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The Riverwest (Delta) Case

Peter Nordlinger, Associate Lawyer,
C.D. WILSON & ASSOCIATES

In 1996, the owners of the leaky Riverwest condominium complex in Delta sued the Corporation of Delta, the owner-developer, general contractor, and others involved in construction of their building. The B.C. Supreme Court has now rendered its decision, which lawyers and condominium owners alike will be reviewing carefully.

HISTORY

Riverwest was a "typical" leaky-condo building. Soon after occupancy in November, 1991, problems developed with the decks and balconies, which had been constructed with inadequate slopes. The owners carried out remedial efforts on those parts of the structure, which revealed more serious rot in the structural framing of the building. Further work and time brought to light problems with the construction as a whole. Experts were retained, and, after taking legal advice in September, 1996, the owners sued Delta and the other defendants in October of that year. A final report in early 1998 detailed the necessary repairs at a price tag of about three million dollars.

The owners sued Delta for negligent approval of the application for the building permit, negligent inspection of construction, and negligence in issuing an occupancy permit. Most of the owners no doubt felt that the municipality, as a public body carrying out approvals and inspections, should have ensured that the building was properly constructed and fit for use. What was the court to make of this claim? As in any legal issue, it was a matter of applying the relevant law to the particular facts at hand. The court reviewed the law and then examined Delta's role in the approval and inspection processes.

THE LEGAL BACKGROUND

Any claim in negligence involves proving that the defendant owed the plaintiff a duty of care, or, in other words, was closely enough involved with the plaintiff to have to ensure that any actions taken would not cause harm to that particular plaintiff. Secondly, it must be shown that the defendant did not fulfill that duty to a reasonable standard or level. Lastly, the plaintiff must convince the court that the defendant's failure to reach that standard led to the damage or harm.

Historically, the law has applied a two-step test in determining when a city owes a duty of care to private claimants. On the facts of each situation, there must be a close enough relationship between the city and the particular claimant, or group of claimants, to allow a reasonable prediction that negligence by the city would cause harm to that claimant or group. Then, even if a duty of care would otherwise arise, there must be no valid policy-based reason why the city should be excused. If there is not a close enough relationship, or if there are sound policy reasons why a duty of care need not be fulfilled, the city will not owe a duty of care to private claimants. The Supreme Court of Canada has recently summarized what a sound policy might be: "True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance." For the city to be excused from a duty of care, its policies must be established and carried out on the operational level in good faith, and "in a reasonable manner which constitutes a bona fide exercise of discretion."

When a duty of care can be shown, the standard of care will be "that expected of an ordinary, reasonable and prudent person," having regard to "the likelihood of a known or foreseeable harm, the gravity of that harm, and the cost which would be incurred to prevent it." If the standard of care exercised by the city was inadequate, it only remains for the plaintiff to show that that inadequacy led to his damage or harm.

THE APPROVAL AND INSPECTION PROCESSES

Like many other cities, Delta had passed bylaws adopting the provincial Building Code, obligating it to ensure that all construction in its area was done "in accordance with the provisions of this By-law and the Provincial Code." In particular, the bylaw required all drawings and specifications submitted for a building permit for any technically complex project to be prepared by an architect or engineer, and to be in significant detail.

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Voice from the Strata-sphere

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Part 5 of the Building Code deals with wind, water, and vapour protection for large buildings. Having adopted the Provincial Code in its entirety, Delta was obligated to demand plans prepared by an architect or engineer showing in detail how the building would meet the Part 5 requirements. Delta, however, approved plans that were not drawn by an architect and that lacked sufficient detail. It focused its attention on safety issues and ignored Part 5 of the Code when reviewing the plans. Neither did it carry out adequate inspections of the actual construction to make sure the water protection requirements of Part 5 were in place. Delta said it failed to demand more detailed plans certified by a professional, and to inspect for Part 5 compliance, in part because it felt the city council would not approve the extra cost when there had been no history of building failures pertaining to water penetration to that date. Delta characterized that position as a policy that should exempt it from a duty of care.

The court disagreed. The real policy, it found, was to adopt the Building Code in its entirety. Having done that, Delta was under an obligation to properly fulfill that policy at the operational level through the approval and inspection processes: "to hold otherwise would allow for a situation where a Municipality declares in a bylaw it is going to administer and enforce a scheme of regulation, parts of which are then avoided at the departmental level, defeating significant aspects of this responsibility", or, in other words, "where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect."

FORESEEABILITY

The court, then, found that Delta owed a duty of care to the Riverside owners. But was it foreseeable that the water problems would develop? If not, the standard of care required of Delta would not be high enough to support a finding of negligence. The court found that it should have been apparent to Delta, had it inspected for Part 5 requirements on site, as indeed it was to subsequent experts hired by the plaintiffs, that the construction did not meet the Code standard and was inadequate. The court noted that "the express purpose of Part 5.4 is to provide standards dealing with rain protection, an elementary feature to be expected of residential construction. In my view Delta should have anticipated the obvious. The public would reasonably expect that a municipality would put some effort into its responsibility to administer and enforce these Provincial Code provisions." It made no difference that there was no record of failures: "Detection before a history of failure occurs can and often should be expected. The fact that a wood structure would suffer damage if water persistently entered the interior of a frame wall, was, in my view, reasonably foreseeable. Like a defective retaining wall, the situation shouldn't have required a history of failure before the provisions were enforced." The standard of care required of Delta thus included ensuring compliance with Part 5 of the Code.

CAUSATION

Did Delta's failure to require adequate plans and to inspect for Part 5 compliance lead to the damage? That was the third and final step towards a finding of negligence. The court simply found that Delta's failings "materially contributed to the onset and extent of the failure, and hence the failure in the enforcement of the Code is a cause of the loss."

