



Report on Insurance Issues for Stratas

A report published as part of the Strata Property Law Project—Phase Two

Report on Insurance Issues for Stratas

**A Report Prepared for the British Columbia
Law Institute by the Members of the
Strata Property Law (Phase Two) Project
Committee**

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Introductory Note

Report on Insurance Issues for Stratas

Insurance is of vital importance for all property owners. This point is equally valid for owners of single-family homes and owners of strata lots. But strata-property owners face complex issues that other owners don't face. Managing these issues is one of the major tasks of strata-property law.

This report recommends ways to enhance the legal framework governing insurance issues for strata properties. The report recommends expanding the insurance mandate on strata corporations to include directors-and-officers insurance, a new approach to dealing with liability to pay a strata corporation's insurance deductible in cases where an owner is responsible for a claim, and enhanced reporting and information-sharing provisions. The report also contains draft legislation and regulations, which illustrate how the report's recommendations could be implemented.

This report is the fourth report published in BCLI's Strata Property Law Project—Phase Two. BCLI's work on strata-property law reaches back to phase one of this project, which concluded in 2012 with recommendations to examine selected areas of strata-property law and to make recommendations for legislative reform that will support the next generation of the *Strata Property Act*.

On behalf of the board of directors of the British Columbia Law Institute, I want to thank the members of the Strata Property Law (Phase Two) Committee for their hard work on this report and their ongoing commitment to the project. BCLI fully supports their recommendations and endorses this report.



Thomas L. Spraggs
Chair,
British Columbia Law Institute
March 2019

Strata Property Law (Phase Two)

Project Committee

The Strata Property Law (Phase Two) Project Committee was formed in fall 2013. This volunteer project committee is made up of leading experts in strata-property law and practice in British Columbia. The committee's mandate is to assist BCLI in developing recommendations to reform strata-property law in the areas selected for study in this phase-two project. These recommendations will be set out in final reports for each area.

The members of the committee are:

Patrick Williams—chair
(Partner, Clark Wilson LLP)

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Ed Wilson
(Partner, Lawson Lundell LLP)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

**For more information, visit us on the World Wide Web at:
<https://www.bcli.org/project/strata-property-law-phase-two>**

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BCLI also thanks all those individuals and organizations that participated in the public consultation that preceded this report. Their responses and comments helped the committee in shaping and evaluating the final recommendations contained in this report. For publicizing the consultation paper that preceded this report, BCLI thanks the Advocate, the Canadian Bar Association—BC Branch, the Condominium Home Owners Association, and the Vancouver Island Strata Owners Association.

Members of the Insurance Brokers Association of British Columbia and the Insurance Bureau of Canada generously gave their time to meet with the Strata Property Law (Phase Two) Project Committee as it was initially developing its tentative recommendations for the *Consultation Paper on Insurance Issues for Stratas*. BCLI and the committee would like to thank IBABC and IBC and the following individuals:

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- Trudy Lancelyn, Insurance Brokers Association of British Columbia;
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- Patrick North, Insurance Brokers Association of British Columbia & GNK Insurance;
- Scott Preston, Insurance Brokers Association of British Columbia & SeaFirst Insurance;
- Rana Shamoan, Insurance Bureau of Canada;
- Steve Storrey, BFL Canada;
- Sarah Thompson, Insurance Brokers Association of British Columbia & Hub International Coastal.

The views expressed in this report are those of BCLI and the committee and they may not reflect the views of any of the listed individuals, IBABC, or IBC.

The Strata Property Law (Phase Two) Project has been made possible by support from the Real Estate Foundation of British Columbia, the Notary Foundation of British Columbia, the Ministry of Municipal Affairs and Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association. BCLI thanks all these organizations for their generous contributions to the project. BCLI also thanks the Vancouver law firm Clark Wilson LLP for hosting committee meetings.

Finally, the staff of BCLI have played a key role in designing, managing, and executing the work leading up to this report. Jim Emmerton (executive director to June 2015) and Kathleen Cunningham (executive director June 2015 to present) have both provided executive planning and management for the project. Kevin Zakreski (staff lawyer) is the project manager, and was also responsible for drafting this report and the consultation paper that preceded it. He, Greg Blue, QC (senior staff lawyer), and Valerie Le Blanc (staff lawyer) have contributed to supporting project-committee meetings. And the following staff members have also contributed to the research and administration for this project: Emily Amirkhani (University of Victoria Law Coop student), Alexandre Blondin (research lawyer), Gurinder Cheema (summer law student), Allison Curley (summer law student), Raissa Dickinson (manager, community engagement), Eric Hou (summer law student), Rachel Kelly (research lawyer), Shauna Nicholson (legal assistant), Sergio Ortega (University of Victoria Law Coop student), Elizabeth Pinsent (office administrator), and Bénédicte Schoepflin (social media coordinator).

EXECUTIVE SUMMARY

Introduction

Insurance is a pressing concern for all homeowners. It is no less important for people whose homes are located within a strata property. But insurance generates some complicated legal issues within strata properties that don't arise within a single-family home. This is because the one-to-one relationship of homeowner to insurer is refracted in a strata property into a more complex set of relationships involving (at a minimum) strata-lot owners, their insurers, the strata corporation, and its insurers. Experience in British Columbia and elsewhere has shown that legislation is necessary to coordinate these relationships.

This report examines how the *Strata Property Act* and the *Strata Property Regulation* are performing in carrying out that task. It contains 11 recommendations for reforming the act and the regulation, to improve how they function in governing insurance in strata properties.

About the Strata Property Law Project—Phase Two

This is the fourth report published in BCLI's Strata Property Law Project—Phase Two. The phase-two project builds on the consultation and research carried out in phase one of the project. It addresses legislative reform of the *Strata Property Act*, with the goal of promoting the development of the next generation of the act. Previous reports have considered terminating a strata, complex stratas, and governance issues for stratas.

Our supporters and the project committee

The Strata Property Law Project—Phase Two has been made possible by project funding from the Real Estate Foundation of British Columbia, the Notary Foundation of British Columbia, the Ministry of Municipal Affairs and Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

BCLI is carrying out the Strata Property Law Project—Phase Two with the assistance of a volunteer project committee. The committee is made up of a diverse range of

experts in the strata-property field. Its 13 current members hail from the legal and notarial professions, owners' organizations, the strata-management and real-estate professions, and the public sector.

Consultation Paper on Insurance Issues for Stratas

This report was preceded by the committee's *Consultation Paper on Insurance Issues for Stratas*, which was published in September 2018. The consultation paper was made available via the BCLI website. Its publication marked the beginning of a three-month consultation on the committee's tentative recommendations.

This consultation attracted a high level of response, garnering a total of 90 responses. Both the volume of responses and the quality of the comments helped the project committee in refining its proposals and deciding on the final recommendations contained in this report.

Content of the report

Introduction

The report contains six chapters, including its brief introductory and concluding chapters. The introductory chapter gives an overview of the project and a summary of the report's recommendations.

Strata-property basics

The report's second chapter contains a general overview of strata-property law. This discussion is pitched at readers who are unfamiliar with the distinctive terms and concepts found in this body of law. It's intended to provide these readers with just enough information about the creation and operation of strata properties to allow them to work their way through the chapters that follow.

Insurance and strata properties

A thorough review of part 9 of the *Strata Property Act* forms the subject of the report's third chapter. Part 9 contains the act's legal framework for insurance in strata properties.

After briefly recounting the legislative history of part 9, the chapter gives a detailed review of its component parts. These components include the following provisions:

- legislative requirements—that is, mandates—on the strata corporation to obtain property and liability insurance;

- an enabling provision, allowing the strata corporation to obtain insurance other than that required by the legislation;
- a provision confirming the strata corporation's insurable interest in the property it must insure;
- reviewing and reporting requirements imposed on the strata corporation;
- a provision spelling out the named insureds on the strata corporation's insurance and establishing a rule preventing subrogated claims by the strata corporation's insurers against those named insureds;
- a provision regulating the payment and application of insurance money;
- provisions regarding deductibles in the strata corporation's insurance;
- an enabling provision for strata-lot owners to obtain their own insurance;
- a provision regulating contributions by the strata corporation's and the owners' insurers.

Issues for reform

While the committee reviewed all of part 9 of the act, its recommendations for reform concern only those areas where the committee saw a need for improvements. These areas consist of the following four topics.

- **The insurance mandate:** the committee recommended adding a requirement to the strata corporation's insurance mandate to obtain directors-and-officers coverage. The committee also considered mandating coverage for two perils (earthquakes and overland floods) that aren't currently within the scope of the major perils that must be covered.
- **Insurance deductibles:** the committee made two recommendations concerning deductibles: (1) amending the legislation to expressly assign responsibility for an insurance deductible to a responsible owner; and (2) requiring strata-lot owners to obtain their own insurance that covers payment of a deductible under a strata-corporation policy.
- **Named insureds:** the committee canvassed recent case law on this provision. In its view, legislative change isn't required to ensure that it continues to fulfil its main purpose, which consists of establishing the rule preventing subrogated claims against named insureds.
- **Reporting and administration:** the committee recommended that the legislation require strata corporations to obtain appraisals to determine the adequacy of their property-insurance coverage; that the frequency of such

appraisals be (at a minimum) once every three years; and that the strata corporation be required to inform owners and tenants of any material change in the strata corporation's insurance coverage.

Finally, this report considers adoption of the standard-unit concept as a feature of British Columbia's legislation, a topic which was framed as a question for discussion in the consultation paper. The standard unit is an idea used in other Canadian jurisdictions to determine the scope of a strata corporation's property-insurance obligations. Adopting this concept in British Columbia would represent a significant change in this province's law. After reflecting on the comments received on its question for discussion and on recent developments elsewhere in Canada, the committee recommended that further study and consultation be devoted to this issue.

Draft legislation and regulations

The report contains a chapter setting out draft legislation and regulations, which are intended to illustrate how the committee's recommendations could be implemented by amendments to the *Strata Property Act* and the *Strata Property Regulation*.

Conclusion

This report's final recommendations will be submitted to the provincial government. The province of British Columbia regularly updates strata legislation.

Chapter 1. Introduction

An Overview of Insurance and Strata Properties

Insurance and homeownership go hand in hand. For many people, owning a home is the most important investment made in their lifetimes. But it's an investment that is beset by risks. Fires or inclement weather can damage or destroy a building. An accident on a homeowner's property can result in a weighty settlement or court judgment. All of these risks and more have the potential to erode or deplete the homeowner's investment.

The main way to blunt the force of these risks is by insurance. The social purpose of insurance is to serve as "a mechanism for spreading the risk of loss."¹ People who face risks "can team up with others in the same position" and "contribute to a fund from which money will be available to pay for losses when they occur."² Homeowners have a particularly strong incentive to obtain insurance to protect their investment.

This incentive is no less strong for a homeowner whose home is located within a strata property. But when the interplay of insurance and strata properties is examined for legal issues, this incentive isn't the only thing that shines through. What becomes readily apparent is that this subject is governed by its own legal framework, which makes up a significant part of British Columbia's laws on strata properties: the *Strata Property Act*³ and the *Strata Property Regulation*.⁴

Why is this legal framework necessary? It owes its existence to the fact that some of the most challenging issues in the strata-property field concern insurance. "Insurance" is, as an early commentator on strata-property law put it, "probably the most difficult subject, technically, for the legislative draftsman, the developer, and the owners."⁵

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1. Craig Brown et al, *Insurance Law in Canada*, vol 1 (Toronto: Thompson Carswell, 2002) (loose-leaf release 2010-1) at § 1.1.
 2. *Ibid* (commenting further on the nature of insurance: "Each contribution, or 'premium,' is much less than the potential loss the contributor faces. This is possible because the losses covered by the system are random losses. Among a relatively large number of people facing similar risks, only a relative few (whose identity is unknown) at the outset will actually suffer loss. The contributions of the many pay for the losses of the few." [footnote omitted]).
 3. SBC 1998, c 43.
 4. BC Reg 43/2000.
 5. R C B Risk, "Condominiums and Canada" (1968) 18:1 UTLJ 1 at 56.
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The difficulty appears to reside in the exceptional demands this subject places on the law to coordinate a diverse range of actors and strike a careful balance between an elaborate and complex set of interests. These demands appear at two levels.

At the first, operational level, the relatively simple relationship of insurer to homeowner is refracted into a relationship between multiple players. Among these players is the strata corporation, which acts as a collective administrator for the strata property, on behalf of its owners. As will be seen, strata corporations are subject to legislative mandates to obtain certain forms of insurance. But nothing in these mandates prevents an individual owner from obtaining insurance. Further, the legal framework recognizes that other actors may be at play in some strata properties, such as tenants and what the act refers to as “occupants” (“a person, other than an owner or tenant, who occupies a strata lot”).⁶ Finally, given the financial realities of homeownership, another player exists who is likely to take a keen interest in the strata property’s insurance arrangements: the mortgage lender. All of this leads to the signature issue for this report, which concerns designing laws that strive to “eliminat[e] the twin evils of overlapping policies and gaps in coverage.”⁷

At the second, conceptual level, strata-property law and insurance law are both sophisticated, detailed, and complex bodies of law. The *Strata Property Act* contains over 300 sections. Commentators have stressed the significant, far-reaching impact this statute (and those like it in other jurisdictions) has had on real-property law.⁸

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6. *Supra* note 3, s 1 (1) “occupant.” To round out this list of players in the insurance field for strata properties, it should be noted that some stratas will have one further player: a section. Sections are a kind of sub strata corporation, which crop up most frequently in mixed-use stratas. The *Strata Property Act* allows the creation of sections in limited circumstances to represent the different interests of specified groups of owners (see *ibid*, s 191). The act goes on to grant sections certain corporate powers, one of which is the power to “obtain insurance only (a) against perils that are not insured by the strata corporation, or (b) for amounts that are in excess of amounts insured by the strata corporation” (*ibid*, s 194 (4)). While sections don’t figure into much of the discussion in this report, they were one of the main subjects of two earlier publications in this project. See British Columbia Law Institute, *Consultation Paper on Complex Stratas* (2016), online: <www.bcli.org/wordpress/wp-content/uploads/2016/09/2016-08-31_BCLI-Consultation-Paper-on-Complex-Stratas-FINAL.pdf> [perma.cc/A43A-3NN7]; British Columbia Law Institute, *Report on Complex Stratas*, Report 81 (2017), online: <www.bcli.org/wordpress/wp-content/uploads/2017/06/2017-06-19_BCLI-SPL-Ph2-Report-on-Complex-Stratas-FINAL.pdf> [perma.cc/NZZ8-JQMP] (see especially recommendation (12), which recommends expanding a section’s power to obtain insurance at 77–79).
 7. Patrick J Rohan, Melvin A Reskin, & Michael P Sanchirico, “Recent Developments in the Field of Insurance for Condominium Projects” (1974) 48:4 St John’s L Rev 1084 at 1092.
 8. See e.g. Don J Manderscheid, “Condominium Contributions: A Matter of Priority” (1999) 37:4 Alta L Rev 973 at 974 (describing strata-property legislation as having “ushered in a totally alien

British Columbia's *Insurance Act*⁹ is similarly lengthy (it runs to about 170 sections). And this act is only one part of an intricate web of statutes, regulations, and case law which make up insurance law. It's readily apparent that a significant effort would be needed to ensure that these two distinct bodies of law align together for seamless application. "The strata corporation concept does not fit neatly into a number of insurance concepts and principles," as a leading practice guide for strata properties explains, so an overriding goal of the *Strata Property Act*'s insurance provisions is to "make adjustments for this purpose."¹⁰

About the Strata Property Law Project—Phase Two

This *Report on Insurance Issues for Stratas* is part of the British Columbia Law Institute's ongoing Strata Property Law Project—Phase Two. BCLI began the Strata Property Law Project—Phase Two in summer 2013. The project's goals are to study selected areas of strata-property law, identify issues calling for reform of the law, and recommend changes to the *Strata Property Act* to address those issues.

The phase-two project builds on BCLI's Strata Property Law Project—Phase One, which was completed in 2012. Over the course of the phase-one project, BCLI carried out initial legal research and focused consultation with leading experts in the strata-property field. The results of this research and consultation were published in BCLI's *Report on Strata Property Law: Phase One*,¹¹ which recommended that BCLI undertake a law-reform project to examine the following subjects: (1) fundamental changes to a strata; (2) complex stratas; (3) selected governance issues; (4) common property; (5) selected land-title issues; (6) selected insurance issues; (7) leasehold stratas.

concept of land ownership" [footnote omitted]); Cathy Sherry, "Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property" (2013) 36:1 UNSW LJ 280 at 314 ("when using legislation to create novel forms of property which accommodate high density development, we must be conscious of the ways in which we are straying from orthodox rules or property and the consequences of the divergence").

9. RSBC 2012, c 1.

10. Continuing Legal Education Society of British Columbia, ed, *British Columbia Strata Property Practice Manual* (Vancouver: Continuing Legal Education Society of British Columbia, 2008) (loose-leaf 2018 update) at § 15.1.

11. Report 70 (2012), online: <www.bcli.org/sites/default/files/2012-11-30_BCLI_Report_on_Strata_Property_Law--Phase_One.pdf> [perma.cc/FBV8-J9C7].

The first subject in the phase-two project was partially addressed in the project's first two publications, the *Consultation Paper on Terminating a Strata*¹² and the *Report on Terminating a Strata*.¹³ The Legislative Assembly of British Columbia implemented this report's recommendations in fall 2015.¹⁴

Complex stratas, the project's second subject, were the focus of a further two publications for this project: the *Consultation Paper on Complex Stratas*¹⁵ and the *Report on Complex Stratas*.¹⁶

Governance issues have been addressed by two publications, the *Consultation Paper on Governance Issues for Stratas*¹⁷ and the *Report on Governance Issues for Stratas*.¹⁸ And a consultation paper has been published that combines three subjects: common property, selected land-title issues, and fundamental changes to a strata (that is, the remaining issues with fundamental changes that weren't addressed in the committee's earlier work on terminating a strata).¹⁹

Unfortunately, the time and resources available to the project have ruled out the planned review of its seventh subject, leasehold strata plans.

The Phase-Two Project's Supporters

The Strata Property Law Project—Phase Two has been made possible by project grants from the Real Estate Foundation of British Columbia, the Notary Foundation

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12. (2014), online: <www.bcli.org/wordpress/wp-content/uploads/2014/05/2014-05-15_BCLI-Consultation-Paper-on-Terminating-a-Strata-FINAL.pdf> [perma.cc/XK58-9PLF].
 13. Report 79 (2015), online: <www.bcli.org/wordpress/wp-content/uploads/2015/02/2015-02-20_BCLI-SPL-Ph2-Report-on-Terminating-a-Strata-FINAL.pdf> [perma.cc/GW7W-VCBX].
 14. See *Natural Gas Development Statutes Amendment Act, 2015*, SBC 2015, c 40, ss 37–55 (in force 28 July 2016).
 15. *Supra* note 6.
 16. *Supra* note 6.
 17. (2018), online: <www.bcli.org/wordpress/wp-content/uploads/2018/03/2018-03-13_BCLI-Consultation-Paper-on-Governance-Issues-For-Stratas-CONSULTATION-FINAL.pdf> [perma.cc/3A57-2889].
 18. Report 85 (2019), online: <www.bcli.org/wordpress/wp-content/uploads/2019/01/Report-on-Governance-issues-final-report-WEB.pdf> [perma.cc/BRQ5-L6ZB].
 19. See *Consultation Paper on Common Property, Land Titles, and Fundamental Changes for Stratas* (2018), online: <www.bcli.org/wordpress/wp-content/uploads/2018/11/2018-12-07_BCLI-CP-on-Common-Property-Land-Titles-and-Fundamental-Changes-for-Stratas-FINAL-reduced.pdf> [perma.cc/A2EQ-H5XB].
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of British Columbia, the Ministry of Municipal Affairs and Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

The Strata Property Law (Phase Two) Project Committee

In carrying out the phase-two project, BCLI is grateful to have the assistance of an expert project committee. Brief biographies of committee members may be found in appendix B.²⁰

Consultation Paper on Insurance Issues for Stratas

This report was preceded by the *Consultation Paper on Insurance Issues for Stratas*, which was published in September 2018.²¹ Publication of the consultation paper opened a three-month window for the public to comment on the committee's 10 tentative recommendations for reform and one question for discussion.

The consultation paper garnered 90 responses, which is a high level of response for a BCLI law-reform publication. Responses were fully considered in crafting this report's final recommendations. The committee thanks everyone who provided a response in this consultation. Their efforts helped the committee to test and refine its thinking on the issues for reform found in this report.

An Overview of this Report

While the committee reviewed all of part 9 of the *Strata Property Act*, its recommendations for reform focus on four areas:

- the insurance mandate: the committee recommended adding a requirement to the strata corporation's insurance mandate to obtain directors-and-officers coverage; the committee also considered mandating coverage for two perils (earthquakes and overland floods) that aren't currently within the scope of the major perils that must be covered;

20. See, below, at 93–100.

21. (2018), online: <www.bcli.org/wordpress/wp-content/uploads/2018/09/2018-09-14_BCLI-Consultation-Paper-on-Insurance-Issues-For-Stratas-FINAL.pdf> [perma.cc/S84T-3JYK].

- insurance deductibles: the committee made two recommendations concerning deductibles: (1) amending the legislation to expressly assign responsibility for an insurance deductible to a responsible owner; and (2) requiring strata-lot owners to obtain their own insurance that covers payment of a deductible under a strata-corporation policy;
- named insureds: the committee canvassed recent case law on section 155 of the act but did not recommend any changes to that provision;
- reporting and administration: the committee recommended that the legislation require strata corporations to obtain appraisals to determine the adequacy of their property-insurance coverage; that the frequency of such appraisals be (at a minimum) once every three years; and that the strata corporation be required to inform owners and tenants of any material change in the strata corporation's insurance coverage.

Finally, this report considers adoption of the standard-unit concept as a feature of British Columbia's legislation, a topic which was framed as a question for discussion in the consultation paper. The standard unit is an idea used in other Canadian jurisdictions to determine the scope of a strata corporation's property-insurance obligations. Adopting this concept in British Columbia would represent a significant change in this province's law. After reflecting on the comments received on its question for discussion and on recent developments elsewhere in Canada, the committee recommended that further study and consultation be devoted to this issue.

Chapter 2. Strata-Property Basics

Introduction

Strata-property law has a highly original cast of characters and concepts. Its terms and ideas are how the law creates strata properties' distinctive combination of ownership and management of property. Understanding these concepts is a necessary part of analyzing the legal issues that can arise in a strata property.

Who is responsible to repair property? How do decisions get made in a collective of property owners? How are expenses divided up among these owners? What role do the bylaws play in establishing the governing norms of the community? What is meant by such terms as *common property*, *strata lot*, and *unit entitlement*? The answers to these and similar questions will often figure deeply into the analysis of any given insurance issue in a strata property.

This chapter's goal is to acquaint readers with basic strata-property terms and concepts. It is pitched at readers who are new to the subject or unfamiliar with strata properties and is meant to give them just enough information to find their way through the chapters that follow.

The Essential Elements of a Strata Property

Strata properties²² are a legal device that accommodates individual ownership of an interest in land within a collective, multi-unit structure. The law contains many such devices. What sets a strata property apart from, say, a cooperative, a joint tenancy, a tenancy in common, or a long-term lease, are the following "two essential elements":

- the division of property into units, to be individually owned, and common elements, to be owned in common by the owners of the units; and
- an administrative framework to enable the owners to manage the property.²³

22. For many people the name *strata property* itself is the first stumbling block that's encountered in a discussion of this area of the law. British Columbia is the only jurisdiction in Canada that uses this name. Its significance is mainly historical: it reflects the origins of this province's law in legislation that was enacted first in Australia. Other Canadian provinces and territories drew on American law to create their legislation. So they adopted the leading American word, *condominium*. The two terms actually describe the same concept. Nothing in law turns on the use of one or the other.

