage to the unit was caused by the strata unit owner's own "acts or omissions." The Court of Appeal found that the owner was not negligent and that the loss was entirely an accident. Consequently, liability for the insurance deductible was the sole responsibility of the strata corporation. The doctrine of *contra proferentem* operated in the strata unit owner's favour.

There are two important cases in British Columbia which have considered section 158 of the Act. The first is *Strata Plan LMS 2835 v. Mari.*[25] In this case, a faulty water level switch in a washer located in the unit owned by the defendant unit owners failed, causing water damage to the building totalling $9,888.86. The strata corporation sued the unit owners to recover the $5,000 deductible under the strata corporation's property policy, the balance having been paid by the strata corporation's property insurer. The strata corporation was successful in its Small Claims action and the unit owners appealed.

The Supreme Court agreed with the lower court's decision that "responsible for", as used in s. 158(2) of the *Act* meant "legally accountable or answerable" in the sense of being a conclusion or determination with no consideration of the type of action or non-action involved or of the degree of fault involved. Rather, the owners were liable for the deductible merely because they "caused" the washer to be used. No finding of negligence was required.

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[23] Trial decision unreported.
[24] [2001] A.J. No. 1703 (Q.B.)
[25] 2007 BCSC 740

In making this finding, the Supreme Court distinguished the Alberta decision in *Reilly, supra*, on the basis that the Alberta legislation did not contain a similar provision to s. 158(2) of the *Act* and the condominium's by-laws required fault on the part of an owner before the owner would be liable for the deductible. The Court also followed the Ontario decision of *Stevens, supra*, since the Ontario legislation was similar to B.C.'s 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*."

The second B.C. case to consider s. 158(2) is *Strata Plan KA 1019 v. Keiran*, 2006 BCPC 360. In this case, the Strata Corporation sought recovery of the deductible paid under the strata corporation's insurance policy from a strata unit owner as a result of a pipe that burst in the defendant strata owner's unit. The Court noted that the pipe was located in an area not within the common property, but "*within the owners' realm of responsibility, as would be the case with any homeowner*". The pipe's failure was due to high acid levels in the local water and there was no issue that there was no negligence on the part of the unit owners.

The issue to be decided was whether section 158 required the strata corporation to prove that the unit owners had been negligent before the owners could be compelled to pay the deductible. The Court determined that proof of negligence was not required, stating that the requirement in section 158 that the owner be "responsible for the loss" meant a "*situation where the homeowner had the duty to repair and maintain*" the property. As such, no fault need be shown against the unit owner for the strata corporation to seek recovery of the deductible.

The Court further considered whether the unit owners' liability insurer was obliged to indemnify the unit owners for the strata corporation's costs in repairing the unit, totalling $3,787.80. The Court noted that $2,500.00 of that amount was covered by the unit owners' insurance policy, which provided that "*We will pay up to $2,500 for that part of an assessment made necessary by a deductible in the insurance policy of the Condominium Corporation*". The unit owners' insurer paid this portion directly to the strata corporation. The strata corporation sought recovery of the remaining $1,287.80 from the unit owners, who sought coverage under their policy for damage caused by a covered peril, water escape.

The Court decided that the nature of the claim against the unit owners was not for damage to common property, but was rather for "*damage in respect of which an owner is personally and primarily responsible. It is not 'made necessary' by the strata corporation's deductible, rather by the fact of the owner's primary responsibility for damage to the owner's unit*." As such, the Court found that the damage was caused by an insured peril (water

escape) for which coverage should be provided, and was not within the meaning of the "additional coverage" for a deductible assessment.

On appeal to the BC Supreme Court,[26] the Court noted that "*It is clear that being responsible is not the same as being negligent*" and that strata unit owners are "responsible" for what happens in their units. The Court agreed with the reasoning of the lower court and found that the water escape which occurred in the strata unit was an event for which the unit owners were "responsible". No fault need be shown on the part of the unit owner.

The *Mari* and *Kieran* decisions were recently followed in *Strata Corporation LMS 2723 v. Morrison*,[27] where the court found a unit owner liable to pay for the strata corporation's deductible where the unit owner's tenant had left a candle unattended, resulting in a fire causing damage to common property. The court noted:

> *Applying those principles to this case, like the presence of washing machines, dishwashers, air conditioners, and water dispensing refrigerators, tenants pose a risk. While I appreciate that Ms. Morrison had no control over the candle, the owner is responsible for what occurs within their unit. Finally, 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.*

D. SUMMARY

The issue of liability for a deductible is determined by analogy to the prevailing practice in the insurance industry, which is to shift the deductible portion of the loss to the party causing the loss as a means of controlling insurance claims and in accordance with the provisions of the bylaws and rules of the particular strata corporation. There is no universal rule, however, and strata corporations may design their own particular scheme.