DISCUSSION

What can we conclude from this case? It's good news for strata lot owners who seek to recover from their municipalities. However, like other cases, it will be confined to its facts. Delta adopted the entire Building Code by bylaw, approved plans that were not prepared by an architect or engineer, and failed to inspect for Part 5 compliance. If another city that has also adopted the entire Building Code requires properly made detailed plans supported by assurances from the professionals, and inspects for Part 5 compliance, the result might be quite different. In addition, the Delta case itself will quite possibly be appealed. It cannot be said that all municipalities will now be automatically liable for leaking buildings merely because they administered approvals and inspections. Strata owners and the legal community will have to continue to be alert to this developing area of the law.

Editorial – Will the Delta victory mean more litigation?

Cora D. Wilson, Editor
STRATA-SPHERE CONDOMINIUM SERVICES INC.

The Delta decision ignited hope of successful third party recovery for Leaky Condo victims. This is the first significant court decision to date in favour of a strata corporation with respect to third party liability, particularly with respect to municipalities. It is anticipated that numerous strata corporations will rethink whether or not to litigate in light of this decision.

The Delta case stands as a testament to the judicial position in favour of the victims and against the systemic negligence pervasive in the construction community and the municipalities which cumulatively resulted in a potential two billion dollar housing crisis in BC.

The Courts appear prepared to bend over backwards to help victims in this crisis. Every Delta argument ably prepared and advanced by experienced and seasoned legal counsel was quashed. In the absence of letters of assurance from a certifying professional, such as an architect or an engineer, a municipality may not be able to escape liability if it adopted all provisions of the building code, yet failed to conduct a design review of building envelope components and inspections for building code compliance (Part 5, BCBC, Rain Water Penetration).

If a strata corporation undertakes a successful law suit against a municipality for damages for premature building envelope failure, then does this mean that 100% of the damages will be paid by this defendant?

In the absence of contributory negligence on the part of the strata corporation (ie. Failing to act timely, in a reasonable fashion and **pursuant to professional advice**), the Delta decision stands for the proposition that once found liable for a portion of the loss (ie. 20%), the municipality is liable to pay 100% of the damages arising out of that loss to the strata corporation (ie. The building envelope failure).

In other words, in the Delta case, the Court awarded a judgment in the amount of $3,151,572.65 against the developer, the general contractor, the designer, and the municipality, jointly and severally, for negligence associated with the design and construction of the building envelope portion of the project. The city was held 20% at fault. However, the City is not obliged to just pay its' several portion of the award or about $640,000.00 - it is on the hook for the WHOLE amount. This is a very significant decision. If the strata corporation is unable to recover from certain third parties because they are judgment proof (ie. Shell companies with no assets or insurance, for example), a successful claim against one defendant with pockets deep enough to satisfy the claim is all that is necessary. Municipalities may carry adequate insurance to cover significant claims or the ratepayers may be required to either pay the award or make up any short fall if insurance is inadequate. Either way payment is likely assured assuming liability against a municipality is established on a joint and several basis. The legislature may be asked to create a shield against liability in favour of municipalities. If this wish is granted, it will result in public outrage.

Should strata corporations pursue litigation? Seek legal advice for a preliminary legal opinion prior to plunging into the quagmire of expensive, complex and time-consuming legal proceedings. Not every strata corporation will fit within the Delta success criteria. This issue should be investigated at an early stage to determine the probability of success. The strata corporation should take baby steps to ensure that funds are wisely allocated and expended for this purpose. This means following the advice of a lawyer experienced in this area and undertaking the process in a step by step methodical way.

Ensure at every step of the way that the legal position of the strata corporation is not prejudiced or compromised by failing to meet critical limitation periods, for example. The limitation period for placing the municipality on notice and starting a claim is very short. Do not assume that because it appears as though these dates have passed that your action is statute barred.

If you do nothing, you will get nothing. Start by determining the legal constraints and probability of success. Only then should the strata corporation make an informed decision as to how to proceed. Do not piecemeal legal proceedings. This is comparable to undertaking bandaid repairs. Choose your professionals wisely and follow their advice.

Renovation Warranties and Strata Corporations
What to Look for and What to Ask!

Gordon Paul, Vice-President
WILLIS CANADA INC.

A building envelope renovation is difficult and challenging for strata corporations and their owners. Hopefully the following information will provide assistance and direction in what to look for and what to ask regarding renovation warranties.

BACKGROUND INFORMATION

In September 2000 the provincial government enacted regulations making warranty insurance mandatory on building envelope renovations of a particular size. If a project is relatively small, the regulations require *at least* a two-year labour and materials warranty. If a project is larger - involving a refitting of more than 60% of a wall's exterior envelope - the regulations call for *at least* a further five-year coverage component for protection against unintended water penetration caused by material, workmanship and design defects.

The warranty coverage can be purchased either directly by the strata corporation or through the general contractor selected to perform the construction work.

Finally, a note on how warranty insurance is distributed. Typically, insurance company products are delivered to the consuming public through insurance brokers and agents, not unlike homeowners and business insurance. There are three primary distributors, or brokers, of renovation warranty insurance and each represents a specific insurance company program. Two firms are single purpose insurance brokerages whose *raison d'Ítre* is the delivery of mandatory warranties; one of these firms is partially owned by the insurance company it represents. The third firm is a larger internationally based insurance broker and risk management consultancy.

Getting additional general background information is reasonably easy. Simply contact the Homeowners Protection Office (HPO). You can reach them through their website: www.hpo.bc.ca or you can call them at (800) 407-7757. HPO is the Crown Agency established to assist in the strengthening of consumer protection for homeowners in BC. The website has a number of excellent publications, providing information on topics such as repair management, financial issues, the selection of consultants and contractors and so on. Warranty insurance broker contact information is also on the website.

WHAT TO LOOK FOR AND WHAT TO ASK

- **Distribution**. As mentioned, understanding how warranty insurance is distributed is important in order to select which firm best suits your strata's needs and objectives. Of particular importance in this regard is the stability and resources of the firms involved, their insurance and warranty experience and their approach to handling claims.

As noted previously, some warranty insurance brokers are either single purpose firms or are actually owned, in part, by the insurance company they represent. These arrangements could be important when considering, for example, if claim settling is thought to be potentially too oriented toward the insurer and less to the consumer.