23. Ontario Law Reform Commission, *Report on the Law of Condominium* Report 11 (1967) at 3.

These essential elements exist within a body of law that “reflects the combination of several legal concepts”—especially concepts drawn from real-estate law, easements, and corporate law.²⁴

The Three Generations of Strata-Property Legislation

Introduction

It might be possible to achieve this combination of rules and essential elements by carefully executed easements and agreements. But throughout Canada, the United States, and Australia, strata properties have been fostered by legislation.

British Columbia is no exception to this approach. This province has supported the creation and administration of strata properties by legislation, which can be seen as developing in three distinct generations.

Strata Titles Act 1966–74

In April 1966, British Columbia became the first jurisdiction in Canada to enact strata-property legislation. The first-generation act, called the *Strata Titles Act*, came into force in September of that year.²⁵

The first-generation act was skeletal legislation. It did little more than enable people to create and administer strata properties.

Strata Titles Act/Condominium Act 1974–2000

In 1974, the second generation of the legislation appeared.²⁶ The second-generation act retained the framework set out in the first-generation act and enhanced it by adding new provisions dedicated to consumer protection and addressing concerns about the administration of strata properties.

24. *Shaw Cablesystems v Concord Pacific Group*, 2007 BCSC 1711 at para 6, Leask J (quoting *2475813 Nova Scotia Ltd v Rodgers*, 2001 NSCA 12 at para 5, Cromwell JA).

25. SBC 1966, c 40.

26. *Strata Titles Act*, SBC 1974, c 89. See also *Strata Titles Amendment Act, 1977 (No 2)*, SBC 1977, c 64 (containing a major set of amendments to the 1974 act).

In 1979, the name of the legislation was changed to *Condominium Act*.²⁷ The second-generation act is commonly known by this name.

Strata Property Act 2000—present

The third generation of strata-property legislation, the *Strata Property Act*, was enacted in July 1998.²⁸ The *Strata Property Act* was only brought into force after a transitional period, which lasted until 1 July 2000.

Although it preserves much of the framework put in place by the first two generations of the legislation, the *Strata Property Act* also contains a large number of provisions not found in previous acts, making it a far more comprehensive statute than its two predecessors.

Parts of the *Strata Property Act* have been significantly amended in 2009,²⁹ 2012,³⁰ and 2015.³¹ These changes primarily relate to financial planning, dispute resolution, and termination; they don't directly address insurance issues.

The *Strata Property Act* is probably the most detailed and sophisticated legislation of its kind in Canada. It contains an array of laws on subjects that aren't addressed in equivalent statutes found in the other provinces or territories.³² But the act was also

27. RSBC 1979, c 61.

28. *Supra* note 3.

29. See *Strata Property Amendment Act, 2009*, SBC 2009, c 17.

30. See *Civil Resolution Tribunal Act*, SBC 2012, c 25.

31. See *Natural Gas Development Statutes Amendment Act, 2015*, *supra* note 14.

32. See Alberta: *Condominium Property Act*, RSA 2000, c C-22 (see also *Condominium Property Amendment Act, 2014*, SA 2014, c 10, s 55 [partly in force]); Saskatchewan: *The Condominium Property Act, 1993*, SS 1993, c C-26.1; Manitoba: *The Condominium Act*, SM 2011, c 30, CCSM c C170; Ontario: *Condominium Act, 1998*, SO 1998, c 19 (see also *Protecting Condominium Owners Act, 2015*, SO 2015, c 28, Schedule 1 [partly in force]); Québec: arts 1038–1109 CCQ; New Brunswick: *Condominium Property Act*, SNB 2009, c C-16.05; Prince Edward Island: *Condominium Act*, RSPEI 1988, c C-16; Nova Scotia: *Condominium Act*, RSNS 1989, c 85; Newfoundland and Labrador: *Condominium Act, 2009*, SNL 2009, c C-29.1; Yukon: *Condominium Act*, RSY 2002, c 36; Northwest Territories and Nunavut: *Condominium Act*, RSNWT 1988, c C-15 (duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28). As this report was being prepared for publication, Alberta announced plans to bring the bulk of the provisions of the *Condominium Property Amendment Act, 2014*, with associated regulations, into force variously on 1 July 2019 and 1 January 2020. See Alberta, News Release, “Making condos a better place to live: New rules will increase transparency and improve condominium governance in Alberta” (14 December 2018), online: <www.alberta.ca/release.cfm?xID=62241C77ECC2B-ED28-41CB-20BBFFBAB3B1DB03> [perma.cc/5ZG4-MEUX] [Alberta News Release] [announcing proposed amendments to the *Con-*

consciously drafted to provide enhanced flexibility to certain kinds of stratas. This quality can make it difficult to discuss the act's provisions, as it's often necessary to note both a general rule and a series of exceptions. For the sake of simplicity, the pages that follow will focus on the general provisions and will touch on exceptions, where necessary, in footnotes.

The Owner-Developer

The person who starts the stratification process is called an *owner-developer*.

Before someone becomes an owner-developer, that person is an owner of land³³ who wants to develop it as a strata property. That person is responsible for shepherding the project through the procedure for stratifying land. After this process is complete, the owner-developer holds all titles in the development, which are gradually sold off to purchasers.

The owner-developer can have a decisive influence over both the original conception and the ongoing operation of a strata property. Many of the key decisions that are made in setting up a strata property originate with the owner-developer. These decisions can reverberate long after the owner-developer has left the scene.

Creation of a Strata Property by Deposit of a Strata Plan

The stratification process begins with the deposit in the land title office of a strata plan.

The strata plan has been described as “the fundamental document that divides property into strata lots and creates title in each of those strata lots.”³⁴ It is a docu-

dominium Property Regulation, Alta Reg 168/2000, online: <www.alberta.ca/assets/documents/condominium-property-regulation.pdf> [perma.cc/Q6KE-SCF7]).

33. And here's the first exception to note: in some cases, it isn't the landowner but rather a lessee under a long-term ground lease who acts as the owner-developer. The act calls these cases *leasehold strata plans*. For simplicity's sake, this report will focus on the much more common case of a landowner developing a strata property and will downplay the rarer leasehold strata plan. That said, there is nothing in law that prevents the committee's proposals from extending to leasehold strata plans.

34. *Chow v The Owners, Strata Plan NW 3243*, 2015 BCSC 1944 at para 5, Smith J.

ment prepared by a qualified land surveyor, which is required to contain specific details and meet exacting technical standards.³⁵

Kinds of Strata Plans

There are essentially two kinds of strata plans under the *Strata Property Act*. One is called a *bare-land strata plan*. It concerns the subdivision of land.³⁶

The other kind of strata plan isn't named in the act, but it's commonly called a *building or conventional strata plan*.³⁷ This kind of strata plan deals with the subdivision of a building. This is the more common kind of strata plan.

Among the things that a strata plan does, one of the most important is to distinguish between the two building blocks of a strata property: strata lots and common property.

Strata Lots

A *strata lot* is the legislation's name for the unit in a strata property that is individually titled and owned. A common example of a strata lot is an apartment in a residential strata property. But it is important to bear in mind that nothing in strata-property law restricts strata lots to apartments or residential uses. Strata lots may be townhouses, shops used for commercial purposes, industrial plants, recreational cottages, or parking lots. So long as they are identified as such on a strata plan, strata lots may be almost anything within the ingenuity of an owner-developer.

But, that said, the act does, in many places, distinguish between strata lots based on their uses. This distinction turns on whether or not the strata lot is used for residen-

35. See *Strata Property Act*, *supra* note 3, s 244.

36. See *ibid*, s 1 (1) "bare land strata plan" ("means (a) a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the floors, walls or ceilings of a building, or (b) any other strata plan defined by regulation to be a bare land strata plan."). Regarding paragraph (b), note that to date no regulations on this point have been adopted.

37. See Adrienne M Murray, "The Basics of Strata Property Law," in Continuing Legal Education Society of British Columbia, ed, *Strata Property—2006 Update: Materials prepared for the Continuing Legal Education seminar, Strata Property Fundamentals for Lawyers, held in Vancouver, B.C., on October 20, 2006* (Vancouver: Continuing Legal Education Society of British Columbia, 2006) 1.1 at 1.13; Mike Mangan, *The Condominium Manual: A Comprehensive Guide to Strata Law in British Columbia*, 3rd ed (Vancouver: Strata Publishing, 2010) at 17; *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 1.14.

tial purposes. *Residential strata lot* is a defined term, meaning “a strata lot designed or intended to be used primarily as a residence.”³⁸ Strata lots used for any other purpose are referred to as *nonresidential strata lots*. Whether a strata lot is a residential strata lot or a nonresidential strata lot can have a bearing on how certain provisions relating to property, expenses, and governance are applied to it.

Common Property, Limited Common Property, and Common Assets

Common property

The *Strata Property Act* essentially takes a two-pronged approach to defining *common property*.³⁹

The first prong basically classifies everything that isn’t part of a strata lot as common property: “‘common property’ means (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot.” This definition is fairly easy to grasp in the abstract. Some concrete examples of things that could fit this definition include “hallways, stairwells, roofs, balconies, attics, elevators, patios, parking stalls,” and even the underlying land in a building strata plan (but not in a bare-land strata plan).⁴⁰

The second prong of the definition tackles cases in which it would be difficult to apply a simple and clear-cut distinction between being part of a strata lot or part of the common property. It is aimed at a long list of specific building components and systems for services (“pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio,

38. *Supra* note 3, s 1 (1) “residential strata lot.” See also *East Barriere Resort Ltd v The Owners, Strata Plan KAS1819*, 2017 BCCA 183.

39. See *supra* note 3, s 1 (1) “common property.”

40. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 3.2. Regarding the underlying land in a bare-land strata plan, “parts of the land are divided into separate strata lots, and the strata plan will not typically show the buildings on each strata lot. In this case, the entire building, whether constructed by the owner developer or by the strata lot owner, on the bare land strata lot (including the exterior portions of the building and the interior pipes, wiring, and other mechanical systems) will form part of the strata lot. The common property will be limited to access roads, sidewalks, and recreational facilities shown on the strata plan, as well as any of the underground services and the physical plant if capable of servicing more than one strata lot.” (*Ibid.*)

television, garbage, heating and cooling systems, or other similar services”).⁴¹ These things may be common property by definition, depending on the location of the thing or the usage of the thing.⁴² And it’s at this point that the second prong of the act’s definition of common property splits into two branches.

The first branch deals with location. It’s concerned with boundary cases. The definition focuses attention on whether the component or system listed earlier is located “within a floor, wall or ceiling” that itself forms a boundary

- between a strata lot and another strata lot,
- between a strata lot and the common property, or
- between a strata lot or common property and another parcel of land.⁴³

The effect of this branch of the definition is to bring these boundary cases within the scope of common property.

The second branch deals with use. Even if any of the things listed above (pipes, wires, etc.) finds itself “wholly or partially within a strata lot,” it’s still within the definition of common property if it is “capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property.” Court decisions considering this branch of the definition have concluded that if the component or system is “connected” to other components or systems that service other strata lots⁴⁴ or is otherwise part of an “integrated whole,”⁴⁵ then it should be considered common property. As a leading practice guide has noted, this approach “leave[s] very few such facilities within a condominium outside of the ‘common property’ of that complex.”⁴⁶

Limited common property

Within the scope of common property, the act embeds the concept of *limited common property*. This is common property that has been “designated for the exclusive

41. *Strata Property Act*, *supra* note 3, s 1 (1) “common property.”

42. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 3.2 (“Whether a particular part of a system or service, such as a wire, pipe, or duct, constitutes part of the common property is determined by the location of the part or by the usage of the part.”).

43. *Supra* note 3, s 1 (1) “common property.”

44. *Taychuk v Owners, Strata Plan LMS 744*, 2002 BCSC 1638 at para 28, Gray J.

45. *Fudge v Owners, Strata Plan NW2636*, 2012 BCPC 409 at para 48, Woods Prov Ct J.

46. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 3.2.

use of the owners of one or more strata lots.”⁴⁷ Some typical examples of things that might be limited common property are a balcony for an apartment in a high-rise tower, a patio for a townhouse or ground-floor apartment, and a parking space in a parking lot.

But it should be borne in mind that these items are not necessarily limited common property and they don’t exhaust the category of limited common property. The definition of the term is general and open-ended. The key to knowing whether common property is limited common property is the designation. There are two ways to make this designation. It may be made on the original strata plan or an amendment to that strata plan.⁴⁸ Or it may be made by a resolution of the strata corporation, passed by a 3/4 vote, and filed in the land title office along with a sketch plan.⁴⁹

Court cases have considered the nature of a strata-lot owner’s interest in a designation of limited common property. A leading case has described it “as a special category of property over which the unit owner has a substantial degree of control and something approaching a beneficial interest.”⁵⁰ The key word in this passage might be *approaching*, as a later case has emphasized the balance between the owner benefiting from a designation and the other strata-lot owners:

It is clear, however, that the unit holder is not the beneficial owner of the limited common property. The other owners retain more than simple legal title. They retain a bundle of rights and responsibilities as set out, *inter alia*, in ss. 71–75 of the *Strata Property Act*. This is consistent with the communal nature of common property.⁵¹

A commentator has concluded that, on the state of the case law, “[a]n owner’s interest in [limited common property] is not easily defined within the parameters of traditional property law.”⁵²

47. *Supra* note 3, s (1) (1) “limited common property.”

48. *Ibid*, s 73 (a)–(b).

49. *Ibid*, ss 73 (c), 74. The sketch plan referred to in the text must be one that “(a) satisfies the registrar [of land titles], (b) defines the areas of limited common property, and (c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property” (*ibid*, s 73 (2)).

50. *Moure v The Owners, Strata Plan NW2099*, 2003 BCSC 1364 at para 22, Groberman J.

51. *Yestel v New Westminster (City of)*, 2012 BCSC 925 at para 28, Master Muir.

52. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 3.3.

Common assets

Finally, the act also characterizes some property as *common assets*. The definition of common assets contains two categories. The first is “personal property held by or on behalf of a strata corporation.”⁵³ Examples of this category include items of property like furniture in a lobby or exercise equipment in a gym. The second category is “land held in the name of or on behalf of a strata corporation, that is (i) not shown on the strata plan, or (ii) shown as a strata lot on the strata plan.”⁵⁴ An example of (i) is any offsite land owned or held on behalf of the strata corporation. An example of (ii) is a caretaker’s suite in a residential building which is a strata lot.

The Strata Corporation

In addition to dividing land into strata lots and common property, depositing a strata plan in the land title office “establishes” a strata corporation.⁵⁵ This strata corporation is the major component of the second essential element of a strata property (“an administrative framework to enable the owners to manage the property”).⁵⁶ It is the vehicle by which strata-lot owners are able to administer their strata property.

The act says that the purpose of a strata corporation is to take responsibility for “managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.”⁵⁷ Ownership of common property and common assets is in the hands of the strata-lot owners, collectively.⁵⁸ The membership of the strata corporation is made up of “the owners of the strata lots in the strata plan.”⁵⁹ The strata corporation is the means for coordinating these owners to make effective and timely collective decisions.

53. *Supra* note 3, s 1 (1) “common asset.”

54. *Ibid*, s 1 (1) “common asset.”

55. *Ibid*, s 2 (1) (a).

56. See Ontario Law Reform Commission, *supra* note 23 at 3.

57. *Supra* note 3, s 3.

58. See *ibid*, s 66 (“An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner’s strata lot divided by the total unit entitlement of all the strata lots.”). The act doesn’t allow the link between ownership of a strata lot and ownership of a share in the common property to be broken. See *ibid*, s 251 (2) (“An owner must not deal with the owner’s share in the common property and common assets of the strata corporation separately from the owner’s strata lot except as expressly allowed by this Act.”).

59. *Ibid*, s 2 (1) (b).

The Fundamentals of Strata-Corporation Governance

Bylaws and rules

A strata corporation is required to have bylaws.⁶⁰ Bylaws are a third-order set of laws to govern strata properties, ranking in priority below the act and its regulations.⁶¹ That said, for many issues, the “bylaws, more than any other document, direct the conduct of owners, tenants and occupants” and visitors.⁶²

By default, the legislation provides strata corporations with a set of standard bylaws.⁶³ But strata corporations are free to amend these standard bylaws or to create their own bylaws, so long as these bylaw amendments are approved by a 3/4 vote, are filed in the land title office, and do not conflict with the *Strata Property Act*, the *Strata Property Regulation*, or any other enactment or law.⁶⁴

Bylaws may address the following topics:

- “the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation”;⁶⁵
- “the administration of the strata corporation.”⁶⁶

60. See *Strata Property Act*, *ibid*, s 119 (1).

61. See *ibid*, s 121.

62. Murray, *supra* note 37 at 1.1.2.

63. See *supra* note 3, s 120.

64. See *ibid*, ss 126–128 (rules on bylaw amendment), 120 (1) (filing amendments in the land title office), 121 (unenforceable bylaws). On the last point, in addition to being unenforceable due to a conflict with an enactment or a law, a bylaw is unenforceable to the extent it “destroys or modifies” one of the easements for support, services, or shelter created under the act or “prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot” (*ibid*, s 121 (1) (b)–(c)). Of course, there are exceptions to the last point, which allow a strata corporation to put in place rental restrictions, restrictions on the sale of a strata lot, or age restrictions, all of which must conform strictly to detailed requirements contained in the act (see *ibid*, s 121 (2)).

65. *Ibid*, s 119 (2).

66. *Ibid*, s 119 (2).

Unlike bylaws, rules are optional for a strata corporation. Rules are also more limited in scope than bylaws, as they may only govern “the use, safety and condition of the common property and common assets.”⁶⁷ Rules can’t be used to govern strata lots or to address the administration of a strata corporation.

Annual general meetings and special general meetings

The act requires many strata-corporation decisions to be made by the owners collectively. These decisions are typically identified as ones calling for a “resolution” as evidence of the decision. Resolutions are considered and either adopted or rejected at general meetings of the strata corporation.

Strata corporations are required to have at least one general meeting a year—called, appropriately, an annual general meeting.⁶⁸ The standard bylaws contain the order of business for the annual general meeting’s agenda.⁶⁹ Strata corporations may also have any number of special general meetings.⁷⁰

The act contains a detailed and exacting set of provisions on the calling and conduct of general meetings.⁷¹ For the purposes of this discussion, it’s only necessary to take some notice of how the act deals with voting.

Votes are ultimately how decisions at general meetings get made. The basic position is majority rule—what the act calls *majority vote*.⁷² A resolution passed by a majority vote is one that was approved by more than half of the votes cast by owners—or

67. See *ibid*, s 125.

68. See *ibid*, s 40. There is an exception to this requirement: if all eligible voters agree, they may consent in writing to the main business of the meeting (namely passing a budget and electing a strata council) and may waive, each by a written document, the holding of an annual general meeting (see *ibid*, s 41).

69. See *ibid*, Schedule of Standard Bylaws, s 28.

70. See *ibid*, s 42.

71. See *ibid*, ss 45–50, 53–58. See also *Report on Terminating a Strata*, *supra* note 13 at 63–71; Gerry Fanaken, *Understanding the Condominium Concept: An Insightful Guide to the Strata Property Act* (Coquitlam, BC: Paige Condominium Services, 2013) at 36–48, 52–55; Mangan, *supra* note 37 at 101–114; *British Columbia Strata Property Practice Manual*, *supra* note 10 at §§ 6.36–6.74.

72. See *supra* note 3, s 1 (1) “majority vote” (“means a vote in favour of a resolution by more than 1/2 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting”).

their proxyholders, if there are any—at the general meeting.⁷³ In other words, the question is decided by the majority of owners (and proxyholders) present at the meeting and not abstaining from voting.

Some decisions require approval by more than a majority of voters. The most common form of this kind of approval is what the act calls a *3/4 vote*.⁷⁴ A resolution is passed by a 3/4 vote when at least 75 percent of the votes cast at a general meeting are in favour of it.⁷⁵ In certain exceptional cases, the act demands that a resolution be supported by a *unanimous vote* in order for it to be approved.⁷⁶ A resolution only meets this threshold when *all* strata-lot owners vote for it. So, unlike resolutions passed by a majority vote or a 3/4 vote, a resolution can't be passed by a unanimous vote if it is supported just by all the owners who turn up to the general meeting and vote for it if there are other owners who don't attend the meeting (in person or by proxy) or who abstain from voting. Finally, if the vote is on what the act calls a "winding-up resolution"⁷⁷ (to terminate the strata—that is, the cancel the strata plan

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73. The act doesn't actually refer to *owners* voting; its term is *eligible voters*. This term reflects two concerns: (1) sometimes an owner's vote for a strata lot may be exercised by someone other than an owner, such as a tenant (see *ibid*, s 54 (b)), a mortgagee (see *ibid*, s 54 (c)), a parent, guardian, or other representative (see *ibid*, s 55), or a court-appointed voter (see *ibid*, s 58); and (2) in some cases, an owner may lose the right to vote if the owner is in default of certain payments owing to the strata corporation and the strata corporation is thereby entitled to file a lien against that owner's strata lot (see *ibid*, ss 53 (2), 116 (1)). These are all exceptional cases, so for brevity's sake the text will simply refer to owners voting.
74. See *ibid*, s 1 (1) "3/4 vote" ("means a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting").
75. A special rule comes into play if "a resolution required to be passed by a 3/4 vote is passed at an annual or special general meeting by persons holding less than 50% of the strata corporation's votes" (*ibid*, s 51 (1)). Under this rule, "[w]ithin the one week following the vote, persons holding at least 25% of the strata corporation's votes may, by written demand, require that the strata corporation hold a special general meeting to reconsider the resolution" (*ibid*, s 51 (3)). If that special general meeting attracts a quorum of owners, and if the resolution is not passed again by a 3/4 vote at that meeting, then the strata corporation may not implement the resolution (see *ibid*, s 51 (10)).
76. See *ibid*, s 1 (1) "unanimous vote" ("means a vote in favour of a resolution by all the votes of all the eligible voters").
77. *Ibid*, s 1 (1) "winding-up resolution" ("means a resolution referred to in (a) section 272 (1), or (b) section 277 (1).").
-

and wind up the strata corporation under part 16),⁷⁸ then it may be passed by an 80-percent vote.⁷⁹

The strata council

A strata corporation must have a strata council.⁸⁰ The strata council is elected at each annual general meeting, with its members usually coming from the strata-lot owners.⁸¹

The strata council has been described as being “effectively a board of directors”⁸² and “somewhat analogous to a fourth level of government.”⁸³ These descriptions reflect the act’s basic position, which is that the “powers and duties of the strata corporation must be exercised and performed by a [strata] council.”⁸⁴ As a rule of thumb, this means that the strata council has the authority to make decisions respecting the strata corporation, except for those decisions where the act calls for a resolution at a general meeting.⁸⁵

Budgets and funds

The act requires the strata corporation to “establish,” and the strata-lot owners to “contribute, by means of strata fees,” to the following two funds:

78. See *ibid*, ss 272–89.

79. See *ibid*, s 1 (1) “80% vote” (“means a vote in favour of a resolution by at least 80% of the votes of all the eligible voters”).

80. See *Strata Property Act*, *ibid*, s 25.

81. See *ibid*, s 28 (1). While strata-council members are in fact drawn overwhelmingly from the ranks of owners, the legislation actually allows three groups presumptively to be strata-council members: (1) owners; (2) individuals who represent corporate owners; and (3) tenants who have been assigned an owner’s right to vote (*ibid*, s 28 (1)). Further, the act allows strata corporations to adopt bylaws that allow other classes of people to be strata-council members (*ibid*, s 28 (2)).

