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Leaky Condos - From Confrontation to Cooperation The Design Professional's Position

Bryan S. Shapiro
SHAPIRO HANKINSON & KNUTSON

We have all heard the expression... "Every man's home is his castle..." This helps to explain the emotional trauma suffered by condominium owners whose dreams of relaxing carefree home ownership are being swept away in a flood of acrimonious finger-pointing as the water entering their homes erodes confidence in the ability of the British Columbia construction industry to design and build water-tight residences.

The leaky condo problem which has become indigenous to the construction industry in the lower mainland of British Columbia is now so widespread and notorious, that the major protagonists to the construction process, developers, design professionals, contractors, suppliers, manufacturers, and municipal and provincial governments and strata corporations are engaged in an almost daily round of public recrimination. What is one to make of all of this? What is to become of the condominium construction industry in the lower mainland, and will we ever see confidence in this construction sector again? Central to the problem is the position of the design professional, architect/engineer, who is responsible for designing a product which will meet the reasonable expectations of the condominium purchasing community.

The design professional designs according to the state of the art of his profession at the date that the design is prepared. He is required to design according to all applicable building codes and bylaws, and to prepare a design that a reasonable and prudent design professional would prepare. He is also required to provide an appropriate level of field services to ascertain that the work of the contractor who is constructing the building is being performed in conformance with the design plans and

Bryan S. Shapiro, Partner, Shapiro, Hankinson & Knutson, Vancouver, BC. Mr. Shapiro practices in the area of construction, insurance and contract law. He is the former chairman of both the Canadian and B.C. Bar Association Construction Law Sections. He is an adjunct professor in UBC's civil engineering department. He is the author of ACEC Standard Contracts.

specifications, building codes and by-laws and in accordance with good construction practice.

The 1995 Supreme Court of Canada decision in the case of Winnipeg Condominium Corp. No.36 v. Bird Construction Co., affirmed the liability of the design professional not only to the developer or owner who enters into a contract with the architect or engineer, but also to second, third or other subsequent purchasers of a condominium if it can be shown that it was foreseeable by the design professional that a failure to take reasonable care in designing the building would create defects that could pose a substantial danger to the health and safety of the building occupants. The Supreme Court of Canada was clear in stating that where negligence is established and such defects in the design of the building manifest themselves, even before any physical damage to persons or property is incurred, the architect or engineer will be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state. This case constitutes a major re-definition of the law in Canada concerning the liability exposure of the design professional.

Given the recent explosion in the number of condominium units being constructed in British Columbia, the Winnipeg Condominium case

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The Design Professional's Position

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enunciates a legal principle that applies not only to design professionals, but also to the other parties to the condo construction process, making each of them liable to subsequent purchasers with whom they have no direct contractual relationship for their own individual acts of negligence.

It is the writer's opinion that for too long, the parties to the condo construction process have been indulging in self-cleansing confrontation, rather than communicating with their counterparts in the industry in an effort to uncover the real reasons for the proliferation of leakage problems, and working out practical procedures for their resolution. In reality, the leaky condo crisis is not a legal problem, and will not be resolved by lawyers or judges. Proper education of architects and engineers, contractors and building authorities as to the consequences of certain design alternatives, uses of materials, construction methods, sequences or procedures of construction, and how these together affect the ultimate water insulation integrity of a building is sadly lacking. Education and a formal licensing program for design professionals and contractors represent one area of potential control of the problem. Warranties and insurance protection, while a good idea, are not a final solution to the problem as they only provide for monetary responsibility, but do not obviate the likelihood of future leakage problems occurring.

In summary, only by embarking on a concerted campaign of cooperative, open communication between designers, contractors, municipal and provincial authorities, is there any hope for resolution of this serious situation. Only after the technical aspects of the problem are clearly understood by the parties responsible, and changes made to the building codes, bylaws, design and construction practices, will there be any relief for the condo purchaser. Ultimately, these technical solutions should be buttressed by proper insurance, education and licensing programs for designers and contractors which will hopefully have the effect of restoring the purchaser's confidence in the condo construction sector which, to date, has been tested and found sorely wanting.



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Report of the President

Cora D. Wilson

The flood of changes in response to the "Leaky Condo Syndrome" have been swift and dramatic recently. The much anticipated Barrett Report containing 82 recommendations was released in June, 1998. The recommendations may be broken down into three main categories, as follows:

1. Proposed legislative changes;
2. Education and licensing requirements; and
3. Relief to "Leaky Condo" victims.

The "Strata Property Act" and the "Homeowner Protection Act" expeditiously received third reading and it is anticipated that both will be implemented in 1999. Many of the Barrett recommendations have been incorporated into the new legislation.

The Homeowner Protection Office is scheduled to open October 1, 1998. The purpose of the office is "to strengthen consumer protection, improve the quality of residential construction, provide research and education on matters regarding construction and retrofitting of housing, and provide loans through the reconstruction fund."

The Provincial and Federal Governments will make some funds available through the Homeowner Protection Office to those homeowners most in need. Although the eligibility criteria for funding has not yet been set, it is anticipated that there will be a flood of applications when the office opens in October.

One of the themes of the Barrett report was that strata councils,

property managers and trades people must be educated in their fields. Trade certification related to multifamily residential construction will become a reality. All property management firms will be required to register with and initially be licensed through the Homeowner Protection Office.

