BILL 8 AMENDMENTS TO THE *STRATA PROPERTY ACT*

As They Significantly Affect Property Managers

[Section References noted in square brackets refer to Bill 8]

Note: Although Bill 8 has received Royal Assent, the amendments are not yet in force.

1. The requirement that the Provincial Court only has jurisdiction for debt claims not exceeding $25,000 has been significantly changed. With the exception of section 174 (appointing an administrator), an owner or the strata corporation can commence proceedings in the Small Claims division of Provincial Court seeking relief under the Strata Property Act (the "SPA"). This will, in the view of Clark Wilson LLP, have a profound effect on the court adjudication of disputes. We will attempt to address those effects where appropriate in this discourse.

2. [Section 4]: Section 32 of the SPA has been amended to include matters being addressed in a council meeting in which a strata council member *might* have a conflict. The amendment includes the following:

> A council member who has a direct or indirect interest in
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> (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member …

Concerns that arise from this amendment include:

(a) Any unhappy owner can easily go to Provincial Court on any matter in which *they* think a council member may have a conflict.

(b) What does "materially" mean?

(c) "Could" result – not "does" result. This means that the conflict need not be there or even proven, just that there could be such a result.

3. [Section 6]: Section 34.1 has been added to the SPA:

> **34.1** (1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.
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> (2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.
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> (3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing

This section is identical to Standard Bylaw 15, which bylaw has been repealed. In enacting this provision as part of the SPA, the Legislature wanted to prevent a strata corporation changing Standard Bylaw 15 by denying an owner or tenant the right to a hearing before council.

4. [Sections 7 and 8]: Sections 35 (record preparation and preservation) and 36 (access to records) of the SPA have been changed to include audit reports and depreciation reports as records of the Strata Corporation. More on these changes will be addressed by separate paragraph. A significant change that managing agents should be aware of is the ability of a former owner or tenant to access records of the strata corporation that, whenever created, relate to the time they were an owner or tenant. As you can imagine, a council or existing owner will not be happy with the concept that they must pay the cost of an agent monitoring an inspection (or many inspections) by a person who is no longer an owner or tenant. What a draconian way for a former displeased owner to get retribution!

5. [Section 9]: Section 44 of the SPA has been amended to provide that an SGM can be requisitioned by persons holding 20% of the strata corporation's votes, rather than the 25% that presently exists.

6. [Section 12]: The requirements set out in section 59 of the SPA for a Form B Information Certificate have been extended to include identification of which parking stalls and storage lockers, if any, have been allocated to a strata lot. This will require the managing agent to accurately determine which lot has an assigned numbered stall and/or locker and will likely create liability where such a disclosure is incorrect. One wonders whether managing agents in such situations will insist upon the Form B Certificates being signed by two council members. Regular parking stall and storage locker audits will probably have to be done to minimize the possibility of claims arising from incorrect information.

   The Form B must also append the most recent depreciation report, if any.

7. [Sections 13 and 14]: The notice provisions set out in sections 61 and 63 of the SPA are being amended to provided for communication by email. Email will be considered effective service if an owner or tenant has provided an email address for the purpose of receiving notices, records or documents, and a strata corporation will receive notice by email if the strata corporation or a council member has provided an email address. As a result of this amendment, property managers will be entitled to send out documents, such as general meeting notice packages, by email, if an owner has provided an email address.

8. [Section 15]: Section 94 of the SPA is the provision dealing with depreciation reports. The old section 94 has been repealed and in its place the following substituted:

   94 (1) In this section, **"qualified person"** has the meaning set out in the regulations.