82. Mangan, *supra* note 37 at 39.

83. Fanaken, *supra* note 71 at 21.

84. *Supra* note 3, s 4.

85. See Murray, *supra* note 37 at 1.1.4 (“Where the Act does not reference a vote by the owners . . . the activity or duty may be performed by the strata council without input from the owners. However, where the Act requires a vote of the owners, the decision to be made is not one for the strata council alone and can only be made with the approval of the owners based on the voting threshold set out in that section.”).

- “an operating fund for common expenses that (i) usually occur either once a year or more often than once a year, or (ii) are necessary to obtain a depreciation report”;⁸⁶ and
- “a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.”⁸⁷

The act addresses the establishment of these funds, raising of their contributions, expenditures from them, and accounting for those expenditures.⁸⁸ At the centre of these functions is the strata corporation’s annual budget.⁸⁹ Among other things, the annual budget must contain “the estimated expenditures out of the operating fund, itemized by category of expenditure; the total of all contributions to the operating fund; the total of all contributions to the contingency reserve fund; each strata lot’s monthly contribution to the operating fund; [and] each strata lot’s monthly contribution to the contingency reserve fund.”⁹⁰

Common Expenses

Many of the decisions that a strata corporation has to make concern spending money to pay for expenses. The act makes the strata-lot owners collectively responsible for what it calls *common expenses*, which it defines as expenses

- relating to the common property and common assets of the strata corporation, or
- required to meet any other purpose or obligation of the strata corporation.⁹¹

Common expenses often relate to the first bullet point and are, in effect, the flip side of owning property in common. The strata corporation has a legal obligation to “repair and maintain common property and common assets.”⁹²

86. *Supra* note 3, s 92 (a).

87. *Ibid*, s 92 (b).

88. See *ibid*, ss 92, 93, 95–100, 103–109.

89. See *ibid*, s 103.

90. *Strata Property Regulation*, *supra* note 4, s 6.6 (1) (c)–(g).

91. *Supra* note 3, s 1 (1) “common expenses.”

92. *Ibid*, s 72 (1). See, below, at 23–26 (further discussion of the duty to repair and maintain property).

Although the strata corporation is responsible for common expenses,⁹³ paying for repairs—as for all common expenses—ultimately comes from contributions from strata-lot owners. How these contributions are determined leads to consideration of one of the act’s foundational concepts, unit entitlement.

Unit Entitlement

What is unit entitlement and how is it used?

At bottom, unit entitlement is a number. Each strata lot in a strata property is assigned its own unit-entitlement number.

The act uses unit entitlement in a way that ties this concept into one of the defining characteristics of a strata. This defining characteristic is the unique strata property-ownership model, which combines individual ownership of strata lots with shared ownership, among strata-lot owners, of a strata’s common property and common assets, and shared responsibility for the debts and liabilities of the strata corporation.

Specifically, unit entitlement is used in “calculations” that “determine” each strata lot’s share of:

- common property;
- common assets;
- common expenses; and
- liabilities of the strata corporation.⁹⁴

How is unit entitlement determined?

The act has a detailed set of rules on how to determine the unit entitlement of a strata lot. Which rules apply in a given case depends on (1) the use of the strata lot and (2) the kind of strata plan at issue.

The act distinguishes between residential and nonresidential uses, and contains a special rule for mixed-use stratas. The methods for determining the unit entitlement of a strata lot are:

93. See *supra* note 3, s 91.

94. *Ibid*, s 1 (1) “unit entitlement.” Some jurisdictions go even further than British Columbia and use unit entitlement to determine a strata lot’s voting rights and its share of residual property after termination.

- **for residential strata lots:** one of (a) the habitable area of the strata lot, (b) a whole number that is the same for all residential strata lots, or (c) a number that “allocates a fair portion of the common expenses to the owner of the strata lot,” in the opinion of the superintendent of real estate, who must approve any use of option (c);⁹⁵
- **for nonresidential strata lots:** one of (a) the total area of the strata lot, (b) a whole number that is the same for all nonresidential strata lots, or (c) a number that “allocates a fair portion of the common expenses to the owner of the strata lot,” in the opinion of the superintendent of real estate, who must approve any use of option (c);⁹⁶
- **for mixed-use stratas:** “[i]f the strata plan consists of both residential and nonresidential strata lots,” then unit entitlement “must be approved by the superintendent as fairly distributing the common expenses between the owners of the residential strata lots and the owners of the nonresidential strata lots.”⁹⁷

For residential and nonresidential strata lots, in most cases unit entitlement is determined using option (a). In effect, this means that the size of the strata lot determines its unit entitlement. It is slightly more complicated than that, because the act relies on two different standards for determining the size of a strata lot.

For residential strata lots, the size of a strata lot is determined by measuring its *habitable area*. This is a defined term,⁹⁸ which effectively limits unit entitlement to living areas in a strata lot, excluding things like “patios, balconies, garages, parking stalls or storage areas other than closet space.”⁹⁹ For nonresidential strata lots, size is determined by the *total area* of the strata lot.¹⁰⁰

95. *Ibid*, s 246 (3) (a).

96. *Ibid*, s 246 (3) (b).

97. *Ibid*, s 246 (5).

98. See *ibid*, s 246 (4). See also *Barrett v The Owners, Strata Plan LMS3265*, 2017 BCCA 414.

99. *Strata Property Regulation*, *supra* note 4, s 14.2.

100. Total area isn’t a defined term; it simply takes its everyday meaning. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 2.39 (“‘total area’ includes all of those areas listed as excluded from ‘habitable area’ of a residential strata lot”).

In both cases, option (a) requires unit entitlement to be “determined by a British Columbia land surveyor.”¹⁰¹

These rules only apply when the strata plan is a conventional (building) strata plan. For bare-land strata plans, a special rule comes into play.¹⁰²

When is unit entitlement determined and where is it found?

The unit entitlement of a strata lot must be determined at the outset of the stratification process. The act requires the “person applying to deposit a strata plan” to include the unit entitlements of the strata lots in the strata plan.¹⁰³ These unit-entitlement numbers are grouped together as a schedule to the strata plan, called the Schedule of Unit Entitlement.¹⁰⁴ This schedule is the definitive source of the unit entitlement of a strata lot in that strata plan.

The Duty to Repair and Maintain Property

Strata-property law has a detailed framework for allocating responsibility to repair and maintain property. This system depends on the interplay of legislation, regulations, and strata-corporation bylaws.

Common property and common assets

Even though the strata-lot owners collectively own the common property and common assets, the *Strata Property Act* makes the strata corporation responsible for their repair and maintenance. As the act provides, “the strata corporation must repair and maintain common property and common assets.”¹⁰⁵

The act goes on to set out two exceptions to this basic duty.¹⁰⁶ These exceptions allow a strata corporation to make a strata-lot owner responsible for the maintenance

101. *Supra* note 3, s 246 (3) (a), (b).

102. *Ibid*, s 246 (6) (“The unit entitlement of a strata lot in a bare land strata plan must be (a) a whole number that is the same for all of the strata lots in the strata plan, or (b) a number that is approved by the superintendent and that in the superintendent’s opinion allocates a fair portion of the common expenses to the owner of the strata lot.”).

103. *Ibid*, s 246 (2).

104. See *ibid*, s 246 (2). The schedule is a prescribed form. See *Strata Property Regulation*, *supra* note 4, Form V.

105. *Supra* note 3, s 72 (1).

106. See *ibid*, s 72 (2).

of common property. In both cases, the act requires the strata corporation to adopt a bylaw that makes the owner responsible for repair and maintenance to the common property.

The first case deals with “limited common property that the owner has a right to use.”¹⁰⁷ The standard bylaws that apply by default to a strata corporation give an example of how responsibility to repair and maintain limited common property may be divided between the strata corporation and a strata-lot owner who has the right to use the limited common property. The standard bylaws provide, as a general proposition, that “[a]n owner who has the use of limited common property must repair and maintain it, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws.”¹⁰⁸

The bylaws go on to deal with the exception, by providing that the strata corporation must repair and maintain limited common property in two defined circumstances. The first circumstance concerns the frequency of the repair or maintenance. If it’s repairs or maintenance that “in the ordinary course of events occurs less often than once a year,” then it’s the strata corporation’s responsibility to carry it out.¹⁰⁹ The second circumstance concerns the type of property that must be repaired or maintained. The strata corporation must repair and maintain limited common property in all cases (“no matter how often the repair or maintenance ordinarily occurs”) if the property is any of the following:

- the structure of a building;
- the exterior of a building;
- chimneys, stairs, balconies and other things attached to the exterior of a building;
- doors, windows and skylights on the exterior of a building or that front on the common property;
- fences, railings and similar structures that enclose patios, balconies and yards.¹¹⁰

Because this list is contained in a bylaw it can be amended by a strata corporation.

107. *Ibid*, s 72 (2) (a).

108. *Ibid*, Schedule of Standard Bylaws, s 2 (2).

109. *Ibid*, Schedule of Standard Bylaws, s 8 (c) (i).

110. *Ibid*, Schedule of Standard Bylaws, s 8 (c) (ii).

The second case involves “common property other than limited common property.”¹¹¹ Similar to the first case, for the second case the legislation says that a strata corporation may assign the responsibility to repair and maintain such common property to a strata-lot owner if the strata corporation is enabled to do so by a bylaw. But the legislation also attaches an important condition to the second case. It provides that the strata corporation may adopt such a bylaw for common property other than limited common property “only if [the common property is] identified in the regulations and subject to prescribed restrictions.”¹¹² In practice, this condition has turned the second case into a dead letter. This is because the necessary enabling regulation has never been adopted.

Strata lots

The basic presumption of strata-property law is that strata-lot owners are responsible for repairs and maintenance to their strata lots. This presumption flows from their ownership interest in the strata lots. But the *Strata Property Act* allows for this presumption to be displaced. It provides that a “strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.”¹¹³

The standard bylaws that apply by default to a strata corporation give an example of the extent to which a strata corporation may be responsible for repairing and maintaining a strata lot. As a starting place, the standard bylaws provide that “[a]n owner must repair and maintain the owner’s strata lot, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws.”¹¹⁴ The bylaws go on to identify specified portions of a strata lot that a strata corporation must repair and maintain. They provide that a strata corporation must repair and maintain a strata lot—so long as that strata lot is “in a strata plan that is not a bare land strata plan”¹¹⁵—but that duty “is restricted to” the following portions of a strata lot:

- the structure of a building,
- the exterior of a building,
- chimneys, stairs, balconies and other things attached to the exterior of a building,

111. *Ibid*, s 72 (2) (b).

112. *Ibid*, s 72 (2) (b).

113. *Ibid*, s 72 (3).

114. *Ibid*, Schedule of Standard Bylaws, s 2 (1).

115. *Ibid*, Schedule of Standard Bylaws, s 8 (d).

- doors, windows and skylights on the exterior of a building or that front on the common property, and
- fences, railings and similar structures that enclose patios, balconies and yards.¹¹⁶

Because this list is contained in a bylaw it can be amended by a strata corporation.

Dispute Resolution and the Civil Resolution Tribunal

Finally, resolution of disputes is an important part of strata-property law. In British Columbia it is particularly important because the province has recently embarked on a new approach to strata dispute resolution.

The centrepiece of this new approach is the Civil Resolution Tribunal. The tribunal's mandate is "to provide dispute resolution services in relation to matters that are within its authority, in a manner that"

- is accessible, speedy, economical, informal and flexible,
- applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
- uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and
- accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.¹¹⁷

Since its inception, the tribunal's authority has extended to most kinds of strata disputes.¹¹⁸ The tribunal has been accepting strata-dispute claims since 2016.

Given that it's still early days for the tribunal, this project hasn't made an attempt to address reforms concerning dispute resolution. But the existence and operation of the tribunal is an important part of strata-property law in this province, and should be borne in mind while this report focuses on insurance.

116. *Ibid*, Schedule of Standard Bylaws, s 8 (d).

117. *Civil Resolution Tribunal Act*, *supra* note 30, s 2 (2). See also *The Owners, Strata Plan BCS 1589 v Nacht*, 2018 BCSC 455 at para 9 [*Nacht*], Funt J (description of the Civil Resolution Tribunal).

118. See *Civil Resolution Tribunal Act*, *supra* note 30, s 3.6.

Chapter 3. Insurance and Strata Properties

Introduction

Insurance is subject to a sophisticated and detailed body of law.¹¹⁹ Like strata-property law, insurance law is home to a distinctive set of ideas and terms.

For this report's purposes, it's not necessary to give an overview of insurance law to the same scale as the overview of strata-property law in the previous chapter. Insurance law can be seen as a tree with many separate branches, which cover areas such as property insurance, liability insurance, marine insurance, and motor-vehicle insurance. The parts of insurance law that are relevant to strata properties are largely contained in part 9 of the *Strata Property Act*.¹²⁰ So this chapter's focus is almost entirely on the provisions of part 9.

That said, there is a tight-knit group of concepts that supports all the branches of insurance law. A brief review of these concepts sets the stage for this chapter's overview of part 9.

Background on Insurance and Insurance Law

Insurance defined

The *Insurance Act* defines *insurance* to mean “the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event.”¹²¹

Even though this technical, legal definition may not capture every conceivable insurance product that could enter the market,¹²² it does make a number of significant points.

119. See Denis Boivin, *Insurance Law*, 2nd ed (Toronto: Irwin Law, 2015) at 56 (“Canadian insurance law is a mixture of federal, provincial, and territorial legislation, regulations, directives, common law, and custom.”).

120. See *supra* note 3, ss 149–162. See also *Strata Property Regulation*, *supra* note 4, ss 9.1–9.3.

121. *Supra* note 9, s 1 “insurance.”

122. See Boivin, *supra* note 119 at 25–54 (general discussion of the range of insurance products available in Canada).

- **“Undertaking by one person”:** as a matter of legal classification, insurance is a branch of the law of contracts;¹²³ but insurance contracts are highly regulated under a legal framework that often departs from the main principles of contract law.¹²⁴
- **“To indemnify another person”:** under a contract of insurance, a “financial loss will be made good,” but “no more than [that loss] will be paid”; in other words, insurance isn’t supposed to be used to “engineer loss so as to profit from it.”¹²⁵
- **“Against loss or liability for loss in respect of a certain risk or peril”:** the bedrock social purpose of insurance is to shift the risk of loss, primarily from an individual person to a broader group.¹²⁶

Distinguishing principles of insurance law

Building on this definition of *insurance*, a leading Canadian textbook has said that insurance law is marked by a set of “distinguishing principles.”¹²⁷

- **Utmost good faith:** In contrast to general contract law, under insurance law the principle of buyer beware is largely displaced—particularly, as regards

123. See Brown, *supra* note 1 at § 1.2. See also *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21 at para 27, LeBel J (“Insurance policies form a special category of contracts.”).

124. See Boivin, *supra* note 119 at 56 (“few industries have attracted the attention of federal and provincial governments, legislatures, and courts as much as the insurance industry has”).

125. Brown, *supra* note 1 at § 1.2 (c).

126. See Brown, *ibid* at § 1.1 (“Insurance is a mechanism for spreading the risk of loss. Houses burn down. Jewellery is stolen. Ships sink. Courts order people to pay damages. People who face the possibility of occurrences such as these can team up with others in the same position. They can contribute to a fund from which money will be available to pay for losses when they occur. Each contribution, or ‘premium,’ is much less than the potential loss the contributor faces. This is possible because the losses covered by the system are random losses. Among a relatively large number of people facing similar risks, only a relative few (whose identity is unknown) at the outset will actually suffer loss. The contributions of the many pay for the losses of the few.” [footnote omitted]); Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed (Toronto: LexisNexis Canada, 2014) at 1 (“From the point of view of a person buying insurance coverage, insurance is about protecting oneself from financial loss. From a societal point of view, however, insurance is fundamentally about spreading the risk of loss.”).

127. Brown, *supra* note 1 at § 1.2.

the disclosure of relevant information. Instead, both the insured and the insurer operate under a duty to act in good faith.¹²⁸

- **Fortuity:** Insurance covers losses that are fortuitous, that is losses that “occur randomly.”¹²⁹
- **Indemnity:** This facet of insurance law was discussed in the previous section, where it was noted that its goal is to deter people from being indifferent to (or, worse, being on the active lookout for) losses, by removing the financial incentive to engineer a loss. This is usually referred to as *moral hazard*. The “avoidance of [moral hazard] is the main objective of the indemnity principle.”¹³⁰
- **Consumer protection:** In view of the differences in levels of sophistication, knowledge, and expertise about insurance between insurance companies and insurance purchasers, “much of insurance law has as an objective the protection of consumers.”¹³¹

Strata-Property Legislation and Insurance

Why does strata-property legislation deal with insurance and how does it tackle the subject?

Provisions on insurance have been a feature of strata-property legislation in North America since the advent of that legislation in the 1960s. One rationale for the existence of these provisions linked insurance conceptually to the duty to repair property. As an early commentator noted, legislation “compel[ling]” the purchase of insurance for strata properties is necessary, given the “vital common interest in having repairs made.”¹³²

This point leads to another general point that is important to understanding the insurance provisions of the *Strata Property Act* and to applying them in practice. Even though the legislative duties to repair and to insure may be bound together at the level of concept and rationale, in British Columbia the legislation spells out the scope

128. See *ibid* at § 1.2 (a).

129. *Ibid* at § 1.2 (b).

130. *Ibid* at § 1.2 (c).

131. *Ibid* at § 1.2 (d). The authors mention a fifth distinguishing principle, “compensation,” but tie it exclusively to motor-vehicle insurance, which of course isn’t relevant to strata properties (see *ibid* at § 1.2 (e)).

132. Risk, *supra* note 5 at 59.

of those duties in different ways.¹³³ So, in practice, “[w]hether and to what extent a strata corporation or an owner has insurance has nothing to do with who must carry out or pay for a repair.”¹³⁴

The other major rationale for insurance provisions in strata-property legislation was to address the need to coordinate the diverse players who may be active in placing insurance in a strata property.¹³⁵ Right from the outset, commentators and policy-makers saw that there were essentially three ways in which strata-property legislation could manage insurance coverage:

- insurance could be left to the individual strata-lot owners;
- insurance could be the exclusive concern of the strata corporation;
- insurance could be subject to a hybrid system, in which some elements are assigned to the strata corporation and others are open to the owners.¹³⁶

Even though one commentator described it as “the most obvious scheme,”¹³⁷ simply leaving insurance to the strata-lot owners never gained much traction. It ran aground on some obvious problems, such as the difficulty of coordinating a diverse range of owners to guarantee sufficient coverage.¹³⁸ Even if adequate coverage could

133. See, above, at 23–26 (discussion of the scope of the duty to repair and maintain property).

134. Mangan, *supra* note 37 at 265–266 [footnote omitted]. See also *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.4 (“A strata corporation’s obligation to insure is broader than its ownership rights and its duty to repair and maintain.”); *David v The Owners, Strata Plan KAS 2955*, 2018 BCCRT 498 (discussing scope of strata corporation’s duty to insure property vis-à-vis its duty to repair and maintain property).

135. Subsidiary rationales for the insurance mandate include promoting economic efficiency and fairness among strata-lot owners. See *Stevens v Simcoe Condominium Corp No 60* (1998), 42 OR (3d) 451 at 452, [1998] OJ No 5843 (QL) (Div Ct) [*Stevens*], the court (“The rationale for imposing the duty to obtain insurance on the corporation is to provide efficient means to ensure that all owners have adequate insurance at low cost and to avoid the risk of prejudice to other owners that would result if an owner failed to obtain insurance and was unable or unwilling to repair his premises at his own expense.” [citation omitted]).

136. See Risk, *supra* note 5 at 57–58; Patrick J Rohan, “Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance” (1964) 64:6 Colum L Rev 1045 at 1046–47.

137. Risk, *supra* note 5 at 57.

138. See Rohan, *supra* note 136 at 1048 (“The condominium dweller, however, is in a condition of structural and financial dependency, because he cannot unilaterally insure (and recover the proceeds necessary to restore) every segment of the building that may be essential to access and enjoyment of his particular unit. His interest being limited, and the facilities to be covered so vast and diversified, an individual could not hope to insure adequately without the aid of the association or a substantial number of his neighbors.” [footnotes omitted]). See also Fanaken, *supra*

be guaranteed, obtaining it owner by owner would be the most expensive way to provide for insurance.¹³⁹

Authorizing the strata corporation to be exclusively responsible for insurance would avoid these problems. But, in their place, new ones would likely spring up. It would be very difficult for the strata corporation to account for individual variation in furnishing and outfitting strata lots.¹⁴⁰ Individual owners would likely find it obtrusive and a diminishment of their ownership interests to have their choices for insurance coverage reduced to a single standard, imposed by the wishes of the majority.¹⁴¹

So the model that emerged was a hybrid, which compelled the strata corporation to insure certain aspects of the complex but which also allowed for overlapping coverage between the strata corporation and the owners for other aspects.¹⁴² As one commentator put it, “[i]f any theme is revealed, it appears to be one of permissive duplication of coverage.”¹⁴³

The emergence of this model has led to some perennial concerns for strata-property insurance provisions. These concerns may be summarized as compelling the legislation to do three things:

- mandating coverage in certain areas by the strata corporation;

note 71 at 120 (“From a common sense perspective, it is not reasonable or logical to propose that each owner in a condominium, strata corporation should obtain and maintain their own basic insurance. It would be chaotic, unreliable and likely not cost effective. The legislators, therefore, clearly envisioned a simple scheme whereby the strata corporation is shouldered with the duty to obtain and maintain insurance on behalf of its owners.”).

139. See Rohan, *supra* note 136 at 1047 (“The condominium unit is an integral part of a larger structure which may be insured most economically and conveniently as an entity. . . .” [footnote omitted]).

140. See Irwin Davis, “Condominium and the Strata Titles Act” (1966) 9:6 Can Bar J 469 at 485–486 (“Substantial structural changes or improvements to one apartment increasing its value, either will not be covered by the policy or will be paid for in part by the other owners under the blanket policy.”).

141. See Rohan, *supra* note 136 at 1061 (“The central attraction of the condominium to the purchaser is the concept of home ownership, albeit a home surrounded on all sides, above and below, by other homes. Consequently, the very sales psychology relied upon to attract buyers will operate to suggest the need for, or satisfaction of having, a policy of insurance.” [footnote omitted]).

142. See *ibid* at 1053–1057.

143. *Ibid* at 1055.

- enabling coverage in other areas by the strata corporation and the strata-lot owners;¹⁴⁴
- managing any overlaps or gaps in coverage that may result.

These concerns are on full display in British Columbia's legislation.

Legislative History in British Columbia

Evolution of legislation through three generations of strata-property legislation

British Columbia has had insurance provisions in its strata-property legislation right from the act's inception in 1966. The development of these provisions has followed a familiar pattern, which has been observed in other subjects covered in this project.

At the outset, policymakers were aware of potential legal issues that needed to be addressed in the legislation but weren't certain about being able to fill in all the details. As an early commentator on insurance provisions in strata-property legislation put it, "the lack of meaningful experience in this area suggests that improvisation is likely for several years."¹⁴⁵ With each major revision of the act, more and more parts of the legal framework have taken shape.

First-generation act: 1966–74

British Columbia's first generation of strata-property legislation contained just one section on insurance.¹⁴⁶ The bulk of this provision was concerned with mapping out where strata-lot owners are entitled to place insurance in addition to the insurance placed by the strata corporation.

144. In British Columbia there is potentially a third actor at play in some strata properties, as sections are also enabled by the legislation to obtain insurance coverage. See *Strata Property Act*, *supra* note 3, s 194 (4) ("A section may obtain insurance only (a) against perils that are not insured by the strata corporation, or (b) for amounts that are in excess of amounts insured by the strata corporation.").