The cost to the strata community due to the "Leaky Condo" crisis has been titanic. The cost is not just financial, it is also emotional. We experience daily the burden borne by homeowners who are retired, on fixed incomes or suffer from health problems. Unit owners "rip your heart out" with stories of an inability to pay huge assessments. Strata council members struggle with the stress created by lack of support or negative feed back from unit owners and some buckle from the enormity of the task.

It must not be forgotten that we are in a "crisis." We can only hope that condominium communities will be strengthened by this disaster by working together to a satisfactory resolution of the "Leaky Condo," by implementing proper maintenance programs as a method of prevention or early detection for the future and by educating themselves on how to avoid the pitfalls.

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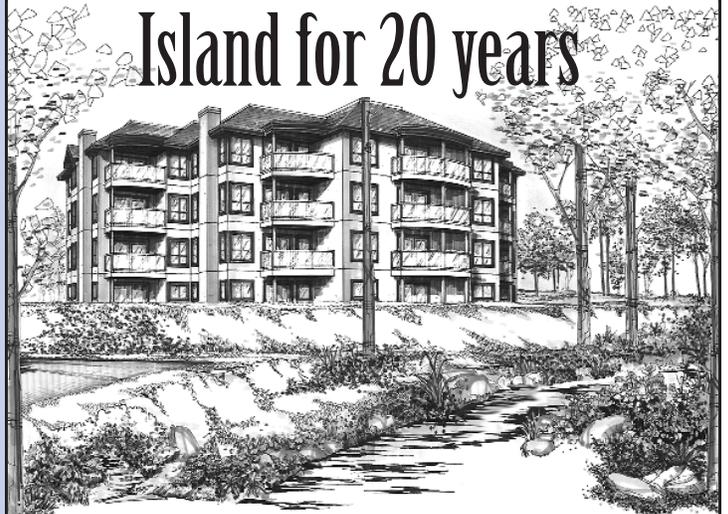
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Professional Speakers

ANDREW COLWELL, *Managing Director, Condominium Management*, ABACUS PROPERTIES INC., Victoria. Andrew has 18 years of management experience in the area of commercial and strata management.

JILL SINKWICH, *Policy Advisor*, MINISTRY OF FINANCE & CORPORATE RELATIONS. Jill has been working on the Condominium Act Revision Project since 1993. She will address the new Strata Property Act.

SHAYNE RAMSAY, *Chief Executive Officer*, THE HOMEOWNER PROTECTION OFFICE. Shayne's experience in the housing and construction field goes back to 1986. He is the former Director of Development Services for the BC Housing Management Commission (1996 - 1998) & Housing Policy and Program Development with the BC Ministry of Municipal Affairs and Housing (1995-1996).

DAVID GIBSON, *P. Eng.*, CHATWIN ENGINEERING LTD., Nanaimo. David is a Professional Engineer with 15 years experience specializing in drainage system problems. He has conducted numerous studies and designs for storm drainage systems that drain buildings, footings and foundations.

GRAHAM BESSANT, *Building Envelope Specialist*, READ JONES CHRISTOFFERSEN LTD., Structural Engineers, Victoria. Graham has 27 years of experience in building sciences, including construction. He has been involved in building envelope reviews since 1991. The Company has been engaged in over 90 leaky condo problems in the Vancouver area and on Vancouver Island.

GARY CHRISTOPHERSON, *Property Manager, President* of CASTLEGATE PROPERTY MANAGEMENT LTD., Courtenay. Gary has been a property manager since 1989 in the Comox Valley Area.

MARILYN RODBOM, *Condominium Manager and Real Estate Agent*, REALTY WORLD, Campbell River. Marilyn has used her real estate background to catapult herself into Condominium management.

DAVID OSBORNE, *Property Manager and Real Estate Agent*, REALTY EXECUTIVES, Courtenay. David has managed condominium and commercial properties in BC, Alberta, Ontario, Quebec and Florida since 1979.

CORA WILSON, *Condominium Lawyer, Educator and Arbitrator*, C.D. WILSON & ASSOCIATES, Nanaimo. Cora has been practicing law since 1986. She currently represents numerous leaky condo victims from Victoria to Courtenay.

DAVE BUSBY, *Arbitrator, Educator and Past President* of CHOA, Comox. Dave is an extraordinary personality with iron will and drive. He is an instructor at the North Island College Community Education Department, an arbitrator and a consultant to the Condominium community.

R.C. TINO DI BELLA, *Condominium Lawyer*, RANDALL & COMPANY, Victoria. Mr. Di Bella has been a lawyer since 1980. A preferred area of his practice is condominium law. He acts for a number of Strata Corporation in financing issues, governance and legal obligations.

The "Leaky Condo" Reviewed

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Professional Speakers

CATHERINE MacARTHUR, *C.A.*, Nanaimo. Catherine has over 10 years experience as a Chartered Accountant. She completed the Canadian Institute of Chartered Accountant's In-depth Tax Program and worked in the tax group of the international accounting firm of Peat Marwick Thorne prior to starting her own accounting practice.

ROY WOOD, *B. Sc., Specialist in Condominium Management*, ROY WOOD STRATA MANAGEMENT, Duncan. Roy is an engineer and a graduate of the Banff School of Advanced Management. He has several years experience working in Strata Management in the Cowichan Valley.