Gordon P. Paul is Vice President of Warranty and Construction for Willis Canada Inc. He holds an undergraduate degree in urban planning from UBC and a CRM designation from the Risk and Insurance Management Society. He is actively involved in the building envelope and warranty communities, serving as a member of the Provincial Advisory Council for the Homeowner Protection Office as well as actively participating in the Building Envelope Research Consortium and the BC Building Envelope Council.
Willis Canada Inc. is part of the Willis Group, a worldwide insurance brokerage and risk consultancy firm employing 12,500 people in 235 offices in 73 countries. Additional information about the Willis Warranty program can be found at www.williswarranty.com.

Ask questions of the warranty insurance brokers regarding all of these key areas.

- **Insurance Company Financial Security.** Nobody wants to see another debacle like that of the New Home Warranty bankruptcy. There are regulatory measures in place to reduce the chances of this taking place, setting the new, regulated warranty industry on a solid financial footing.

All warranty insurers now have to have their financial condition reviewed and approved by the provincial Financial Institutions Commission (FICOM) before providing this particular type of insurance. The financial standing of each warranty insurance company involved in BC carries at least an AM Best "A" (Excellent) rating. AM Best is the preeminent independent insurance company rating firm.

By comparison, an independent rating firm never examined the New Home Warranty Program books nor did FICOM review its financial statements and business plans.

Ask for the annual reports of the insurance companies, confirming the financial information distributed by the warranty broker.

- **Warranty Insurance Experience.** Financial statements aside, warranty insurance companies have varying degrees of experience in providing this type of insurance. Some are relatively new to construction and warranty insurance; some have substantial worldwide experience. Ask what sort of experience insurer has, both locally and internationally.

- **Underwriting.** A strong indicator of the experience level and stability of the insurance company and warranty insurance broker is the soundness of the overall risk assessment and management process used - typically referred to as "underwriting". Each warranty program has a different approach to underwriting. Ask for specifics regarding how projects are assessed and how enrolled consulting and contracting firms are evaluated.

You should feel comfortable about how your prospective insurance company views and reviews risk. Sound underwriting is a hallmark of a program with a long-term future and no one wants to be insured by a program that they feel falls short on underwriting.

- **Coverage Options.** The warranty marketplace does, in fact, offer a range of coverage for building envelope renovations. Some programs simply comply with the government required minimum standards; others provide significantly enhanced coverage.

The recognition of availability of broader than minimum insurance appears quite important when stratas make warranty insurance decisions. Our firm's experience is that 70% of stratas select enhanced coverage when presented with the option to purchase it. Typically, strata owners that have gone this route advise that enhanced coverage is seen both as a unit resale and value enhancement tool in addition to being simply a better consumer protection product.

Understand what the strata corporation's warranty insurance goals and objectives are and tailor buying decisions accordingly. Ask warranty insurance brokers for firm, non-cancelable quotations for basic and enhanced coverage.

- **Premiums.** Identify how premiums are calculated and how consistently they are applied. The application of a reasonable premium based on sound underwriting is

another foundation of program stability. Beware the inconsistent.

- **Warranty - Buying Direct.** Project bid documents are the basis on which general contractors quote pricing to do renovation work. Some forms simply call for the general contractor to provide insurance to the strata owners that complies with basic minimum government regulated amounts.

These arrangements have important consumer implications. Firstly, the warranty purchasing decisions are in the hands of the general contractor and the strata is simply precluded from making its own warranty protection choices - both in terms of who provides the insurance and what scope of coverage is put in place. Such bid documents carry de facto assumptions that the strata owners are indifferent about which warranty broker and coverage they want. Considering the predominant buying pattern toward enhanced coverage, such assumptions stand a likely chance of being inaccurate.

Secondly, having the insurance arranged for the strata through the general contractor can result in additional and unnecessary costs. For example, if the warranty is incorporated into the general contractor's final price, the premiums are subject to GST. If, however, warranty is purchased directly by the strata, premiums are not subject to GST. No disrespect to the federal government, but why give them more money than necessary?

Another potential added cost is that the general contractor, depending on the structure of the contract, could add a mark up to the warranty premium. Again, this is a needless expense.

Lastly, the general contractor may not share some of strata's other warranty objectives and criteria and simply may select a program that, given the choice, you and your strata would not consider.

The answer to this situation is to consult directly with warranty insurance brokers early in the overall renovation process and advise the firm drafting the bid documents (typically the building envelope consultant) of the warranty firm you wish to use. Ask your consultant how these arrangements can be made and the conditions that might apply.

CONCLUSIONS

There is a range of options available with the product and service offerings that stratas require in a building envelope renovation project; warranties prove no exception to this rule. To select the best fit, it is necessary for the strata to identify your warranty needs, objectives and preferences.

Based on what is set out in these key areas, the next step is to do some old-fashioned detective work. Finally, take a highly proactive approach to insure the proper execution of your warranty preferences.

Considering the implications that warranty program selection can hold in the months and years ahead, this is work that is well worth the effort.

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The Selection of a Residential Warranty Provider

Robert Boyd, President (since 1972)
WYLIE-CRUMP LIMITED

The following four Insurance Companies are licensed to underwrite residential warranties as mandated by provincial legislation through the *Homeowner Protection Act* (HPA):

Royal & SunAlliance established 1710 (Marathon Warranty)
Commonwealth established 1950 (Willis Canada)
Kingsway established 1965 (Residential Warranty)
London Guarantee established 1985

Although the Financial Institutions Commission (FICOM) is the authority for licensing the Insurer, it does not perform a process of due diligence with respect to the fiscal integrity of the Insurance Company. FICOM will tell you it does not have the resources to provide this scrutiny. Case in point – Eron Mortgage Corp.

Any strata council may check the reputation and financial stability of these four insurance underwriters simply by contacting any professional commercial insurance brokerage.

The selection of a warranty Insurance Company is determined by a number of considerations other than price. There first must be a "fit" between the contractors and the project engineers. It is essential for the owners and property managers to understand their options and interview the warranty providers before the invitation to tender stage.