B.C. case law shows that, even though a strata corporation's property insurer cannot subrogate against a unit owner for loss to common property (*i.e.*, for "insured losses"), a strata corporation can recover its incurred deductible from an owner who is "responsible for" an insurance claim (*i.e.*, for any "uninsured losses" such as the deductible). A strata corporation can also recover any amounts incurred to fix damage within the property insurance deductible from an owner who is "responsible for" the damage. Significantly, the concept of "responsiblity for" is broader than negligence and

[26] 2007 BCSC 727
[27] 2012 BCPC 300

does not require fault on the part of the unit owner. Lastly, a unit owner's insurer may have to indemnify the unit owner even if the amount of the loss is greater than the deductible coverage available in the unit owner's policy if the loss is caused by an "insured peril".

IV. STRATA PROPERTY DISPUTE RESOLUTION

In 2011, the British Columbia government commenced a public consultation process in relation to proposed changes to the way that strata property disputes are resolved in British Columbia. As a result of that process, a new dispute resolution forum has been created. The *Civil Resolution Tribunal Act* (the "*Act*") received Royal Assent from the B.C. legislature on May 31, 2012. It establishes a new dispute resolution and adjudicative body, the Civil Resolution Tribunal (the "Tribunal"), which has the authority to hear certain types of strata property disputes. It is anticipated that the legislation will be in force and the Tribunal operational in 2014.

A. CURRENT STRATA PROPERTY DISPUTE RESOLUTION MECHANISMS

The creation of the Tribunal arises in main part from a perceived lack of appropriate forums to resolve disputes under the *Strata Property Act*. Under the *Strata Property Act*, there are several ways that disputes can be addressed:

- an owner or tenant can request a hearing at a strata council meeting to discuss matters of concern, request a decision (section 34.1) or answer a complaint against them (section 135(1));

- the strata corporation is required to hold a special general meeting to consider a resolution or other specified matter with the written support of 20 per cent of the strata corporation's votes (section 43);

- a resolution or other matter can be included on a general meeting's agenda with the written support of 20 per cent of the strata corporation's votes (section 46(2)).

In addition, the *Strata Property Act* provides for mediation, arbitration, or court action. Section 177 of the *Act* provides:

> ***Disputes that can be arbitrated***
>
> ***177*** *(1) Subject to section 178 (1), the strata corporation may refer to arbitration a dispute with an owner or tenant if the dispute concerns a matter set out in subsection (3) of this section.*
>
> *(2) Subject to section 178 (1), an owner or tenant may refer to arbitration a dispute with the strata corporation or with another owner or tenant if the dispute concerns a matter set out in subsection (3) of this section.*
>
> *(3) A dispute may be referred to arbitration under subsection (1) or (2) if it concerns any of the following:*
>
> *(a) the interpretation or application of this Act, the regulations, the bylaws or the rules;*
> *(b) the common property or common assets;*
> *(c) the use or enjoyment of a strata lot;*
> *(d) money owing, including money owing as a fine, under this Act, the bylaws or the rules;*
> *(e) an action or threatened action by, or decision of, the strata corporation, including the council, in relation to an owner or tenant;*
> *(f) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.*

In the course of conducting its public consultation on the current dispute resolution methods under the *Strata Property Act*, the government indicated that common complaints they had received regarding strata property disputes were:[28]

> 1. *Disputes can be extremely upsetting and disruptive to residents of the strata complex.*
>
>   - *They can pit neighbour against neighbour and create factions.*

[28] Province of British Columbia, Housing Policy Branch, "Dispute Resolution in Strata Properties: A Proposed Tribunal Model under British Columbia's *Strata Property Act*", 2011, available at http://www.housing.gov.bc.ca/strata/tribunal/Tribunal_StrataProperty.pdf.

- *Disputes can be expensive and emotionally draining.*
- *Disputes can remain unresolved, or violations continue, for a number of reasons, including the expense involved, lack of support from other owners, unwillingness to commit the time that would be needed, and confusion over how to access what recourse is available. Unresolved disputes can result in dissatisfied owners moving.*
- *Strata owners may avoid serving on the strata council and/or avoid strata meetings because of their experience with past or present conflicts within the strata corporation.*

2. *The complexities of shared ownership and mutual obligations among individual owners and the strata corporation require a good working knowledge of the Strata Property Act.*

    - *Some disputes in stratas occur because the parties to the dispute do not know how to find clear and reliable information on the basic requirements of the Strata Property Act and the bylaws of the strata corporation.*
    - *Strata council members are volunteers and can't be expected to be full-time staff or subject matter experts.*
    - *Some strata council members are negligent in their duties, seem to wilfully disregard the Act, or abuse their power. Similarly some owners refuse to comply with their responsibilities under the Act or bylaws. There needs to be a better way to hold all parties accountable.*
    - *There is uncertainty and misunderstanding about the role of strata managers, who may sometimes find themselves involved in disputes.*
    - *Voluntary dispute resolution committees that are permitted through the Act's Schedule of Standard Bylaws (Section 29) are almost never used and are probably not promising or practical mechanisms to focus on.*

