

Bulletin #14

The new *Strata Property Act* is overwhelming. Each month we attempt to inform and educate you on different provisions and we hope this process is helpful. If you need a copy of previous bulletins please feel free to ask your property manager. If you have joined your strata council in recent months you should obtain a copy of previous bulletins as they are most useful. The content of these bulletins does not purport to offer legal opinions or advice. You should retain and consult with legal professionals.

Earthquakes – Repairs and Insurance

The recent minor earthquake prompts this month's newsletter. While we received very few complaints about damages in the buildings we manage, the incident clearly reminds us that it is only a matter of time before there is a more significant shake which will result in some substantial damages to your strata corporation. Some very interesting and difficult questions will arise at that time and the purpose of this month's newsletter is not only to draw your attention to one specific section of the new *Strata Property Act* but also to have you think about some of the questions that will arise that are not necessarily answered by the legislation.

As you know, when a strata corporation wishes to raise money for large projects which are not included in the annual budget, it is necessary for the strata corporation to call a special general meeting and have the owners vote on a $\frac{3}{4}$ vote resolution. (Under the *Condominium Act* we used to refer to these events as Extraordinary General Meetings and Special Resolutions.) Under the old *Condominium Act* in the event of an earthquake, which causes damages to a strata corporation, it would be necessary to follow this process and obtain the consent of the owners to raise a specific sum of money to undertake repairs. We never had to face that issue but it does raise an interesting question as to what might have happened if the owners did not agree to the special resolution.

In leaky condo litigation there has been a very important case rendered by the B.C. Supreme Court known as Tadeson. In short, when a strata corporation wishes to raise money to repair a leaky condo but the owners do not sanction the $\frac{3}{4}$ vote resolution, the strata corporation is unable to meet its statutory duty. The court, in Tadeson, simply directed the strata corporation to proceed with the

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leaky condo repairs and assess the owners their proportionate unit entitlement share of the expense. For the purpose of this newsletter, we have simplified the Tadeson case but it is an important concept which has been relied upon several times following the decision several years ago. The problem with Tadeson is that it still takes a court application to derive its benefit. It is not "automatic". This can take several months if not longer. So what does all this have to do with earthquakes, you ask?

Well, the answer is this: a strata corporation faced with earthquake repairs (i.e., the deductible) could rely on Tadeson to force owners to ante up the necessary special assessment for repairs but, as illustrated, the timeline could be several months, if not longer. In the meantime, what does the strata corporation do to effect repairs to its damaged structure? The answer lies at Section 158(3) of the *Strata Property Act* which reads as follows:

"Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159."

Underline added for emphasis. (For the purpose of this discussion, Section 159 is not relevant.)

Just so that you understand the complete impact of Section 158, here is the full section:

"Insurance deductible

158 (1) 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 section 99 (2) or 100 (1).

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

(3) Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159."

In the context of an earthquake deductible, Section 158(3) will allow a strata council to simply determine the amount of a special levy on the owners and proceed without getting their consent.

Since Section 158 also deals with insurance deductibles and chargebacks to owners, this newsletter also draws your attention to the fact that, at the end of this year, such chargebacks will no longer be permitted even if you have a bylaw. The following is an excerpt from The New Condominium Concept (Revised) which is published by Vancouver Condominium Services Ltd.:

158. Insurance Deductible

Here is a change to the condominium concept which will drive strata council members crazy. Strata corporation insurance policies, like most insurance policies, come with deductibles and, in the case of water related claims, the deductibles tend to be quite high, especially if there has been a high frequency of claims. Strata councils have traditionally accepted the responsibility for paying such deductibles when the source of the water leaks have originated from strata corporation common property such as water lines, exterior envelope, roofs, etc. Strata councils have been extremely loathe to pay

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insurance deductibles when the claims arise from either the negligent behaviour of an owner or tenant, or from a fixture or appliance under the control of an owner or tenant, such as a washing machine. For example, consider a tenant or owner sitting in a bathtub and drinking alcohol and/or smoking an illegal substance, and then losing track of what he or she is doing thus permitting the water to overflow causing thousands of dollars of damage. Strata councils have generally permitted insurance claims under such circumstances¹ but have charged back the deductibles to the owners. On the general advice of experts in the field, including insurance agents and consultants, many strata corporations introduced so-called "insurance deductible bylaws" which authorized the strata corporation to charge back these deductibles to owners. The theory was that the bylaw would give sufficient authority to the strata corporation to validate the charge backs. The government has always disagreed with this concept and has now addressed the issue via Section 158(1) which states that, subject to the regulations², 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. What this clearly means is that insurance deductible bylaws or equivalent council policies are no longer valid. In most cases, these would be registered as bylaws in the appropriate land title offices and, notwithstanding their registration, after January 1, 2002 they will be invalid as a result of the introduction of the Strata Property Act, Section 158(1).