Remember always that ultimately it is the owners who select the Insurance Company.

Some warranty providers are limited to certain contractors while some are limited to certain engineers, or a certain size of project.

Most warranty providers will scrutinize the contractors' abilities, reputation for customer satisfaction and quality of work. Often, an independent or staff engineer reviews the design of the owners' engineers. Any discrepancies in building science principles or practices are addressed and reconciled before the remediation work begins. During construction, regular site visits continuously monitor the quality of work.

In terms of the "fine print" differences among warranty underwriters, remember that the warranty was authored by the Government and written as a direct damage insurance policy on a no fault – no deductible basis. According to the HPO, British Columbia has the most comprehensive residential construction warranty in North America.

The four Insurers may vary in terms of their underwriting requirements of the builders and contractors and the indemnities required of them, but the wording may not be less than the broad form legislated in the *Homeowner Protection Act.*

Wylie-Crump Limited (Est. 1972) is an independent specialty risks insurance brokerage with one office in Vancouver, British Columbia, Canada. Its principal shareholder, Robert G. Boyd, has been underwriting and brokering general insurance since 1963. Wylie-Crump provides innovative custom crafted risk reduction and risk transfer methods and products to a number of clients with intricate and unusual insurance and guarantee needs.

The legislated warranty term for **NEW** construction is for a period of 2 years for labour & materials / 5 years for water ingress / 10 years for structural defects (i.e. 2/5/10) but some Insurers may extend the water ingress term to 10 years for certain projects.

The legislated warranty term for **RENOVATION** construction is for a period of 2 years for labour & materials / 5 years for water ingress (i.e. 2/5). Under certain circumstances the coverage for the water ingress term may be extended for an extra premium.

To quote a familiar expression, "an ounce of prevention is worth a pound of cure." Diligence is required in the selection of not only the contractor and engineer, but also the warranty Insurer.

New Research and Practices for BEP

Jan Caulkens
HOMEOWNER PROTECTION OFFICE

Proper construction and renovation of building envelopes has been an important issue in B.C.'s coastal climate since the mid-1990s. In response to this issue, the housing industry has joined forces to learn more about the factors involved, to devise better ways to build and repair building envelopes, and to reduce the possibility of future moisture damage in B.C. homes.

A number of research initiatives are now coming to completion, resulting in a huge body of knowledge and expertise about building envelopes. The next step is to implement this new knowledge into practice, and to continue to build on the best practices and quality control protocol that has been established. New products and practices in the residential construction industry will enable homeowners to build, repair or buy homes with increased confidence.

Several research projects funded and managed by Canada Mortgage and Housing Corporation (CMHC), the Homeowner Protection Office (HPO), and other organizations in the residential construction industry will be discussed this October, in the first-ever Building Envelope Research Symposium. The symposium was developed by CMHC and the HPO to be a principal vehicle for disseminating the results of building envelope research completed in 2001.

The Building Envelope Research Symposium is funded by CMHC and the HPO, and will be presented in partnership with the Building Envelope Research Consortium (BERC), the Urban Development Institute (UDI), and the BC Building Envelope Council (BCBEC).

The Homeowner Protection Office is a provincial Crown corporation established to increase consumer protection for homeowners and bring about an improvement in the quality of residential construction. The HPO's program areas include: licensing of residential builders and building envelope renovators, setting the standards for and monitoring the third-party home warranty insurance system, a research and education function in the areas of consumer information and building science, and financial assistance for owners of leaky homes.

Builders, developers, architects, engineers, contractors, renovators and representatives from across the residential construction industry and the government will attend this one-day seminar, to learn about new research pertaining to the construction and repair of building envelopes. Topics will include:

- **The Latest Research Results on High-Rise Buildings**
  A look at what has been learned about the building envelope performance of high-rise residential buildings. Also, new guidance on selecting materials and construction techniques.

- **Rainscreen Performance Monitoring Results**
  A review of actual performance results for rainscreen walls.
- **Building Envelope Rehabilitation**
  New guidelines for the evaluation and repair of building envelopes, and a look at case studies that show the successful use of creative design solutions instead of extensive repairs where possible.
- **Building as a System — Effective Ventilation**
  Buildings function, and should be considered, as entire systems. This session will look at how the building envelope, mechanical (heating, cooling, ventilation) systems, and occupants interact to influence overall building performance and occupant comfort.
- **Understanding How Wood Decays & How Metals Corrode**
  This session will help ensure that each material used in the home will function properly within its environment.
- **Designing Fast-Drying Walls**
  While deflection and drainage are the primary means of shedding rain, walls must also be capable of diffusing small amounts of trapped moisture in order to ensure long-term performance.
- **Updates to CMHC's BC Best Practice Guide**
  This guide provides designers with key moisture management principles and building envelope design guidance.
- **CMHC's Quality Assurance Protocol**
  Quality assurance procedures for the entire development process to help ensure high performance of the project.

Attendees of the symposium will take away additional tools to improve the construction and renovation of building envelopes in B.C. homes. The symposium will include lectures, interactive workshops, discussion opportunities, and product demonstrations in order to foster the most complete understanding of the new research.

"Through broad consultations with industry representatives, we have developed high-quality research products to assist all industry stakeholders with building envelope issues. Homeowners will also benefit from improved building envelope construction and renovation techniques resulting from this recent research," said Mark Salerno, a Senior Consultant for Research and Technology Transfer with CMHC.

Bob Maling, Director of Licensing and Registrar for the Homeowner Protection Office added that, "on-going building science research and education is key to improving the quality of residential construction and restoring consumer confidence in the long term. Partnerships with other government agencies and industry to research emerging issues in building envelope construction and then transfer that knowledge to those people who implement it in the field helps bring about these goals."

Several gains have been made in the construction of building envelopes over the past five years, including the implementation of a Best Practice Guide, a Quality Assurance Protocol, and the initiation of the Builder's Tool Box building envelope construction educational program and Model Buildings Program. Future plans for research include the printing of industry publications and the establishment of further training for the residential construction industry. The results of these projects will be presented at future symposia planned for the industry.