3. *It is difficult to find a balance between complaints that some see as frivolous and others consider serious.*

4. *There are limited enforcement mechanisms in the Act, especially in situations where there is a willful disregard of the Act. Taking court action is seen as an intimidating and expensive option, not suited for all disputes.*

5. *The current arbitration process (sections 179 - 189) is said to be impractical and expensive and is rarely used.*

6. *While mediation is suitable for many strata property disputes, it is said to be poorly understood and **seldom chosen** by the parties.*

In relation to strata property disputes in the Courts, the preferred forum has generally been the Provincial Court – Small Claims division. As those with recent experience in participating in the Small Claims Court process will attest, it can be a frustrating experience. Cases are often 'back-logged' in the Small Claims court system to the extent that many cases take well over a year to reach the mandatory Settlement Conference stage. An unsettled matter will likely take another year after that to reach trial.

B. TRIBUNAL CREATION AND JURISDICTION

In response to the perceived weaknesses of the current dispute resolution model for strata property matters, the government has created the Tribunal.

Pursuant to the *Act*, the Tribunal has authority to hear:

1. Small claims disputes where the parties decide to take the matter to the Tribunal instead of the court, up to a maximum value of $25,000, for:

    - Debt or damages;
    - Recovery of personal property;
    - Specific performance of an agreement relating to personal property or services; or
    - Relief from opposing claims to personal property.

2. Strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as:

    - Non-payment of monthly strata fees or fines;
    - Unfair actions by strata corporations or by people owning more than half of the strata lots in a complex;
    - Uneven, arbitrary or non-enforcement of strata by-laws (such as noise, pets, parking, rentals);
    - Issues of financial responsibility for repairs and the choice of bids for service;
    - Irregularities in the conduct of meetings, voting, minutes or other matters;
    - Interpretation of the legislation, regulations or by-laws; and
    - Issues regarding the common property.

The Tribunal will not decide matters which affect land, such as:

- Ordering the sale of a strata lot;
- Court orders respecting rebuilding damaged real property;
- Dealing with developers and phased strata plans; or
- Determining each owners' percent share in the strata complex (the "Schedule of Unit Entitlement").

These matters will continue to be heard in the Supreme Court, as will the following matters relating to significant matters in a strata complex:

- Appointment of an administrator to run the strata corporation;
- Orders vesting authority in a liquidator;
- Applications to wind up a strata corporation;
- Allegations of conflict of interest by council members; or
- Appointment of voters when there is no person to vote in respect of a strata lot.

C. PROCEDURAL HIGHLIGHTS OF THE ACT

The Tribunal process will feel remarkably different from those that practitioners and participants are currently used to, particularly for those that have dealt with the Small Claims court process. In terms of procedure, the *Act* provides the following:

1. The process is voluntary. If a person or company against whom a claim is made does not consent to resolution under the *Act*, the Tribunal may not proceed. Participation is mandatory only if required under another act or by court order.

2. Once a Tribunal proceeding has commenced, no party can commence a court proceeding or other legally binding process against another party to the Tribunal proceeding in relation to an issue or claim that is to be resolved in the Tribunal proceeding. If such court proceeding or other legally binding process has already been commenced, it must be adjourned or suspended until while the Tribunal proceeding is continuing.

3. Once the Tribunal formally accepts a request for Tribunal resolution, the limitation period that applies to a claim in the dispute is postponed until (a) the Tribunal refuses to resolve the claim, (b) the parties withdraw from the Tribunal

proceeding by agreement or (c) circumstances in relation to a judicial review of a final decision of the Tribunal.

4. The general rule is that parties will represent themselves. For corporations and other legal entities, representation may be by director, officer, partner, or other individuals permitted by the Tribunal. For the insurance industry, we anticipate that an insured may be represented by insurance adjusters and examiners.

5. A party "may" be represented by a lawyer if:

    a. the party is a child or person with impaired capacity,

    b. the rules permit the party to be represented; or

    c. the tribunal, in the interests of justice and fairness, permits the party to be represented.

6. In considering "the interests of justice and fairness", the *Act* stipulates that the Tribunal may consider whether another party is represented or the other parties have agreed to the representation in support of giving the permission. Of course, legal advice is not precluded outside the formal process.