WILL CARTER, *CPM, President* of BAYWOOD PROPERTY MANAGEMENT LTD., Victoria & Vancouver Island Chapter of the Real Estate Institute of Canada. Will has been involved in condominium management for 20 years. He has been in Victoria for the last 13 years. He taught property management courses at Camosum College, Victoria.

JAN MITTON, *Manager*, EVANS-BASTION INSURANCE, Rutherford, Nanaimo. Jan has been involved in insurance for over 18 years. She specializes in insuring strata corporations and has spoken on numerous occasions to the strata community on this topic.

ROBERT PEARSON, *Condominium Management*, BOORSMAN INVESTMENT CO. LTD., Victoria. Boorsman manages about 800 units from Victoria to Nanaimo. Robert has been involved in condominium management for 7 years.

BRIAN M. TWEED, *Manager - Marketing & Communications*, NEW HOME WARRANTY. There have been major industry changes proposed such as Bill 46, the Homeowner's Protection Act. Brian will speak on the impact of the legislative changes on the New Home Warranty Program.

LOIS MITCHELL, *Account Manager*, BANK OF MONTREAL, Main Branch, Nanaimo. Lois has 18 years banking experience and she specializes in the commercial loans and services.

JERRY FANAKEN, *President*, VANCOUVER CONDOMINIUM SERVICES LTD. Vancouver. Mr. Fanaken has been actively involved in the administration of strata corporations for about 25 years. His company currently manages 225 residential strata corporations which represents approximately 13,000 individual condominium units.

BRIAN CHATWIN, *P. Eng., President* of CHATWIN ENGINEERING LTD., Nanaimo. Mr. Chatwin is a Professional Engineer who specializes in maintenance management programs among other things. He has over 15 years of experience in this field and has successfully developed more than 75 maintenance programs.

CRAIG LABAS, *P.Eng.* with CHATWIN ENGINEERING LTD., Nanaimo. Mr. Labas is a Professional Engineer specializing in building envelope problems. He has 18 years of experience in both the construction and design of structures.

ROBERT I. MOSS, *President & General Manager*, ZAICANA PACIFIC REALTY LTD., Nanaimo. Bob has been a property manager for 10 years. He is the former B.C. Regional Manager for Zaicana Real Estate Ltd..

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John W. Wells, President - J.W. WELLS CONSULTING INC.

In the years I worked as Technical Manager for the Roofing Contractors Association of B.C., one of my duties was dealing with the "general public" on roofing related matters.

Replacing a roof on a home or strata building is a major expense and often is a project about which the owners know very little. "Out of sight, out of mind" is an expression altogether too common when it comes to roofing maintenance or problems, but when a major crisis stares you in the faces, what do you do?

When the time comes for major repairs or replacement (and this is inevitable), few consumers are knowledgeable about roofs or roofing materials. It puts this consumer into a very vulnerable situation. Not all roofing contractors or roofing sales people are ethical and the veracity of many might be questioned! Like many other industries, roofing is not a perfect world! From the purchasers' standpoint, they are too often the classic case of "the sitting duck"!

Just like any other major purchase, the wise consumer should take the time to research information on materials, contractors and perhaps suppliers. It will give both sides an opportunity to deal fairly. Hopefully the end product is a good roof, a satisfied consumer and a contractor who adds another positive reference to his portfolio.

The consumer should take the time to read all he can about roofing materials and techniques. Information sources include the RCABC Roofing Practices Manual, which is available at many public libraries. This reference discusses most types of roofing materials and roof types in language that is not outrageously technical. It also has many diagrams that relate to good roofing practices.

John W. Wells, RCABC, RCI, RICABC, Roofing Consultant & President of J.W. Wells Consulting Inc., Victoria. Mr. Wells has over 30 years of construction experience. He is the founding President of the B.C. Building Envelope Council. He played a major role in the redevelopment of the Roofing Practices Manual and gained international recognition for his work with RCABC and their unique Guarantee Program. Mr. Wells is also an educator and a lecturer in his field. His formidable accomplishments are too numerous to list.

Another step is often in the hiring of a "Consultant." In Canada, anyone can call themselves a "roofing consultant," just as in most jurisdictions, you can call yourself a roofing contractor when you have absolutely no credentials. A pickup and a ladder is all that's needed. In fact, many roofing contractors call themselves roofing consultants and many even have separate yellow pages advertisements in that regard. The guy that is trying to sell a roof to a customer is in a bit of a conflict of interest if he is also purporting to give "consultations or advice"!

The Consultant's credentials should include credible roofing industry experience, independence from any one supplier or manufacturer and no direct links with any contractors. Ideally, the consultant should have some professional education and/or affiliation, some professional industry accreditation, should carry appropriate insurance to cover the advice that he gives and should have wide industry affiliations. The Consultant provides the Client with independent expertise that the Client does not or cannot supply in house.

It behooves the Client to accurately establish the Consultant's credentials and carefully research his references and philosophy. As always, the lowest

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Leaky Condos and Personal Liability on Council Members

“So You Think You Are Free From Liability?”

