

Lessons from British Columbia



Managers should investigate all reports of deficiencies before signs of exterior mould and wood rot issues escalate as in the leaky condos of British Columbia.

What every property manager should know

By Adam I. Zasada

Photos: Gilbert Laroque



AS A litigation lawyer I practice primarily in the area of construction law. In particular, I seem to have a natural affinity for construction deficiency claims – I like them and they like me. Not only do deficiency claims usually have complex and interesting factual and legal issues, they are often meaningful for the parties involved. This makes for satisfying legal work.

I grew up in Kitchener, Ontario but packed up in 1993 and headed to law school and practicing law at a large Vancouver law firm where I joined that firm's Construction Law Practice Group in early 2002 to help with the incredible workload that the "leaky condo crisis" had generated. Until returning to Ontario in 2008, I worked on numerous files arising from leaky buildings, representing primarily condominium owners, but also single-family homeowners, a large building product manufacturer and residential developers.

Most people, certainly in condominium management circles, have

some degree of awareness and understanding about British Columbia's leaky condos. It was a real phenomenon and socio-economic crisis that had a profound and lasting impact on the lives of tens of thousands of homeowners and the practices of builders, developers, architects and municipal inspectors. To get a sense of the magnitude of the effect and fall-out, one only need consider that it resulted in the financial collapse of B.C.'s provincial new home warranty provider of the day, a significant re-writing of parts of the *B.C. Building Code*, and an international renaissance in building envelope science.

I should say at the outset that I don't think for a minute that Ontario is likely to experience a leaky condo experience anything akin in magnitude to that in B.C. – the climate is different, there's less moisture here and warmer drying periods, and the architecture is somewhat different. That said, buildings that suffer water ingress are not by any means a uniquely coastal phenomenon and Ontario's heavy seasonal (and often wind-driven) rains, the rapid rise in

multi-unit residential construction in Ontario and late-coming changes to the *Ontario Building Code* (approximately eight years behind those in the *B.C., Building Code*), certainly create the possibility.

While not everyone will be genuinely interested in the "leaky condo" story, what is, in my view, of utmost importance is that people – homeowners, property managers, builders and designers – heed the lessons that were learned in B.C. recognize the early signs of a problem and act on them. This article is intended to offer a few suggestions that I wished over the years I had been able to provide to owner/manager clients who, unfortunately, didn't seek advice (legal, engineering, etc.) until long after the problem had been discovered.

■ Heed Early Warning Signs

Most often, the early signs of a "leaky condo" are first evident to the owners of individual units in the building. These owners will report wet carpets, water on windowsills, drywall or ceiling staining, or simi-

lar problems to the condominium board or the management company. Sometimes these reports will begin very shortly after a new building is occupied and other times the reports won't start until years after a building was constructed. From a legal point of view, it is critical that those involved in the management of the building take these reports seriously and act on them quickly.

Property managers are almost always heavily involved in both the investigation of construction deficiencies and the management of the remediation work. Similarly, if the condominium corporation votes to raise funds and pursue cost recovery litigation, the property manager will almost always serve as the primary liaison between legal counsel and the condominium's board of directors. Given these realities, there are a few things that every property manager should consider and keep in the back of his or her head to be well positioned to both identify issues and to respond effectively and appropriately in the face of the discovery of a design or construction deficiency.

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Signs of interior mould.

1. Even without signs of leaks, for new buildings, one of the best things a condominium's management can do is to retain a building science professional (generally an architect or an engineer) to conduct an investigative building envelope assessment of the subject building within the first year of the Tarion warranty coverage. If the investigating expert discovers Building Code violations, substandard workmanship in the building envelope construction, or significant deviations from building manufacturer's details, specifications and installation instructions, these should be reported to Tarion right away so that Tarion can assess whether warranty coverage applies. While incurring the

cost of a building envelope assessment on a new building can be a hard sell to the owners, taking this proactive and preventative measure will be some of the best money the condominium corporation ever spends if a serious problem is discovered.