7. The proceeding has two phases: the case management phase and the Tribunal hearing phase.

    a. In the case management phase, resolution by agreement between the parties is facilitated and preparations are made for the Tribunal hearing should one be required. A case manager is assigned to assist with communications between the parties. This can be done in person, by telephone or over the internet. With the consent of the parties, the case manager may make "neutral" evaluations, and make settlement recommendations to the Tribunal.

    b. If the dispute is not resolved in the case management phase, the claim is to proceed to resolution by Tribunal hearing. This process may unfold without the parties being physically present with each other or the Tribunal. The Tribunal may use "electronic communication" for all or part of the proceeding. The Tribunal is given broad fact finding power, including the power to ask questions and inform itself "in any other way it considers appropriate". The Tribunal need not follow the rules of evidence.

8. Tribunal orders can be enforced by filing the final decision of the Tribunal or consent resolution order with the Provincial or Supreme Court, where appropriate, and it will have the same force and effect as if it were a judgment of that Court.

9. Parties are entitled to make an application for judicial review of a final decision of the Tribunal. The time limit for commencing an application for judicial review in respect of small claims decisions is 60 days. The time limit for strata related decisions is 90 days.

D. CONSIDERATIONS FOR PARTICIPANTS AND INSURERS

The Act creates an entirely new mechanism for dispute resolution of certain strata property matters. What is currently unknown is the extent to which participants will make use of the new Tribunal. As indicated above, the process is voluntary. The hope, of course, is that parties will make use of the new tribunal to obtain substantially quicker results in a more informal manner.

Not-for-profit D&O insurers who issue policies to strata corporations will want to take note of the new process for addressing strata property disputes. Currently, notice is generally provided when an action is commenced, be it in Small Claims court or Supreme Court. The new tribunal process is voluntary, as noted above. Underwriters should consider policy endorsements in British Columbia which deal with notice of proceedings, participation in proceedings and coverage for settlements or final decisions under the *Act*. Underwriters will also want to consider the nature of coverage which is being provided, particularly as it pertains to providing 'defence costs'. As indicated above, lawyers will generally not be allowed to participate in the tribunal process, and the monetary limit on which the tribunal can decide is $25,000 --- a not inconsequential sum.

Claims administrators should consider educating staff on the *Act*'s procedures and jurisdiction in order to effectively handle claims against an insured or in advancing subrogated claims under the *Act*.

V. THE NEW BRITISH COLUMBIA LIMITATION ACT

On June 1, 2013, British Columbia's *Limitation Act*, RSBC 1996, c. 266 (the "Current Act") will be replaced with a new *Limitation Act*, SBC 2012, c. 13 (the "New Act"). The New Act brings about important changes to the time period in which a party has to file a civil

claim in British Columbia and brings BC's law in line with other provinces. This section will highlight some of the fundamental changes to BC's law on limitation periods pertaining to strata property claims and the provisions for transitioning from the Current Act to the New Act.

A. BASIC LIMITATION PERIOD OF 2 YEARS

Under the Current Act, damage to property within a strata complex is subject to either a 2 or 6 year limitation period. Section 3 of the Current Act reads, in part:

> *3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:*
>
> *(a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;*
> *…*
>
> *(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.*

Section 3(2)(a) provides for a 2 year limitation period for causes of action involving "*injury to person or property*" whereas Section 3(5), which provides for a 6 year limitation period for "*any other action*" not specifically provided for elsewhere in the Act.

A body of case law developed to determine whether a particular instance of property damage was "*injury to person or property*" and subject to the 2-year limitation period. Whether property damage constitutes "*injury to property*" is a function of the mechanism by which the damage is caused. If the damage is caused by something inherent in, or internal to, the property, the claim is not one for injury to property. If, in contrast, the damage is caused by an identifiable act or event which is extrinsic, or external, to the property itself, the claim will be characterized as one for injury to property. Such analysis becomes all the more complicated when there is a combination of internal defects and external forces which caused the property damage.

The New Act does away with the 2-year vs. 6-year limitation period for property damage and establishes a default 2-year limitation period in which to commence a claim for all property damage. Section 6 of the New Act states: "*a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered*".

This unified shortened timeframe establishes certainty with regards to the limitation period for property damage; however, it will require that plaintiffs act promptly when a claim is discovered. From the insurer's standpoint, this is important in the context of a potential subrogated action against a third party for recovery of damages.

B. DISCOVERABILITY WILL APPLY TO ALL CLAIMS

Under the Current Act, the limitation period of certain claims, such as those for personal injury or property damage, may be postponed by the principle of discoverability. This means that the limitation period would not commence until the plaintiff knew or ought to have known that he or she has grounds for a civil claim and that he or she is in a position to commence an action.