The legislation nevertheless recognizes the aggravation that has been caused by such circumstances giving rise to these insurance deductible bylaws so, in subsection (2), the Act provides that the dictate of subsection (1) does not limit the capacity of the strata corporation to litigate against an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim. In other words, the strata corporation will now have a statutory provision to present to a court of competent jurisdiction when litigating against an owner for recovery of such damages. Interestingly, notwithstanding the distribution of powers, rights and duties to tenants who live in strata corporations, there is no provision in subsection (2) allowing the strata corporation to sue a tenant to recover the deductible portion of an insurance claim if the tenant is responsible for the loss or damage that gave rise to the claim. Thus, if a tenant or owner is sitting in the bathtub and loses track of what he or she is doing and allows the water to

¹ There are a few strata corporations who have actually refused to make insurance claims and have charged the entire amount of the damage back to the owner. These strata councils have been operating illegally as an owner has the right to the benefit of the insurance irrespective of the cause.

² None at this time.

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overflow and create thousands of dollars of damage, the strata corporation must, of course, make an insurance claim and pay the deductible but there is no statutory authority³ for the strata corporation to seek recovery of that deductible from the tenant in a court of competent jurisdiction. The strata corporation would have to sue the landlord owner but this may prove to be very difficult.

Subsection 158(3) introduces a remarkable new concept to condominium administration by stating that a strata corporation does not require approval for a special levy, or for an expenditure, from the Contingency Reserve Fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace the damaged property as outlined in the following Section, 159. What this means is that the strata council may simply charge insurance deductibles to the Contingency Reserve Fund, a rather odd authority given the general sanctity of the Contingency Reserve Fund. Similarly, this section permits the strata corporation to raise any necessary insurance deductible amount by way of a special levy on the owners without seeking consent from the owners. All the strata council has to do is determine the amount of the levy and send a bill to every owner. This is a highly unusual concept and owners receiving notification from their strata councils about the required special levy will, no doubt, be astounded that they were not consulted. Strata councils would do well to ignore the freedom offered by the Act and, if a special levy is required, they should still convene a Special General Meeting if for nothing else to at least inform the owners.

If there is one advantage to this highly unusual statutory authority, it would be in the circumstance of an earthquake. Earthquake insurance deductibles are

³ Landlord's and owner's responsibility for fines and costs incurred by tenant

131 (1) If the strata corporation fines a tenant or requires a tenant to pay the costs of remedying a contravention of the bylaws or rules, the strata corporation may collect the fine or costs from the tenant, that tenant's landlord and the owner, but may not collect an amount that, in total, is greater than the fine or costs.

(2) If the landlord or owner pays some or all of the fine or costs levied against the tenant, the tenant owes the landlord or owner the amount paid.

Note that this section cannot be utilized to recover the insurance deductible from a tenant because the section says that there must be a contravention of the bylaws or rules of the strata corporation. Since Section 158 provides that insurance deductibles are common expenses, there can be no bylaw to overrule the statutory direction.

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extremely high⁴ and it is unlikely that most strata corporations would have sufficient monies in the Contingency Reserve Fund to repair or replace damaged property following an earthquake. To take the time to call a Special General Meeting and pass a special levy would cause unwarranted delays. Remember that special levies, when presented to Annual or Special General Meetings may be contested⁵ and, in fact, the strata council has to wait a week after passing a resolution if less than 50% of the voters attend, in order to permit the possibility of a contest.

The final point about Section 158 is, in fact, the very first four words of the Section "Subject to the regulations...". At this time there are no regulations concerning the issue of deductibles and chargebacks; however, the Act has the power to add regulations at a later date. If strata corporations abuse the process offered by Section 158 the government will surely introduce restrictive controls via the regulations."

This bulletin has only "touched" on some of the issues concerning deductibles and earthquakes. In future bulletins we will explore such questions as how to address repairs inside strata lots which are below the deductible. Does the strata corporation pay? Does the strata lot owner pay? Thoughts?

⁴ The standard deductible is 5% of the value of the building, although some policies may increase to 10% in the coming years. In either event, it is still a very high amount and probably well beyond the capacity of most Contingency Reserve Funds.

⁵ Section 51 **Reconsideration of Resolution Passed by a 3/4 Vote**