Jerry Fanaken, President

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I have been working with strata councils for the past 20 years and I can truly say that the vast number of owners who become council members are under the impression that they are free from liability while in the course of fulfilling their duties as officers of the strata corporation, based on a by-law in the current Condominium Act which reads as follows:

“A member of a strata council is not personally liable for an act done in good faith in carrying out his or her duties as a member of the council.” (s. 122(4))

Well, it may not be quite that simple! First of all, this is a by-law of the Condominium Act and it is not part of the main statute. The by-laws of a strata corporation only affect the owners of the strata corporation... they do not affect the other four billion people on the face of this earth. That means that actions taken or not taken by a strata council member are indeed subject to potential litigation from a wide variety of sources. It is for this reason that most strata insurance policies provide an errors and omissions rider, sometimes known as “*Directors and Officers*” protection. The usual amount is \$1 million and, in the past, most strata council members and management companies have believed this to be an adequate amount. In actual fact, where strata corporations have strata lots which are worth more than \$1 million each in the real estate market, it is probably a good idea to increase the coverage to a higher amount such as \$5 million. For example, the owner of a strata lot worth \$3.5 million might bring litigation against the members of the strata council for something they have done or not done which has diminished the value of his or her strata lot. Although there are not that many strata lots that are valued in excess of \$1 million, it is something to think about.

Notwithstanding the by-law and the fact that it only applies to other owners within the strata corporation, there is considerably more litigation today by owners against their strata corporations and/or their council members. Some of this litigation is directly through the conventional judiciary and some of it is through Section 44 of the Condominium Act which provides for arbitration. In the past ten years, there has been a dramatic increase in the amount of litigation against council members and, in the next five to ten years, this pattern will continue and increase.

The interesting phrase in the by-law to remember is “*in good faith.*” The leaky condo crisis is an excellent example of an area which is ripe for litigation. In my experience as a property manager, I witness situations where substantial repairs are required at a property but the strata council is reluctant to proceed with such repairs because of the huge expense involved. In addition to the huge expense, councils are also concerned about the image that is left about their building with the public and the probable reduction of property values which result. It is a valid dilemma but, in my opinion, avoiding the proper disclosure can be an even greater dilemma.

continued from previous page

price is not the law!

The real Consultant has only one thing to offer and that is his legitimate expertise. He must use that expertise judiciously, honestly and in the best interests of the Client, without undue influence from parties outside the Client/Consultant relationship. Make sure that references from the contractor or consultant are available and **TAKE THE TIME TO CHECK THEM OUT THOROUGHLY.**

Remember also that warranties are not a panacea for good design and installation. Warranties are not printed on waterproof paper! The **LARGE PRINT GIVETH** and the small print taketh away!

The time you take to learn, will be an investment in peace of mind and protection of your asset.

Jerry Fanaken, President, Vancouver Condominium Services Ltd. Mr. Fanaken has been actively involved in the administration of strata corporations for about 25 years. His company currently manages 225 residential strata corporations which represents approximately 13,000 individual condominium units.

Property managers such as myself are all too aware of the potential for litigation, not only against the strata corporation but also against the management company and as a result, property managers are now recommending to their clients that engineering reviews be undertaken whenever there appears to be a significant leak problem. Such engineering reviews can be expensive and can create apprehension amongst the owners, particularly if they want to sell their strata lots. As a result, councils are now sometimes telling the property managers to “*not put that in the minutes*” in an effort to mask the situation. This, in my view, poses a huge liability for members of the strata council and to “*not put that in the minutes*” may not be a proper course of action for the council.

In some instances, councils are cognizant of serious leak problems and for one reason or another, they decide to take the caulking gun approach to the problem, rather than doing proper (and considerably more expensive) repairs to fix the problem. Again, the question of acting in good faith comes into play if the strata council knowingly covers up a serious problem. The problem becomes magnified when council members actually say that they plan to sell their strata lots in the near future. Clearly, such statements and thoughts indicate anything but “*good faith.*”

While it is understandable that strata councils do not wish to incur substantial engineering expenses and further incur huge repair projects and further send a negative message to the real estate market that they have a leaky condo, my advice to such strata councils is to simply bite the bullet and get on with it. The problem will not go away and, in fact, by covering it up or delaying necessary repairs, the ultimate costs will be substantially higher and, in the meanwhile, council members are exposing themselves to potential litigation. If anything, it is actually commendable that a strata council take the initiative to properly repair the building and make it a good investment for current and future owners. This action also fulfills the council’s statutory duty, on behalf of the strata corporation, to repair and maintain the assets of the corporation.

This is only one example of potential liability against council members and there are many more. The point today, however, is to remember that it is not simply good enough to rely on By-law 122 (4) when acting as a council member. It is not a carte blanche exemption from the obligation to do the right thing.



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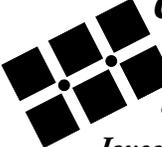
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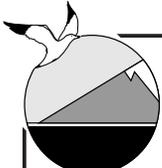
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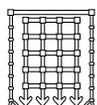


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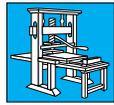


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Graham Bessant, Engineer
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On-going water penetration through the building envelope will result in deterioration - it is only question of time. If left unchecked, moisture penetration in wood frame buildings may lead to complete degradation of not only the interior finishes such as floor coverings, trims and drywall, but also the structural wood frame elements. Consequently, prompt identification and correction of a problem will result in reduced damages and costs.

Strata corporations should consider undertaking a Building Envelope Investigation to identify sources of water penetration early in the game and to develop cost effective, long term solutions.

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“We’ve Got a Leaky Condo!” The Role of the Building Envelope Specialist

Craig Labas, P. Eng. - CHATWIN ENGINEERING LTD.