Bylaws and the "Strata Property Act"

Gerry Fanaken, President
VANCOUVER CONDOMINIUM SERVICES LTD.

Our legal system has certain standards and procedures for the collection of evidence when charges are to be laid against a person for violations of statutes. We have seen over the years that, when enforcing authorities (i.e., the Police) do not adhere to those standards, evidence which may be gleaned through an improper process is sometimes set aside by the courts as being inadmissible.

As we all know by now, the new *Strata Property Act* is vastly different from the old *Condominium Act*. I have often called the new legislation "consumer protection legislation" because it goes to great lengths to protect the rights of strata lot owners from unfair, arbitrary, biased or capricious decisions by strata councils. We also know that the enforcement of strata corporation bylaws, despite improvements to the legislation, still rests with the council of a strata corporation. To a large extent, when bylaw violations are being addressed, the strata council remains the police force, prosecutor, judge, jury and executioner.

Over the next few years and, indeed, over the next decade, it is likely that we will see a substantial number of council decisions being challenged in the courts or through arbitration. It is vital, therefore, that strata councils adopt a very stringent and high standard of administration when it comes to the enforcement of bylaws.

Frequently, strata councils receive a complaint from an owner and automatically assume that there has been a bylaw violation. At other times, council members themselves observe certain conduct of owners or tenants and initiate bylaw infraction remedies which could include the levying of fines or the issuance of specific orders to an owner or tenant to comply with the bylaws. It raises the question, however, as to how valid such actions by strata councils will be if it can be shown that the collection of evidence was done in a manner inconsistent with the general standards of our broader community. Let me give you an example.

Gerry Fanaken, Author, Educator and President of Vancouver Condominium Services Inc., Vancouver. Mr. Fanaken has been actively involved in the administration of strata corporations for over 25 years. His company currently manages over 200 residential strata corporations which represents approximately 13,000 individual condominiums units.

A strata corporation has a "No Pet" bylaw and, unknown to the strata council, an owner has a pet. On the face of it, the owner is in violation of the bylaw. This situation exists for a number of months or years and no one is any the wiser for it until one day there is a water leak from a pipe within that particular strata lot where the pet is residing. No one, except the pet, is home when the plumber arrives and the strata council has the door opened by a locksmith in order to permit entry to the strata lot on an emergency basis. It is generally believed that the action taken by the strata council in this regard complies with various provisions of the statute and the bylaws of the corporation. So far, so good. But,

once inside the strata lot, while the plumber is doing the pipe repair, the strata council notices that the absent owner has a pet. The strata council says "Ah ha! We have discovered a violation of the strata corporation bylaws and we must enforce it."

The strata council proceeds, therefore, to issue a letter to the owner of the pet advising that the pet must be removed and/or a fine is to be levied on the owner's account for violation of the "No Pet" bylaw. If the owner complies then that is the end of this story but, if the owner does not comply and argues with the strata council (which happens very often in the case of pet bylaw infractions), the matter is surely to end up before an arbitrator or a judge. The question that will have to be answered is whether or not the evidence collected by the strata council will be considered admissible since the collection of that evidence was done so in a manner which is not consistent with normal bylaw enforcement. Indeed, this is not a criminal matter; thus, the principle may well not apply in such circumstances. Nevertheless, it is something that will have to be considered sooner or later by a competent authority. As a matter of fact, there are some situations already afoot dealing with this topic and it will be interesting to see how the ball bounces.

When I started property management over twenty years ago, I would see maybe one or two lawsuits or arbitrations in a year. Over the years, condo owners have become more feisty and are not prepared to stand by quietly while their strata councils mete out unilaterally made decisions and penalties. This attitude, combined with the stringent provisions of the new *Strata Property Act*, are giving rise to a considerable number of disputes which will end up in the courts or before arbitrators. The costs are astronomical!

Strata councils, with the best of intentions, try to institute bylaws which are ostensibly created in the best interests of their strata corporations. Sometimes these bylaws are well-meaning but may very well infringe on an owner's rights or maybe go beyond the authority given to the strata corporation for such bylaws. For example, some strata corporations insist, through bylaws, that the owners must pay their monthly strata fees by post-dated cheques or through an automatic bank transfer arrangement. Would this type of bylaw be valid? When you look at the statutory provision at Section 119 of the *Strata Property Act*, it states:

Nature of bylaws

119 (1) The strata corporation must have bylaws.

(2) The bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation.

Note the last phrase of subsection (2) which states "... for the administration of the strata corporation." Can it be argued that the "administration" includes the method for processing strata fees? If the answer is yes, then it would appear that a bylaw requiring the payment of those strata fees to be done in a certain manner, i.e., post-dated cheques or pre-authorized payments, falls within the authority of the strata corporation to create such a bylaw. Did the legislators really intend that expression to be as broad as I have suggested here or was it to have a different meaning?

Also note in subsection (2) that the bylaws "may" provide. It does not say "shall" provide. Will this be a focus of litigation? Likely yes!

Take a look at the new bylaw #8 dealing with the responsibility for doors and windows of a strata lot. It would appear that the strata corporation is now responsible for the repair and maintenance of unit doors and windows. Does that bylaw include locks and keys to the same doors of those strata lots? If so, does that mean that the strata corporation has a right to hold a key to each individual strata lot? What happens if an owner upgrades to an expensive high-security system? Does the bylaw require the strata corporation to give consent? To repair or replace if necessary?

I do not have the answers to these questions and, as stated earlier, over the next few years I have no doubt that we will see some very interesting battles in the legal system. The new *Strata Property Act* has solved a number of problems for strata corporations but, at the same time, it is clear that many new avenues of uncertainty now have to be explored. Bylaws will be a hot topic, a very hot topic, you can count on it.

Friends of the... strata-SPHERE

Windows and Bylaws

Tony Gioventu, Executive Director
CONDOMINIUM HOME OWNERS' ASSOCIATION OF B.C. (CHOA)

BYLAWS: AVOID DISPUTES. HAVE A LEGAL REVIEW. CAN YOU ENFORCE YOUR BYLAWS?