Under the New Act, discoverability now applies to *all* claims. The New Act does not change the definition of discoverability, although it articulates more clearly the elements of when a claim is deemed to be discovered:

> ***8*** *Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:*
>
> *(a) that injury, loss or damage had occurred;*
> *(b) that the injury, loss or damage was caused by or contributed to by an act or omission;*
> *(c) that the act or omission was that of the person against whom the claim is or may be made;*
> *(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.*

Specific discovery rules apply for minors and persons under disability, as well as for specifically enumerated claims such as claims for contribution or indemnity which is discussed below.

C. ULTIMATE LIMITATION PERIOD OF 15 YEARS FROM THE DATE THE ACT OR OMISSION OCCURS

Section 8(3) of the Current Act provides that "*no action to which this Act applies may be brought … in any other case, 30 years from the date on which the right to do so arose*".

However, Section 21(1) of the New Act states:

> *21 (1) Subject to Parts 4 and 5, even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than 15 years after the day on which the act or omission on which the claim is based took place.*

The New Act significantly reduces the ultimate limitation period from 30 to 15 years. Further, the limitation period will start to run from the date the act or omission took place and not once all the individual elements of the legal claim have accrued (*i.e.*, when the actual loss or damage that would give rise to a civil claim occurred).

Therefore, if a claim is not discovered until after 15 years from the date when the act or omission occurred, the claim will be statute barred, even if the potential plaintiff had not yet suffered any loss or damage. The 2-year basic limitation period will not revive a claim that is discovered after the expiry of the ultimate limitation period. The New Act does however provide that the willful concealment of a claim postpones the 15-year ultimate limitation period.

The rationale underlying this change is to provide simplicity by eliminating the need for litigants and courts to determine at what point all elements of the claim have accrued and more predictability for the time starts to run at the same point regardless of the type of claim made (*e.g.*, negligence claim vs. breach of contract claim). The change is also said to balance the rights of plaintiffs to commence legal actions against defendants' right to have certainty and not be subject to potential indefinite liability.

D. NEW DISCOVERY RULE FOR CLAIMS FOR CONTRIBUTION OR INDEMNITY

The New Act infringes upon a defendant's current right to bring claims for contribution or indemnity against a third party in British Columbia. Under the Current Act, the limitation period for a defendant to commence a claim for contribution and indemnity does not begin to run until liability has been found against that defendant. However, Section 16 of the New Act provides:

> *16. A claim for contribution or indemnity is discovered on the later of the following:*
>
> > *(a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;*

> *(b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.*

Hence, the New Act provides that a claim for contribution or indemnity cannot be brought against a third party more than 2 years from the later of the day on which a defendant is served with the Notice of Civil Claim or when that defendant knew or ought to have known that a claim for contribution or indemnity could arise.

This is a significant change for it often will not be possible for parties to wait to see the outcome of litigation before filing a claim for contribution or indemnity. Counsel and insurers need to be aware of the new discovery rule for claims for contribution or indemnity and ensure such claims are filed within the new timeframe.

E. TRANSITIONAL PROVISIONS

Transitional provisions are set out in Section 30 of the New Act. The transition rules in the New Act govern claims where the act or omission occurred prior to the effective date of the New Act but discovery occurred on or after the effective date (June 1, 2013).

Hence, where discovery of the claim occurs before June 1, 2013, the Current Act applies.

However, where discovery of the claim occurs on or after June 1, 2013, the New Act applies and the basic 2-year limitation period will start to run from the date of discovery and the 15-year ultimate limitation period will start to run from June 1, 2013. For claims subject to the transitional rules, the ultimate limitation period will expire on June 1, 2028.

VI. STRATA PROPERTY ACT PROCEDURAL ISSUES AND CONCERNS FOR INSURERS

A. THE NEED FOR A SPECIAL RESOLUTION BEFORE COMMENCING LITIGATION

This section of the paper will discuss the procedural problems that affected strata corporations commencing legal proceedings following the decision of Mr. Justice Cohen in *The Owners Strata Plan LMS 888* v. *The City of Coquitlam et al.*,[29] and the subsequent legislative response. It will also consider the question: "Do you still need a special resolution to pursue a subrogated action in the name of the strata corporation?"

[29] 2003 BCSC 941.