You’re a member of a strata council. You’ve heard all the publicity surrounding “Leaky Condos” and now your worst nightmare happens. You are starting to get reports that your condo leaks too. What do you do?

Well first of all, the Barrett Commission estimates that 50-75% of all wood frame condos built in the last 10 years will be Leaky Condos, so you shouldn’t be surprised.

As a member of the strata council you have a duty to do something about the leaks. So what do you do? Here are the steps that will help you walk through this process in a logical, responsible manner:

The Process

1. The first thing to do is get a good lawyer. If there’s a cost (and I guarantee there will be), then someone other than you should be persuaded to pay. This could be a developer, builder, designer, warranty company, insurance company or the government. There will have to be some sort of persuasion to get them to pay, such as negotiations, mediation, arbitration or a law suit. Get a lawyer experienced in the “Leaky Condo” problems so that you don’t have to pay for their education.
2. Retain an experienced building envelope specialist to do a “Building Envelope Condition Survey.” This is just the start of the jargon you are going to hear. “Building Envelope” just means all of the things that you put around the inside of the building such as the roof, exterior walls, windows, etc.. This survey will identify the causes of the leaks and give options or solutions to stop them.
3. The building envelope specialist should then conduct a cost estimate of the recommended repairs.
4. An extraordinary general meeting would then be called to seek approval for the repairs. The building envelope specialist will then prepare the tender documentation and tender the project.
5. Following the approval of the tender, the building envelope specialist will oversee and inspect the construction of the renovation.

What Are Some of the Things to Watch Out For?

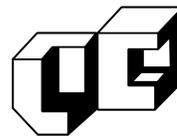
1. Make sure that the tendering companies are qualified and that their references are checked to ensure that they have a good track record in renovations for building envelope problems.
2. Make sure that the renovations recommended by your building envelope specialist are done in accordance with the recommendations of the Barrett Commission (if you don’t, you may not qualify for funding from the government).
3. Ensure that your building envelope specialist does not have a conflict of interest. For instance, the architect of your building could have been a past client of the specialist and could subsequently be a future client.

Craig Labas, P.Eng. with Chatwin Engineering Ltd., Nanaimo. Mr. Labas is a Professional Engineer specializing in building envelope problems. Mr. Labas has over 18 years experience in both the construction and design of structures incorporating building envelope techniques.

4. Ensure that your building envelope specialist has professional liability insurance to cover the renovations.
5. Have you lawyer help you through the maze of financing the project. Remember, with the Barrett Commission Report there will be a complicated array of government subsidy options available.
6. Keep the process moving on choosing whoever is responsible and available to pay for the damages that you and your strata members have incurred.
7. Ensure your building envelope specialist is also a good candidate as an expert witness in case you need him to testify in court.

Summary

Sound complicated? It is to someone not used to dealing with these types of issues. However, if you build yourself a good team of qualified people (lawyers, building envelope specialists and contractors), the job will flow much smoother.



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Governance and The Crisis Situation

Cora D. Wilson, Lawyer
C.D. WILSON & ASSOCIATES

We are in a "crisis." Strata councils facing the leaky condo syndrome are confronted with a formidable and emotionally difficult task. They must carefully choose their professionals, including the lawyer, the engineer and the building envelope specialist. The most successful retrofit programs are those which are properly structured from day one. Professionals must be retained. The political arena must be carefully staged. Unit owners must be informed. General meetings must be convened. Resolutions must be approved to do the remedial work, pay the expenses and commence litigation.

Strata corporations face two major tasks when confronted with the leaky condo crisis. First of all, strata corporations must undertake the remedial work and pay for it out of their own pocket, even though they did not cause the disaster. The lucky ones have a cooperative developer or are covered by a warranty. Secondly, and usually simultaneous with the first task, strata corporations, once authorized by special resolution, must proceed with legal action against third parties to recover costs and damages.

The following is a summary of some of the steps that should be taken by a strata council facing a leaky condo crisis:

1. Retain legal counsel as soon as possible to obtain advice and deal with issues of privilege.
2. Call a strata council meeting for the purpose of instructing legal counsel and working out a plan to deal with the problem. Designate the council

Cora D. Wilson, LLB, Lawyer with C.D. Wilson & Associates. Cora was called to the Bar in 1986. She is a condominium lawyer, an educator and a condominium arbitrator. Cora currently represents strata corporations suffering from the "Leaky Condo" crisis from Victoria to Courtenay.

meeting an "in camera" meeting. The minutes of the meeting should not be distributed to unit owners until approved by legal counsel.