145. Rohan, *supra* note 136 at 1046.

146. See *Strata Titles Act*, *supra* note 25, s 15. An argument could be made that this act contained more than one section dealing with insurance, to the extent that enabling provisions for the purchase of insurance were listed among the general duties and powers of the strata corporation (see *ibid*, s 14 (1) (a)–(d)).

Second-generation act: 1974–2000

The second-generation act¹⁴⁷ also had only a single section on insurance, but its length and scope represented considerable expansions from the first-generation act.¹⁴⁸ This provision spelled out the mandate on strata corporations to obtain property insurance and enabled strata corporations to obtain other insurance. It also enabled the strata-lot owners to obtain insurance. Finally, the act began to address complex questions about the interrelation of strata-corporation and owners' insurance and set out a procedure for dealing with cases in which a strata corporation decides not to repair property damage.

Third-generation act: 2000–present

The third-generation act, that is, the *Strata Property Act*, has a dedicated part (part 9) consisting of 13 sections dealing with insurance.¹⁴⁹ So it's not surprising that part 9 is considered to exceed the predecessor legislation in its level of detail and sophistication.¹⁵⁰

The Strata Property Act's Provisions on Insurance

Property insurance required for strata corporation

Scope of requirement

The *Strata Property Act* requires strata corporations to have, at a minimum, two kinds of insurance.¹⁵¹ The first is property insurance, which must be placed on the following:

147. See *Strata Titles Act*, *supra* note 26.

148. See *Strata Titles Act*, *ibid*, s 30. Over its time in force, this provision was ultimately divided into three sections. See *Condominium Act*, RSBC 1996, c 64, ss 54–56.

149. *Supra* note 3, ss 149–162. See also *Strata Property Regulation*, *supra* note 4, ss 9.1–9.3.

150. See Allyson Baker, "What a strata corporation needs to know about insurance?," CHOA Bulletin 600-004 (March 2014) at 1, online (pdf): *Condominium Home Owners Association of British Columbia* <www.choa.bc.ca/wp-content/uploads/pdf/600/600-004%20Insurance%20Sept%202014.pdf> [perma.cc/TZ74-BL54] ("Although insurance requirements have always formed a part of the legislation governing condominiums, Part 9 of the *Strata Property Act* (the Act), in conjunction with Part 9 of the *Strata Property Regulation* (the Regulation), spells out in greater detail the minimum types and levels of insurance that a Strata Corporation is required to obtain.").

151. See *supra* note 3, ss 149–150.

- common property;
- common assets;
- buildings shown on the strata plan; and
- fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.¹⁵²

Definition of “fixtures”

Fixtures (referred to in the last bullet point) is a term of art. To understand what is meant by it requires a short introduction to a corner of property law.

There’s a fundamental distinction in property law between land and personal property. In most cases, it’s clear whether an item of property is land or personal property (or a *chattel*, to use the technical name). But sometimes the bright line dividing the two kinds of property can get fuzzy. Fixtures are an example of this phenomenon. If something that would ordinarily be classified as personal property is “sufficiently attached to the land [then it] may be transformed into a ‘fixture,’ thereby forming part of the realty.”¹⁵³

The common-law test for determining whether property is a fixture is complex.¹⁵⁴ Legal academics and others have criticized it.¹⁵⁵ So, probably in an effort to side-step the uncertainty over the meaning of *fixtures*, the term is defined in the *Strata Property Regulation*. Under the regulation (for the purposes of this section on property in-

152. *Ibid*, s 149 (1). The other kind of insurance that a strata corporation must have is liability insurance. See, below, at 37–38. *Common property* and *common assets* are defined terms. See, above, at 12–15 (discussion of the act’s definitions of common property and common assets).

153. Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 117 [footnote omitted].

154. See *ibid* at 118 (“The determination of whether a chattel has been transformed into a fixture is a matter of intention, objectively determined. That intention is ascertained by examining the degree and object (sometimes called purpose) of the annexation. When a chattel is attached to the land, however slightly, a rebuttable presumption is raised that the item has become a fixture. The extent of the attachment tends to affect the strength of that presumption. The presumption is reversed if the chattel is resting on its own weight; here, it will be presumed to remain a chattel. The sole ground for the rebuttal of these two presumptions is the object/purpose of annexation. The test is whether the purpose of attachment was (a) to enhance the land (which leads to a conclusion that a fixture exists); or (b) for the better use of the chattel as a chattel.” [footnotes omitted]).

155. See *ibid* at 119 (“Attempts to reconcile the case law relating to the application of the law of fixtures seem pointless.” [footnote omitted]).

insurance and a later section on optional insurance coverage),¹⁵⁶ *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.”¹⁵⁷

With this definition in place, the term *fixtures* ends up playing an important role in defining the limits of the property-insurance mandate on strata corporations. The strata corporation’s property insurance must only cover these fixtures “if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.”

As a commentator notes, “[t]he key consideration is whether the fixture was installed at the time of original construction or during a unit owner’s subsequent renovations.”¹⁵⁸ If the fixture was installed by the owner-developer during the strata property’s original construction, then it’s embraced within the act’s mandate on strata corporations to obtain property insurance. If it wasn’t (because, for example, it’s an upgrade made by a subsequent strata-lot owner), then it’s not within the mandate’s scope.¹⁵⁹

How this dividing line may be located in practice is spelled out in an example given by another commentator:

assume that a carpet was installed by the owner developer at the time of original construction. Damage to that carpet, clearly located in a strata lot, is the responsibility of the strata corporation insurer. However, if the strata lot owner replaces the carpet three years later with a better carpet or a hardwood floor, the strata corporation has no responsibility to insure that replacement flooring, because it is not a fixture installed as part of the original construction.¹⁶⁰

156. See *Strata Property Act*, *supra* note 3, s 149 (2).

157. *Strata Property Regulation*, *supra* note 4, s 9.1 (1).

158. Ryan Dix, “An Overview of Strata Property Issues in British Columbia” (May 2013) at 5, online (pdf): *Dolden Wallace Follick LLP* <www.dolden.com/wp-content/uploads/2016/06/159-An-Overview-of-Strata-Property-Issues-in-British-Columbia-May-2013.pdf> [perma.cc/YX7X-8N37].

159. Note that not being within the mandate doesn’t mean that a strata corporation may never insure these fixtures. The act allows a strata corporation to place insurance on “fixtures built or installed on a strata lot that were not built or installed by the owner developer as part of the original construction on the strata lot” (*supra* note 3, s 152 (b)). See, below, at 37–39 (discussion of other insurance a strata corporation may obtain).

160. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.4. See also Baker, *supra* note 150 at 3 (“Owners should be aware that alterations and upgrades made by *prior* owners are

This commentator also notes that, “[i]n practice, both insurers may contribute to the replacement or restoration costs, with the strata corporation’s insurer contributing to the extent of the value of the original carpeting and the strata lot owner’s policy contributing the balance.”¹⁶¹

Full replacement value

The strata corporation’s property insurance must be “on the basis of full replacement value.”¹⁶² *Full replacement value* “is the current cost to replace the damaged item, without any deduction for depreciation or wear and tear.”¹⁶³

Although, strictly speaking, the act doesn’t require it, this section has the effect of making it strongly advisable for strata corporations to obtain an annual appraisal of the strata property.¹⁶⁴ Otherwise, the strata corporation could end up being underinsured by failing to comply with this requirement that its property insurance be on a full-replacement-value basis.

Major perils

The strata corporation’s property insurance must “insure against major perils . . . and any other perils specified in the bylaws.”¹⁶⁵ *Major perils* is defined in the regulation. It means “the perils of fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft and vehicles, vandalism and malicious acts.”¹⁶⁶

also typically excluded from the Strata Corporation’s insurance coverage.” [emphasis in original]).

161. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.20.

162. *Strata Property Act*, *supra* note 3, s 149 (4) (a).

163. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.5.

164. See *ibid* (“What constitutes full replacement value can only be assessed by consulting a qualified insurance appraiser.”).

165. See *Strata Property Act*, *supra* note 3, s 149 (4) (b). See also *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.6 (“A ‘peril’ can be described as a cause of property damage.”).

166. *Supra* note 4, s 9.1 (2).

Liability insurance required for strata corporation

Description of the legislation

The strata corporation must also have insurance “against liability for property damage and bodily injury.”¹⁶⁷ “Liability insurance,” notes a commentator, “is intended to defend and indemnify the insured with respect to claims brought against the insured for injury or damage to the person or property of a third party caused by an accident or negligence.”¹⁶⁸

The sources of such liability are wide-ranging.¹⁶⁹ These sources and their potential to generate high-value claims will vary with the types of buildings that comprise the strata property and the activities carried on at the strata property.¹⁷⁰

The strata corporation’s liability insurance must provide coverage for at least \$2 000 000.¹⁷¹ In cases in which both of the strata corporation’s mandated insurance policies may respond to a claim, “[m]ost policies require that a strata corporation

167. *Strata Property Act*, *supra* note 3, s 150 (1). See also *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.9 (“The Act does not provide a definition of either [*property damage* or *bodily injury*]. However, both are usually defined terms in insurance policies. While the exact definition will vary by policy wording, from an insurance perspective, ‘property damage’ is typically defined as damage to tangible property, while ‘bodily injury’ is typically defined to include injuries, sickness, and disease.”).

168. *British Columbia Strata Property Practice Manual*, *ibid* at § 15.9.

169. See Thomas J Hakala, “Condominium Casualty and Liability Insurance” (1974) 48:4 St John’s L Rev 1112 at 1119 (“Sources of liability are not difficult to foresee. Besides the usual exposure to tort actions from ordinary licensees and invitees, the association may be subject to liability for injuries incurred in connection with everything from the negligent operation of condominium owned vehicles to product defects in food items dispensed from on-premises vending machines. In large developments equipped with swimming pools, restaurants, health clubs, and play areas, the sources of liability will be proportionately multiplied. It is apparent that in all cases the sources of liability extend well beyond the limits of personal conduct and care of the individual unit owner.” [footnotes omitted]).

170. See Bonnie S Elster, “Insurance and Strata Corporations,” in *Strata Property—2006 Update*, *supra* note 37 5.1.1 at 5.1.3 (“A strata corporation would be well advised to consider obtaining higher coverage limits, especially if it has recreation facilities, such as a swimming pool.”).

171. See *Strata Property Act*, *supra* note 3, s 150 (2); *Strata Property Regulation*, *supra* note 4, s 9.2. See also Baker, *supra* note 150 at 2 (“[I]ncreasing the amount of liability coverage from \$2 million to some higher figure typically results in only a modest increase in premium and, as a result, most strata corporations obtain liability insurance coverage limits of at least \$5 million. As the damages from a significant or catastrophic injury claim can exceed \$2 million, strata corporations are well advised to consider obtaining higher coverage limits.”).

must first call upon its property insurance before the corporation's liability insurance responds to the claim."¹⁷²

Other insurance a strata corporation may obtain

Description of the legislation

The *Strata Property Act* doesn't place any limits on the insurance that a strata corporation may wish to obtain.¹⁷³ Apart from the property insurance and liability insurance that strata corporations are mandated to obtain, there are many other kinds of insurance policies that may appeal to a given strata corporation.

One such policy is mentioned by name in the *Strata Property Act*. The act enables a strata corporation to obtain directors-and-officers coverage.¹⁷⁴ "The purpose of D&O insurance," explains a leading practice guide, "is to defend and indemnify where a claim has been made against a strata council member (typically by one or more strata lot owners or by the strata corporation itself) as a result of mismanagement or error in the exercise of the member's duties on council."¹⁷⁵ Further, "[t]he insurance is intended to respond to negligence or 'honest' mistakes made by strata council members and therefore will not respond where the member has deliberately or recklessly caused a loss."¹⁷⁶

The *Strata Property Act* also expressly enables strata corporations to obtain coverage, if they wish, for the following:

- a peril or liability of the strata corporation that is not referred to in section 149 [requiring strata corporation to have property insurance] or 150 [requiring strata corporation to have liability insurance];
- fixtures built or installed on a strata lot that were not built or installed by the owner developer as part of the original construction on the strata lot.¹⁷⁷

172. Mangan, *supra* note 37 at 253.

173. See Baker, *supra* note 150 at 4 ("The Act does not limit the Strata Corporation's options with respect to insurance coverage.").

174. See *supra* note 3, s 151 ("The strata corporation may obtain and maintain errors and omissions insurance for council members against their liability and expenses for errors and omissions made in the exercise of their powers and performance of their duties as council members.").

175. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.11. See also *Coleman v Great American Insurance Co*, 2010 BCSC 1796 (extensive consideration of strata corporation's directors-and-officers policy).

176. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.11.

177. *Supra* note 3, s 152.

The first bullet point raises other kinds of insurance policies that a strata corporation may want to have. One commentator lists several kinds of policies as being among “common forms of optional coverage”:

- Boiler and machinery insurance (to respond to claims arising from the Strata Corporation’s boiler or other mechanical or electrical equipment);
- Crime insurance (to respond to claims for misappropriation of funds by the Strata Corporation’s agents and employees);
- Glass coverage;
- . . .
- Pollution coverage.¹⁷⁸

This commentator notes that strata corporations may also rely on the act’s enabling provision for “expanding coverage to address common exclusions in property and liability policies”—citing coverage for “earthquakes or floods” as an example.¹⁷⁹

The second part of the enabling provision allows a strata corporation to obtain coverage for “fixtures built or installed on a strata lot that were not built or installed by the owner developer as part of the original construction on the strata lot.”¹⁸⁰ This language ties into the legislative mandate to obtain property insurance, which is limited to those fixtures that *were* built or installed by the owner-developer as part of the original construction on the strata lot. Here, the act is allowing a strata corporation to decide if it wants coverage in excess of what the mandate requires.¹⁸¹

Strata corporation has an insurable interest in property it must insure

Description of the legislation

“In Canada,” as an insurance-law textbook puts it, “an agreement which purports to be an insurance contract is not legally enforceable unless the insured has an insurable interest in the subject-matter of the insurance.”¹⁸²

178. Baker, *supra* note 150 at 5.

179. *Ibid* at 4.

180. *Supra* note 3, s 152 (b).

181. See, above, at 34–36 (discussion of the definition of *fixtures* and its role in determining the scope of the legislative mandate).

182. Billingsley, *supra* note 126 at 35 [footnote omitted].

This requirement is designed to achieve three goals, all of which flow from the larger objective of differentiating between a wager and an insurance contract: (1) to preserve the public policy against wagering; (2) to preserve the principle of indemnity (*i.e.*, that the insured should not profit upon a loss occurring); and (3) to prevent the insured from being tempted to destroy the insured property or to otherwise intentionally bring about the insured-against risk.¹⁸³

The tests for determining whether an insurable interest is present can vary with the type of insurance at issue.¹⁸⁴ Here are the tests for property insurance and liability insurance, the two types of insurance that the act mandates a strata corporation to have:

- for property insurance, it's necessary to have “moral certainty of advantage or benefit” from the property;¹⁸⁵
- for liability insurance, “[t]he risk insured in a liability insurance contract—liability to third parties—is itself an interest.”¹⁸⁶

In the strata-property field, the concerns raised by insurable interest relate mainly to property insurance. Even though a strata corporation is required to insure property that it doesn't own,¹⁸⁷ an argument could be made that it would have an insurable interest under the test for property insurance.¹⁸⁸ But it's far from absolutely certain that this argument would succeed in all cases.

Right from the inception of strata properties in the 1960s, commentators have pointed out that the law on insurable interest could pose serious problems for any legislative model that relied on the strata corporation obtaining property insur-

183. *Ibid* at 35–36 [footnotes omitted].

184. See Brown, *supra* note 1 at § 4.2.

185. *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 at 30, 34 DLR (4th) 208, Wilson J (Beetz, Lamer, Le Dain, and La Forest JJ concurring).

186. Brown, *supra* note 1 at § 4.2 (a) (iii).

187. See *Strata Property Act*, *supra* note 3, s 66 (“An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner's strata lot divided by the total unit entitlement of all the strata lots.”).

188. This argument could be based on the strata corporation's duty to repair and maintain the common property and common assets. See *Strata Property Act*, *ibid*, s 72. See also Rohan, *supra* note 136 at 1050.

ance.¹⁸⁹ Given the drastic consequences of running afoul of the law on insurable interest, the *Strata Property Act* removes the issue from the realm of argument by flatly declaring that “[t]he strata corporation has an insurable interest in any property insured under section 149 [property insurance required for strata corporation] or 152 [optional strata-corporation insurance].”¹⁹⁰

Strata corporation must review and report on insurance coverage

Description of the legislation

The act imposes two administrative duties on the strata corporation, as a means to promote good governance and accountability to the owners. First, the strata corporation must “review annually the adequacy of the strata corporation’s insurance.”¹⁹¹ Second, it must “report on the insurance coverage at each annual general meeting.”¹⁹²

Named insureds include strata corporation, owners, tenants, and occupiers

Description of the legislation

The act provides that “named insureds in a strata corporation’s insurance policy include” the following:

- 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 lots.¹⁹³

This provision applies “[d]espite the terms of the insurance policy.” It has two implications for insurance in a strata property. One is obvious; the other is subtle and more difficult to grasp.

189. See Risk, *supra* note 5 at 57 (“The possibility that the association may acquire insurance raises the problem of insurable interest.” [footnote omitted]).

190. *Supra* note 3, s 153.

191. See *ibid*, s 154 (a). See also Baker, *supra* note 150 at 8 (list of suggested “factors a Strata Corporation should take into account in undertaking the annual review”).

192. See *supra* note 3, s 154 (b).

193. *Ibid*, s 155.

Clear identification of broad group of named insureds

The obvious implication of this section is that it clearly sets out the broad group that makes up the named insureds in a strata corporation's insurance policy. A named insured is simply "the person named in the contract of insurance as the insured."¹⁹⁴

A named insured is entitled to a benefit under an insurance policy, if that named insured has a valid claim under it. So this provision makes the practical point that a broader group than just the strata corporation is potentially entitled to benefits under the policy.¹⁹⁵ Or, to put it another way, simply because the strata corporation pays the insurance premium doesn't mean that the benefits under the policy are limited to the strata corporation.

The no-subrogation rule

The subtler purpose of this provision is to establish what commentators have called the no-subrogation rule.¹⁹⁶ In this way, the provision is helping to play an important role in bridging the divide between fundamental insurance-law and strata-property concepts.

Subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."¹⁹⁷ Typically, the most important of these rights is "the right to sue a wrongdoer who caused the loss in question."¹⁹⁸ In this way, subrogation ties into some of the distinguishing principles of insurance law.¹⁹⁹

194. *AXA Insurance (Canada) v Old Republic Insurance Co* (1998), 38 OR (3d) 630 at 637, [1998] OJ No 918 (QL) (Ont Gen Div), Lax J. See also Mangan, *supra* note 37 at 228 ("A **named insured** is a person that the insurance policy designates as the insured, by contrast to someone who may be covered by the policy but who is not explicitly named." [emphasis in original]).

195. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.15 ("There is a common misconception among councils, strata managers, and strata lot owners that only the strata corporation itself is entitled to access the benefits of a strata corporation's insurance policy.").

196. See *ibid* at § 15.9; Dix, *supra* note 158 at 19–20.

197. Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (St. Paul: Thomson Reuters, 2014) sub verbo "subrogation."

198. Mangan, *supra* note 37 at 243.

199. See, above, at 28–29.

Courts have established that the main rationale of subrogation is to support the indemnity principle. As a leading case put it, “avoiding overpayment of the insured is the basis for subrogation.”²⁰⁰ Subrogation also supports the principle of good faith.²⁰¹

But subrogation isn’t an iron law that applies in all cases. Instead, as a commentator notes, the “law of subrogation is complex and provides for certain exceptions.”²⁰² An important “exception to the insurer’s right of subrogation occurs where the insured accidentally causes the loss in question.”²⁰³

How does this complex interplay of rule and exception apply to a strata property, which has its own complicated set of multiple ownership interests? A particular problem here is what to do with an owner who has caused damage to the owner’s strata lot *and* other strata lots or common property. An argument could be made that the basic principles of subrogation should protect this owner from a subrogated claim.²⁰⁴ But simply leaving the matter to be sorted out in accordance with those principles could lead to uncertainty and confusion.²⁰⁵ It would also impose unnecessary costs and unwanted litigation on the parties to insurance in the strata-property sector.²⁰⁶

In order to avoid these problems, the *Strata Property Act* ensures that a broad group of people within a strata property have the benefit of being protected against subrogated claims. It achieves this result by declaring a list of persons to be named insureds. Because they are considered by law to be named insureds, strata corporations, strata-lot owners, tenants, and “the persons who normally occupy the strata lots” are brought within an exception to the law on subrogation.²⁰⁷

200. *Condominium Corp No 9813678 v Statesman Corp*, 2007 ABCA 216 at para 27 [*Statesman*], Côté JA, leave to appeal to SCC refused, [2007] SCCA No 456 (QL).

201. See *ibid* (“reduces the moral risk of dishonesty by the insured”).

202. Mangan, *supra* note 37 at 243.

203. *Ibid*.

204. See *Statesman*, *supra* note 200 at paras 46–57; Rohan, *supra* note 136 at 1070–1072.

205. See Rohan, *ibid* at 1070.

206. See *Statesman*, *supra* note 200 at paras 33–35; *Owners, Strata Plan No NW 651 v Beck’s Mechanical Ltd* (1980), 20 BCLR 12 at 16, [1980] BCJ No 46 (QL) (SC).

207. *Strata Property Act*, *supra* note 3, s 155. See also Mangan, *supra* note 37 at 243 (“Suppose, for example, that an owner accidentally causes a loss covered by the strata corporation’s insurance, and the insurer then pays the strata corporation’s loss in accordance with the insurance policy, subject to any deductible and the policy limits. While normally the insurer could rely on the in-

Payment and application of insurance money

Description of the legislation

If a strata corporation becomes entitled to a payment of insurance money²⁰⁸ under a policy, then the *Strata Property Act* requires that the money be paid in trust as follows:

- to the order of the insurance trustee designated by the bylaws, or
- if an insurance trustee is not designated, to the order of the strata corporation to be held in trust until paid out under section 157.²⁰⁹

Section 157 requires that, when insurance money is received “with respect to damaged property,” that money must in the ordinary course be “used to repair or replace the damaged property without delay.”²¹⁰

The exception to section 157 is for cases in which the strata corporation decides not to repair or replace damaged property. Such a decision must be taken “by a resolution passed by a 3/4 vote at an annual or special general meeting held no later than 60 days after the receipt of the money referred to in section 156.”²¹¹

If a resolution is passed under section 157, then the insurance trustee or strata corporation (as the case may be) holds the insurance money as trustee “for each person who has an interest in the money, including the holder of a registered charge.”²¹² The money must be distributed “according to each person’s interest,”²¹³ unless an

suror’s right of subrogation to sue the wrongdoer, in this case, the insurer cannot. Why? Because the wrongdoer is an owner and by virtue of section 155 of the *Strata Property Act*, an owner is a named insured under the strata corporation’s insurance policy.”).

208. See *Insurance Act*, *supra* note 9, s 1 “insurance money” (“means the amount payable by an insurer under a contract, and includes all benefits, surplus, profits, dividends, bonuses and annuities payable under the contract”).

209. *Supra* note 3, s 156.

210. *Ibid*, s 157.

211. *Ibid*, s 159 (1).

212. *Ibid*, s 159 (2).

