

Headline: Are You Insured? Owners, Tenants and Occupants May Not Be . . . Depending on the Policy Wording

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Some owners, tenants and occupants do not take out personal liability insurance. One reason for that decision may be the belief that they are covered under the strata corporation's liability policy. In that regard, section 155 of the *Strata Property Act* (the "Act") provides that:

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

- (a) the strata corporation,*
- (b) the owners and tenants from time to time of the strata lots shown on the strata plan, and*
- (c) the persons who normally occupy the strata lots.*

Under section 150(1) of the Act, a strata corporation is required to take out liability insurance against liability for property damage and bodily. Under the *Strata Property Regulations*, the liability coverage must be at least \$2 million.

A recent decision of the B.C. Supreme Court, *Economical Mutual Insurance Company v. Aviva Insurance Company of Canada*, raises concerns about the extent of the liability coverage that an owner, tenant or occupant may actually receive under a strata corporation's liability insurance policy, depending on the policy's wording. The outcome of this decision (which is likely to be appealed) is the possibility of increased and uninsured liabilities for strata corporations, council members and property managers.

The Accident

On March 30, 2008, Mr. Rattan, an owner at Strata Plan LMS 3927, hosted a party at his home within the condominium complex. One of the party guests, a Mr. Hiebert, was involved in a car accident with another vehicle, operated by a Ms. Sidhu, as he was leaving the party. The three passengers in Ms. Sidhu's vehicle commenced legal proceedings against Mr. Rattan and Mr. Hiebert, each claiming personal injury. The claim against Mr. Rattan alleges "social host liability" — a failure to supervise Mr. Hiebert's alcohol consumption at the party and a failure to take steps to prevent Mr. Hiebert from operating a motor vehicle upon leaving the party. (It should be noted that none of the allegations have yet been proven in court.)

The Issue

Economical Mutual is Mr. Rattan's homeowners' insurer and there is no question that Mr. Rattan is an insured under that policy. Aviva Insurance is the strata corporation's liability. The question before the Court in this decision was whether Aviva Insurance was required to participate in defending Mr. Rattan against the claims being made by the passengers of the Sidhu vehicle.

The Policy Wording

The Aviva Insurance policy contains wording regarding liability coverage not uncommon in the typical strata corporation liability policy. In particular, on the issue of who the "insured" under the liability policy is, the policy says:

SECTION II – WHO IS AN INSURED

1. *If you are designated in the Declarations as:*
 - a. *An individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner. (the "Individual Clause")*
 - b. *A partnership or joint venture, you are an Insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.*
 - c. *An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds but only with respect to their liability as stockholders. (the "Organization Clause")*

The liability policy wording does not refer to "strata corporations" or "condominium corporations" at all.

The Argument

In applying for a ruling that Aviva Insurance should be required to participate in the defence of the claim against Mr. Rattan, Economical Mutual referred to section 155 of the Act and argued that, regardless of what the policy says, the Act requires that the strata corporation's policy must extend liability coverage to Mr. Rattan as a strata lot owner.

In response, Aviva Insurance submitted that, while the Act may impose an obligation on a strata corporation to take out liability coverage for the owners, the Act cannot act to amend the wording of the policy actually taken out by the strata corporation. Aviva Insurance further argued that the strata corporation's policy only provided Mr. Rattan with liability coverage as follows:

- (a) *Under the Individual Clause, coverage related only to claims arising from "his business of which he was a sole owner"; and*
- (b) *Under the Organization Clause, coverage related to liabilities arising from Mr. Rattan's position as a "stockholder" of the strata corporation.*

Aviva Insurance's conclusion was that, since the social host claims did not arise from either a business in which Mr. Rattan was a sole owner or from his "stockholder" position, Mr. Rattan was not entitled to liability coverage under the strata corporation's insurance policy.

The Court accepted Aviva Insurance's argument and held that Mr. Rattan was not entitled to any coverage under the strata corporation policy. In reaching this conclusion, the Court made no reference to the 1992 decision of the BC Supreme Court in *Ghag v. Cater*, in which the Court held that, by virtue of a similar provision in the *Condominium Act*, a strata lot tenant was entitled to the benefit of the strata corporation's liability policy when the tenant was sued with respect to an accident occurring on the limited common property.

The Potential Risk for Strata Corporation, Council Members and Property Managers

In ruling against coverage for Mr. Rattan under the strata corporation policy, the Court noted that it was the responsibility of the council members to comply with the *Strata Property Act* and a failure to do may give rise to liability on their part. Although the Court did not make any final rulings regarding possible council liability to Mr. Rattan, the judge stated:

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.

The presiding judge then went on to comment:

In this case, the Strata Corporation enjoys coverage as an organization other than a partnership or joint venture. The organization's executive officers and directors, who are insureds, could likely claim coverage for damages resulting from their omission to fulfill their duties as officers or directors, one of which is to ensure that appropriate insurance is acquired and maintained by the Strata Corporation.

It should be noted that a typical directors' and officers' insurance policy (which provides some coverage to council members associated with mistakes they may make in their council capacity) will provide that there is *no* coverage for claims arising out of the failure to obtain any or adequate insurance coverage. This leaves strata council members, property managers (when assisting strata corporations obtain insurance coverage) and strata corporations potentially exposed to claims by owners, tenants or occupants for alleged failures to obtain insurance coverage on their behalf. With claims for inadequate or no insurance coverage likely to be uninsured, the strata lot owners may ultimately be held personally liable to pay for the absence of insurance coverage.

What to do in light of this decision

Although this decision is likely to be appealed, and may be overturned, the appeal process can take many months. It is recommended that council members and property managers undertake the following steps in light of this decision:

1. Speak to the strata corporation's insurance broker to identify who is a named insured on the strata corporation's insurance policy *and* for what coverage. If owners, tenants and/or occupants are not being afforded liability insurance coverage or the coverage is limited (in a manner similar to that discussed here or in some other manner), the strata corporation needs to investigate the available options to ensure that these persons are insured in accordance with the requirements of the Act.
2. Do not make representations to owners, tenants and occupants about the extent of the strata corporation's insurance coverage. While the Act does require an annual report on insurance at the annual general meeting, council members and property managers must take care not to overstate the extent of coverage generally, and particularly with respect to coverage for owners, tenants, occupants and council members.
3. Communicate to owners, tenants and occupants the importance of obtaining personal insurance associated with their own strata lots, in part to deal to protect them from any gaps in the liability coverage that the strata corporation does have.