   (2) Subject to subsection (3), a strata corporation must obtain from a qualified person, on or before the following dates, a depreciation report estimating the repair and replacement cost for major items in the strata corporation and the expected life of those items:

> (a) for the first time, the date that is 2 years after the coming into force of this section;
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> (b) if the strata corporation has, before or after the coming into force of this section, obtained a depreciation report that complies with the requirements of this section, the date that is the prescribed period after the date on which that report was obtained;
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> (c) if the strata corporation has, under subsection (3) (a), waived the requirement under this subsection to obtain a depreciation report, the date that is the prescribed period after the date on which the resolution waiving the requirement was passed.

(3) A strata corporation need not comply with the requirement under subsection (2) to obtain a depreciation report on or before a certain date if

> (a) the strata corporation, by a resolution passed by a 3/4 vote at an annual or special general meeting within the prescribed period, waives that requirement, or
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> (b) the strata corporation is a member of a prescribed class of strata corporations.

(4) A depreciation report referred to in subsection (2) must contain the information set out in the regulations.

This provision will have a dramatic effect on property managers. Note that, in order to opt out of the report requirement, a 3/4 vote resolution must be passed unless the strata corporation is a member of a prescribed class of strata corporation. The regulations will determine who is a "qualified person". Minister Coleman indicated in Legislature discussion that consultation for the regulations would include engineers, quantity surveyors, architects, and accountants. He did indicate property managers would be consulted but added: "*Somebody who might be a property manager from the standpoint of running meetings and that sort of thing would not necessarily have the expertise and the understanding of depreciation*".

Minister Coleman was asked whether the exempt class of strata corporation would be determined by size of the development. His answer was unequivocally that it would not, and then discussed complexes such as co-ops, although he did not call them that. He did discuss classes, such as bare land strata corporations, when speaking of exemptions from audit requirements, so perhaps that line of reasoning will be adopted for depreciation report exemptions. He spoke of two to five years gaps being considered with respect to the frequency of obtaining these depreciation reports.

9. [Section 16]: Section 103 of the SPA has been amended to require an annual financial audit. This new provision states the following:

(5) The financial statement to be distributed with the proposed budget must be audited by a qualified person in accordance with any standards prescribed for the purposes of this subsection unless

> (a) the strata corporation, by a resolution passed by a 3/4 vote at an annual or special general meeting within the prescribed period, waives the requirement for the financial statement to be audited, or
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> (b) the strata corporation is a member of a prescribed class of strata corporations.

(6) In subsection (5), **"qualified person"** has the meaning set out in the regulations.

This new requirement is going to create headaches. An AGM must be held within two months of the end of a fiscal year. Notice of the AGM requires a minimum of 19 days. Proposed budgets must be circulated with the AGM Notice Package. First, knowing how long it takes to get an audit, it will be virtually impossible to obtain an audit that is current in time for an AGM. Second, if the 3/4 vote resolution opting to not have an audit must be passed at a general meeting within the prescribed period, does that mean such a resolution can only be made with respect to the projected fiscal year? Or must an SGM be held immediately before the delivery of an AGM Notice Package, since that package will not include an audit report?

More headaches and cost can be expected for property managers. Is a "qualified person" a CA or CGA? Minister Coleman stated it would not be expected to be a full-blown audit on an annual basis, however he does expect it to be done by a CA or CGA, at a cost of about $2,000 - $4,000. Minister Coleman stated that the audit was necessary "*to address concerns for strata corporations that accounts aren't being properly kept*".

Minister Coleman stated that the exempt class of strata corporations would be bare land strata corporations and small projects. He commented that "small projects" would be "*duplex ... or four, or whatever*" and that the government would be working with the industry to come up with a number. We think it is safe to assume that a strata corporation being managed by a property manager would likely be large enough that it would not be exempt, and hence a 3/4 vote resolution will be necessary to opt out of the audit requirement. Opting out decisions will likely be based upon a cost vs. benefit analysis, although a 3/4 vote is a significant majority to achieve in order to be able to opt out. The cost of obtaining an audit will also have to include a consideration of extra expense billed by the managing agent to the strata corporation for the time spent by that agent interacting with the certified audit professional.