1. The Law Subsequent to July 1, 2000: The Strata Property Act

The *Condominium Act* was repealed on July 1, 2000 when the *Act* came into force. Sections 171 and 172 of the *Act* then governed the commencement of legal proceedings by strata corporations. Those sections read as follows:

> *171 (1) The strata corporation may sue as representative of all owners…about any matter affecting the strata corporation, including any of the following matters:*
>
> *(a) the interpretation or application of this Act, the regulations, the bylaws or the rules;*
> *(b) the common property or common assets;*
> *(c) the use or enjoyment of a strata plan;*
>
> [...]
>
> *(2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.*
>
> [...]
>
> *(5) All owners…must contribute to the expense of suing under this section.*
>
> *(6) A strata plan's share of the total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1)…*
>
> *172 (1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata plans if, before beginning the suit,*
>
> *(a) it obtains the written consent of those owners, and*
> *(b) the suit is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.*
>
> *(2) Only those owners on whose behalf the suit is brought must contribute to the expense of suing under this section.*

> *(3) A strata plan's share of the total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1) except that*
>
> *(a) only owners on whose behalf the suit is brought are required to contribute, and*
> *(b) only the unit entitlement of strata plans owned by owners on whose behalf the suit is brought are used in the calculations.*

The British Columbia Supreme Court first considered sections 171 and 172 in *The Owners, Strata Plan LMS 888* v. *The City of Coquitlam et al* ("*Strata Plan LMS 888*").[30] In *Strata Plan LMS 888*, the Court was asked to decide whether the failure of the plaintiff to obtain a special resolution under section 171 and to obtain a special resolution and the written consent of each individual owner under section 172 prior to commencing its action amounted to a procedural defect capable of being cured.

In reviewing sections 171 and 172, the Court concluded that:

> *The word "before" in sections 171 and 172 cannot be viewed as superfluous and must have the meaning ordinarily given to it. To conclude that the requirement that a ¾ vote be obtained "before" a suit is brought is merely directory, would not only render the word meaningless but would also suggest that the Legislature had no real purpose or reason to include it in the provisions.*

The Court also refused to accede to the strata corporation's contention that it should interpret sections 171 and 172 to have the same meaning as section 15 of the *Condominium Act,* which had been determined to be only procedural in nature. The Court opined that since the *Condominium Act* was repealed and replaced with the *Act* the strata corporation could no longer rely on judicial decisions based on the *Condominium Act* to determine its rights and obligations under the *Act*, particularly since its action was commenced after the *Act* came into force. In the result, the Court ruled that:

a) the strata corporation's right to commence a representative action did not exist outside of sections 171 and 172 of the *Act*;

b) the strata corporation must conduct a ¾ vote before it commenced an action pursuant to section 171, and, in the case of section 172, the

[30] 2003 BCSC 941

strata corporation must also obtain the written consent of the unit owners before doing so. Having failed to do so, its right to commence a representative action did not arise; and

c) non-compliance by the strata corporation with sections 171 and 172 must result in the action being declared a nullity.

Strata councils have attempted to circumvent the ¾ vote requirement. In *Dockside Brewing Co. v. Strata Plan LMS 3837*,[31] certain strata council members sought to circumvent the ¾ requirement in s.171(2) by instigating litigation against the strata corporation, rather than having the strata corporation approve litigation under s.171(2), and by approving an operating budget which set aside legal fees to pay for the litigation, even though the strata council members knew a ¾ vote could not be obtained. The court stated that s.171(2) of the Act indicates that the Legislature determined that the initiation of only such litigation as is approved by ¾ vote is in the best interests of the strata corporation. Without that support, the legal expense (including the potential exposure to costs) may be presumed to outweigh the benefits to the strata corporation. In the circumstances, the strata council members had acted not for the benefit of the strata corporation, but for own personal gain.

The courts in BC have held that s.171 does not apply to an application for the appointment of an administrator under s.174 of the Act: *Strata Plan LMS 2643 v. Kwan*,[32] does not apply to a petition seeking an order for sale of a defaulting unit owner's strata lot: *Strata Plan VR1008 v. Oldaker*,[33] and does not apply to appeals: *Coupal v. Strata Plan LMS 2503*.[34]

2. The Impact of Strata Plan LMS 888 and the Legislative Response

Strata Plan LMS 888 made clear that all actions commenced by strata corporations on or after July 1, 2000 were a nullity if not previously authorized by special resolution; in most cases, written consent of owners participating in the proceeding was also required. As a result of the decision, it became incumbent upon property insurers to undertake new adjusting practices, specifically to ensure that the necessary resolution and consent were obtained prior to the commencement of legal proceedings. More importantly, the decision raised the spectre that a substantial number of legal proceedings could be declared nullities.

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[31] (2005) 46 B.C.L.R. (4th) 153 (S.C.)
[32] (2003) 7 R.P.R. (4th) 42 (B.C.S.C)
[33] (2004) 29 B.C.L.R. (4th) 121 (S.C.)
[34] 2004 BCCA 552

As a result of *Strata Plan LMS 888*, the BC Legislature responded with Section 173.1 of the *Strata Property Act*, which provides:

> ***Validity of suits and arbitrations undertaken by strata corporation***
>
> ***173.1*** *(1) The failure of a strata corporation to obtain an authorization required under section 171 (2) or 172 (1) (b) or the written consent of an owner under section 172 (1) (a) in relation to a suit or an arbitration:*
>
> *(a) does not affect the strata corporation's capacity to commence a suit or arbitration that is otherwise undertaken in accordance with this Act,*
>
> *(b) does not invalidate a suit or arbitration that is otherwise undertaken in accordance with this Act, and*
>
> *(c) does not, in respect of a suit or arbitration commenced or continued by the strata corporation that is otherwise undertaken in accordance with this Act, constitute*
>
> *(i) a defence to that suit or arbitration, or*
>
> *(ii) an objection to the capacity of the strata corporation to commence or continue that suit or arbitration.*
>
> *(2) Despite any decision of a court to the contrary made before or after the coming into force of this section, subsection (1) applies to a suit and an arbitration commenced or continued before or after the coming into force of this section.*
>
> *(3) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.*

Section 173.1 is a strong legislative response to the *Strata Plan LMS 888* decision, and makes it clear that failing to obtain the necessary authorization from the Strata Corporation before commencing an action will *not* invalidate the lawsuit. The amendment is also unusual in that it is specifically made retroactive to all lawsuits that had been commenced since the *Act* came into force. The practical effect of the amendment is that defendants will no longer be able to raise the technical defence of a

failure to obtain authorization from the owners prior to commencing an action under ss. 171 or 172. It also means that subrogating insurers will not necessarily need to obtain the ¾ resolution authorizing the action before it is commenced.

In *Strata Plan LMS 2940 v. Squamish Whistler Express and Freight*,[35] the Court of Appeal confirmed that s.173.1 was made for the benefit of strata corporations and should not be construed to their detriment.

3. Is It Still Necessary To Obtain A Special Resolution For Subrogated Actions?

In light of the fact that the decision to subrogate is often made shortly before the expiry of the limitation period, leaving little time for property insurers to obtain a special resolution from the owners, the legislative amendments in s.173.1 are a welcome response to the *Strata Plan LMS 888* decision. Property insurers can now instruct counsel to file a Notice of Civil Claim to protect against the expiry of a limitation period and then address getting the requisite resolution from the owners.

The question then arises, is it still necessary to obtain a special resolution when proceeding with a subrogated action? Many subrogated actions are commenced with the ultimate goal of securing a negotiated resolution of the property damage claim without proceeding with protracted litigation. In turn, this may lead property insurers to ask about the need for a special resolution at all, when the property insurer is the one receiving any proceeds from the litigation.

Notwithstanding that a special resolution is no longer required prior to commencing an action in the name of the strata corporation, there are a number of reasons that it is still necessary to obtain a special resolution. First, once the claim is resolved, the defendant is going to ask for a release from the strata corporation. A typical resolution authorizing the action in the name of the strata corporation permits the strata council to provide instructions to counsel in the handling of the action, and allows the strata council to sign any releases required upon resolution of the claim. Without a resolution authorizing the action, the property insurer will find that it is unable to provide the necessary release to the defendant because the strata council is not permitted to provide one without authorization from the owners.

Another reason that a special resolution is still required for a subrogated action is to protect against potential future allegations that the settlement of a subrogated action is not binding upon the owners. If a special resolution is never obtained, owners who feel

[35] (2010) 317 D.L.R. (4th) 505 (BCCA)

that they were not adequately compensated for the original damage may decide to commence their own actions against the defendant. The property insurer may then find itself facing a claim from the defendant for any amounts that it received in the settlement of the subrogated action that the defendant may be held accountable for to the owners in the separate claim.

While the legislative amendment permitting a special resolution of the owners to be obtained following commencement of an action in the name of the strata corporation allows steps to be taken quickly to avoid the expiry of a limitation period, it does not do away with the requirement that a special resolution be obtained at some point during the course of the litigation.

B. LAWSUITS COMMENCED BY INDIVIDUAL OWNERS FOR DAMAGE TO COMMON PROPERTY

A recent decision of the British Columbia Court of Appeal has opened the door for owners to sue in their own name to recover for damage to the common property. In *Hamilton v. Ball*,[36] the British Columbia Court of Appeal had an opportunity to consider whether individual strata property owners could bring an action for damage to common property, particularly in a situation where the plaintiffs had attempted, but failed, to receive the necessary ¾ authorization to commence the litigation. In so doing, the Court of Appeal considered what the nature of common property was in the context of the Act and the relationship of an individual unit owner to the common property.

In *Ball*, the plaintiffs were individual unit owners who commenced an action against the strata council members, who were alleged to have caused certain repair and maintenance work to be carried out on the common property. The plaintiffs claimed the work was defective. The defendants applied to have the action struck on the basis that the plaintiffs could not bring an action, which was in essence "*on behalf of the owners of the building as a whole*" without the necessary ¾ authorization.