3. Retain a qualified building envelope specialist or engineer for the purpose of undertaking a building envelope review.
4. If funds are not available in the budget to hire experts, consider retainers on an emergency basis. An emergency basis must be established by council to authorize payment outside of a general meeting and must be clearly documented in the minutes. If there is any doubt as to whether or not an emergency situation exists, council should seek legal advice or call a general meeting of unit owners to approve the expenditure.
5. Call information meetings to inform the unit owners of the situation. It is extremely important that unit owners be kept informed. Many strata corporations hold one or more information meetings with the lawyer and the building envelope specialist present. The unit owners should understand the problem and feel comfortable with the experts retained.
6. The building envelope inspection report should be made available for inspection by unit owners. Unit owners should be informed of the availability of this report and given an opportunity to review it prior to a general meeting.
7. Unit owners should complete a questionnaire regarding water penetration issues or other damage to the interior of their unit and provide details to the strata council as soon as possible.
8. Unit owners facing financial constraints should, on a confidential basis, notify the strata council of such constraints. This will allow council an opportunity to investigate means of assisting those homeowners most in need.
9. Strata council members making representations to unit owners or other third parties regarding the nature and extent of the problem, should never understate the magnitude of the problem and should never underestimate the costs.
10. Avoid the pitfall of "retrofitting the retrofit". Water penetration is a silent and sometimes invisible demon. Because it cannot be seen, many councils believe that patchwork solves the problem. A band-aid won't cure cancer if major surgery is required.
11. Avoid the common error of underestimating or limiting funds for remedial work and professional costs. The political scene grows evermore ugly each time the unit owners are requested to once again contribute towards this seemingly bottomless pit of repair.
12. Undertake the remedial work based upon the recommendations of the building envelope specialist.
13. Litigation against the owner/developer, general contractor, architect, engineer, subtrades and others should be approved by the unit owners. The goal is not to engage in expensive and time consuming court battles. The objective is to settle or have the responsible third parties deal with the remedial work and costs. Open channels of communication from day one to enhance settlement opportunities and results.

The crisis cries out for help from professionals. Don't hesitate to seek their guidance to help you through the land mines.



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Leaky Condos and Tax Implications

Catherine MacArthur, B.Comm., C.A.

Strata councils have an obligation to provide financial statements for the strata corporation on an annual basis. It is important to remember that some of the primary users are the strata unit owners and one of their primary uses is preparing financial information for income taxes purposes. If the strata unit owner is an individual who owns and occupies the unit and is not engaged in the business of selling properties, the strata unit will probably qualify as a principal residence and the financial statements for the strata corporation will have little, if any, impact on the unit owner's personal income taxes.

If the strata unit owner holds their unit as a rental property, operates a business from their strata unit or is in the business of buying and selling such properties, the strata corporation financial statements may be used by the unit owner in preparing their rental income schedule or in determining the net income from their business. For income tax purposes, any expenditure which is considered capital in nature is not deductible in the current year and is only deductible over time through capital cost allowance. Major repairs which extend the useful life of the property (such as replacement of a roof, a new elevator in an apartment building, or an upgrading in the building structure or materials) are considered capital in nature and form part of the capital cost of the building. The capital cost allowance rate or write-off rate for buildings constructed after 1987 is only 4% per year on a declining balance basis.

Whether or not an expenditure restores something to its original condition or is considered a substantial betterment can be difficult to determine. Many of the leaky condominium repairs which are in the hundreds of thousands of dollars may have a significant capital component. Other expenditures that might be incurred in the repairing of a leaky condominium include:

- a) engineering fees to determine the problem, recommend a course of action or oversee the repair process,
- b) professional fees to recover the cost of the repairs from the builder, new home warranty, subcontractors, or other third parties,
- c) annual fees such as standby fees, guarantee fees or transfer agent fees and interest costs related to loans obtained by the strata corporation or by the individual unit owners to pay for the repairs.

Catherine MacArthur is a chartered accountant with extensive experience in public practice. She has spent many years assisting real estate development companies in the accounting and taxation areas. She also completed the Canadian Institute of Chartered Accountant's Indepth Tax Program and worked in the tax group of the international accounting firm of Peat Marwick Thorne prior to starting her own accounting practice.

Consideration must be given to what portion of these costs are capital in nature or whether some of these costs meet other criteria under the Income Tax Act for deductibility in the current year.

The onus is on the taxpayer (ie. the unit owner) to correctly account for these expenditures when preparing their personal or corporate income tax return. The onus is on the strata council to provide strata corporation financial statements and other financial information so that the unit owners can comply with Revenue Canada's requirements. In summary, as strata unit owners and as strata councils ensure that you correctly distinguish between capital and non-capital expenditures and the correct accounting for some of these other costs to minimize costly Revenue Canada reassessments in future years.

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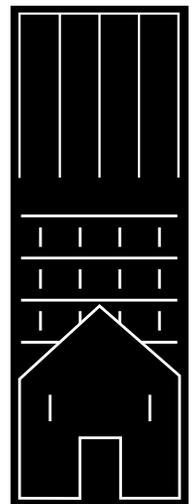
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Highlights of the New “Strata Property Act”

In July 1998, the Legislative Assembly of British Columbia passed a new Strata Property Act. The Act was introduced by Joy K. MacPhail, Minister of Finance and Corporate Relations, after extensive public consultation. This Act will replace the existing Condominium Act (which has not been substantially amended since the 1970's) without fundamentally changing the basis of strata ownership.

There are four main policy objectives of the new Strata Property Act (the “SPA”). First, it has been reorganized and rewritten in plain language to provide strata corporations with a more comprehensive and comprehensible code for managing their affairs. Second, the new Act re-balances the sometimes competing rights and interests of the various parties involved with condominiums, particularly those of individual owners, strata councils, and the strata corporation as a whole. Third, the SPA gives strata corporations new flexibility to enable them to better adapt to the changing needs of their owners. Finally, the new Act implements most of the recommendations of the Barrett Inquiry into “leaky condos” that relate to the Condominium Act.

The SPA has not been brought into force yet, in order to allow for the preparation of new forms and regulations (which will set out more detailed procedures for some matters), and to enable the correction of any technical errors. It is hoped that the Act will be in force by mid-1999. Until the SPA is brought into force, strata corporations will continue to be governed by the Condominium Act.

