

Headline: **Council Members' Liability
Directors and Officers (D&O) Liability Insurance**

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Written by: Veronica P. Franco, Lawyer with Clark Wilson

You have been elected a member of your Strata Council and now you are responsible for making decisions relating to your Strata Corporation. Section 31 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "Act") should be your guiding principle. That section provides that:

"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".

That's all well and good, but council members are human, and can make mistakes. The question that arises is "Will I be held personally responsible for those mistakes?". If the Strata Corporation's bylaws includes bylaw 22 of the Standard Bylaws to the Act, council members have some protection. Bylaw 22 provides that

"A council member who acts honestly and in good faith is not personally liable because of anything done or omitted in the exercise or intended exercise of any power or the performance or intended performance of any duty of the council".

Therefore, provided the council member is acting honestly and in good faith, that council member will not be held personally liable.

Additional peace of mind can be obtained in the form of Directors and Officers (D & O) Liability Insurance. Outlined below are the basics every Strata Corporation should know about D & O Insurance.

What is D & O Insurance?

D & O Insurance is purchased by the Strata Corporation to cover "mistakes" made by council members, which cause loss or damage to others. Each insurance policy will have its own form with different wording. However, all policies will define who is insured, and what claims are covered.

Who is covered under the D& O Insurance Policy?

Each insurance policy is different. However, generally speaking, D & O policies cover the members of the Strata Council. Note that it does not cover the spouse of a Council member, unless the spouse happens to be on Council. Depending on the policy, it may cover Property Managers, members of other committees, such as the "Building Committee" or the "Social Committee". It may also cover volunteers of the Strata Corporation. For example, the neighbour who agreed to volunteer his time to do the Strata Corporation's landscaping.

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What types of liability does a D & O Policy cover?

Generally, a D & O Policy will cover losses arising from the “wrongful acts” of the person that is insured. “Wrongful Acts” is a term defined in the policy, and generally includes the following provided that the individual is acting in their capacity as an authorized representative of the Strata Corporation:

- (a) Errors or misstatements;
- (b) Misleading statements, Acts or omissions;
- (c) Negligent acts; and
- (d) Breaches of duty;

For example, the Strata Council instructs the Property Manager to register a Certificate of Lien against a strata lot for arrears owing by the registered owner. As it turns out, the Lien should not have been registered because the only money owing was for fines and penalties. The registered owner is unable to complete the sale of his strata lot because of the Lien. The registered owner pays the money owing “in protest” to allow the sale to complete, and sues the Strata Corporation and the Strata Council for damages. A D & O Policy would likely cover such a claim. Accordingly, the insurer would pay for the Strata Council Members’ legal costs to defend the claim.

In addition, a D & O policy may require the Insurer to defend claims against the Strata Corporation itself, even where the individual council members are not named as defendants in the lawsuit. For example, in **The Owners, Strata Plan NW3341 - Riverwest v. Royal Insurance Co. of Canada**, 1996 CarswellBC 612, Royal refused to continue to defend Riverwest in a lawsuit commenced by the Flemings, who were registered owners of one of the strata lots. In the Fleming lawsuit, the Flemings sued Riverwest for failing to complete repairs to the common property, which rendered her Strata Lot unfit for habitation. In addition, the Flemings sued Riverwest for inducing breach of contract. When the Flemings were trying to sell their strata lot, the prospective purchasers were told by members of the Strata Council that their infant daughter would not be able to live at Riverwest. As a result of those statements, the Flemings lost the sale. While the Strata Corporation’s general commercial policy did not include the types of claims made by the Flemings, the Court held that Royal was obliged to defend Riverwest, because the claims made by the Flemings, if proven, would be covered by the D & O Policy, even though the individual members of the Strata Corporation were not parties to the Fleming lawsuit. The Court reasoned that the Fleming’s claim was against the Strata Corporation, and any judgment against the Strata Corporation is a judgment against **all** of the owners. The Fleming claim concerns statements made by some strata owners (who were also members of the Strata Council). In other words, the allegation was for a wrongful act (statements) of the Insured (Council Members), which is what the D & O Policy covers. Accordingly, the D & O Policy acted as extra coverage for the Strata Corporation.

The Riverwest case suggests that where the Strata Corporation is sued for damages arising from the actions of its Strata Council, the Insurer may still be obliged to defend, even where the Strata Corporation’s general commercial policy excludes those claims.

What isn’t covered by a D & O Policy?

The specifics of each D & O policy may vary, but generally, the following claims are excluded from coverage:

- (a) Damages for losses arising from a Council Member gaining personal to which he or she was not legally entitled;
- (b) Damages for a wrongful act arising from a Council Member’s admitted or proven dishonesty;
- (c) Damages arising from bodily injury, personal injury, sickness, disease or death;

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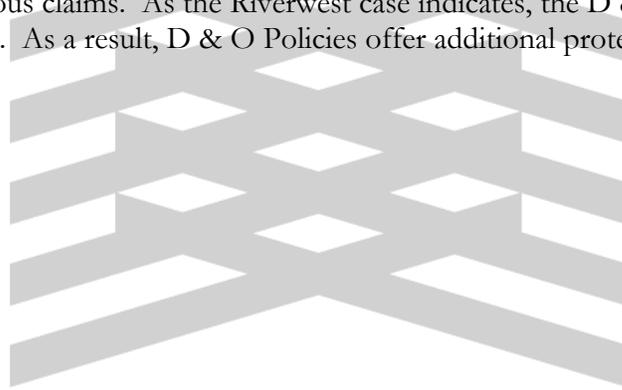
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- (d) Slander and libel;
- (e) Breach of contract
- (f) Willful violation of the law; and
- (g) Damages arising from a dishonest, fraudulent, criminal or malicious act.

Therefore, coverage would likely be denied where an owner sues the council member who assaulted him at the last Annual General Meeting. Coverage would also be denied where the Strata Council uses funds from the Contingency Reserve Fund for her personal gain.

Should a Strata Corporation purchase D & O Insurance?

The decision to purchase a D & O Insurance Policy should not be taken lightly. More and more people are availing themselves of the Courts to recover their perceived losses, which inevitably means that increasingly more and more Strata Corporations find themselves involved in litigation. Where members of the Strata Corporation are not happy with the decisions of their council, Council Members could also find themselves in litigation. It would be prudent to have a D & O Policy in place to protect Council Members from liability, the cost of litigation, and frivolous claims. As the Riverwest case indicates, the D & O Policy may also cover claims against a Strata Corporation. As a result, D & O Policies offer additional protection to all of the owners of the Strata Corporation.



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