The lower court decided that the plaintiffs could not commence the action against the defendants as the strata corporation was a distinct legal entity whose affairs were governed by the strata council and that, in essence, the common property was not property of the plaintiffs, but a distinct holding of the strata corporation.

On appeal, the plaintiffs argued that they were not commencing the action as representatives of all owners of the strata corporation. Rather, they argued that they, "*together with others, are tenants-in-common of the common property, and assert that like any*

[36] [2006] 6 W.W.R. 1; 2006 BCCA 243

other co-owners, they are entitled to sue for a remedy for injury to their own interests in such property". The Court of Appeal agreed. The Court noted that in British Columbia, "*common property is not owned by the strata corporation, but by the strata owners in proportion to their respective unit entitlements*."

The question then arises, why is it necessary to have section 171 of the *Act* which states that with a ¾ authorization of strata members an action can be commenced in the strata corporation's name? Why try to obtain ¾ authorization when any individual member can sue for damage to common property? The Court of Appeal noted that "*Section 171 creates a mechanism by which a three-fourths majority of owners may use the strata corporation as their vehicle for suing and spread the expenses thereof*". As the Court notes, "*that is as far as the legislation goes*". In other words, individual unit owners may commence an action for damage to common property without obtaining the consent of any other strata owner, however, no other owner is liable to pay the costs of commencing and maintaining the claim.

Practically speaking, this decision has paved the way for multiple claims by owners in a strata corporation for recovery for damage to property in their own units and to the common property. To date, our office is handling two claims by separate unit owners in the same building for recovery of their special assessments paid to remediate a leaky building.

Recently, the Ontario Court of Appeal followed the reasoning in *Hamilton*, and concluded that there is nothing in the Ontario legislation which would "*preclude an individual condominium unit owner from pursuing a claim relating to common elements where what is at issue is a contractually unique problem or other unit-specific wrong raising a discrete issue relating to common elements immediately pertaining to the owner's unit*".[37]

C. CAN A STRATA CORPORATION REPRESENTATIVE LEGALLY BIND THE STRATA CORPORATION?

For the insurer it is important to appreciate that the strata corporation can only act on a special resolution of the strata unit owners or by following the dictates of the strata council, which is ultimately responsible to the owners and must act within the confines of the Act and bylaws. For that reason, an insurer or an adjuster ought to be extremely careful in purporting to settle a property or liability claim with either a strata corporation or a management company retained by the strata corporation to conduct its business. Problems can arise by sole reliance upon the terms of a policy without regard to the

[37] *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249

inherent limitations of a strata corporation. For example, in most "all risk" property policies written in British Columbia that there exists a provision which states:

> *The Council of the Strata Corporation shall have the exclusive right to adjust any loss with the Insurer(s), and the owner of a damaged Strata plan shall be bound by such adjustment, provided, however, that the said Council may in writing authorize an owner to adjust any loss to his lot with the Insurer(s).* (emphasis added)

The strata unit owners are not a party to the strata corporation's insurance policies and could potentially, following completion of a settlement, commence proceedings for a determination that the settlement is not binding on the strata corporation insofar as the latter acted without jurisdiction in entering into the purported settlement. To guard against this eventuality it would be prudent for the insurer to stipulate that the terms of the settlement be conditional upon proof of one or more of the following:

a) a special resolution of the strata unit owners ratifying the terms of the settlement;

b) proof of a prior special resolution of the strata unit owners that the strata corporation is empowered or delegated the authority to enter into any settlement without limitation as to amounts; or

c) proof of a prior special resolution of the strata unit owners that an agent has been appointed to conclude a settlement and has the actual authority to bind the strata corporation and the strata unit owners.

Except in emergencies or after the bylaws are amended, a strata council cannot, without the consent of the strata unit owners, authorize an expenditure exceeding $2000.00 which was not set out in the annual budget and approved by the owners at the general meeting.[38] To appreciate the practical difficulties this poses one need only examine the decision in *Re Blunt and Strata Corporation VR45*.[39] The Court determined that the strata council must obtain approval by special resolution for an expenditure of $2,400 to paint the building notwithstanding that the council had a duty to maintain and repair the strata building that was intended to be painted.

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[38] Section 98 of the *Strata Property Act*.

[39] (1977), 2 B.C.L.R. 248 (S.C.).

VII. SUMMARY AND CONCLUSION

As we have seen above, the legal landscape pertaining to strata property matters continues to evolve. The British Columbia Law Reform Institute recently commenced a two part consultation and study of the development in strata law over the past 13 years, with an anticipated final report in 2014. Judicial consideration of the issues outlined above forms the template for the Institute's investigations.

In broad terms, the issues discussed above highlight the need for both insurers and strata corporations to actively address the extent of what the strata bylaws permit, the extent of insurance coverage which is being provided, and whether it accords with what the strata and the insurer are intending to cover.