Existing strata corporations may find that some of the matters included in their bylaws will be dealt with in a different manner by the new Act. Even though such bylaws may conflict with the requirements set out in the new Act, they will continue to be valid for a transitional period. Strata corporations will have until December 31st of the year following the year the SPA comes into force to comply with the new requirements.

Some of the major changes in the new Act are as follows:

Developers’ Responsibilities The responsibilities of the developer in the initial stages of the strata corporation have been enhanced and clarified. New provisions include:

- a requirement that the developer contribute start-up money to the contingency reserve fund (section 12)
- new developer responsibilities regarding documents to be provided to the strata corporation (section 20)
- the termination of property management contracts entered into by the developer at the second AGM (section 24)
- compensation by the developer for serious under-estimation of expenses, and for failure to call the first meeting or to transfer documents to the strata corporation (sections 18 and 20)

Strata Corporation Governance Fundamental rules of governance and procedure for the strata corporation have been expanded and clarified. Many of these provisions have been moved from the bylaws to the body of the Act to ensure that they will not be changed. New provisions include:

- conflict of interest and accountability rules for strata councils (sections 32 and 33)
- more detailed requirements regarding record-keeping, access to strata corporation records, and information for prospective purchasers (sections 35, 36, and 59)
- a restriction on strata managers from holding proxies (section 56)
- a new section allowing for the reconsideration of a decision based on a 3/4 vote in limited circumstances (section 51)
- the option of waiving meetings by unanimous consent, and of attending meetings by electronic means (sections 41, 44, and 49)

Property Issues Rules of common property ownership and management are fundamentally the same, with the following changes:

- strata corporation approval is required for changes to the habitable area of a lot, and for changes in the use/appearance of common property (sections 70 and 71)
- restrictions have been imposed on the council’s power to give owners and tenants exclusive use of common property (section 76)

Financial Matters The new Act maintains the principle of size-based sharing of expenses for existing condominiums. Changes to the expense-sharing rules are allowed, but only by unanimous agreement (section 100). Further refinements to expense-sharing rules (for example, to “cap” the difference in lot sizes) may be set out in the regulations. Other new features include:

- higher minimum contributions to the contingency reserve fund, and provision for contributions on the basis of common property depreciation (sections 93 and 94)
- detailed guidelines for budgets and financial statements, to be set out in the regulations (section 103)
- rules for strata corporation borrowing and investing, and provision for special levies (sections 111 and 108)
- provision for payment of disputed debts by the owner to enable the sale of a lot (section 114)

Bylaws and Rules Rules and procedures for bylaw (and rule) creation and enforcement are substantially the same. Some changes include:

- the requirement that the rules of the strata corporation be ratified by the owners (section 125)
- clarification that age bylaws are not prohibited by the Act (section 121)
- exemption of currently resident persons and pets from new age and pet bylaws (section 123)
- new procedures for bylaw enforcement, including notice requirements and hearings (section 135)

Rentals The new Act maintains and clarifies the ability of strata corporations to pass bylaws limiting or prohibiting the rental of lots. However, it contains the following new provisions:

- family member exemption from rental restriction bylaws (section 142)
- one year grace period before a rental restriction bylaw becomes effective (section 143)

Dispute Resolution Issues The dispute resolution provisions of the Condominium Act have been significantly expanded. The SPA contains detailed arbitration rules and procedures, including a new method of appointing an arbitrator and a requirement to explore mediation (sections 175 to 189), as well as a provision for a voluntary dispute resolution bylaw (section 124).

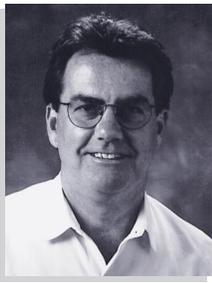
Schedule of Standard Bylaws The SPA includes a new set of Standard Bylaws for new strata corporations. The new bylaws will not apply to already-established strata corporations unless the strata corporations specifically adopt them. New provisions include the following:

- default pet bylaw (bylaw 3)
- provisions for staggered council terms, requisitioned council meetings, electronic meetings, owners’ attendance at council meetings, and the posting of council minutes (bylaws 10, 15, 17 and 19)
- restrictions on council spending powers (bylaw 21)

The SPA may be accessed via the Internet at:

http://www.legis.gov.bc.ca/bills/3rd_read/gov47-3.htm.

SPA: This article was prepared by the Financial and Corporate Sector Policy Branch of the Ministry of Finance and Corporate Relations.



Regular Maintenance Maintains Value of Your Investment

Brian D. Moran, President - BAYVIEW MANAGEMENT GROUP

Let's talk about values. The principle factor contributing to the enhancement of your investment within the Condominium Act is the provision for: keeping the common property, common facilities and assets of the strata corporation in a state of good and serviceable repair. (s.34(1)(d)). Repair and maintenance has a direct relationship to value.

"Human nature being what it is, it is essential to work to a plan and not plan to work." Also, it doesn't help to have a plan nobody pays much attention to, just as it isn't good to operate without a plan. Buildings that are neglected, deteriorate and depreciate in value. One of the major components of depreciation is the physical condition and the level of maintenance and quality of repair to a building. "The longer the life of a building, the slower the rate of depreciation." Owners make a substantial investment in their strata lots; however, they often fail to recognise that the condition of the common property has a dramatic effect on the market value of their unit.