2. Even if a building is not new and there's no warranty coverage, bringing in an expert to assess the construction and condition of the building envelope can be a good investment. If a major problem is discovered, the condominium corporation can start budgeting to carry out repair work and consult with a lawyer to see whether legal action is warranted. If no major problems are discovered, the consultant will be able to provide advice with respect to required maintenance and identify any areas that should be monitored.

3. Regardless of whether it is a newer or an older building being assessed, encourage the condominium board to hire a premier building science firm to carry out the investigation. First, the old adage that "you get what you pay for" often holds true in this case. Second, the preliminary assessment may be one of the most important pieces of evidence if litigation later follows and premier building envelope consultants will generally be better expert witnesses than consultants with less experience or weaker qualifications.

4. Educate owners within the building about what to look for and

set up a protocol for reporting problems. This suggestion may sound a little pedestrian but you'd be surprised how many times I've seen unit owners wait months or years before reporting the problem and acting upon it. A necessary component to this suggestion is that the management (the condo board, the property manager, etc) needs to follow up with these reports, investigate the causes, and watch for patterns (i.e., leaks or moisture at the balcony doors of more than a couple of units may indicate a defective sliding door design or installation, a membrane problem, or slope deficiency that might affect most or all units in the complex).

5. Establish a system of inspecting and maintaining the exterior of the building. While a window and a wall assembly might be reasonably expected to last for 20-30 years (or much more), caulking and other seals generally are not. One excellent building envelope consultant that I worked with often in Vancouver told me that, ideally, caulking should be inspected every 1-2 years and completely replaced every few years. If a building has systemic water ingress problems and significant design or construction flaws, this usual and normal maintenance won't likely solve the problem. However, if a building is not maintained, owners can bet their bottom dollar that the defendants in their cost recovery claim are going to raise a lack of

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maintenance as a defense (contributory negligence) to the claim.

6. One of the most important things to do following the discovery of a problem is to consult legal counsel quickly. Every province has its own legislation that governs the timeframe within which a would-be plaintiff must start his lawsuit. In Ontario, the current legislation requires that a lawsuit be commenced within 2 years of the event giving rise to the claim. It's actually much more complicated than this – there is a huge body of law surrounding when that 2-year clock begins to tick – but many otherwise strong claims have been defeated because a plaintiff failed to commence a claim in time. This is a heartbreaking way to lose the right to pursue compensation for repairs. Bottom line: Err on the side of caution and act quickly.

7. Keep good records (and store them in an organized file) with respect to building envelope maintenance, reports of water ingress, any investigations undertaken, discussions (i.e., meeting minutes) and communications (emails, letters,

etc.) on the subject and financials. If a problem arises and if litigation becomes likely, not only will the condominium corporation's lawyer love management for having done this, the condominium corporation will likely save considerable money in legal fees if the lawyer doesn't have to comb through dozens of files and thousands of documents looking for and sorting the relevant documents.

8. If there is a suspected problem with the building envelope, take steps to find out the identities of all of the players involved in the construction of the building in question. Some of this information can be obtained from the condominium's description documents and the contracts of purchase and sale. However, often the best source is in the planning and building department file of the municipal authority having jurisdiction over building permits and approvals and such. A bit of advance notice to the good staff at the planning and building department and a half an hour at City Hall will usually net a lot of good information. If a lawyer is retained, he or she can take care

of this as well but can better "hit the ground running" if some of this information is already known. This can also save valuable time if limitation periods are an issue.

At the end of the day, the central theme of these few suggestions is to monitor and investigate, maintain, and to seek advice promptly if problems are discovered. Another important point to take away is that, if owners fail to properly and diligently maintain their buildings over time and act quickly if problems emerge, they will, to varying degrees, risk having to absorb or share in the blame that might have otherwise been borne by the developers, designers, builders, trades, and municipalities that designed, built, and approved the construction of the building. ■

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