

MUNICIPAL OFFICIALS SEMINAR 2008

Building Code Inspection Liability

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About HED Insurance & Risk Services

- HED is Manitoba's largest independent insurance broker/consultant
- Specializing in “protected self-insurance” programs for member firms/entities of larger associations, such as the AMM
- All such programs put a significant concentration on risk management and loss prevention, for the protection of the program and participating members

About HED Insurance & Risk Services

- HED's current staff totals 220 employees
- The Manitoba Municipal Insurance Program: owned by municipalities, managed by the AMM, and administered by HED since its inception in 1975



FILLMORE RILEY

FILLMORE RILEY LLP
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MUNICIPAL LAW PRACTICE GROUP

Fillmore Riley LLP performs a wide variety of services for our clients in all aspects of municipal law. In addition to acting as counsel of record for municipalities under the Municipal Insurance Program administered by Hayhurst Elias & Dudek Inc., we also act as general counsel for municipalities and have extensive experience with the array of legal issues that arise in this field.

Outline

- **Municipal Insurance Program Outline**
- **Municipal Liability**
- **Exposure to Liability Claims**
- **Avoiding Building Inspection Claims**
- **Case Examples**

Manitoba Municipal Insurance Program Outline

Property Insurance

- The Manitoba Municipal Insurance Program provides All-risk coverage (Fire, Theft, Damage) for Municipal buildings and equipment listed on the policy.
- Coverage is extended to groups / committees (named on the Municipality's Policy) that operate municipal facilities.
- Coverage only applies if the group and the facility has been specifically added to the policy.

Liability Insurance Protection

- Municipalities participating on the Manitoba Municipal Insurance Program, their employees and,
- Groups / committees named on their Municipality's Insurance certificate are provided with:
- \$20,000,000 Liability Coverage for Bodily Injury and Property Damage claims against them.
- A \$2,500 minimum deductible applies to all liability claims.

Insurance Program Loss Pool

- The Manitoba Municipal Insurance Program operates as a Protected Self-Insurance Plan
- A portion of the premiums for all Municipalities are retained in a self-insurance loss pool held by the AMM; the pool pays the first part of claims (\$500,000 on liability claims, \$1,000,000 on property claims)
- Commercial insurance carriers provide excess protection above the self-insurance pool, to ensure that the pool can never be in a deficit

Liability Insurance Coverage

- Liability insurance protects both employer and employee against claims alleging negligence / liability
- Employee has the right to independent legal representation
- Insurance coverage includes awards for damages and legal defense costs

Municipal Liability

Legal Liability Basis:

- **Duty of Care** - Obligation to exercise “reasonable care” with respect to the interests of others, including protection from harm
- **Standard of Care** – The degree or level of care a reasonable person should exercise in the circumstances; the standard applied by the courts will vary depending on the position held by the alleged wrongdoer.

Legal Liability Basis:

- **Vicarious Liability** - Liability that an organization takes on for the actions of those who function on its behalf.
- **Joint and Several Liability** – A situation in which more than party is found liable for the wrong suffered but may be each individually responsible for the entire obligation (payment of the entire damage award)

Liability

- **Negligence:**
 - Doing something other than what a “reasonable” person would do which results in injury or damages
 - Being found negligent leads to being legally obligated to pay for the assessed damages
 - Organizations are responsible for the actions of their employees and volunteers while acting within the scope of their duties (**Vicarious Liability**)
 - Organizations could be held liable for the actions of parties using their facilities (**Joint and Several Liability**)

What is your duty?

- Once the Municipality makes the decision to issue building permits and conduct building inspections it is held to owe a duty to the property owners and future owners to properly review plans and conduct inspections
- Liability arises at two major stages of a construction project:
 - The plan approval stage and
 - The on-site inspection stage.

Plan Approval Stage

- Municipality could be held 100% liable for issuing a permit based on plans not approved by an engineer or architect
- Developers will sometimes try to convince you that the plans meet code and an engineer's approval is not needed
- Plans stamped by an engineer and/or an architect may now be required prior to some construction.