There are no stated intentions of dictating the frequency with which audits have to be obtained as is the case with depreciation reports (you will recall time gaps were discussed with respect to the depreciation report). The frequency of conducting an audit would be expected to be addressed by the 3/4 vote at the AGM or an SGM.

10. [Section 17]: Section 108 of the SPA, which deals with special levies, has been amended to include interest on special levies if a bylaw is in place for that purpose. Those managers whose strata corporations purchased the Clark Wilson LLP bylaw template will have such a bylaw, unless a strata corporation chose to remove it. It was included in the template on the possibility that this amendment would in the future be enacted, since we were of the view its exclusion (only strata fees were capable of bearing interest) was a

mistake. It is the recommendation of Clark Wilson LLP that strata corporations nonetheless re-adopt the interest on special levies bylaw because they were not enforceable when first adopted. Also note that the interest will form part of the levy and is lienable under section 116.

A further change to section 108 identifies ***who*** is entitled to any surplus from a special levy. Under the present legislation, surpluses are to be paid back to owners "*in amounts proportional to their contributions*". This created huge headaches for property managers, since a person who contributed may no longer be an owner, and might not have been an owner for some time. The amended sections read:

(5) If the money collected exceeds the amount required, or for any other reason is not fully used for the purpose set out in the resolution, the strata corporation must pay to each owner of a strata lot the portion of the unused amount of the special levy that is proportional to the contribution made to the special levy in respect of that strata lot***, and***

(7) In subsections (4) and (5), **"money collected"** means the money collected on a special levy and includes any interest or income earned on that money.

This wording is much better. The refund will go to the owner of the strata lot at the time of refund, rather than the person who paid the amount. While a purchaser can still agree with a vendor to pay the vendor any refund, that arrangement should no longer have any impact on the property manager, who will have to provide it to the owner at the time, per the legislation. Note the refund also includes any income earned on the levy amount.

11. [Section 19]: Section 124 of the SPA has been amended to provide that mediation receives the same "billing" as arbitration, so property managers should be aware of the process of mediation, and the major differences between mediation and arbitration.

12. [Section 20]: Section 127 of the SPA as it exists now provides that no bylaws can be amended before the first AGM unless by unanimous resolution. That limitation has been amended so any amendment to the bylaws before the second AGM will require a unanimous resolution. The stated intention is to ensure that developer-controlled strata corporation will get some breathing room, although Minister Coleman also said that the change would bring "stability" to the buildings.

13. [Section 21]: Under section 128 of the SPA, bylaw amendments must be filed in the LTO to be enforceable and must be filed within 60 days. The current SPA does not, however, say that bylaw amendments are never enforceable if they are not filed within the 60 day period – in fact, there is no reference at all to the consequences of not filing within 60 days. The amended section 128 drops the 60 day filing requirement, leaving no time limit at all, but confirms that bylaws must be filed in the LTO and will have no effect until they are filed. This is a good amendment. It also takes the pressure off property managers who do not file within 60 days, or who inherit strata corporations who have not filed bylaw amendments. However, one potential downside could be the registration of bylaws amendments that were passed by a strata corporation a year previously, or longer.

14. [Section 22]: This provision amends section 142 of the SPA dealing with rentals to family members. For the purposes of determining the number of strata lots permitted to be rented when a rental restriction is in place, the calculation of lots rented does not include rentals to exempted family members or owners who have been granted an exemption on the basis of hardship. This has been a debatable issue for many years. Clark Wilson LLP has been of the view that such exempted rentals should not be included in the calculation of lots rented. This amendment supports that view.