The following is a list of some regular strata corporation maintenance items: landscaping, fences, roofs, gutters, drains, alarm systems, ventilation systems, central garage doors, lobby and hallway walls, high voltage electrical services, chimneys, exterior siding or stucco, pumps, hotwater tanks and boilers, emergency lighting systems, exterior entrance doors, hallways and stairwell flooring, vents, roadways and walkways, fire hydrants and elevators.

Once the strata council has identified those items which require repair or maintenance, it now has the onerous task of choosing who to rely on for the best job.

"Remember to choose someone based on value, not price."

The strata council or its management should develop a list of repair

contractors, obtain customer references, consider original suppliers, look for continuity of contractors, and obtain building plans, including mechanical, electrical and landscaping plans.

Simple repairs might only require a strata corporation member to look at the problem and making a 'common sense' evaluation. However, complex or unusual problems should involve an engineer or an architect.

"In the good ol' days you closed most deals on a handshake and your word. Not any more!" Nowadays it is wise to write a specification document for the work and to obtain quotes based on the specifications. The specification document should deal with specifics of the work to be performed. Timing for commencement and completion, method of payment, holdback requirements and the date and location for quotations to be submitted. Remember, even a brief specification sheet is better than nothing. Specification sheets remind everyone of what was discussed and it serves as a handy reference for judging the satisfactory completion of the work. Write everything down!

"Scrutinize the contractors work." Afterall, a lot of things are lost in 'translation' between the time you approved the work and the time it is completed. Try to ensure there are no financial discrepancies with your contractor. If in doubt, seek help from architects, engineers, construction project managers and other qualified people.

"Getting value is the name of the game." A regular repair and maintenance program is essential to maintaining the value of your investment.



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Could It Have Avoided the Leaky Condo Problem?

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The short answer is no. The longer answer is that it could have reduced the cost of remediation, identified the problem earlier, and reduced the condominium owner's responsibility for liability.

What is Maintenance Management?

Maintenance management is quite simply the setting up of a system to organize and control the maintenance of a facility. One of the fallacies that we have with the construction of projects (and this does not just pertain to condominium projects) is that we spend millions of dollars to construct a building or other infrastructure and spend a minimal amount of money to service and protect it.

A maintenance management program for a building is simply a schedule of well thought out maintenance tasks that are required to be done on a regular basis to a building or infrastructure. These tasks or activities are assigned a frequency, manhour projection to complete, and materials or sub-contracts to complete the tasks. These tasks are formulated into a matrix called an "Annual Work Plan." Following is an example of an Annual Work Plan for ABC Strata Council:

An Annual Work Plan accomplishes two major objectives:

1. It gives the Strata Corporation manager a controlled work plan that can be monitored on a weekly basis to ensure that adequate maintenance is being completed on their condominium project.
2. It provides a substantiation for a maintenance budget (it has a better rationale than "that's the amount we used last year").

What Are the Steps to Setting Up A Maintenance Management System?

1. The Strata Council should retain a Professional Engineering Company experienced in the development of maintenance management systems.
2. The Professional Engineer will analyze the building and infrastructure and determine the appropriate tasks and activities required for a proper maintenance system. They will determine the frequency of maintenance, manhour requirements, material requirements and sub-contracts for the various activities. These activities can vary from simply an inspection of certain components of the facilities to the complete annual maintenance of the heating system.
3. Work orders for all of the activities would be developed which outline a step-by-step process for maintenance personnel to follow for the various activities.

4. The Professional Engineer will develop an Annual Work Plan. This can be developed either through a maintenance management computer program or for simpler systems, manually. The output of the system will be as follows:

- An Annual Work Plan;
- Maintenance budgets; and,
- Activity work orders.

How Does a Maintenance Management System Work?

An Annual Work Plan covers a 52 week period. It generates, on a weekly basis, work order sheets for the maintenance personnel to complete. The manager meets with maintenance personnel on a weekly basis and provides the maintenance personnel with weekly work orders. They discuss the week's work, the budget and any problems identified in the previous week's work. Arrangements will be made for work to be done by outside contractors and established in the work plan.

The whole system sounds simple and, as such, too logical to not be incorporated into a program to protect your building asset.

How does this relate to liability? One of the issues that will be dealt with during court proceedings to reclaim costs from the parties at fault will be whether the Strata Council took steps to mitigate any damages related to faulty construction or faulty design. An established maintenance management system with maintenance records is sure-fire proof that the Strata Council acted properly to mitigate against losses.

A proper maintenance management system for your condominium will extend the life of the components in your building, reduce the cost of repairs for areas such as the building envelope which may have faulty design or construction, and prove that the Strata Council acted in a prudent and proper manner regarding the mitigation of any problems.

Annual Work Plan - ABC Strata Council															
Activity / Weeks	1	2	3	4	5	6	7	8	9	10	11	49	50	51	52
Foundation Inspection	1														
Roof Inspection	4														
Weatherproofing of Buildings															
Sump Pump	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	→	.5	.5	.5
Plumbing System Inspection	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	→	.5	.5	.5
Light & Switch Inspection		1									1				1
Main Electrical Inspection									1						1
Fire Alarm Inspection	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	→	.5	.5	.5
Forced Air Heating Inspection	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	→	.5	.5	.5

Note: 1. Times noted are for manhours of work per week.

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