Site inspection Stage

- Building owner may allow contractor to proceed with work without giving the municipality adequate notice to inspect. At times support work or internal work has been covered up before the inspection can be conducted
- Relying on the assurances of the contractor that they have been properly installed can leave the municipality liable for problems later on
- You have the power to order work to be opened to allow you to inspect

Municipal Act:

- New Municipal Act January 1997 provides significant protection for municipalities and their employees regarding building code inspections
- Specifically, a municipality is not liable for a loss related to:
 - (a) the matter or extent of an inspection, or
 - (b) the frequency, infrequency or absence of an inspection;unless the inspection was requested at the appropriate stage of construction and, with reasonable advance notice, and the municipality failed to conduct the inspection or conducted it in a negligent manner

Municipal Act:

- An inspection is conducted in a negligent manner only if it fails to disclose a defect or deficiency that (a) could be reasonably expected to be detected, and (b) falls within the scope of the inspections being conducted
- The intent of the legislation was to limit municipal liability in building inspection cases; it remains to be seen how the courts in Manitoba will interpret and apply these provisions.

Exposure to Liability Claims

Exposure to Claims

- Municipalities issue building permits and conduct site inspections at various stages of construction (as requested)
- While some municipalities have qualified staff to handle Part 3 (Commercial) construction, most do not!
- Combined Planning Districts creates large enough area to permit the hiring of a qualified building inspector
- Dept. of Labour can also be contracted to handle building inspections when needed.

Example

- Building permit is issued for a new residential building
- Construction is completed and some time later sewage smell is detected coming from under the floor
- The floor is opened up and it is discovered that the sewage drain lines were not installed properly
- Costs to open the floors and repair the work and remediate the damage is substantial

Example

What usually happens!

- Building owner will undoubtedly sue!
- Lawsuit would name the contractor as primary responsible party for faulty construction and;
- Lawsuit would also name the municipality and the building inspector as secondary responsible party because they issued the permit and conducted the inspections

Example

- Contractor often declares bankruptcy!
- If contractor does not have enough insurance / assets, courts will look for someone that can pay for the damages
- That someone who will pay for the damages is very likely going to be the municipality!
- Where is that payment for the damages going to come from?
- From the Loss Pool – Basically from your own pocket!!

Avoiding Building Inspection Claims

Avoiding Claims

- Avoid acting as a consultant!
- Ensure that your building inspector is properly qualified
- Ensure that the building project falls within your qualifications (Part 9 vs. Part 3) before issuing permits and inspecting
- Ensure that drawings are sealed by an architect or engineer where required
- Verify that all required documentation has been received before issuing a permit

Avoiding Claims

- During inspection, document deficiencies, issue orders when necessary and follow up to ensure compliance
- You have the power to order work uncovered if its been covered before you've inspected
- Get to know your builders. Which ones will follow the building code and which ones may take short cuts?
- Watch for new builders or contractors working outside their usual area of expertise, or outside their normal location

Avoiding claims

- Be aware of changes to construction that may require revised plans
- Refer to the building code when in doubt or ask the Dept. of Labour for opinion. If construction is outside your area of qualification – contract Dept. of Labour / Office of the Fire Commissioner to conduct inspections
- Take notes during inspections – what you checked, what you found, comments etc. that will refresh your memory in the event of a claim months / years later

Court decisions

and

Case examples

Leading Canadian Decisions

Rothfield v. Monolakos

- Construction of a retaining wall; permit applied for after the construction already started
- Sketch lacked detail but permit issued
- No inspection called for before backfilling of footings

Leading Canadian Decisions

Ingles v. Tutkaluk Construction Ltd.

- Owner hired contractor to do renovations to basement floor
- With owner's knowledge, contractor began work before building permit issued
- Permit issued and inspection took place
- Underpinnings beneath footings could not be checked
- Underpinnings improperly constructed.

Case example

- Municipality issues permit for construction of an addition notwithstanding that overall size of building in excess of 6,000 square feet, bringing it out of Part 9 and into Part 3 of the Building Code
- Municipality no longer has jurisdiction and permit needs to be obtained from Office of Fire Commissioner
- Owner moves forward with construction, then finds out later that substantial renovations needed to comply with more onerous requirements of Part 3 of the Building code

Case example

- Owner retains contractor to build new home
- Significant deficiencies in construction
- Numerous inspection conducted during construction
- Contractor completes foundation, backfills and finishes other work without calling for inspection
- Building inspector does not require “opening up” but simply approves
- Other deficiencies clearly of the sort that ought to have been detected on a reasonable inspection.

Case example

- Owner hires a contractor to build a cottage
- Alleges numerous deficiencies including failure to anchor the concrete piles to bedrock
- Inspections were never called for by either the owner or the contractor but building inspector did attend on numerous occasions to conduct inspections; alleged deficiencies not identified
- Owner claiming for estimated cost of remedial work.

Building Code Inspection Liability

Questions?

Contact Information

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