Writing your bylaws and adopting them at a general or special general meeting is only the beginning of the bylaw procedures for your strata corporation. Many stratas never anticipate what they will do if they are required to apply bylaws, enforce the fines or penalties against the owners or defend the bylaws in a dispute. The value of having a legal review of your bylaws should never be underestimated. All strata corporations considering their bylaw reviews have been advised to seek financial approval from their strata corporations to undertake a legal review of their final proposed drafts before proceeding to a general meeting to ratify them. I have included a sample article of a proposed bylaw that addresses the replacement and/or repair of thermal sealed window systems. The bylaw not only sets out the requirement for who is responsible for the repairs, but directs the council and corporation how the procedure must be executed.

THERMAL/MULTI PANED WINDOWS

Assuming that windows form part of the building envelope and therefore form part of the common expense, this assumption may imply that there is a responsibility on the part of the Strata Corporation for these window repairs. The exterior wall is the boundary of the strata lot, and the window may be divided by that boundary. Many stratas have struggled with the issue of what caused the failure of the thermal pane in the primary instance and who pays for the repair. Was it a result of excessive heat and humidity in the unit? Excessive cold and weather from the exterior? Inferior product that could not withstand the duration of time? Installation failures? Product transfers from other regions of the country? (This has been a cause of failures because the pressurization of the product has been altered by the transfer through higher elevations).

In our experiences through the association, we have encountered a myriad of afflictions with the windows, and we have gathered interesting information from our members and associates that may be a helpful resource for your strata corporation.

If the strata corporation allows for the owners to replace the windows as they fail, the individual unit cost is much higher than replacing 10-20% of them at one time. The quality control of the replacement is jeopardized because the strata's control over the installation is limited. There may not be sufficient contractor's liability insurance. The building envelope may be damaged causing future failures. The technicians may not be experienced in your type of building envelope. The window design and material may be significantly different from the existing windows in the building. As most owners have some form of these windows in the newer complexes, many strata corporations have chosen by a 3/4 resolutions or by a registered bylaw amendment, to replace windows at a specific quantity in one time period, when they have failed and where the failure is purely cosmetic in nature and not a risk to the building envelope or the structure of the building.

Sample bylaw:

"The Owners, Strata Plan NW!@#$, by 3/4 resolution, hereby resolve that: thermal pane windows will be replaced by the strata corporation as they fail in the following procedure. When 20 (or any number or % set by the bylaw) identified windows have failed in a cosmetic/pressurized nature only, the corporation will undertake their timely replacement in accordance with building code and municipal requirements. The windows will be replaced with similar design and cosmetic presentation, but will be replaced with superior product produced by local manufacturers. Wherever possible the corporation will undertake to negotiate warranties, and solicit building inspections and technical requirements as they pertain to the building envelope and the window installation by qualified technicians.

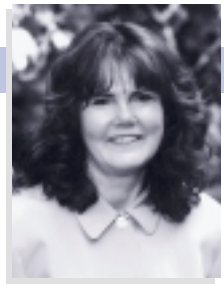
The strata corporation as represented by the council will take every precaution in the event of such replacement with respect to the protection of the strata corporation, the building and its assets, and from any liability that may arise. The expense for the repairs will be presented to the strata corporation at a Special General or Annual General meeting for ratification prior to proceeding with the repair, and shall be expended as a common expense from the contingency reserve fund. The strata corporation shall include an amount in the projected contingency reserve fund planning for such replacement on a 5 year cycle, as presented with the annual operating budget.

Tony Gioventu, the Executive Director and Strata Property Advisor for the Condominium Home Owners' Association of B.C. (CHOA), educator and editor of the CHOA Journal. Tony brings 18 years' of experience in property management, development and strata property legislation to his position. In serving a provincial member base of over 34,000 home owners, Tony often fields up to 100 enquiries a day for information related to Strata Corporations.

In this example, the strata corporation has adopted a proactive resolution to ensure the windows are replaced properly, expensed fairly and on a cycle that would mitigate costs. The solution was clarified in the bylaw and the owners are treated in an equitable manner. Because of the complex nature of even the simplest bylaws, the necessity of having a legal review is reaffirmed. In addition to the bylaw procedure, the corporation should also give consideration to the terms of contracts in the construction cycle.

Under section 72(2) of the *Strata Property Act*, the windows are not designated as LCP and in many cases form the boundary of the strata lot as part of the exterior wall or roofing system as part of the common property.

While this example of a draft bylaw is not intended for any use other than educational, it may provide the strata corporation with a method to clarify a very common inquiry and identify the complexities that may be encountered when you are developing your schedule of bylaws and amendments.



Letters of Assurance & the Local Government Act

Joyce M. Johnston, Associate Lawyer
C.D. WILSON & ASSOCIATES

What are Letters of Assurance? They sound like something one would like to get in the mail, but they're not. They are certificates that the Building & Inspection Departments of Municipalities receive from registered professionals who are retained by owners on building developments. The professionals are architects and engineers registered under the applicable *Architect's Act* or the *Engineer's Act* of the Province. The letters assure the Municipality that the work the professional has overseen for the owner-developer is in substantial compliance with the B.C. Building Code. However, municipalities generally have building and inspection by-laws, formulated under the powers given to them under the *Local Government Act*. Under these by-laws and the law developed in the courts, the Building Inspectors are responsible for ensuring compliance with the Building Code. The question becomes, how do these two systems mesh?

Before considering this question, we should look at how Letters of Assurance came to be. The current Letters of Assurance (Part of the B.C. Building Code) were introduced in 1992 through revisions to Section 2.6, "Professional Design and Review." Prior to the inclusion of the uniform mandatory Letters of Assurance in the 1992 B.C. Building Code, there were a number of different versions of Letters of Assurance developed and deployed by various municipalities. The Station Square Inquiry report recommended that standard Letters of Assurance be made mandatory for all buildings governed by Part 4 of the BC Building Code. Municipalities, owners, designers and all parties using

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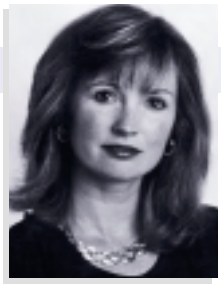
Letters of Assurance were keen to have a standard set used throughout the province. A technical committee was struck to formulate the current Letters of Assurance comprised of representatives of the Architectural Institute of B.C., the Association of Professional Engineers and Geoscientists of B.C., the Building Inspectors Association of B.C., the Union of B.C. Municipalities and the Building Standards Branch.