213. *Ibid*, s 159 (2) (a).

interested person obtains a court order under the act's extensive enabling provision.²¹⁴

These provisions are a legislative response to a problem identified early on: how to ensure that the various interests in a strata property—including mortgagees—are all given adequate protection in the application of insurance money.²¹⁵

Deductible

Insurance deductible is characterized as a common expense

As a leading case once put it, the realities of the insurance market dictate that a strata corporation's insurance "is invariably subject to a deductible."²¹⁶ A deductible is simply "the portion of the loss that the insured must pay" first before collecting any insurance money.²¹⁷ "Insurers use deductibles," as a commentator has explained, "to reduce their administration costs and obtain premium savings for policyholders."²¹⁸

As a starting place on the role deductibles play within the insurance system for strata properties, the act provides that "the payment of an insurance deductible in re-

214. *Ibid*, s 160 ("If the strata corporation decides not to repair or replace the damaged property and the strata plan is not cancelled, any of the following persons may apply to the Supreme Court for an order under this section: (a) an owner; (b) the holder of a registered charge against a strata lot; (c) an insurer of land shown on the strata plan; (d) any other person the court considers an appropriate person. (2) On application by a person referred to in subsection (1), the court may, by order, implement a scheme to do one or more of the following: (a) rebuild some or all of the damaged property or to make some other use of the land; (b) provide for the interests of the owners and registered charge holders on a just and equitable basis. (3) The court may make any order it considers advisable to give effect to the scheme, including, without limitation, orders with respect to (a) the payment of insurance money received by the strata corporation, (b) the discharge of the liabilities of the strata corporation, the persons liable to contribute to the discharge and their share of the liability, (c) the amendment of the strata plan, (d) the transfer or conveyance of the interest of owners whose strata lots have been wholly or partially destroyed to the other owners in proportion to the unit entitlements of the strata lots of the other owners, and for the compensation of the owners whose interests have been transferred or conveyed, (e) the sale of land shown on the strata plan, or the sale of the common assets, and (f) the distribution of any of the common assets of the strata corporation.").

215. See Rohan, *supra* note 136 at 1053–1057.

216. *Stevens*, *supra* note 135 at 453. See also *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.24 ("As a commercial reality, most strata corporation insurance policies have deductibles that apply to the various coverages under the policy.").

217. Mangan, *supra* note 37 at 239.

218. *Ibid*.

spect of a claim on the strata corporation's insurance is a common expense."²¹⁹ This means that payment of an insurance deductible is presumptively something that all the owners are responsible for, "to be contributed to by means of strata fees."²²⁰

Strata corporation may recover deductible payment from responsible owner

But the act doesn't stop at characterizing an insurance deductible as a common expense. It goes on to provide that nothing about this characterization "limit[s] 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."²²¹ This provision means that a responsible owner may ultimately end up being liable for an insurance deductible.

Like much of the framework for insurance in strata properties, this provision first appeared in the *Strata Property Act*. Its rationale has been described as clarifying the law. The subsection's purpose was to "[set] out expressly what was not previously addressed by legislation, but was governed by common law."²²² The provision has also been described as determining liability for an insurance deductible "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."²²³

Commentators have noted that this provision has effectively become a default provision.²²⁴ Court judgments interpreting the provision appear to have left the door

219. *Supra* note 3, s 158 (1).

220. *Ibid*, s 158 (1). See, above, at 20–23 (general discussion of common expenses and unit entitlement).

221. *Supra* note 3, s 158 (2).

222. *The Owners Strata Corporation VR2673 v Comissiona*, 2000 BCSC 1240 at para 22 [*Comissiona*], Levine J.

223. Dix, *supra* note 158 at 26. On this point of insurance law's approach to deductibles, it should be noted that nothing said earlier about the rule barring subrogated claims would apply to a strata corporation's claim against an owner to recover an insurance deductible (see, above, at 42–43). See Mangan, *supra* note 37 at 243–244.

224. See Dix, *supra* note 158 at 26 ("There is no universal rule, however, and strata corporations may design their own particular scheme.").

open for strata corporations to become active in this area by amending their by-laws.²²⁵

What this has meant in practice is that a strata corporation may apparently choose to adopt an “indemnity bylaw.”²²⁶ The wording of this bylaw can have a significant practical effect on litigation over liability to pay an insurance deductible. As several court cases have revealed, many “indemnity bylaws” use words other than *responsible* to describe when an owner will be liable for a deductible. A commentator has explained that the leading cases have decided that “the word ‘responsible’ had a broader meaning than the legal concept of ‘causation’ (which would be required to prove negligence)”²²⁷

So while these bylaws have proved to be attractive to strata corporations, as they appear to hold out the prospect of establishing liability for an insurance deductible without the need for a court or tribunal proceeding,²²⁸ judgments have shown that references to terms like *negligence* can be enforced against a strata corporation, requiring it to clear a higher legal hurdle than mere *responsibility* to establish liability.²²⁹

225. See *Strata Plan LMS 2835 v Mari* (8 December 2006), Vancouver 2004-05746 (BC Prov Ct), aff'd 2007 BCSC 740 [*Mari*]; *Strata Plan VR360 v Jauhar*, 2016 BCPC 238 [*Jauhar*]; *Wawanesa Mutual Insurance Co v Keiran*, 2007 BCSC 727 [*Keiran*]; *Comissiona*, *supra* note 222. See also *Stevens*, *supra* note 135 at 454 (“Finally, we would observe that from a policy point of view, we would reject the analysis of the motions court judge which has the effect of imposing a particular regime upon all condominiums. A significant feature of that scheme is the imposition of shared liability by the owners for all deductibles as the condominium corporation itself call only satisfy a liability imposed upon it by requiring the owners to contribute to the common expenses. The forced sharing of the deductible deprives the owners as a group of the disciplining effect a deductible has upon claims. While the effect of the result we reach is to open the possibility that claims will be made as between owners for the deductible, a condominium may avoid that result if it wishes to do so by making appropriate provision in its declaration, by-laws or rules. It seems to us preferable to leave the question of liability for deductible to be determined in this way so that condominium owners are able to design a scheme appropriate to their particular needs.”).

226. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.25.

227. *Ibid* at § 15.25, citing *Mari*, *supra* note 225; *Jauhar*, *supra* note 225; *Keiran*, *supra* note 225; *Comissiona*, *supra* note 222.

228. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.25 (“[M]ost strata corporations would prefer to avoid lawsuits and simply charge the amount claimed (be it the deductible or other insured amount) against the owner’s strata lot; in the absence of a bylaw, charging an owner to collect the uninsured amount may not be justifiable”).

229. See *ibid* (“For example, if an indemnity bylaw adopted by the strata corporation refers to claims against an owner for only negligence or carelessness, a claim in strict liability against the owner may be precluded.”). See also *Strata Plan LMS 2446 v Morrison*, 2011 BCPC 519 [*Morrison*]. But see *Nacht*, *supra* note 117 at para 22 (casting doubt on the continued validity of the concluding

Strata corporation approval not required for payment of deductible

Finally, the legislation on insurance deductibles concludes by addressing strata-corporation decision-making. As an overriding rule, the act provides that “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.”²³⁰ This rule represents a departure from the act’s basic provisions on decision-making and governance, which generally call for special levies and payments out of the contingency reserve fund to be approved by a resolution passed by a 3/4 vote.²³¹ The departure appears to be justified by the vital interest in having repairs done (recall that a deductible must be paid first, before any insurance money may flow to the strata corporation). But “[p]rior approval is necessary,” as a commentator notes, “where a strata corporation has previously decided, in accordance with the *Strata Property Act*, to not repair or replace the damaged property in question.”²³²

Owner’s insurance

Description of the legislation

In addition to the strata corporation, a strata-lot owner is also entitled to obtain property and liability insurance. To address potential concerns about duplicating coverage obtained through the strata corporation’s insurance, the *Strata Property Act* deals with the scope of coverage available to an owner.²³³ Under the relevant provision, a strata-lot owner is entitled to “obtain and maintain insurance for any or all of the following”:

- loss or damage to the owner’s strata lot and the fixtures referred to in section 149 (1) (d)

clause in the text by stating the following questions of law to be determined in subsequent supreme-court proceeding: “(a) Can the by-laws of a strata corporation serve to narrow the application of s. 158(2) of the *Strata Property Act*, S.B.C. 1998, c. 43? . . . (c) Should the decision of the Provincial Court in *Strata Plan LMS 2446 v. Morrison*, 2011 BCPC 519 have application?”).

230. *Supra* note 3, s 158 (3). This provision applies “[d]espite any other section of this Act or the regulations,” but doesn’t apply when the “strata corporation has decided not to repair or replace under section 159” (*ibid*, s 158 (3)). See also *Wong v The Owners, Strata Plan LMS 2461*, 2018 BCCRT 255 (provision doesn’t extend to special levy to top up contingency reserve fund after payment of insurance deductible).

231. See, above, at 16–20 (general discussion of strata-corporation governance).

232. See Mangan, *supra* note 37 at 240. See also *Strata Property Act*, *supra* note 3, ss 158 (3), 159.

233. See *ibid*, s 161.

- against perils that are not insured by the strata corporation, and
- for amounts that are in excess of amounts insured by the strata corporation;
- fixtures in the owner's strata lot, other than the fixtures referred to in section 149 (1) (d);
- improvements to fixtures referred to in section 149 (1) (d);
- loss of rental value of the owner's strata lot in excess of insurance obtained and maintained by the strata corporation;
- liability for property damage and bodily injury, whether occurring on the owner's strata lot or on the common property.²³⁴

The “fixtures referred to in section 149 (1) (d)” are “fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot,” with *fixtures* defined in the regulation to mean “items attached to a building, including floor and wall coverings and electrical and plumbing fixtures, but does not include, if they can be removed without damage to the building, refrigerators, stoves, dishwashers, microwaves, washers, dryers or other items.”²³⁵

The intent of this provision is to coordinate coverage between the strata corporation and strata-lot owners. It's meant to avoid overcoverage or duplications in coverage. To achieve this result, the provision relies on the definition of *fixtures* to act as a dividing line between the strata corporation's property insurance and the owner's insurance.²³⁶ As a commentator has noted, the “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.”²³⁷

Owners in bare-land strata plans

The act provides that a strata-lot owner in a bare-land strata plan is entitled to “obtain and maintain insurance on buildings or fixtures built or installed on the strata

234. *Ibid*, s 161 (1).

235. *Supra* note 4, s 9.1 (1).

236. See, above, at 34–36 (discussion of the definition of *fixtures* and the scope of a strata corporation's insurance coverage).

237. Dix, *supra* note 158 at 4.

lot.”²³⁸ This provision owes its existence to the special features of bare-land strata plans.²³⁹

As the leading practice guide points out, “[t]he obligation of a strata corporation to insure strata lots in a bare land strata plan is more limited than is the case in a conventional strata plan.”²⁴⁰ This is because in most bare-land strata plans “[t]he dwellings and other buildings constructed on the strata lot are not depicted on the strata plan.” This fact takes them outside the scope of the legislative mandate on a strata corporation to obtain property insurance.²⁴¹

In recognition of these limitations on the mandate placed on strata corporations, the act enables strata-lot owners in a bare-land strata plan to play a greater role in obtaining insurance.²⁴² While there are practical considerations that set this arrangement apart from the typical case in which a strata corporation in a building strata

238. *Supra* note 3, s 161 (2).

239. See *ibid*, s 1 (1) “bare land strata plan” (“means (a) a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the floors, walls or ceilings of a building, or (b) any other strata plan defined by regulation to be a bare land strata plan”) (no regulations have been adopted under paragraph (b)). See also, above, at 11 (general discussion of kinds of strata plans).

240. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.4 [cross-reference omitted].

241. See *Strata Property Act*, *supra* note 3, s 149 (1) (c) (legislative mandate applying to “buildings shown on the strata plan”). The act also provides that the part of the mandate relating to “fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot” doesn’t apply to a bare-land strata plan (see *ibid*, s 149 (3)). All this said, on paper a strata corporation should be able to insure buildings on a strata lot in a bare-land strata plan under its power to obtain “optional” insurance (see *ibid*, s 152). But see *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.27 (noting that a strata corporation that obtained such insurance would find it to be a poor fit with its legislative duty to repair and maintain property in a bare-land strata plan).

242. See *supra* note 3, s 161 (2) (“Despite this Act, the *Insurance Act* or any other law, an owner of a strata lot in a bare land strata plan may obtain and maintain insurance on buildings or fixtures built or installed on the strata lot.”).

plan places insurance,²⁴³ the legislation appears to generate results that meet the expectations of strata-lot owners in bare-land strata plans.²⁴⁴

Contribution

Description of the legislation

Part 9 concludes with a provision that attempts to manage the competing claims that may arise against a strata corporation's and an owner's insurance. This provision overrides any contrary terms in an insurance policy with respect to contributions in two situations:

- first, “neither the strata corporation's insurance policy nor an owner's insurance policy is liable to be brought into contribution with another policy unless the other policy is issued on the same property”;²⁴⁵
- second, “neither the strata corporation's insurance policy nor the owner's insurance policy is ‘other insurance’ in relation to another policy unless the other policy is issued on the same property.”²⁴⁶

“Other insurance” is a term of art that refers to “a clause in the insurance contract which redefines the policy coverage where other insurance is in place for a given loss.”²⁴⁷

243. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.27 (“With strata lots not typically covered by a bare land strata corporation's insurance policy, the policy is left to cover the common property only. Strata corporations should bear in mind that the common property associated with a bare land strata plan often includes roadways, fences, sewers, and other services and utilities, and that the availability of insurance for these items must be explored when obtaining the corporation's insurance coverage.”).

244. See *British Columbia Strata Property Practice Manual*, *ibid* (“Many bare land strata lots are sold by the owner/developer as undeveloped lots, which are then developed by the owner of the lot. This arrangement can lead to great variation in the sizes, configurations, and materials used in the construction of the dwellings. As the original owner has much more control over the structures built on the strata lot than in a conventional strata plan, requiring the owner, rather than the strata corporation, to insure the structures avoids significant disparities that could arise, given that common expenses are usually divided equally by the number of strata lots (unit entitlements for a bare land strata plan are often set at one for each strata lot).” [cross-reference omitted]).

245. *Supra* note 3, s 162 (a).

246. *Ibid*, s 162 (b).

247. Billingsley, *supra* note 126 at 338–39, noting also that “[t]he intended effect of such an ‘other insurance’ clause is to limit the insurer's indemnity obligation where another insurance policy co-

vers the loss, such that the threshold requirement of overlapping coverage between the policies is not met" (*ibid* at 339).

Chapter 4. Issues for Reform

Introduction

The committee examined each of the provisions of part 9 of the *Strata Property Act* for potential issues for reform.²⁴⁸ Looking deeper, it delved into commentary on the act. The committee's research also led it to make comparisons with legislation on strata properties and insurance in force elsewhere in Canada.²⁴⁹ Finally the committee examined recent reform work in Alberta²⁵⁰ and Ontario.²⁵¹ Both of those provinces have recently completed major projects, which featured some consideration of emerging issues in insurance for strata properties.

As a result of this review, the committee decided to focus attention on issues for reform in the following areas:

- the insurance mandate;
- insurance deductibles;
- named insureds;
- reporting and administration; and
- the standard unit.

Issues for Reform—The Insurance Mandate

The core of part 9 of the act is the insurance mandate—that is, the legislative requirement that strata corporations must obtain property and liability insurance. This insurance mandate has been a feature of the legislation since the advent of the

248. See *supra* note 3, ss 149–162.

249. See *supra* note 32 (list of Canadian strata-property legislation).

250. See Service Alberta, *Condominium Property Act Review: Consultation Analysis Report* (June 2013), online: <open.alberta.ca> [perma.cc/874W-JPUE] [Alberta Report].

251. See Canada's Public Policy Forum, *Growing Up: Ontario's Condominium Communities Enter a New Era: Condominium Act Review Stage Two Solutions Report* (Ottawa: Canada's Public Policy Forum, 2013), online: <www.ppforum.ca> [perma.cc/2N5D-7VXN] [Ontario Stage Two Report]; Canada's Public Policy Forum, *Ontario's Condominium Act Review: Stage One Findings Report* (Ottawa: Canada's Public Policy Forum, 2013), online: <www.ppforum.ca> [perma.cc/Q5NV-6MRL] [Ontario Stage One Report].

first-generation act in 1966 (for property insurance).²⁵² With the enactment of the *Strata Property Act* the mandate was expanded to include liability insurance.²⁵³ The overriding question for the committee in this part of the report is whether the mandate requires further expansion to address new areas of concern or perils currently not covered by it.

Should the Strata Property Act require strata corporations to obtain directors-and-officers insurance?

Brief description of the issue

In the strata-property field, directors-and-officers insurance is “[i]nsurance that provides coverage for members of [strata councils] against ‘wrongful acts,’ which might include actual or alleged errors, omissions, misleading statements, and neglect or breach of duty on the part of the [strata council].”²⁵⁴ Commentators have stressed the importance of directors-and-officers insurance coverage.²⁵⁵ The *Strata Property Act* pays some heed to this point, by enabling strata corporations to purchase this coverage.²⁵⁶

Equivalent legislation in other parts of Canada goes even further than the *Strata Property Act*. Four provinces’ acts mandate directors-and-officers insurance for strata corporations.²⁵⁷ In view of the acknowledged importance of this type of coverage,

252. See *supra* note 25, s 14 (1) (a) (“The duties of the strata corporation include the following: (a) to insure and keep insured the building to the replacement value thereof against fire and other risks as may be prescribed under this Act, unless the owners by unanimous or special resolution otherwise resolve . . .”).

253. See *supra* note 3, s 150. An enabling provision specifically mentioning liability insurance was a part of the second-generation act (see *supra* note 26, s 30 (1) (b)).

254. Insurance Bureau of Canada, *Glossary* (last visited 8 August 2018) at 16, online (pdf): *Insurance Bureau of Canada* <assets.ibc.ca/Documents/Resources/Glossary.pdf> [perma.cc/6S76-SY8S].

255. See Mangan, *supra* note 37 at 253 (“As a practical matter, however, D&O insurance is necessary for strata council members.”).

256. See *supra* note 3, s 151.

257. See Alberta: *Condominium Property Act*, *supra* note 32, s 47 (7) (“In addition to placing and maintaining insurance under subsection (1), a corporation shall place and maintain insurance against the following: (a) any liability incurred by a member of the board or an officer of the corporation arising out of any action or omission of the member or officer with respect to carrying out the functions and duties of a member or officer except as a result of a failure to comply with section 28(2); (b) any liability incurred by the corporation arising out of any action or omission of a member of the board or an officer of the corporation with respect to carrying out the functions and duties of a member or officer”); Saskatchewan: *The Condominium Property Act*,

should British Columbia follow these provinces' lead and add directors-and-officers insurance to its legislative mandate?

Discussion of options for reform

The options considered for this issue boiled down to two: either add directors-and-officers coverage to the insurance mandate or retain the status quo.

The case for treating directors-and-officers insurance like property and liability insurance rests on recognizing that it too provides coverage for a significant area of vulnerability for strata corporations. The act provides that a strata corporation functions through its council.²⁵⁸ In this role, council members are often faced with making difficult decisions, which must meet the requisite standard of care.²⁵⁹ In the absence of directors-and-officers coverage, the individuals who make up the strata council may be personally on the hook for errors and omissions. If they lack the resources to cover any losses, then the strata corporation and its constituent owners (the parties that are most likely to have claims against council members)²⁶⁰ could find themselves suffering costly losses.

1993, *supra* note 32, s 65 (9) (a) (iii)–(iv) (“The corporation shall obtain and maintain: (a) insurance against its liability . . . (iii) incurred by a member of the board or an officer of the corporation arising out of any act or omission of the member or officer with respect to carrying out the functions and duties of the member or officer unless it is shown that the member or officer acted in bad faith; and (iv) incurred by it arising out of any act or omission of a member of the board or an officer of the corporation with respect to carrying out the functions and duties of the member or officer”); Manitoba: *The Condominium Act*, *supra* note 32, s 187 (2) (“A condominium corporation must obtain and maintain insurance for (a) any liability incurred by a director or officer arising out of any act or omission by him or her with respect to carrying out his or her functions and duties, except liability that results from a breach of his or her duty to act honestly and in good faith with a view to the best interests of the corporation; and (b) any liability incurred by the corporation arising out of any act or omission of a director or officer with respect to carrying out his or her functions and duties.”); Ontario: *Condominium Act, 1998*, *supra* note 32, s 39 (“If the insurance is reasonably available, a corporation shall purchase and maintain insurance for the benefit of a director or officer against the matters described in clauses 38 (1) (a) and (b) except insurance against a liability, cost, charge or expense of the director or officer incurred as a result of a breach of the duty to act honestly and in good faith.”).

258. See *supra* note 3, ss 4 (“The powers and duties of the strata corporation must be exercised and performed by a council, unless this Act, the regulations or the bylaws provide otherwise.”), 26 (“Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.”).

259. See *ibid*, s 31 (“In exercising the powers and performing the duties of the strata corporation, each council member must (a) act honestly and in good faith with a view to the best interests of the strata corporation, and (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.”).

260. See *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.11.

A mandate for directors-and-officers coverage could also have benefits outside the insurance sphere. It might help with recruitment of strata-council members, who may be reassured to know that the legislation requires this coverage.

The disadvantages of this proposed reform are that it could impose added costs on strata corporations and would limit their flexibility to make decisions on insurance coverage. Very small strata corporations, in particular, might struggle with an addition to the act's insurance mandate.

These considerations could give support to the status quo. The current provision could be seen as striking the right balance by enabling, but not requiring, directors-and-officers insurance. In this way, it helps bring awareness to the issue, without binding strata corporations to a single solution.

The committee's recommendation for reform

While the committee understood the concerns regarding added costs and rigidity, it decided that adding directors-and-officers coverage to the insurance mandate would on balance benefit the strata-property sector. The committee accepted the view that a lack of this coverage could leave a strata corporation and its strata council vulnerable to significant losses.

In view of the special position of very small strata corporations, the committee discussed proposing an exemption that would apply to them. While it may be possible to design such an exemption the committee wasn't convinced of the wisdom of this approach. Even small strata corporations may be exposed to losses in this area. They may also find it more difficult to recover from a loss.

The committee also understands the directors-and-officers insurance is relatively inexpensive, which limits the concerns about its ongoing cost to strata corporations.

In addition, the committee understands that, under the current legislation, the vast majority of strata corporations have opted to have directors-and-officers coverage. In the committee's view, it's worthwhile to have the legislation close the remaining gap. The fact that the majority of strata corporations should not notice a difference from a change in the law was seen as a benefit for this proposal, as it would limit any potential disruption flowing from reform.

Finally, it should be noted the bulk of respondents in the public consultation favoured amending the act to require strata corporations to obtain directors-and-officers insurance.

The committee recommends:

1. The Strata Property Act should require a strata corporation to obtain directors-and-officers insurance.

What amount of coverage should a strata corporation be required to obtain for its mandated directors-and-officers insurance?

Brief description of the issue

This issue flows from the previous one. Having decided that the *Strata Property Act*'s insurance mandate should include directors-and-officers insurance, the committee realized that a logical follow-up question would involve its views on the amount of that coverage.

Discussion of options for reform

Proposals in response to this issue could be limitless. The issue calls for commitment to a specific number. The number should provide reasonable guidance to strata corporations on the level of coverage needed. It should be in an area in which adequate coverage is available but overcoverage is avoided.

The committee's recommendation for reform

In the committee's view, the number that would meet these criteria is \$2 000 000. This number matches the minimum amount of liability coverage that a strata corporation must obtain.²⁶¹ While this proposal was supported by the majority of respondents in the consultation, it should be noted that a minority favoured either having the regulation set out a lower minimum amount of required coverage or having the regulation be silent on this issue (effectively leaving the amount of coverage to a strata corporation's discretion).

The committee recommends:

2. For the purposes of section 151 of the Strata Property Act, the strata corporation must obtain and maintain directors-and-officers insurance for a minimum amount of \$2 000 000.

261. See *Strata Property Regulation*, *supra* note 4 s 9.2.

Should the definition of “major perils” in the Strata Property Regulation be amended to include earthquakes?