15. [Section 23]: The Government considers the amendments to section 143 of the SPA to be the most significant policy change. The new subsection (2) reads as follows:

> (2) Subject to subsection (1), if a strata lot has been designated as a rental strata lot on a Rental Disclosure Statement in the prescribed form, and if all the requirements of section 139 have been met, a bylaw that prohibits or limits rentals does not apply to that strata lot until,
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> > (a) in the case of a Rental Disclosure Statement filed before January 1, 2010, the earlier of
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> > > (i) the date the strata lot is conveyed by the first owner of the strata lot other than the owner developer, and
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> > > (ii) the date the rental period expires, as disclosed in the Rental Disclosure Statement as it read on December 31, 2009, and
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> > (b) in the case of a Rental Disclosure Statement filed after December 31, 2009, the date the rental period expires, as disclosed in the Rental Disclosure Statement.
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> (3) Even if a Rental Disclosure Statement filed before January 1, 2010 is changed under section 139 (2) after December 31, 2009, subsection (2) (a) of this section applies.
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> (4) Subsection (1)(b) does not apply to a bylaw that is passed under section 8 by the owner developer.

The addition of subsection (4) is intended (we think) to ensure that the period of grace does not apply to a rental restriction bylaw passed by a developer. Subsection (1)(b) only talks about the applicability of a "*bylaw that prohibits or limits rentals*" to a strata lot. Therefore, even if there were a bylaw that says anyone can rent, subsection (1)(b) and (4) would not apply to it. Hence, we read subsection (4) as saying: "*If, when you buy it, the bylaws prohibit or limits rentals, and that bylaw prohibiting or limiting rentals was passed by the developer, there is no grace period and the bylaw applies to all owners*".

Owner-developers do not typically pass rental restriction bylaws because their market includes investors. However, given the changes to section 143(2), which will be discussed in the next paragraph, a market may now exist for complexes that limit or prohibit rentals, much like there is a market for age-restricted complexes. As a result, we may end up seeing new strata corporations where the developer has passed a bylaw that limits or prohibits rentals.

The key change to section 143 appears to be with respect to the Rental Disclosure Statement of the Developer. Presently section 143(2) provides that, if a strata lot has been designated as a rental strata lot, then a bylaw prohibiting or limiting rentals does not apply to that strata lot until the earlier of the date the first purchaser conveys the strata lot and the expiry date noted in the statement. That has been changed with Bill 8.

The amendment creates two situations – those before January 1, 2010 and those after December 31, 2009:

(a) For disclosure statements issued before January 1, 2010, then it is the earlier of the date the strata lot is conveyed by the first owner after the owner developer (there had been confusion previously on whether this was the case) and the date the rental period expires, as the Rental Disclosure Statement read on December 31, 2009; or

(b) If the Rental Disclosure Statement is filed after December 31, 2009, it will be the date the rental period expires as set out in the statement.

In other words, for disclosure statements issued after December 31, 2009, the number of subsequent owners of the strata lot is irrelevant and the ability of all subsequent owners to rent continues until the date the rental period set out in the statement expires. This means that developers can now create complexes that effectively have no ability to prohibit or limit rentals.

It is easy to understand where the Government was coming from in making this policy change. Minister Coleman stated that the amendment will allow new strata developments to better meet the market demand for rental units and thereby limit the number of situations where strata corporations pass rental restriction bylaws that negatively affect the both rights of owners and purchasers and the marketability of the units.

16. [Section 24]: At present, section 144 of the SPA states that, if an owner requests a hearing for an exemption from a rental restriction or prohibition on the basis of hardship, that hearing must be held within 3 weeks of receipt of the request. That timeframe creates problems for strata councils, which typically meet less regularly than every 3 weeks, and therefore requires a "special" council meeting, rather than a scheduled one, to consider a hardship request. The new legislation increases that period for the holding of a hearing to 4 weeks, and confirms if the meeting is not held within 4 weeks of the request, the exemption is allowed. The rest of the rental hardship exemption section continues as before.

17. [Section 25]: Section 173 of the SPA is the section that permits the strata corporation to apply for an injunction enjoining an owner from contravening the Act. Presently, such injunctions must be obtained in the Supreme Court. This amendment permits the application to be made in Provincial Court.