Background materials put out by the Ministry of Social Development and Economic Security (formerly Municipal Affairs) state that Letters of Assurance are intended to clearly identify the responsibilities of key players in a construction project. There are bold statements that Letters of Assurance do not alter the fundamental responsibility of local government or anyone else from what existed previous to their adoption. The professional Acts of architects and engineers already specified that these professionals check compliance with the B.C. Building Code and provide field review to make sure that the intent of the design is realized in the construction. Marketplace developments in the 1980s had led to developers bargaining with architects and other design professionals to provide drawings only, and to undertake limited or no field review. For many reasons it became apparent that this was undesirable. Mandatory Letters of Assurance was one answer to the concern.

The missing piece of the puzzle is whether a Municipality with Letters of Assurance can deflect their responsibility for design review and approval during the building permit process and conducting field reviews. Section 290 of the *Local Government Act* provides that the municipality will not be held liable when it issues a building permit for a development that does not comply with the building code in certain circumstances. One prerequisite is that a registered professional engineer or architect must certify that the plans are in compliance with the building Code. The other requirement is that the municipality must indicate in writing that it relied on the certification.

In conclusion, it appears that Letters of Assurance will not exempt a Municipality from faulty inspections. However, if the Letters of Assurance provide the certification provided for in Section 290 of the *Local Government Act*, it may exempt the Municipality from liability where a building permit is issued based on designs containing Building Code violations (ie. lack of details). A lawyer can gain access to the Municipality's documents on behalf of a Strata Corporation to determine whether the correct formalities have been observed. Section 290 only became law in 1990. Obtain legal advice to determine whether or not this legislation applies to your development.



The Delta Success Formula - Follow the Advice of Experts

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

In *The Owners, Strata Plan NW3341 v. Canlan Ice Sports Corp., et al*, (2001), unreported, Vancouver Action No.C965848, Vancouver Registry, August 21, 2001 (B.C.S.C.) the plaintiff obtained a joint and several judgment in the amount of $3,151,572.65 against the developer, the general contractor, the designer, and the Municipality for negligence associated with the design, construction and inspection of the project.

Where a Municipality adopts the BC Building Code, without exception, by bylaw and does not obtain professional assurances for a Part 3 project (large building), the Municipality was found negligent for failing to undertake a review of the design drawings during the building permit stage and to conduct inspections for obvious deficiencies to ensure compliance with Part 5 of the Code. The building envelope damages were foreseeable and there was a causal relationship between the failure of the Municipality to meet its standard of care and the damages. The Municipality was held 20% at fault but may be required to pay the entire judgment as it was found jointly and severally liable with the other defendants.

The Strata Corporation ("Riverwest Estates") was an 85 unit complex comprised of three buildings. It was constructed in 1990 and fully occupied by the fall of l991.The building envelope design was not prepared by a professional architect and no professional assurances from the certifying professional were obtained by the Municipality.

A wood framed face-sealed stucco type wall design was improperly utilized and obvious construction deficiencies should have been detected during inspections, such as improperly sloped decks, failure to install flashings or improperly sloped flashings or failure to apply sealants at openings.

The purpose of Part 5.4 of the BC Building Code is to provide standards dealing with rain protection. Delta should have anticipated the obvious. The public would reasonably expect that a municipality would put some effort into its responsibility to administer and enforce these Provincial Code provisions. The court found it surprising that no attention was paid to a "very basic requirement that a roof shed or drain water."

Was failure to address the inappropriate design and construction a cause of the eventual loss? Expert testimony established that the high quality of design and maintenance needed to succeed with the face-sealed application **in this case** gave rise to too high a risk of eventual failure. The expert witness concluded that the designer should have avoided a face-sealed design. Failure to enforce Part 5 of the code was a cause of the loss.

The construction of the decks and parapet flashings relate directly to Part 5 of the Building Code. Proper administration and enforcement of Part 5 of the Code require details to be shown on the plans to be presented for approval to satisfy rain penetration details. The design did not do so leaving the details to be resolved by the contractor on site. The court found this unacceptable.

The court acknowledged that the face-sealed wall assembly is affected by factors such as weather exposure conditions, climatic conditions and protective design features, such as overhangs. The prevalence of preventative design features requiring maintenance of the seal, protection of wall openings and other protective measures such as flashings contribute to the risk of failure.

Failures occur when face-sealed designs are difficult to protect and when applied without attention to details critical to success. The Court accepted the expert evidence that the face-sealed design in the circumstances of this case did not meet the requisite standards in place at the time of approval and construction of Riverwest.Estates The Court also accepted evidence that the rainscreen design was appropriate and awarded damages on this basis.

Is The Rainscreen Design a "Betterment"?

Many of us have heard the common place argument from Defendants that the remediation is excessive, unnecessary and rainscreen constitutes a "Betterment." There is no legal recovery for these items! The rainscreen design provides a second line of defence against water penetration by utilizing a 3/4" vented air cavity behind the exterior cladding to permit drainage or drying if water penetrates past the exterior stucco, for example. The face-sealed design only has one line of defence - the exterior face. Once water gets into the wall assembly, prolonged exposure to the structural wood framing components above a certain moisture content level results in deterioration, rot and structural failure. The result is "Building Cancer" or premature building envelope failure.

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.

Betterments are non-recoverable items in litigation. The Delta case test for a betterment may be stated as follows: any claim for damages by the strata corporation which is not necessary for the function of the building component, but rather constitutes an enhancement to the project is not recoverable.