Brief description of the issue

The legislative mandate to insure property requires a strata corporation to “insure against major perils, as set out in the regulations.”²⁶² The regulations contain a list of perils that make up its definition of *major perils*.²⁶³ The list is long, but it isn’t comprehensive. As one commentator has noted, “[e]arthquake coverage is probably the most notable omission from the list of major perils mandated by the Act.”²⁶⁴

Since earthquakes pose a real threat to property in much of British Columbia, should the list of major perils that a strata corporation must insure against be expanded to include earthquakes?

Discussion of options for reform

This issue poses a yes-or-no question similar to that at the heart of the previous issue relating to directors-and-officers coverage. The rationale for bringing earthquakes within the mandate is that they represent an area of significant vulnerability for strata properties. Further, strata corporations might not always appreciate the risks posed by earthquakes.

Discussions of earthquakes in British Columbia tend to revolve around the looming danger of a generational catastrophic event. While such an earthquake would be devastating (and may be inevitable), it’s also worth noting that British Columbia is regularly subject to smaller-scale earthquakes. The damage created by these earthquakes may escape public notice because it isn’t widespread. That said, a relatively small earthquake could easily cause significant damage to any strata properties unlucky enough to be located near its epicenter.

The downsides of mandating earthquake coverage are the added costs and reduced flexibility such requirements impose on strata corporations. Earthquake insurance may be an expensive additional cost for strata corporations with high deductible values. Depending on their location, geology, proximity to water and slope-failure

262. *Strata Property Act*, *supra* note 3, s 149 (4) (b).

263. See *supra* note 4, s 9.1 (2) (“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”).

264. Baker, *supra* note 150 at 2.

risks, and type of construction, and the complex exclusions contained within policies, the view of the committee is each strata corporation should in their own interest assess the cost, risk, and the exclusions to determine if they should purchase earthquake coverage.

The threat posed by earthquakes isn't distributed evenly across British Columbia. While coastal areas (for example) are at significant risk, other parts of the province aren't so dangerously exposed. Strata corporations in these areas might resent being required to purchase coverage for a risk they could rightly perceive as minimal.

Finally, requiring earthquake coverage would take the decision out of strata corporations' hands. Many strata corporations already have earthquake coverage. An argument could be made that strata corporations are better placed than legislators to decide on this facet of insurance.

The committee's recommendation for reform

The committee wrestled with this issue, noting that there are good arguments on both sides of it, in formulating its tentative recommendation for the consultation paper. That tentative recommendation ended up being the only tentative recommendation in the consultation paper that failed to attract the support of a majority of respondents. In light of this consultation result, the committee took a careful second look at this issue as it drafted this report.

The committee noted that a significant minority of consultation respondents (including respondents representing legal and insurance professionals) agreed with its tentative recommendation. But, that said, a majority disagreed, often citing the catastrophic results that would accrue to a strata corporation lacking this coverage in the aftermath of a major earthquake.

The committee gave this point further consideration and revisited its reasons for initially proposing not to extend the definition of major perils to cover earthquakes. Those reasons, in brief, were the unequal geographic distribution of risk from earthquakes and the view that those strata corporations that were at risk had already taken steps to protect themselves. In the committee's view, these reasons continued to sway them in favour of not extending the definition of major perils.

The committee continued to be concerned about mandating insurance coverage in areas that are at a low risk of having an earthquake. While on paper it might be possible to have the mandate apply only in certain parts of the province, this solution struck the committee as complex and unappealing. In the main, strata-property law in British Columbia applies consistently to all strata corporations. The committee

didn't favour moving away from that principle to accommodate an expansion of the insurance mandate.

In addition, the committee noted that the vast majority of strata corporations in earthquake zones already have earthquake coverage. Extending the mandate in this case wouldn't be analogous to extending it in the previous issue, which concerned directors-and-officers insurance. In that case, a plausible argument could be made that the holdouts from obtaining this coverage have failed to grasp the risks of managing a strata corporation in an increasingly complex legal environment. Strata corporations that don't have earthquake insurance, on the other hand, are more likely to be located in regions of the province that rarely see earthquakes. Or, if they are located in earthquake zones, some combination of their organization and the insurance products on offer has stayed their hand. An example of this phenomenon is a bare-land strata that is faced with an insurance product that contains complex exclusions. The committee was reluctant to create a legislative mandate that would only, in effect, respond to these kinds of cases.

In the end, the committee concluded that the decision to obtain earthquake coverage should continue to rest with strata corporations. As noted earlier, many strata councils already do obtain this coverage. The committee also noted that there are avenues for the ownership to direct a council to obtain such coverage.²⁶⁵

The committee recommends:

3. The definition of "major perils" in the Strata Property Regulation should not be amended to include earthquakes.

Should the definition of "major perils" in the Strata Property Regulation be amended to include overland flooding?

Brief description of the issue

Just as earthquakes are one significant peril not currently included in the regulation's definition of *major perils*, so overland flooding is a peril that also finds itself

265. See *Strata Property Act*, *supra* note 3, s 27 (1) ("The strata corporation may direct or restrict the council in its exercise of powers and performance of duties by a resolution passed by a majority vote at an annual or special general meeting."). Note also that a strata corporation that had amended its bylaws to list earthquakes as a peril to be insured against would also have to obtain earthquake coverage (see *ibid*, s 149 (4) (b)).

outside this definition.²⁶⁶ Should the definition be expanded to include overland flooding?

Discussion of options for reform

The options for this issue are similar to those discussed in the preceding issue.

Like earthquakes, floods are cause for concern in many parts of British Columbia. They can be devastating to property. So this is another area of vulnerability for many strata properties, which may call for extension of mandatory coverage.

But the downsides of requiring coverage is that it will come with costs and it will bind strata corporations across the province. Strata corporations that perceive themselves not to be at risk for flooding could resent having to pay for coverage.

The committee's recommendation for reform

The committee's consideration of this issue took on many of the points considered previously in relation to earthquake coverage. Similar to the committee's decision on earthquake coverage, the committee decided that coverage for overland flooding shouldn't be required. In the committee's view, there is too much variation in the exposure of strata corporations to flood damage to make it part of the legislative mandate. Further, those strata corporations that are most at risk appear to be largely deciding to acquire this coverage.

A small majority of consultation respondents backed the committee's proposal on this issue. But a sizable minority favoured adding overland flooding to the definition of *major perils*.

The committee recommends:

4. The definition of "major perils" in the Strata Property Regulation should not be amended to include overland flooding.

Issues for Reform—Insurance Deductibles

Introduction

In a nutshell, the *Strata Property Act* makes two points about insurance deductibles: (1) an insurance deductible "is a common expense to be contributed to by means of

²⁶⁶. See *supra* note 4, s 9.1 (2).

strata fees”; and (2) nothing about this characterization as a common expense “limit[s] 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.”²⁶⁷ Although the legislation doesn’t mention strata-corporation bylaws, an unstated third point that should be borne in mind is that many strata corporations have adopted indemnity bylaws. These bylaws purport to assign liability for an insurance deductible to a responsible owner. In many cases, the language of such bylaws uses words other than *responsibility*. For example, many refer to a *negligent* owner. This wording sets a different standard for liability than that found in the statute, which will govern in any strata corporation with such a bylaw.²⁶⁸

The bulk of the case law dealing with strata properties and insurance involves applying this section.²⁶⁹ Claims relating to the recovery of an insurance deductible from a strata-lot owner have also appeared repeatedly in decisions of the Civil Resolution Tribunal.²⁷⁰ In addition, some commentators have harshly criticized the section and its interpretation by the courts and application by strata corporations, with one calling the provision “one of the most misunderstood sections of the *Strata Property Act*.”²⁷¹

267. *Supra* note 3, s 158. See also, above, at 45–48 (general discussion of insurance deductibles for strata properties).

268. See, above, at 46–47. But see *Nacht*, *supra* note 117 (allowing appeal from Civil Resolution Tribunal on questions of law concerning effect of indemnity bylaws and precedential value of *Morrison*, *supra* note 229).

269. See *Mari*, *supra* note 225; *Jauhar*, *supra* note 225; *Keiran*, *supra* note 225; *Comissiona*, *supra* note 222; *Morrison*, *supra* note 229.

270. See *Crichton v The Owners, Strata Plan KAS431*, 2017 BCCRT 33; *The Owners, Strata Plan VR 194 v MacKinnon*, 2017 BCCRT 46; *Zhang v The Owners, Strata Plan BCS 1039*, 2017 BCCRT 56; *Clark v The Owners, Strata Plan LMS 3938*, 2017 BCCRT 62; *Davies v. The Owners, Strata Plan 755*, 2017 BCCRT 71; *The Owners, Strata Plan VIS 6634 v Brown*, 2017 BCCRT 86; *The Owners, Strata Plan BCS 1589 v Nacht*, 2017 BCCRT 88; *Gauthier v The Owners, Strata Plan LMS 2768*, 2018 BCCRT 6; *Keith v The Owners, Strata Plan K 284*, 2018 BCCRT 49; *The Owners, Strata Plan NWS 3429 v Oughton*, 2018 BCCRT 62; *The Owners, Strata Plan KAS 1357 v Amos*, 2018 BCCRT 105; *The Owners, Strata Plan BCS 354 v Liang*, 2018 BCCRT 171; *Bowles v The Owners, Strata Plan NW 227*, 2018 BCCRT 484; *Graham v The Owners, Strata Plan K 852*, 2018 BCCRT 619; *Taylor v The Owners, Strata Plan 1801*, 2018 BCCRT 925 at paras 134–141; *Ruan v The Owners, Strata Plan BCS 1964*, 2019 BCCRT 128.

271. Fanaken, *supra* note 71 at 124.

There is similar legislation in force in most of the provinces and territories of Canada.²⁷² In Alberta and Ontario, this legislation has attracted the attention of law reformers.²⁷³ Commentators have noted that a major factual cause of the litigation over insurance deductibles has been rising deductibles, especially for claims involving water damage.²⁷⁴ In framing its own recommendations, the committee bore in mind the experience of these other jurisdictions in wrestling with concerns about disputes over insurance deductibles.

Note on governance issues for stratas

Readers should note that there is some overlap between this report and the committee's earlier *Consultation Paper on Governance Issues for Stratas* on the subject of insurance deductibles. In that earlier consultation paper, the committee asked for public comment on a series of tentative recommendations involving expanding the scope of the strata corporation's lien.²⁷⁵ This public comment has led the committee to reexamine one of its tentative recommendations.

The tentative recommendation at issue concerned extending the strata corporation's lien to apply in cases in which an amount has been found by a court, an arbitrator, or the Civil Resolution Tribunal to be owing to the strata corporation with respect to an insurance deductible.²⁷⁶ Even though this tentative recommendation was set out in

272. See Alberta: *Condominium Property Amendment Act, 2014*, *supra* note 32, s 55 (amending section 81 of the *Condominium Property Act*, *supra* note 32, by repealing para (h) and substituting new para (h), which will enable regulations addressing insurance-deductible issues), proposed amendments to *Condominium Property Regulation*, *supra* note 32 (adding new section 62.4—in force 1 January 2020); Saskatchewan: *The Condominium Property Act, 1993*, *supra* note 32, ss 65 (5)–(7); Manitoba: *The Condominium Act*, *supra* note 32, s 193 (1)–(2); Ontario: *Condominium Act, 1998*, *supra* note 32, s 105 (as amended by *Protecting Condominium Owners Act, 2015*, *supra* note 32, s 91); Nova Scotia: *Condominium Act*, *supra* note 32, s 35 (9); Newfoundland and Labrador: *Condominium Act, 2009*, *supra* note 32, s 58; Northwest Territories and Nunavut: *Condominium Act*, *supra* note 32, s 22 (1.2)–(1.4).

273. See Alberta Report, *supra* note 250 at 35–44; Ontario Stage Two Report, *supra* note 251 at 24–25, 27; Ontario Stage One Report, *supra* note 251 at 28.

274. See G Stephen Hamilton, “Insurance 2013,” in Continuing Legal Education Society of British Columbia, ed, *Strata Property—2013 Update: Materials prepared for the Continuing Legal Education seminar, Strata Property 2013 Update, held in Vancouver, B.C., on April 18, 2013* (Vancouver: Continuing Legal Education Society of British Columbia, 2013) 1.1 at 1.1.5; Fanaken, *supra* note 71 at 122.

275. See *supra* note 17 at 49–54. See also *Strata Property Act*, *supra* note 3, s 116.

276. See *supra* note 17 at 54 (tentative recommendation no. (31): “The *Strata Property Act* should not enable a strata corporation to register a lien on an owner’s strata lot for amounts owing with respect to a charge back for an insurance deductible or expenses incurred due to damage which

negative terms (proposing not to extend the lien), public comment on it yielded strong support for a change in the law. In view of this strong support for reform, the committee gave serious consideration to revising its position on the issue. Reflection on this public comment and on its own discussions regarding insurance issues led the committee to a final recommendation that endorses an extension of the lien: “The *Strata Property Act* should enable a strata corporation to register a lien on an owner’s strata lot for amounts owing with respect to a charge back for an insurance deductible or expenses incurred due to damage which are less than an insurance deductible, if the charge back has been found valid by a court, an arbitrator, or the Civil Resolution Tribunal.”²⁷⁷

The issues discussed below should be read in light of this recommendation.

Should the Strata Property Act expressly assign responsibility for an insurance deductible to a responsible owner?

Brief description of the issue

The *Strata Property Act*’s provisions on insurance deductibles have created uncertainty and litigation. In part, this is the natural result of a system that appears (1) to rely in large part on a third-party decision-maker to establish liability (by calling on a strata corporation to “sue an owner” to establish liability) and (2) to implicitly invite strata corporations to vary the standard at which liability will be imposed by amending their bylaws.²⁷⁸

Similar issues were at play in Ontario’s project on reforming its strata-property law. After noting concerns that Ontario’s act was “unclear about who pays the corporation’s deductible for the damaged property,” it was recommended that “[t]he Act should provide that an owner is responsible for repair costs or the deductible under the corporation’s insurance policy, whichever is lower, as a result of damage to other units or the common elements caused by an act or omission by the unit’s owner or resident.”²⁷⁹

Should British Columbia adopt a similar approach as a way to dispel uncertainty and potentially reduce litigation over insurance deductibles?

are less than an insurance deductible, even if the charge back has been found valid by a court or the Civil Resolution Tribunal.”).

277. See *Report on Governance Issues for Stratas*, *supra* note 18 at 59.

278. See *Strata Property Act*, *supra* note 3, s 158 (1)–(2).

279. Ontario Stage Two Report, *supra* note 251 at 27.

Discussion of options for reform

The advantages of adopting a proposal like the one discussed in Ontario were hinted at in the framing of this issue. The main virtue of the proposal is that it would lend “greater clarity” to the law.²⁸⁰ The space that the current law has seemingly provided for strata-corporation bylaws to occupy has created much of the present uncertainty. That space would effectively be closed off, as an express legislative assignment of responsibility would eliminate the rationale for these bylaws. This would bring a measure of certainty and consistency to the law.

It would also likely have the effect of cutting down on litigation over insurance deductibles. Litigation tends to thrive on uncertainty. And, in this case, the need for litigation is given a boost by the express reference in the current provision to suing a responsible owner. Doing away with that reference and setting out a legislative standard for liability should significantly reduce the incentive to litigate issues concerning insurance deductibles.

Finally, it’s worth noting that versions of this proposal have been adopted in other jurisdictions. In addition to Ontario,²⁸¹ Saskatchewan²⁸² and Manitoba²⁸³ have legis-

280. *Ibid.*

281. See *Condominium Act, 1998*, *supra* note 32, s 105 (3) (“if an owner, a lessee of an owner, a person residing in the owner’s unit with the permission or knowledge of the owner, or any other person or thing that is prescribed, through an act or omission causes damage to a unit, the common elements or the assets, if any, of the corporation, subject to subsection (3), and if the corporation has obtained and maintained coverage for the damage under an insurance policy, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy shall be added to the contribution to the common expenses payable for the owner’s unit”).

282. See *The Condominium Property Act, 1993*, *supra* note 32, s 65 (“(5) Subject to subsection (6), if an insurance policy obtained by the corporation in accordance with this section contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage is a common expense. (6) If the owner of a unit, or a person residing in the owner’s unit with the permission or knowledge of the owner, through an act or omission causes damage to a unit, the amount determined pursuant to subsection (7) may be added to the common expenses payable by the owner of that unit. (7) For the purposes of subsection (6), the amount is the lesser of: (a) the cost of repairing the damage to the unit; and (b) the deductible limit of the insurance policy obtained by the corporation.”).

283. See *The Condominium Act*, *supra* note 32, s 193 (“(1) Subject to subsection (2), if an insurance policy obtained or maintained by a condominium corporation contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage is a common expense. (2) If (a) damage to a unit or the common elements results from an act or omission of a unit owner or by (i) a tenant or other occupant of his or her unit, or (ii) a person permitted to be on the property by the unit owner or by a tenant or other occupant of his or her

lation on this point. Alberta has recently announced that it plans to implement this proposal in the near future.²⁸⁴

A potential downside of this proposal is the effect it could have on some owners. It's clear that many strata corporations in British Columbia have property insurance with some very high deductibles, particularly for water damage. These deductibles may be the result of claims history, market conditions, or simply the realities of living in a large, high-rise building. A responsible owner who ends up on the hook for such a deductible could be faced with a crippling debt, one that is out of proportion with what a typical homeowner in a single-family home would ever have to face. An argument could be made that such strata-lot owners are being confronted with something that goes beyond the acknowledged purposes of an insurance deductible, which are usually seen as devices to weed out small-value nuisance claims and to crack down on the potential for fraud.²⁸⁵

unit; and (b) the unit owner has the duty under section 182 to repair after damage; the cost of repairing the damage, to the extent of the deductible limit under the condominium corporation's insurance policy, may be added to the common expenses payable in respect of the owner's unit.").

284. See *Condominium Property Amendment Act, 2014*, *supra* note 32, s 55 (amending section 81 of the *Condominium Property Act*, *supra* note 32, by repealing para (h) and substituting new para (h), which will enable regulations addressing insurance-deductible issues—not in force). In December 2018, the Government of Alberta announced that it planned to adopt the enabling regulations referred to in this section by amending the *Condominium Property Regulation*, *supra* note 32, to add the following as new section 62.4: "(1) A corporation may pay an insurance deductible in an insurance claim and recover the amount of the deductible from an owner subject to and in accordance with this section. (2) Subject to subsections (3) and (4), an owner, on request by the corporation, is absolutely liable to the corporation for the amount of the deductible in the corporation's insurance claim to a maximum of \$50 000 for damage that originates in or from the owner's unit or an exclusive possession area assigned to the owner. (3) An owner is not liable to a corporation for the amount of the deductible in the corporation's insurance claim where the claim arose from (a) a defect in the construction of the unit or exclusive possession area assigned to the owner, (b) damage attributable to an act or omission of the corporation, a member of the board, officer, employee or agent of the corporation, or any combination of them, or (c) normal structural deterioration of the common property, the managed property or the real property of the corporation, other than property that the owner was responsible to repair or maintain. (4) Nothing in this section shall be construed in a manner to affect a civil action or other remedy at law of an owner against a person who is responsible for damage to property." These provisions are slated to come into force on 1 January 2020.

285. But note that there have been remarks in the case law and commentary speculating that a strata corporation that places insurance with a high deductible could be vulnerable to the argument that it has failed to comply with the legislative requirement to obtain insurance. See *Stevens*, *supra* note 135 at 454 ("We would add that if the deductible was excessive, it could be argued that the corporation had failed in its duty to obtain insurance."); *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.24 ("[A] failure by the strata corporation to obtain the

Another disadvantage could flow from what might typically be seen as one of the strengths of the proposal. One of the proposal's goals is to cut down on needless litigation by providing a clear legislative allocation of responsibility for the deductible. In some cases, though, this authorization could encourage strata corporations to overreach, leaving owners vulnerable to claims of questionable merit. This could lead to more litigation, which would be particularly frustrating from the owner's point of view.

Finally, the proposal would limit strata corporations' flexibility. The current law appears to allow strata corporations some latitude in dealing with insurance deductibles by amending their bylaws. This latitude may be used in some cases to tailor provisions that conform to a strata corporation's unique features. This flexibility has been lauded in at least one court case.²⁸⁶

The committee's recommendation for reform

In the committee's view, good points may be made on both sides of this issue. On balance, the committee favoured the proposal to amend the act and expressly assign responsibility for an insurance deductible to a responsible owner. The current law appears to give strata corporations some flexibility in managing this issue, but unfortunately that flexibility has brought with it uncertainty and conflict. Adopting a consistent standard in legislation should dispel that uncertainty and cut down on the amount of litigation over insurance deductibles.

A large majority of consultation respondents agreed with the committee's proposal on this issue.

The committee recommends:

5. Section 158 of the Strata Property Act should be amended to allow a strata corporation to decide to charge back to an owner, if the owner is responsible for the loss or damage that gave rise to the claim, the lesser of the following amounts: (a) the cost of repairing the loss or damage; (b) the deductible limit of the insurance claim.

lowest possible deductible in the circumstances may provide a defence to an owner where the strata corporation is seeking to claim the deductible amount against an owner.").

286. See *Stevens*, *supra* note 135 at 454 ("While the effect of the result we reach is to open the possibility that claims will be made as between owners for the deductible, a condominium may avoid that result if it wishes to do so by making appropriate provision in its declaration, by-laws or rules. It seems to us preferable to leave the question of liability for deductible to be determined in this way so that condominium owners are able to design a scheme appropriate to their particular needs.").

Should the Strata Property Act require strata-lot owners to have insurance that covers payment of a deductible under a strata-corporation policy?

Brief description of the issue

There are real concerns that rising insurance deductibles could harm strata-lot owners. This potential for harm might even be exacerbated by the previous recommendation. One response to this harm might be to encourage what many strata-lot owners have already done: take out their own insurance against the prospect of having to pay the strata corporation's deductible.

A proposal for legislation to implement this requirement was considered recently in Alberta. As part of its law-reform project, Service Alberta asked “[s]hould the Act require unit owners to get condominium unit owners’ insurance that also covers the payment of any deductible the owner may be required to pay on a claim made under the corporation’s insurance policy?”²⁸⁷

Discussion of options for reform

The main advantage to this proposed reform is that it provides a practical means to support the broader reforms that the committee is contemplating for insurance deductibles in strata properties. Those reforms could be severely undercut if they were to depend, in the face of rising deductibles, on strata-lot owners paying out of their own pockets. Insurance for owners is an effective way to help ensure that the system works for all.

In addition, requiring owners to obtain this insurance likely wouldn’t be a radical departure from the current situation. Many owners already have such insurance, either because they have decided independently to obtain it or because it is one of the conditions imposed through a mortgage.

287. *Supra* note 250 at 43–44. In December 2018, the Government of Alberta announced that it planned to implement the proposal by amending the *Condominium Property Regulation*, *supra* note 32, to add the following as new section 60.2: “A corporation may, by bylaw, (a) require owners to purchase insurance with respect to deductibles that may be payable to a corporation under section 62.4 in respect of a corporation’s insurance policy, (b) specify the particulars of insurance to be purchased for the purposes of clause (a), and (c) specify the proof an owner must provide to the corporation respecting the insurance purchased.” (In force 1 January 2020.)

The main downside of this proposal is that it could prove to be difficult to enforce. It would likely be a challenge for a strata corporation to know whether or not an owner had such insurance. But even if it did, there may be relatively few effective means to compel an owner to carry insurance against a deductible claim. But without an effective enforcement mechanism, any legislative provision could end up being nothing more than a paper tiger.

