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November 2 2002

Taxpayers on hook for leaky condo

B.C. municipality held liable by appeal court

The British Columbia Court of Appeal has written what may be the final chapter in the first of many "leaky condo" cases to reach that court. Following its decision, ratepayers in the Vancouver suburb of Delta will probably have to pick up the tab for a \$3.2 million repair, plus six years of interest and costs now owing to the owners of Strata Plan NW3341.

The decision has important implications for Ontario homeowners who are unhappy with the construction of their own new homes and condominiums.

The leaky condo story began with the construction of the 85-unit Riverwest development in Delta in 1990-91.

All three Riverwest buildings are of wood frame construction. They were designed with terraced decks, balconies, flat roofs and stucco walls. Unfortunately, improper slopes in the design of the decks and balconies resulted in water pooling on their surfaces. Despite repeated but unsuccessful attempts over the years to make repairs, water began to leak into the exterior and interior walls, window surfaces and ceilings.

This leakage caused significant internal wood rot, and the structural beams of the buildings began to weaken. To make matters worse, the joists were not properly attached to the supporting beams and were inadequate to support the decks and balconies. As well, the chimneys were not resting on foundation footings.

Total repair costs came in at more than \$3 million, or between \$35,000 and \$60,000 per unit.

In 1996, the condominium corporation, on behalf of the owners, sued the city of Delta, the developer, the architects, the building designers and the contractor.

By the time the case got to trial in 2000 and 2001, most of the defendants had either settled or been dropped from the case, and the only real issue for the judge to decide was the liability of the city of Delta.

After a lengthy trial, Delta was ordered to pay \$3.15 million plus interest and costs. The basis of liability against Delta was that it breached its statutory duty to inspect and supervise the construction, and to enforce the provisions of the building code.

Delta did not appeal either the finding of liability against it or the amount of the damages. Instead, it based its appeal on two technical arguments. First, Delta claimed that the court action was started after the limitation period had run out. Under two separate B.C. laws, there are three different limitation periods for suing a municipality six months, two years and six years, depending on circumstances.

The trial judge ruled that the limitation period in this case was six years, and the condominium corporation was not too late in starting their lawsuit in 1996.

The second ground of appeal was that the condo owners should have been held partly at fault for not following the advice of their own experts and starting repairs sooner. On appeal, the three-judge court refused to interfere with the decision of the trial judge, who ruled that the condo owners had acted reasonably in carrying out repairs.

Unless some of the other defendants can be found and forced to contribute, the entire judgment will be the responsibility of the taxpayers of Delta.

Elsewhere in British Columbia, the owners of some 65,000 similarly defective units are awaiting compensation that could exceed \$2 billion in damages and tie up the court system for years. At last report, 7,500 of them had declared bankruptcy. The British Columbia New Home Warranty Plan filed for bankruptcy several years ago and is unable to pay at least \$100 million in claims against it.

In the trial decision of the Strata Plan 3341 case, the judge relied heavily on the Supreme Court of Canada decision in the Toronto case of Ingles vs. Tutkaluk (see Title Page, *City takes hit for shoddy reno*, June 21, 2001, at <http://www.aaron.ca>). Canada's highest court has now made it clear that when a municipal government makes a policy decision to inspect homes under construction for compliance with bylaws and the building code, it owes a duty, under certain circumstances, not to be negligent in implementing that policy.

Based on the appeal decision in the B.C. leaky condo case, and the Supreme Court of Canada decision in Ingles vs. Tutkaluk, unhappy owners of new homes and their lawyers should consider if in some cases there is some municipal liability for failing to ensure compliance with local bylaws and the Ontario Building Code.

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