In other words, the test is whether the remedial work was necessary to make the application functional. It may be inferred that the Defendants are required at a minimum to meet the requirements of the BC Building Code. A negligent standard cannot be the standard of the day, even though the action (ie. face-sealed design) was common practice at the time of construction. The court held that the rainscreen, as well as the canopies over certain doors did not constitute betterments in the circumstances of the case.

One theme of the Delta Case is that a Strata Corporation must follow the advice of its professionals. If the professional recommends remediation with rainscreen, then that is what should be done. Failure to follow the recommendations of the professional creates substantial risks to the strata corporation of successful contributory negligence and betterment claims. Based upon the facts of the Delta Case, the strata corporation retained an engineer in 1992, one year after substantial completion of the Project, to perform the one year warranty review of the complex. He recommended among other things that the balconies be stripped and reconstructed.

The developer contrary to the opinion of the strata corporation's engineer did a piecemeal repair to the balconies which ultimately contributed to the extent of the damage eventually suffered. Further, the Developer did not carry out any of the other recommendations provided by the Engineer. It is interesting to note that neither did the strata corporation. For so long as the developer was taking on this responsibility, the strata corporation was absolved from the obligation. Surprisingly, this conduct was not held to constitute contributory negligence on the part of the strata corporation in the Delta Case.

It is important to recognize that the developer undertook this repair option as opposed to the strata corporation. In light of the fact that contributory negligence was not found against the strata corporation for failing to comply with the recommendations of the professional given at such an early stage, one can only conclude which party undertakes the repair action is significant. The developer was held jointly and severally liable for the premature building envelope failure. If the strata corporation had undertook this bandaid remedial action contrary to professional advice, one must question whether the result of the case would have been different.

The argument that the repairs were too extensive and excessively priced was not considered in detail in the judgement. However, it is safe to assume that if the recommendations of the strata corporation's professionals were followed and an appropriate tender process was implemented, that this will likely translate into recoverable damages in Court. The extent to which future costs are recoverable is still open to question.

The strata corporation follows a dangerous path when it deviates from the recommendations of its professionals. This conduct should be discouraged.

Limitation Periods Reviewed

Sharla M. Haney, Lawyer,
C.D. WILSON & ASSOCIATES

One of the most significant issues that arises in "Leaky Condo" litigation is that of limitation periods. If a limitation period expires, the plaintiff's claim may be extinguished. What most strata corporations don't realize is that there are different limitation periods that apply to different defendants.

The *Local Government Act* ("LGA") sets out specific limitation periods that apply to claims brought against municipalities. These limitation periods are onerous for those who may have a claim for damages against a municipality and are as follows:

1. Written notice setting out the time, place and manner in which the damage was sustained must be delivered to the municipality within 2 months from the date on which the damage was sustained (s.286 LGA); and,
2. The action against the municipality, in certain circumstances, must be commenced within 6 months after the cause of action first arose, or within a further time designated by council (s.285 LGA).

This issue was raised in the recent decision of *Strata Plan NW 3341 v. Canlan Ice Sports Corp. and the Corporation of Delta et. al.* (2001) (the "Delta Case"). The court found that time begins to run when the damage referred to ought to have been discovered through reasonable diligence. In the Delta Case, the court found that the strata corporation had satisfied the notice requirements under the LGA since notice of its claim was delivered to the municipality before a final building evaluation was received from the strata corporation's expert. The court inferred that receipt of a final building investigation report would start the limitation period running. However, the limitation period may start running before receipt of a building investigation report in certain cases. Further, if a limitation period has expired, there are saving provisions that may be relied upon to prevent a claim from being extinguished. As individual circumstances will vary, legal advice should be sought with respect to these issues.

The *Limitation Act* will apply to claims against parties other than municipalities as well as all claims against municipalities which do not fall under s.285 of the LGA. In leaky condominium cases, the issue arises whether a two year or a six year limitation period applies. In *Strata Plan No. VR2000 v. Shaw (1998)*, the court distinguished "injury to property" for which a two year limitation period applies from "damage to property" for which a six year limitation period may apply. The court held that "inherent defects in the construction of the condominium" gave rise to a claim for damage to property. As a result, leaky condominium cases may fall under the six year limitation period. However, please note that this case is under appeal. With respect to when the limitation period starts to run, the court found that the knowledge of the individual unit owner determines when time starts to run since the Strata Corporation brings an action on behalf of the individual unit owners.

Sharla M. Haney, Lawyer, C.D. WILSON & ASSOCIATES. Condominium Lawyer and Litigator. Ms. Haney graduated from UBC Law School in 1999 and was called to the Bar in 2000. She is not only a lawyer, but an award winning former franchise owner and scholastic achiever.

The issue of limitation periods was also addressed in *Strata Plan No. VR1720 v. Bart Developments Ltd.*. In the Bart case, the court found that the strata corporation acted reasonably in addressing the leaks until a professional building condition report was obtained. The Strata Corporation commenced legal proceedings more than six years after an expert report was obtained. The court found that once the report was received, a reasonable person would have concluded a good cause of action lay against the developers, the engineering consultants and the architects regarding defects in construction. Therefore, receipt of the expert report started the limitation period to run. Since the action was commenced outside the six year limitation period, the strata corporation was barred from claiming damages for those deficiencies outlined in the expert report but retained a cause of action for deficiencies that were not the subject of the report.

The court found that in the leaky condo situation, it would be reasonable to expect the plaintiff to need expert advice to determine if these matters were individual leakage problems or defects arising from negligent design or construction. Therefore, changes in general knowledge of the plaintiff regarding significance of relevant facts might have an effect on the limitation period.

Since the time at which each limitation period starts to run will differ based upon the circumstances of each case, each strata corporation should obtain legal advice as soon as damage is discovered to ensure that the municipality and others are put on notice and that the strata corporation's claim is commenced before a limitation period expires. Even if the strata corporation suspects that a limitation period has expired, legal counsel should be sought since there are saving provisions that may be invoked in certain circumstances. It is important to act swiftly and reasonably in this regard and to avoid delay.

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