There is an interesting additional amendment to section 173. If a special levy is tabled and it does not get the required 3/4 majority, the strata corporation may apply to either

level of court for an order approving the resolution as long the resolution receives at least one-half of the votes cast,. There was no discussion with the minister on this issue, but it clear to us that this provision is designed to ensure that a strata corporation is able to address the significant expenses of maintaining and repairing buildings, which forms part of the statutory obligation of the strata corporation.

18. [Section 30]: Sections 179 to 186 of the SPA presently address what occurs when an owner, tenant or the strata corporation wish to invoke arbitration as a dispute resolution mechanism. The provisions regarding the appointment of arbitrators, the procedure (including evidence and examination), the arbitrator's decision and costs have all been repealed. As will be discussed further at paragraph 20, section 34 of Bill 8 gives the government the ability to adopt regulations regarding arbitrations and mediations. It is therefore anticipated that the arbitration repealed sections will be brought back to life in a different form through regulations. Time will tell whether the regulations will be more or less onerous, or involve "Government run service providers" that will assist in dispute resolution.

    One concern is any delay in the regulations being implemented. It is intended that Bill 8 be enacted by the end of 2009. However, if sections 179 to 186 are repealed and regulations are not immediately in place, the practical effect will be there are no provisions dealing with arbitration under the SPA.

19. [Section 33]: Presently, Standard Bylaw 29 provides a dispute may be referred to a dispute resolution committee. We are unaware of any strata corporation that has formed such a committee or any dispute being referred to such a committee. The amendment to section 292 will empower the government to adopt regulations that requires a strata corporation to establish a process for the voluntary resolution of disputes among owners, tenants and the strata corporation.

    What could this mean for property managers? First, if any regulations are adopted, they will require them to assist councils in putting such committees in place. However, at the same, it make take some pressure off property managers in dealing with some of the common complaints between strata corporations and owners or between two or more owners in the building.

20. [Section 34]: This amendment creates section 292.1 of the SPA, which will empower the government to adopt various regulations regarding arbitration and mediation. Although they are lengthy, it is worthwhile reproducing them for the sake of completeness as a Schedule A to this summary.

CONCLUSION:

The views of Clark Wilson LLP are not intended to be considered legal opinions and the views are based upon our understanding of the rationale behind the amendments to the *Strata Property Act*. There has been much commentary that the Government did not consult owners of strata lots, council members, etc. We understand that a number of law firms and industry organizations were consulted, but such consultations were subject to confidentiality agreements.

Regardless, the legislation has presently passed all three readings and received Royal Assent on October 29, 2009. Although the amendments are not yet in force, the Government has made it clear that the rental prohibition/restriction issues are foremost and will be law by January 1, 2010. The timing of enforcement of the rest of the amendments is somewhat unclear and, of course, there are various significant regulations to be implemented. It is likely that different portions of the legislation will come into force at different times as the regulations are developed.

It is the view of Clark Wilson LLP that the major policy changes are as follows:

(a) The ability to proceed to Provincial Court on all judicial matters, with the exception of the appointment of an administrator. This will likely result in much more delay than currently exists, due to the significant backlog of cases in most Provincial Court registries and the number of court appearances required before the trial is held. Furthermore, since the Provincial Court is much more accessible to unrepresented parties, it will most certainly result in more actions by dissatisfied owners against the council, strata corporations and property managers.

(b) The implementation of a depreciation report requirement.

(c) The requirement that the strata corporation's financial statements be audited.

(d) In the case of a Developer filing a Rental Disclosure Statement after December 31, 2009, rental prohibition/restriction bylaws will not be effective against any owner until the expiry date in a Rental Disclosure Statement.

(e) The repeal of arbitration existing provisions and the increased focus on mediation.

Interestingly, one of the topics that gives property managers the most headaches, phased strata plans, has not been the subject of any amendments.

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