The proposal would also have the effect of imposing some costs on strata-lot owners and limiting some of their freedom to act. Strata-lot owners who live in strata properties with relatively small insurance deductibles might resent this mandate for these reasons.

The committee's recommendation for reform

The committee decided that mandating this insurance coverage for owners would be a useful way to shore up its broader reforms for insurance deductibles and to provide needed protection for strata-lot owners and strata corporations alike. The committee was concerned about the problem of enforcing such a requirement. In its view, the best way to ensure compliance is to make the requirement a part of the standard bylaws for strata corporations. This approach might also address some of the concerns about the rigidity of requiring owners to purchase insurance, as it leaves open the prospect that a strata corporation might decide to amend its bylaws and remove the requirement.

While a sizable majority of consultation respondents agreed with the committee, a significant minority of respondents took issue with the committee's proposed reform.

The committee recommends:

6. A new standard bylaw should be added to the Schedule of Standard Bylaws that requires a strata-lot owner to have insurance that covers payment of a deductible under a strata-corporation policy.

Issues for Reform—Named Insureds

The *Strata Property Act* lists the people who are considered to be named insureds in a strata corporation's insurance policy. The primary purpose of the provision containing this list is to extend protection to the strata corporation, strata-lot owners,

tenants, and occupants of a strata lot (the listed named insureds) from being sued by an insurer having a subrogated claim.²⁸⁸

This provision (section 155 of the act) was flagged for consideration in phase one of this project.²⁸⁹ At that time, it was noted that the supreme court's recent decision in the *Economical Mutual* case²⁹⁰ had caused some public anxiety and concern. As a brief discussion of the case reveals, this anxiety didn't relate to the provision's main purpose (articulating the no-subrogation rule) but rather related to a subsidiary issue: the scope of insurance coverage afforded to a named insured.

Economical Mutual involved a lawsuit for damages commenced by "three infant plaintiffs" against the owner of a strata lot "who [was] alleged to be liable for negligence as a social host."²⁹¹ The plaintiffs were injured in a motor-vehicle accident, which occurred after a guest at a party held at the owner's strata lot left the party and "allegedly caused a motor vehicle accident when his vehicle collided with a vehicle" in which the plaintiffs were travelling.²⁹² The lawsuit alleged that the owner was "negligent because he failed to supervise the amount of alcohol [the driver] was served and consumed at the gathering, and he failed to take steps to ensure that upon leaving the gathering [the driver] would not operate a motor vehicle."²⁹³

The owner was insured "under a homeowner's policy issued by Economical."²⁹⁴ In this application, Economical asked for "a declaration that [Aviva, the strata corporation's insurer] is obliged to participate in the defence of claims."²⁹⁵

The court denied Economical's application. As a commentator noted, "the underlying strata corporation policy (which was typical of many strata corporation policy wordings) provided for liability coverage pursuant to a commercial general liability policy

288. See *supra* note 3, s 155. See also, above, at 41–43 (further discussion of section 155 and the no-subrogation rule).

289. See *supra* note 11 at 25.

290. *Economical Mutual Insurance Co v Aviva Insurance Co of Canada*, 2010 BCSC 783 [*Economical Mutual*].

291. *Ibid* at para 1, Pitfield J.

292. *Ibid* at para 2.

293. *Ibid* at para 3.

294. *Ibid* at para 4.

295. *Ibid* at para 1.

written for ‘for profit’ corporations.”²⁹⁶ By its terms, this policy provided coverage as follows: “[i]f you are designated in the Declarations as: a. An individual, you and your spouse are insureds, *but only with respect to the conduct of a business of which you are the sole owner.*”²⁹⁷ This highlighted clause proved to be critical to the outcome of the case. It set the limits of coverage under the insurance policy and, as the court concluded, nothing in section 155 and its list of named insureds could be read as removing the policy’s condition, expanding the limits that this condition placed on insurance coverage, and requiring coverage of the owner as a named insured full stop.²⁹⁸

Even though the result in *Economical Mutual* can be seen as justified, the reasoning that brought the court to that result and the facts of the case appear to have caused some anxiety in the strata sector. This anxiety seems to play into a fear that participants in the strata sector may be underinsured.

Should section 155 of the Strata Property Act be amended?

Brief description of the issue

In view of these concerns stirred up by the *Economical Mutual* case, should section 155 be amended?

Discussion of options for reform

This issue differs from most of the other issues considered in this report. It leads to a much more diffuse and open-ended inquiry.

Economical Mutual—and particularly the reaction to it—could be seen as creating a discussion on the need to clarify section 155. Amendments adding more detail to the law could make it more certain. Greater certainty and detail might help strata corporations in finding appropriate insurance products.

296. *British Columbia Strata Property Practice Manual*, *supra* note 10 at § 15.9.

297. *Economical Mutual*, *supra* note 290 at para 17 [emphasis added].

298. *Ibid* at para 21 (“Compliance with the SPA is something for which the officers and directors of the Strata Corporation are responsible. Their omission to fulfill their duties owed to anyone including [the owner] as one of its members, may give rise to a claim against them. No such claim has been advanced in this case. *To the extent that it is deficient, the contract of insurance cannot be varied or amended to ensure that it complies with the SPA.* The policy provides only the coverage that the insurer has agreed to provide. If the coverage which the Strata Corporation obtained is inadequate, or not in compliance with a requirement imposed by the SPA, that is an issue between the Strata Corporation and Mr. Rattan as an owner and does not impose a duty to defend on Aviva.” [emphasis added].).

That said, there may be some downsides to consider in amending section 155. The section's primary purpose relates to technical rules on subrogation.²⁹⁹ The section appears to be fulfilling this purpose. Further, an argument could be made that *Economical Mutual* primarily raises issues that could be best addressed by education, not law reform.

The committee's recommendation for reform

While the committee was generally wary of proposing legislative reform in response to a single court decision, it decided that *Economical Mutual* raises several concrete issues that help to bring reform into focus. It is troubling to see a strata corporation with an insurance policy that appeared on its face to be ill-suited to the nature of a strata corporation. The committee was interested in canvassing the public for its views on this concern and on the section generally.

The committee itself decided that legislative reform shouldn't be pursued in response to *Economical Mutual*. In the committee's view, the case raises issues that primarily call for an educational or an underwriting response. The committee was also concerned that amending section 155 in response to *Economical Mutual* could unsettle the understanding of what the strata corporation's liability insurance was intended to cover.

The majority of consultation respondents favoured the committee's proposal on this issue. But a minority disagreed, saying that they were open to legislative reforms in response to *Economical Mutual*.

The committee recommends:

7. Section 155 of the Strata Property Act should not be amended.

Issues for Reform—Reporting and Administration

There are a number of provisions in the act that support the insurance mandate and that deal with communication of information on insurance from the strata corporation to strata-lot owners. This section of the report examines proposals to fine-tune these reporting and administration provisions.

299. See, above, at 42–43.

Should the Strata Property Act require strata corporations to obtain an appraisal for the purpose of determining adequacy of property-insurance coverage?

Brief description of the issue

By requiring property insurance on full-replacement-value basis, the *Strata Property Act* effectively calls for strata corporations to do an appraisal of the property in order to determine the appropriate level of coverage. But the act doesn't go the further step of making it an actual requirement. Even though the vast majority of strata corporations do obtain appraisals, some do not, which leaves them potentially exposed to being undercovered. Would creating a legislative requirement to obtain an appraisal help to reduce this danger?

Discussion of options for reform

This issue presents a straightforward, yes-or-no pair of options.

The advantage of a legislative requirement is that it can drive home the point that an appraisal is necessary. Even if most strata corporations have already absorbed this point, it's important to recall that British Columbia has a striking diversity of strata corporations. It isn't difficult to imagine self-managed strata corporations that have failed to grasp the necessity of obtaining an appraisal. The proposal would set a clear minimum standard under the law.

The other option is to retain the status quo. Under the current law, most strata corporations simply go ahead and obtain an appraisal, without being required to do so. Among those that do not may be strata corporations that have taken the measure of the risks and decided not to proceed with an appraisal. A legislative requirement would rob these strata corporations of some flexibility in decision-making. In addition, enforcement of this legislative requirement would be difficult.

The committee's recommendation for reform

The committee favours establishing a legislative requirement to obtain an appraisal. It would set a clear minimum standard and help to protect strata corporations against the danger of being underinsured. A solid majority of consultation respondents favoured this proposal.

The committee recommends:

8. Section 149 (4) (a) of the Strata Property Act should be amended by adding the words “as determined by the most recent appraisal” after “full replacement value.”

How frequently should an appraisal for the purpose of determining adequacy of property-insurance coverage be required to be carried out?

Brief description of the issue

This issue builds upon the previous one. If a strata corporation is required to obtain an appraisal, then should the law give guidance on how frequently an appraisal must be carried out?

Discussion of options for reform

This issue is rather open ended. At a basic level, each strata corporation should assess its own need for an appraisal, since the strata corporation's particular circumstances will be the best guide. A strata corporation that, for example, recently completed major upgrades should obtain a fresh appraisal.

That said, giving guidance on the frequency of appraisals would support the legislative requirement to obtain one. Even though some level of arbitrariness would be involved in establishing a precise number, it would help to make the legislative requirement clearer.

The committee's recommendation for reform

The committee considered numbers in the range of one to five years. Ultimately, it settled on three years as an acceptable minimum standard. The committee noted that this period would match the period generally applicable to depreciation reports.³⁰⁰

In the committee's view, the provision setting out the period for renewing appraisals should be located in the regulation. The process of amending regulations is simpler than the process for amending legislation. It may be necessary to draw on this process, to ensure that this provision remains in sync with developments in the property and insurance markets.

300. See *Strata Property Act*, *supra* note 3, s 94 (2); *Strata Property Regulation*, *supra* note 4, s 6.2 (7).

While the majority of consultation respondents favoured the committee's approach, a significant minority did want to adopt a longer period in the regulation.

The committee recommends:

9. The frequency of appraisals should be determined by regulation. The regulation should initially set this frequency at a minimum of three years.

Should the Strata Property Act require a strata corporation to inform the owners and tenants as soon as feasible of any material change in insurance coverage?

Brief description of the issue

The *Strata Property Act* requires the strata corporation to “report on the insurance coverage at each annual general meeting.”³⁰¹ Some Canadian provinces go even further in requiring strata corporations to inform owners about insurance issues.

In Ontario's strata-property review the authors recommended adding requirements to Ontario's legislation for “prompt notification of owners” of any increase in an insurance policy's deductible and if “the board cannot obtain directors and officers liability, errors and omissions insurance.”³⁰² Ontario recently amended its legislation to implement this recommendation.³⁰³

Should British Columbia follow Ontario's lead and require the strata corporation to give notice of material changes in insurance coverage?

Discussion of options for reform

The main advantage of this proposed reform is that it would support one of the key features of insurance legislation for strata corporations: its coordinating function for strata corporations, strata-lot owners, and other potential actors in the insurance field. While the existing law calls for a report on insurance at the annual general meeting, there may be material changes between meetings. This opens up the possibility for gaps in coverage to appear. Increasing the flow of information from the strata corporation to others should reduce this risk.

301. *Ibid*, s 154 (b).

302. Ontario Stage Two Report, *supra* note 251 at 23.

303. See *Condominium Act, 1998*, *supra* note 32, s 105.1 (added to the legislation by *Protecting Condominium Owners Act, 2015*, *supra* note 32, Schedule 1, s 92).

The downside of this proposal is that it does create an additional administrative burden for strata corporations.

The committee's recommendation for reform

The committee favoured requiring strata corporations to inform owners and tenants of material changes in insurance coverage, promptly after the change occurs. In its view, such a provision will help to reduce gaps in insurance coverage. The committee decided that tenants should be included in the provision because they are, by virtue of the act, named insureds on the strata corporation's insurance.³⁰⁴

The vast majority of consultation respondents agreed with the committee on this issue.

The committee recommends:

10. Section 154 of the Strata Property Act should be amended to require a strata corporation to inform the owners and tenants as soon as feasible of any material change in insurance coverage, including an increase in any deductible.

Issue for Reform—The Standard Unit

Brief description of the issue

Defining the scope of the strata corporation's property-insurance obligations vis-à-vis those of a strata-lot owner is a signal issue for legislation on insurance in strata properties. There have been concerns raised about whether British Columbia's approach in section 149 of the *Strata Property Act*—coupled with the legislative definition of *fixtures* in the regulation—is clear enough to dispel uncertainties and potential legal issues.³⁰⁵

Other provinces have addressed these concerns by adopting an approach based on a standard unit (strata lot).³⁰⁶ This approach attempts to describe, in some detail, the

304. See *supra* note 3, s 155 (b).

305. See Dix, *supra* note 158 at 4.

306. See Saskatchewan: *The Condominium Property Act, 1993*, *supra* note 32, ss 47 (1) (k.1), 65 (3); *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2, s 11.1; Manitoba: *The Condominium Act*, *supra* note 32, s 182 (6); Ontario: *Condominium Act, 1998*, *supra* note 32, ss 43 (5) (h) and 56 (1) (h); 99 (6) (repealed by *Protecting Condominium Owners Act, 2015*, *supra* note 32, s 89—not in force); Nova Scotia: *Condominium Act*, *supra* note 32, s 11 (2) (2A); *Condominium*

baseline features of a strata lot which would be covered by the strata corporation's insurance.

Moving to a standard-unit approach would be a significant change for British Columbia law at the level of language and concept. But it could also represent a major substantive change in the law as well. While there are many ways to implement the standard-unit concept, the one most commonly used sees the strata corporation being responsible for insuring a bare shell of a strata lot. This would significantly alter the division between strata-corporation insurance and owners' insurance that is currently in place in British Columbia.

In view of the conceptual and substantive changes that would be wrought by adopting the standard-unit concept, the committee was reluctant to take a position on this approach before consulting with the public. So in the *Consultation Paper on Insurance Issues for Stratas* it framed this issue as a question for discussion. This approach meant that the issue was presented without a tentative recommendation from the committee and was left as a rather open-ended question. As a means to stimulate responses from the public, the committee obtained a detailed submission on the standard-unit concept from the Insurance Bureau of Canada, which was reproduced in the consultation paper. This submission is a good introduction to the standard-unit concept, so it has also been reproduced in the pages of this report that follow.

IBC commentary

IBC recommendation for standard definition of strata lot in law

A standard definition of residential strata lot will result in consistency across British Columbia concerning responsibility to repair and maintain, and to confirm the insurance requirements for strata lot owners and the strata corporation.

Section 149 of the *Strata Property Act* requires strata corporations to secure property insurance for common property, common assets, buildings shown on the strata plan, and original "fixtures" installed by the developer as part of the original construction on the strata plan. "Fixtures" are defined in section 9.1 of the *Strata Property Regulation*:

Regulations, NS Reg 60/71, s 54 (1A); Newfoundland and Labrador: *Condominium Act, 2009*, *supra* note 32, s 56 (4)–(5). In December 2018, the Government of Alberta announced that it would be implementing the standard-unit concept. See proposed amendments to the *Condominium Property Regulation*, *supra* note 32, ss 20.2 (1) (s) and (2), 60.1 (c), 61.1, 61.2, 62.1, 62.2 (in force 1 January 2020).

Definitions for section 149 of the Act

- 9.1** (1) For the purposes of section 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, micro-waves, washers, dryers or other items.³⁰⁷

The definition is intended to clarify who (the strata corporation or the owner) is responsible for insuring the fixtures installed at the time of the original construction. Issues emerge when strata lot owners replace original fixtures with upgraded fixtures (considered “improvements” in other jurisdictions). Some have interpreted section 149 of the Act and section 9.1 of the Regulations as obliging a strata corporation to maintain insurance on all original fixtures installed by the developer, while the strata lot owner would insure any improvements or upgraded fixtures.

The current situation makes insurance claims difficult to process, as there may be a misunderstanding among insureds about which policy applies for which part of the loss in cases where original fixtures are replaced, altered or upgraded. This can lead to drawn-out disputes between corporations, owners, and insurance providers.

Defining the standard strata lot as being a bare shell (the bare floors, ceilings and unfinished interior walls³⁰⁸ of the strata lot) is the most straightforward approach to clarify and confirm the insurance requirements for owners and strata corporations. All strata lot units in a structure would then be finished to the same construction standards, ensuring consistency in the construction quality of the standard strata lots. All additional finishes inside the strata lot not covered in the standard definition would then be considered “improvements.” Strata unit owners would have full control over the improvements inside the unit, such as paint colours, cabinets, floor coverings/finishes, appliances and lighting fixtures.

The change described above would eliminate the current confusion over whose insurance responds (the corporation’s or the owner’s) when a claim arises in a situation where owners have made upgrades to their fixtures. It would clarify that the unit owner would be responsible for repairs following damage to the improvements, and the strata corporation would be responsible for repairs following damage to the strata lots and common property.

307. *Supra* note 4, s 9.1 (1).

308. The bare walls would consist of the unfinished interior walls of the standard unit, such as unpainted drywall.

This change would require amendments to the sections of the legislation concerning the corporation's insurance requirements and the regulation concerning fixtures.

IBC and its members do not foresee significant changes to the owner policies in the event the government standardizes the definition of a "strata lot" consistent with that described above.

Standard definition of strata lot in bylaws

IBC does not recommend allowing for the standard definition to be defined by the strata corporation's bylaws That would put a technical onus on strata corporation board members to draft bylaws on what constitutes a standard definition of a strata lot, which has implications for the financial responsibilities of all parties in the corporation. It is unfair to consumers to delegate the power of determining financial responsibility to board members who may lack sufficient expertise in drafting such technical rules.

Allowing the standard definition to be defined by the strata corporation's bylaws would also result in inconsistency from one corporation to another, which would create confusion for corporations and owners about their respective financial responsibilities. The absence of a clear definition in legislation or regulation leaves owners vulnerable to the discretion of their strata corporation, which may assign to strata lot owners the responsibility for repairs that would otherwise be considered common property, if standardized.

Further, inconsistency in such rules creates confusion for owners with respect to their insurance needs. When owners are unsure about their responsibilities, the likelihood of overlapping insurance coverages, under insurance, or the complete lack of insurance, are greatly increased. Generally, purchasing a strata lot represents a tremendous investment for consumers, and insurance helps protect that investment. Defining a standard strata lot in law makes it easier for owners to understand their responsibilities and assess their insurance needs. Consistent and clear rules would also allow government and strata corporations to focus their resources on educating consumers on the financial risks they face as owners, and ways they can manage those risks.

Rather than delegating this power to a strata corporation's board, IBC encourages the government to establish immutable rules on what constitutes a standard strata lot so that there is a clear delegation of financial responsibility, which will better protect consumer investments.

The committee's recommendation for reform

The committee has wrestled with this issue since before the publication of the consultation paper that preceded this report. After the closing of that consultation paper's consultation period, there were two more developments relating to the standard-unit concept that the committee had to consider.

First, there were the results from the committee's question for discussion. These results showed strong support for the concept, with essentially a five-to-one majority indicating that they favoured British Columbia adopting the standard unit. Comments from many respondents showed that there was considerable enthusiasm in some quarters for this concept. In sum, it was seen as a way to improve a difficult area of the law.

Second, in December 2018, Alberta announced that it had reached a milestone in its unfolding reform process by publishing proposed regulations to support legislative amendments that it had passed in 2014.³⁰⁹ Among these proposed regulations was a version of the standard-unit concept that went far beyond any other jurisdiction in Canada in terms of detail and sophistication.³¹⁰

While Alberta's announcement came very late in this project's review of insurance issues (it appeared as the committee was reviewing a draft of this final report), the committee was able to give the proposed regulations an initial consideration. The committee was intrigued by what it read. The proposed regulations appear to hold out the prospect of making considerable progress on some of the most vexing issues in strata-property law.

That said, Alberta's proposed regulations also drive home just what level of detail and sophistication would likely be called for to implement the standard-unit concept in British Columbia. Adopting this approach would be a major change in this area of the law, so the committee was wary of leaping into it. Adapting solutions developed elsewhere is something that should only be done after careful study. British Columbia's strata-property sector is larger and more diverse than sectors found in other provinces. In addition, the *Strata Property Act* has provisions that lack equivalents in the legislation of other provinces. Both of these areas would have to be managed carefully in implementing the standard-unit concept.

309. See Alberta News Release, *supra* note 32.

310. See proposed amendments to the *Condominium Property Regulation*, *supra* note 32 (adding new ss 20.2 (1) (s) and (2), 60.1 (c), 61.1, 61.2, 62.1, 62.2—in force 1 January 2020).

In the end, the committee decided further study and consultation is warranted. Given the late stage of this project, the committee isn't in a position to carry on with this work. And given the scale of the work required, the provincial government is the logical organization to take over this task.

Finally, the committee notes that Alberta's regulations are slated to come into force in 2020. A watchful eye should be kept on how these reforms unfold in that province.

The committee recommends:

11. The government of British Columbia should undertake further study of and consultations on adopting the standard-unit concept.

Chapter 5. Draft Legislation and Regulations

Draft legislation

Strata Property (Insurance Issues) Amendment Act, 2019

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

- 1** *Section 149 (4) (a) of the Strata Property Act, S.B.C. 1998, c. 42, is amended by adding the words “as determined by the most recent appraisal” after “full replacement value.”*

recommendation no. (8)

Comment: The committee recommended this amendment to section 149 of the act in order to set a clear minimum standard in the legislation. This standard is grounded in what is occurring in practice. Most strata corporations obtain appraisals to ensure that their mandated property insurance is “on the basis of full replacement value,” as section 149 (4) (a) currently directs. But the committee understands that a significant number of strata corporations are failing to obtain appraisals. This failure puts those strata corporations at risk of being underinsured. By making an appraisal a legislative requirement, this draft provision will reduce that risk.

- 2** *The following section is added to Part 9:*

Appraisal

- 149.1** (1) A strata corporation must obtain, on or before the following dates, an appraisal of the property that must be insured under section 149:
- (a) for the first time,
 - (i) the date that is within 6 months of the date of deposit of the strata plan in a land title office, or
 - (ii) the prescribed date, in all other cases;
 - (b) if the strata corporation has, before or after the coming into force of this section, obtained an appraisal, the date that is the prescribed period after the date on which that appraisal was obtained.

- (2) An appraisal under subsection (1) must be carried out by a person who is qualified and insured as an appraiser in British Columbia.

recommendation nos. (8), (9)

Comment: This draft provision is meant to work hand-in-hand with the previous draft provision. That earlier provision established the legislative requirement to obtain an appraisal; this provision deals with one of the practical questions that will face strata corporations as they comply with that legislative requirement. The draft provision is meant to answer this question: How often must a strata corporation obtain an appraisal in order to remain in compliance with the legislation? The simple answer to that question is “every three years.” Getting to that answer in the way that the committee wants to implement it is a rather more complex undertaking. The committee favours setting out the applicable three-year period in a regulation. (This is done, below, in a draft provision that the committee recommends adding to the *Strata Property Regulation* as section 9.11 (3).) The process of amending regulations is more straightforward and less time-consuming than the process of amending legislation. This is a particular advantage for provisions containing time periods, as changing circumstances in the future might call for a simple change to the time period. For this reason, it’s very common to find time periods in regulations and less common to find them in legislation. But a regulation must be enabled by a legislative provision. This draft section along with draft section 6 (b), below, accomplish that task. This draft section creates the legislative framework for obtaining an appraisal. It is drafted to encompass the full range of strata corporations in existence now and into the future and to put them on the same footing. The draft section is modelled on an existing provision that creates a legislative requirement to obtain a depreciation report (see *Strata Property Act*, section 94). Like that provision, this draft provision sets out the minimum standard, which is to require an appraisal every three years. There is nothing in the draft provision that would prevent a strata corporation from obtaining more-frequent appraisals.

