

Successful defence of BUILDING INSPECTION CLAIMS



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Surprise, surprise, as the ground gets wetter and our society becomes more litigious, an increasing number of legal actions are issued against municipalities alleging negligent building inspections. Many municipalities are not able to successfully defend these claims for a number of reasons, including lack of compliance with legislative requirements, policies which are contrary to legislative requirements, and inadequate record keeping. This column will provide information and advice which can assist a municipality in avoiding a judgment against it for negligence.

The Buildings and Mobile Homes Act is a statutory enactment that obliges all municipalities in Manitoba to adopt and enforce the applicable building construction code or standard, usually the Manitoba Building Code and other applicable construction codes (the “Building Codes”), and their own building or construction by-laws. There is no discretion with respect to enforcement of the Building Codes and by-laws. Municipalities must enforce them.

The Supreme Court of Canada has confirmed the obligation to enforce the Building Codes. When a municipality

inspects, it owes a duty of care to all who might be injured by a negligent inspection, including subsequent purchasers of the building. To avoid liability, the municipal entity must have exercised proper and reasonable care in its inspection. While a municipal inspector is not expected to discover every latent defect in a project or every deviation from Building Code standards, the municipality will be liable for those defects that the inspector could reasonably be expected to have detected and to have ordered remedied. There are some saving provisions in *The Municipal Act*, including when builders are required to call a municipality for inspections. By and large though, if a Code deficiency was able to be detected on reasonable inspection, and wasn't, a municipality will be liable for the failure to detect it.

Municipalities cannot rely on a reputable builder to construct in compliance with the Building Code. Municipalities cannot rely on the involvement of an engineer or architect to absolve them of inspection obligations. Municipalities have their own separate obligation to enforce and cannot delegate the enforcement obligations to other parties except in limited circumstances. The ability of a municipality to rely on an engineer, architect, surveyor or other person with expertise is limited in *The Municipal Act* to situations where there has been an actual certification or express representation. A municipality can rely on a certification or representation only for those matters properly contained within the certification or representation. For example, the mere fact that an engineer has designed a foundation does not relieve the municipality of its obligation to inspect the backfill placed against the foundation, unless or until the municipality sees an inspection



certificate from the engineer as to the appropriateness of the back fill used by the builder. Similarly, engineered drawings do not relieve a municipality from inspecting to ensure that the construction conforms to those drawings, unless the engineer is issuing confirming certificates for each stage of construction.

A municipality cannot avoid its obligation to enforce the Building Codes by having policies in place which limit or restrict the activities of its inspectors. For example, if a municipality institutes a policy prohibiting inspectors from carrying or climbing ladders for inspections, whether for Workers Compensation reasons or otherwise, the municipality will be liable for defects which could have been reasonably detected by use of a ladder. A lot of construction takes place more than 7 feet above the ground. Such a policy would eliminate those kinds of inspections. The legislation and case law does not allow a municipality to avoid liability by creating these exceptions to its inspection obligations.

The defence of many building inspection lawsuits is hampered by the unavailability of detailed records, or any records. A complete master file should be kept in the municipal or planning office with copies or originals of all applications, permits, correspondence, telephone notes, plans, drawings, sketches, and every other document relevant to the building. Inspectors should use an Inspection Work Sheet or Report which contains ample room for the recording of detailed notes for each inspection. Detailed information to be recorded for each inspection includes the stage of construction, precisely what was inspected, who was present, what advice was provided by the owner or builder, what could not be inspected due to the state of construction, conformance with which page and items of the drawings and specifications, defects, orders to remedy etc. If inspectors are using a separate field notebook, copies of the relevant pages from the field notebook should be regularly placed in the master file. If sketches, diagrams, drawings or plans are submitted with the permit application materials or are required for the construction, inspectors should have those documents, or copies,

with them and available for review at the site during an inspection in case the owner is not there or doesn't have the drawings. Also, litigation can involve building inspections which occurred many years ago. It is important that complete records be maintained for lengthy periods of time, although they can be stored electronically or offsite. It is also helpful to place clear directions and requirements on the building

application and permit as to what inspections are mandated, at what stages of construction the owner is obliged to call for an inspection and the amount of advance notice required.

In summary, a municipality can mount a successful defence to building inspection claims by establishing compliance with the legislation through detailed and complete documentation. **L**



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