3 *Section 151 is amended*

- (a) by renumbering the section as section 151 (1) and by striking out “may” and substituting “must”, and*
(b) by adding the following subsection:

- (2) The insurance must be of at least the amount required in the regulations.

recommendation nos. (1), (2)

Comment: This draft provision implements the committee’s recommendation requiring strata corporations to obtain directors-and-officers insurance. Section 151 of the act en-

ables strata corporations to obtain this insurance. Paragraph (a) of the draft amendment simply changes that existing provision from one with a permissive verb (*may*) to one with a mandatory verb (*must*). Paragraph (b) deals with the minimum amount of coverage, which the committee recommended should be \$2 000 000. The committee recommended that the actual amount be stated in the regulations (see, below, draft regulations, which propose adding a new section 9.21 to the *Strata Property Regulation*). Stating the figure in a regulation would be consistent with the law's approach for other types of mandatory insurance. This draft provision, along with draft section 6 (a), below, enable the adoption of a regulation.

4 *Section 158 (2) is repealed and the following substituted:*

- (2) Subsection (1) does not limit the capacity of the strata corporation to decide to charge back to an owner, if the owner is responsible for the loss or damage that gave rise to an insurance claim, the lesser of the following amounts:
 - (a) the cost of repairing the loss or damage;
 - (b) the deductible limit of the insurance claim.

recommendation no. (5)

Comment: This draft provision is intended to replace the current section 158 (2) of the act, which provides that the characterization of an insurance deductible as a common expense in 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.” In place of an authorization to “sue” an owner, this draft provision will authorize a strata corporation to charge back to a responsible owner the lesser of the deductible amount or the cost of repairing the loss or damage. This change is intended to clarify and simplify the law, which has become enmeshed in litigation and obscured by the proliferation of strata-corporation bylaws that purport to supplement the current section 158 (2) by setting out distinct standards of liability in these cases.

5 *Section 154 is amended*

- (a) in paragraph (a) by striking out “and”,*
- (b) in paragraph (b) by striking out “meeting.” and substituting “meeting, and”, and*
- (c) by adding the following paragraph:*
 - (c) inform the owners and tenants as soon as feasible of any material change in insurance coverage, including an increase in any deductible.

recommendation no. (10)

Comment: This draft provision amends the act's provision on review and reporting on insurance coverage. Section 154 of the act already requires a strata corporation to review the adequacy of its insurance coverage each year and to report on that coverage at each annual general meeting. To those two requirements this draft provision adds a third: a requirement to promptly inform owners and tenants of material changes in insurance coverage. This draft provision is modelled on a similar provision in Ontario's legislation.

6 Section 292 is amended

(a) in paragraph (2) (q) by adding "and the minimum amount of errors and omission insurance under section 151" **after** "section 150" **and by striking out** "and the payment of an insurance deductible referred to in section 158"; **and**

(b) in subsection (3) by adding the following paragraph:

(c.1) prescribing a period for the purposes of section 149.1 (a) or (b); .

recommendation nos. (2), (9)

Comment: This draft provision amends section 292 of the *Strata Property Act*, which lists the subjects on which the act enables the power to make regulations. The draft provision adds two new subjects to the list, to enable the implementation of two committee recommendations. These recommendations concern setting out the minimum amount of directors-and-officers insurance and the frequency of obtaining appraisals. Draft regulations setting the minimum amount at \$2 000 000 and the prescribed period at 3 years are found, below, as proposed new sections 9.11 and 9.21 of the *Strata Property Regulation*. The draft provision also removes the authorization to make regulations regarding "the payment of an insurance deductible referred to in section 158." This regulation-making power has never been used. It is removed because it is inconsistent with the proposed amendments to section 158.

7 The Schedule of Standard Bylaws is amended by adding the following section:

Insurance

7.1 An owner must obtain and maintain insurance against liability for payment of the deductible limit of the strata corporation's property insurance policy.

recommendation no. (6)

Comment: This draft provision adds a new section to the standard bylaws, which is intended to appear among the other duties of owners, tenants, occupants, and visitors. The new bylaw would create a requirement on strata-lot owners to obtain and maintain insurance against liability for payment of an insurance deductible. This requirement is intended to respond to a problem that could arise in the wake of the committee's proposal to clarify the law on responsibility for insurance deductibles (see, above, draft legislation, section 4). Many strata corporations have seen their deductibles, particularly for damage caused by water ingress, rise significantly. An owner who isn't adequately insured against this risk could face a crippling liability. Requiring the owner to be insured reduces the risk. But the problem with such a requirement is enforcement. While there is no complete answer to this enforcement problem, in the committee's view making such insurance coverage the subject of a standard bylaw holds out the best hope of counteracting the problem.

Commencement

- 8** This Act comes into force by regulation of the Lieutenant Governor in Council.

recommendation no. n/a

Comment: This is a standard provision found in British Columbia legislation. It gives the cabinet (formally designated as the "Lieutenant Governor in Council") the power to control the timing of when the legislation comes into force. A transitional period would help to ensure that people in the strata sector are prepared for the changes that this legislation will bring.

Draft regulations

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the Strata Property Regulation, B.C. Reg. 43/2000, is amended as set out in the attached schedule.

SCHEDULE

1 *Part 9 of the Strata Property Regulation, B.C. Reg. 43/2000, is amended by adding the following sections:*

Appraisals

- 9.11** (1) The date prescribed for the purposes of section 149.1 (a) (ii) of the Act with respect to a strata corporation that is formed after the coming into force of that section, is the date that is 3 years after the date on which the section comes into force.
- (2) For the purposes of section 149.1 (b) the prescribed period is 3 years.

recommendation no. (8)

Comment: This draft regulation sets the frequency of appraisals required under the committee's draft section 149.1, above. It sets out a requirement to obtain an appraisal at least once every three years. This requirement is set out in the regulation because regulations are simpler to amend. This quality makes it simpler to adjust the requirement if future circumstances were to favour a longer or shorter period.

Minimum errors and omissions insurance

- 9.21** For the purposes of section 151 of the Act, the strata corporation must obtain and maintain errors and omissions insurance for a minimum amount of \$2 000 000.

recommendation no. (2)

Comment: This draft regulation is intended to set the minimum level of directors-and-officers insurance. It's meant to work hand-in-hand with provisions in the draft legislation setting a requirement for strata corporations to obtain directors-and-officers insurance (see, above, at draft section 3 (a)) and enabling a regulation to set the minimum amount (see, above, at draft sections 3 (b) and 6).

Chapter 6. Conclusion

Insurance is a key concern for strata corporations, strata-lot owners, and others. The insurance provisions in the *Strata Property Act* are a valuable and important part of that act.

This report has recommended improvements to those insurance provisions. While the report doesn't recommend fundamentally changing the model used to govern insurance and strata properties, it does recommend fine-tuning the operation of that model. The committee believes that taking up its proposed reforms to the *Strata Property Act* and the *Strata Property Regulation* would benefit all participants in the strata-property sector.

APPENDIX A

List of Recommendations

The insurance mandate

1. *The Strata Property Act should require a strata corporation to obtain directors-and-officers insurance. (54–57)*
2. *For the purposes of section 151 of the Strata Property Act, the strata corporation must obtain and maintain directors-and-officers insurance for a minimum amount of \$2 000 000. (57)*
3. *The definition of “major perils” in the Strata Property Regulation should not be amended to include earthquakes. (58–60)*
4. *The definition of “major perils” in the Strata Property Regulation should not be amended to include overland flooding. (60–61)*

Insurance deductibles

5. *Section 158 of the Strata Property Act should be amended to allow a strata corporation to decide to charge back to an owner, if the owner is responsible for the loss or damage that gave rise to the claim, the lesser of the following amounts: (a) the cost of repairing the loss or damage; (b) the deductible limit of the insurance claim. (64–67)*
6. *A new standard bylaw should be added to the Schedule of Standard Bylaws that requires a strata-lot owner to have insurance that covers payment of a deductible under a strata-corporation policy. (68–69)*

Named insureds

7. *Section 155 of the Strata Property Act should not be amended. (71–72)*

Reporting and administration

8. *Section 149 (4) (a) of the Strata Property Act should be amended by adding the words “as determined by the most recent appraisal” after “full replacement value.” (73–74)*

9. *The frequency of appraisals should be determined by regulation. The regulation should initially set this frequency at a minimum of three years. (74–75)*

10. *Section 154 of the Strata Property Act should be amended to require a strata corporation to inform the owners and tenants as soon as feasible of any material change in insurance coverage, including an increase in any deductible. (75–76)*

The standard unit

11. *The government of British Columbia should undertake further study of and consultations on adopting the standard-unit concept. (76–81)*

APPENDIX B

Biographies of Project-Committee Members

Patrick Williams is a partner of the Vancouver law firm Clark Wilson LLP and a member of the firm's Strata Property Group. He is also a member of the Alternative Dispute Resolution Practice Group. Patrick's practice focuses on assisting strata corporations, developers, and strata-lot owners with dispute resolution. He is an experienced and qualified arbitrator and mediator who has managed numerous strata-property, real-estate, and construction disputes.

Patrick has written and published many articles on issues impacting the strata-property industry, including construction-related problems experienced by owners, property managers, and developers. He is a regular contributor to industry periodicals and regularly delivers presentations and seminars to industry groups, strata corporations, and property managers. He has also published articles regarding the use and benefit of arbitration and mediation as an alternative to court and is a frequent guest instructor for the mediation component of the Professional Legal Training Course required to be taken by all articulated students in British Columbia.

Patrick received his dispute resolution training through the Continuing Legal Education Society of British Columbia and the British Columbia Arbitration and Mediation Institute. He obtained his Bachelor of Commerce degree in 1973 and his Bachelor of Laws degree in 1974, from the University of British Columbia.

Veronica Barlee (committee member July 2014–present) is a senior policy advisor with the provincial government's Office of Housing and Construction Standards. For the past seven years, Veronica has worked on strata legislation, regulations, policies, and issues. Strata housing is a vital economic driver and a key housing choice in British Columbia, providing almost 25% of the province's housing stock. Veronica's professional background includes extensive policy-development and management experience in the private, public, and not-for-profit sectors, including small business, fundraising, forest-fire fighting, and community services. Her MBA from the University of Alberta is augmented by ongoing professional development in policy development, stakeholder consultation, public engagement, and information management.

Larry Buttress (committee member October 2013–June 2016) was first licensed under the *Real Estate Act* in British Columbia in 1980. Working for his family's small, independent real-estate company, he sold residential and multi-family real estate, assisted in the company's property-management portfolio, and achieved his agent's qualifications in 1982. That same year he began working with the Real Estate Board of Greater Vancouver as the manager of its Multiple Listing Service. In 1986, he earned his Diploma in Urban Land Economics and became a member of the Real Estate Institute of British Columbia and the Real Estate Institute of Canada. In 1988, he was appointed as REBGV's executive officer, a position he held until 1995. In 1995, he joined JCI Technologies Inc. as director of real-estate services. He successfully negotiated that company's preferred supplier agreement with the Canadian Real Estate Association that led to the development of mls.ca, now REALTOR.ca, the largest and most frequently visited real-estate website in Canada.

Larry joined staff at the Real Estate Council of British Columbia in 1998 as its manager, industry practice. He has been an active participant in the Canadian Regulators Group as chair of its Internet Advertising Guidelines Task Force, chair of its Electronic Transactions Task Force, and vice-chair of its Agency Task Force. In 2003–04, Larry also served as the district vice-president of the Canadian District of ARELLO, the Association of Real Estate Licence Law Officials. Larry recently retired as the deputy executive officer of the Real Estate Council of British Columbia.

J. Garth Cambrey has over 28 years of experience in the property-management industry in British Columbia. Garth currently sits on the Real Estate Council of British Columbia, was the founding director and past vice-president of Strata Property Agents of BC and was a past director and vice-president of the Professional Association of Managing Agents (PAMA). He is an active member of the Real Estate Institute of British Columbia and is involved with various industry associations and committees. Garth has been appointed by the Supreme Court of British Columbia as an administrator under the *Strata Property Act* on 17 occasions and holds a Chartered Arbitrator designation with the ADR Institute of Canada, acting as an arbitrator in strata disputes. Garth is also involved in various advisory groups with the British Columbia government, providing support and advice with respect to provincial legislation, including the *Civil Resolutions Tribunal Act*.

Tony Gioventu is the executive director of the Condominium Home Owners Association of British Columbia (CHOA), a consumer association in British Columbia with over 200 000 members comprising strata corporations, owners, and business members who serve the strata industry. Tony is the weekly Condo Smarts columnist for *The Province*, *The Times Colonist*, and *24 Hours Vancouver*. Since 2002, Tony has written over 1000 columns and information bulletins dedicated to strata living and

is the co-author of *A Practical Guide to Bylaws: The Strata Property Act*, and *Understanding Governance: Strata Rules of order and procedures in British Columbia*. Tony has served as a director/committee member for the Homeowner Protection Office, BC Building Envelope Council, Canadian Standards Association, the Real Estate Council of British Columbia, and continues to play an active role in research and development of building standards, legislation for strata corporations, and consumer protection.

With offices in New Westminster, Victoria, and Kelowna, CHOA provides service to its members throughout the province, promoting an understanding of strata living, and the interests of strata-property owners. On average the association fields 300 inquiries a day from owners, strata-council members, managers and agents, and delivers over 100 seminars annually on a variety of strata-related topics including governance, operations, and administration.

Ian Holt (committee member October 2016–April 2017) started his career in real-estate sales in 1993. He is currently a real-estate agent with Re/Max Real Estate Services in Vancouver. Ian specializes and has sold many strata properties throughout his career. Ian is a member of the Real Estate Board of Greater Vancouver and the Canadian Real Estate Association and is licensed with the Real Estate Council of British Columbia. Ian has been an MLS Medallion Club member for 19 years with the Real Estate Board of Greater Vancouver. From 2006 to 2008, Ian was a Vancouver Westside Division board member of the Real Estate Board of Greater Vancouver. From 2008 to the present, Ian has been an active member of the Government Relations Committee at the Real Estate Board of Greater Vancouver.

Tim Jowett started with the Vancouver land title office in 1988 and has progressed through the years from an examiner of title into his current position of senior manager, E-business and deputy registrar with the New Westminster land title office at the Land Title and Survey Authority of British Columbia.

Tim currently oversees the E-business team, a group of specialist examiners who are responsible for the published practices, statutory procedures and functionality related to the electronic filing system. The team's work involves various enhancements, changes, and updates to the systems and processes that are being done in an effort to support the needs of stakeholders.

His role also entails answering questions from a variety of stakeholders, primarily lawyers, notaries, land surveyors, and employees with local governments. Tim has presented and is a key participant at various meetings and conferences on land-title issues with these stakeholders.

Alex Longson (committee member July 2016–present) started his career in real estate in 2005, shortly after emigrating from the United Kingdom, where he had 20 years' experience in the automotive-engineering industry working as a test engineer for Ford Motor Company. He became licensed for strata management in 2006 with a brokerage in the Okanagan, and subsequently became licensed for rental management and as a managing broker in 2009. In 2012, he joined the staff of the Real Estate Council of British Columbia and in his role as senior compliance officer he investigates complaints, advises and educates licensees on the requirements of the legislation, and supports the real estate council's Strata Management Advisory Group. He has also been a guest speaker to the Strata Property Agents of British Columbia and the British Columbia Real Estate Association, and is currently a resource to the Real Estate Council of Alberta for the Condominium Managers Implementation Advisory Committee.

Judith Matheson (committee member October 2013–October 2016) started her career in real estate in 1980. She is currently a real-estate agent with Coldwell Banker Premier Realty. Judith has sold thousands of strata properties as resales, as well as having worked for many of the top strata developers in British Columbia. She is ranked in the top seven percent of realtors worldwide with Coldwell Banker, and is a Coldwell Banker Premier Realty Top Producer.

Judith is a member of the Real Estate Board of Greater Vancouver and the Canadian Real Estate Association, and is licensed with the Real Estate Council of British Columbia. She is an MLS Medallion Club Member, Real Estate Board of Greater Vancouver Quarter Century Club Member, and an Affiliate Member of LuxuryHomes.com. Judith has been awarded the Coldwell Banker Ultimate Service Award, the Coldwell Banker Presidents Circle, the Coldwell Banker Diamond Society, the Coldwell Banker Sterling Society, and the Coldwell Banker Top 50 in Western Canada.

Elaine McCormack is a founding member of the law firm Wilson McCormack Law Group. For over 20 years she has assisted strata corporations, individual owners, and management companies in the governance and dispute-resolution processes of strata life. She prepares bylaws and privacy policies, resolutions, and contracts. She has also represented clients in court and in human-rights matters.

Elaine is actively involved in educating members of the strata community. She frequently designs and delivers seminars for the Professional Association of Managing Agents and presently serves on the education committee of PAMA. She has written and delivered the latest full-day course entitled "Real Estate E & O Insurance Legal Update for Strata Managers" used for the Relicensing Education Program for strata

managers. She also frequently delivers seminars for the Condominium Home Owners' Association of British Columbia and has written many articles for the CHOA News. She is a past director of the British Columbia Arbitration and Mediation Institute (BCAMI) and currently sits on the accreditation committee of BCAMI for the QArb designation.

As a Charter Arbitrator, Elaine frequently adjudicates disputes and uses this experience in turn when advocating for clients before fellow arbitrators. She is a member of the MediateBC Civil Roster and has received mediation training through the British Columbia Justice Institute, the Continuing Legal Education Society of British Columbia, and MediateBC. Elaine has also been counsel in several seminal Supreme Court of British Columbia decisions involving such diverse strata issues as the enforcement and validity of age bylaws and rental bylaws, the transitional provisions between the *Condominium Act* and the *Strata Property Act* with respect to allocation of repair costs, and claiming damages for improperly calculated strata fees.

Elaine's degrees and designations include a BA with a major in English, minor in Law and the Liberal Arts from the University of Calgary in 1988, an LLB from the University of British Columbia, and a CARb designation from the ADR Institute of Canada Inc. in 1998.

Susan Mercer (committee member September 2016–present) started her career as a notary public in 1986 in Sidney, BC. During her years of practice, she specialized in real-estate transactions, which included many strata properties. As a result, she is very aware of various issues faced by strata-property owners, as well as by strata-property managers. She has also been involved in strata-property development.

Susan has served various community and professional boards and foundations. She also served on the BCLI Real Property Reform Project Committee from 2008–12.

In 1986, Susan received her certification as a notary public from the University of British Columbia. At that time, she became the first recipient of the annual Bernard Hoeter Award for highest marks achieved on the BC Notary statutory exams. She is also a graduate of the UBC Urban Land Economics Diploma Program (2002), receiving two bursaries recognizing her excellent marks upon completion of the program.

Doug Page (committee member October 2013–July 2014) is the manager of housing policy in the British Columbia government's Office of Housing and Construction Standards and is a former condo owner. British Columbia's strata legislation and regulations are now one of his main responsibilities. He has worked for 25 years in various aspects of the housing field, including stints with the Urban Institute in

Washington, DC, the US Department of Housing and Urban Development, BC's Treasury Board staff, and with a large private developer and manager of apartment buildings. Doug has a BA from Dartmouth College and an MA in urban geography and a diploma in urban land economics, both from the University of British Columbia. He is a member of the Real Estate Institute of British Columbia.

David Parkin is the assistant city surveyor for the City of Vancouver. He has been working in the land surveying profession for over 30 years in different capacities in Whistler and the Vancouver Lower Mainland. He obtained his Bachelor of Science in Surveying Engineering from the University of Calgary in 1992 and was commissioned as a British Columbia Land Surveyor in 1995. He is a practising member of the Association of British Columbia Land Surveyors.

David was employed by Underhill Geomatics Ltd. for 15 years and worked as a project land surveyor and was responsible for managing and supervising the day-to-day operations and projects of the Vancouver office. His preferred areas of practice while with Underhill's were larger development projects that included the preparation of air-space subdivisions and strata plans.

In his current capacity as the assistant city surveyor, David reviews conventional and air-space subdivision applications, subdivisions of existing strata plans and statutory right of way plans, and agreements related to commercial and residential developments.

Allen Regan is the vice president and managing broker for Bayside Property Services Ltd. He has been with Bayside since April 1999. Bayside provides management services to approximately 145 strata corporations throughout the lower mainland, as well as approximately 40 rental-apartment buildings. In total, Bayside manages about 12 000 strata and rental units. Prior to working at Bayside, Allen held positions in the commercial real-estate field with GWL Realty Advisors as regional director for British Columbia and with O & Y Enterprise as general manager for British Columbia. Allen has a B Comm from the University of British Columbia in urban land economics (1979) and is licensed in British Columbia for trading, rental, and strata management, all as a managing broker. Allen is also on the board of directors of the Strata Property Agents of British Columbia.

Garrett Robinson (committee member April 2017–present) started his career in real-estate sales in 1993. He is currently a realtor with Re/Max Crest Realty Westside in Vancouver. Garrett is a member of the Real Estate Board of Greater Vancouver and the Canadian Real Estate Association and is licensed with the Real Estate Council of British Columbia. Garrett has previously been a subcommittee member of

the 2009 *Strata Property Act* Review that was headed by Adrienne Murray. Garrett has been an MLS Medallion Club member for 18 years with the Real Estate Board of Greater Vancouver. Garrett is a past director (three terms) for the Vancouver Westside Division of the Real Estate Board of Greater Vancouver. Garrett is a strata-property owner and active in day-to-day strata-council activity.

Stan Rule (committee member October 2013–September 2016) is a partner at the Kelowna law firm of Sabey Rule LLP. He has been practicing in Kelowna since shortly after he was called to the bar in 1989. His preferred areas of practice are wills, trusts, estates, and estate litigation.

Stan writes a legal blog entitled “Rule of Law.” He has been a guest speaker at the Trial Lawyers Association of British Columbia, the Canadian Bar Association Okanagan wills and trusts and the Victoria wills and trusts subsections, the Okanagan family law subsection, the Kelowna Estate Planning Society, the Vernon Estate Planning Society, and he has presented papers at eight continuing legal education courses.

Stan is a director of the British Columbia Law Institute. He is the treasurer of the national wills and estates subsection of the Canadian Bar Association. He is a member and former chair of the Okanagan wills and trusts subsection, and a member and a former president of the Kelowna Estate Planning Society. He is also a member of the Society of Trust and Estate Practitioners. He recently participated as a member of the British Columbia Law Institute Project Committee on Recommended Practices for Wills Practitioners Relating to Potential Undue Influence.

Sandy Wagner represents strata owners in many areas of public concern as president of the board of directors of the Vancouver Island Strata Owners Association. VISOA’s mandate is education, empowerment, and assistance for British Columbia strata owners, and has provided front-line service to them for 45 years.

She has been a director of VISOA since 2007 and has led the association as president for the past seven years, during which time it has grown significantly both in membership and in visibility. Sandy currently edits the VISOA Bulletin, a quarterly newsmagazine distributed to nearly 10 000 VISOA members, and leads VISOA’s workshop group, providing educational full-day workshops on strata best practices. She is also part of the Civil Resolution Tribunal staff.

Previously, Sandy was a member of the Civil Resolution Tribunal Working Group (a committee working on procedural matters for the CRT) and a volunteer on the Strata Management Advisory Group (working with the Real Estate Council of British Columbia to provide education and information for strata managers).

Ed Wilson is a partner with the Vancouver law firm Lawson Lundell LLP and has practiced in the real-estate and municipal-law fields, with a specialty in real-estate development, for over 30 years. Ed was a member of the Canadian Bar Association's strata property committee that worked with government in developing the current *Strata Property Act*. Ed has been actively involved with the Continuing Legal Education Society of British Columbia. He has taught more than 15 CLEBC courses, including courses on strata-property law, resort development, real-estate development, and depreciation reports for strata corporations. Ed is also a member of the Urban Development Institute's legal issues committee.

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