

Manitoba Building Officials Association

Liability and Risk for Building Officials

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Building permit issued for construction of a single-family dwelling.

Permit and building by-law require inspections of the work and set out timing for the inspections.

Builder starts construction and pours the foundation but doesn't contact you for the required inspection.

You attend at the site and can see some of the work, but not all. You can't determine if the foundation work has been constructed to Code.

The work and cost required to uncover the foundation enough to inspect the work and confirm Code compliance will be significant.



What do you do?

- Direct the foundation to be uncovered so an inspection can take place?
- Accept photos from the builder showing the foundation before it was poured?
- Issue a stop work order or permit construction to continue at the builder's risk?
- Apply for a warrant to enter the property and expose the foundation if the builder refuses?
- Apply for a Court order to prevent further construction if the builder refuses to stop construction?

How to deal with the issues that can arise when administering building and occupancy permits and the related liability concerns.

We will look at:

- Judicial views on building official negligence and liability.
- Municipal Act limitations on liability for building inspections.
- The “Big Three” Supreme Court of Canada cases and the lessons provided by these cases.
- The statutory authority provided to building officials for the enforcement of building by-laws and the building code.

REFRESHER

Negligence of building officials administering building by-laws, codes and permits involves 3 issues:

Duty of care

Breach of the duty

Damages

DUTY OF CARE

- Owed by building officials.
- Must take whatever actions are appropriate to ensure the premises under construction will be built in a manner that ensures the safety of the future occupants.
- Duty is owed to the permit applicant, contractor/builder, owner and future occupants.
- Number of issues in determining the scope and extent of this duty:
 - Does the duty extend to all building code violations or just to those related to structural or health and safety?
 - Does the duty extend to the owner's plans and specifications with the contractor?
 - Does the duty extend to those defects that could not have been discovered on reasonable inspection?

BREACH OF THE DUTY

When deciding whether there has been a breach of the duty of care, the Courts consider the likelihood of the harm occurring and gravity of the risk against the cost or burden on the defendant to eliminate that risk.

The Courts apply the following standard in considering a building official's actions:

“ordinary, reasonable and prudent building official in the same circumstances with the same degree of skill and experience”

Potential liability can arise at any stage: Application and examination of building plans, issuance of the building permit (with or without conditions), during the ongoing oversight of the construction and Code compliance, the inspection process and, finally, the issuance of the occupancy permit stage.

Most lawsuits involve building inspections. This is the basis for the Municipal Act provisions that set out how liability may or may not arise for building inspections.

**MUNICIPAL
ACT
PROTECTION
FROM
LIABILITY**

"building standard" means

- (a) a building construction standard adopted, established, prescribed or varied under *The Buildings and Mobile Homes Act*, and
- (b) a standard adopted, established, prescribed or varied under a regulation under *The Fires Prevention and Emergency Response Act*;

"inspection" means an examination, review, survey or other action permitted or required to enforce a building standard;

Requests for inspections

387(1) A municipality is not liable for a loss related to

- (a) the manner or extent of an inspection; or
- (b) the frequency, infrequency or absence of inspection;

unless the inspection was requested at the appropriate stage of construction and with reasonable advance notice before the inspection was required, and the municipality failed to conduct the inspection or conducted it in a negligent manner.

Negligent inspections

387(2) 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 inspection being conducted.

Certification by professionals

387(3) For the purpose of an inspection, a municipality may rely on a certification or representation by an engineer, architect, surveyor or other person with expertise respecting the thing being certified or represented, and a municipality that relies on such a certification or representation is not liable for any loss or damage caused by the negligence of the engineer, architect, surveyor or other person in making the certification or representation.

**MUNICIPAL
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Matters outside scope of inspection

387(4) An inspection by a municipality to enforce a building standard does not create or impose a duty on the municipality with respect to any matter not being inspected.

Failure to comply with conditions

387(5) If conditions are imposed by the municipality in respect of or in the course of an inspection, the municipality is not liable to any person for loss or damage as a result of the conditions not being complied with, unless the municipality

- (a) knew of the failure to comply with the conditions;
- (b) had the power to order that the conditions be complied with; and
- (c) failed to order compliance.

Failure to prevent or limit loss

387(6) A municipality is not liable for loss or damage resulting from an inspection or a failure to inspect if the person claiming the loss knew or ought to have known of the thing or matter that caused the loss and failed to take reasonable steps to limit or prevent the loss.

Inspection not a guarantee

387(7) An inspection or a system of inspections by a municipality is not a representation, guarantee, warranty or insurance of the quality or standard of construction of, or of any other thing respecting, the property, building, utility, structure or other thing inspected.

MUNICIPAL ACT LIMITATIONS TAKEAWAYS

- For a building inspector to be liable, inspection must have been asked for when it was supposed to and in time for the official to conduct it, but the official either failed to do the inspection or did it negligently.
- A inspection is negligent if it fails to disclose a defect that could reasonably have been detected and was within the scope of the inspection being conducted.
- The building official is entitled to rely upon certifications provided by a professional such as an engineer or architect.



MUNICIPAL ACT LIMITATIONS TAKEAWAYS

- If a person knew about the thing that caused the loss and failed to take reasonable steps to prevent the loss, the municipality may not be liable for the resulting damages.
- A municipality is not guaranteeing the quality of construction.
- **FOCUS for today:** Section 387(5) and the enforcement actions a building official can take to limit liability.
- **Under section 387(5) there is no liability for damages arising from the failure to comply with a condition imposed by a building official during the course of an inspection (including a condition to remedy a non-compliance) unless the municipality knew of the failure to comply with the condition, the building official had the power to order compliance and the official failed to order compliance.**



How the Courts approach building official enforcement actions when dealing with Code compliance is demonstrated in the 'Big Three' Supreme Court of Canada cases:

**Kamloops v Nielsen 1984 SCC
Rothfield v Manolakos 1989 SCC
Ingles v Toronto 2000 SCC**

Kamloops v Nielsen 1984 SCC

Son builds home for parents (father city councillor). Does not follow plans or do proper underpinning, structural work. Official inspects and notices not built in accordance with plans but unable to inspect or see re Code compliance because other work covered up the structural work. Ordered to stop and provide new engineered plans. Provides new plans, proceeds with work but does not follow the new plans. Completes house construction, parents move in. Stop work order still in effect. City knew the new plans were not followed and issues remained but did nothing further. Home sold to Nielsen.

Court found City 25% liable, breached duty of care to subsequent purchasers to ensure home met plans and Code. **Interesting:** The City not taking any further enforcement action. It didn't decide NOT to act, it just didn't do anything. If it had decided not to act further and had a reason for doing so, it might have avoided liability. Court said the City had to give serious thought as to whether to take further enforcement steps. If it had decided on economic grounds not to apply for a Court order then that would have been a legitimate decision and it might not have been liable. Issuing stop work orders is one thing, but going to Court can be costly.

Rothfield v Manolakos 1989 SCC

Vernon, BC. Construction of a backyard retaining wall. Experienced contractor submitted a rough sketch of the work when applying for a permit. Building official granted permit relying on contractor's experience, low level of wall and low cost of the work. Footings put in place, concrete poured and backfill partially done. No inspection request. Official could not do standard inspection. Could have issued stop work and have work uncovered but didn't. Unfortunately, defects would have been found if an inspection had taken place. Wall collapses eventually.

City found 70% liable. Duty to inspect and carry out work subject to limitations arising from powers of building official set out in legislation. Court concluded the City was not negligent for accepting the rough sketch to base the permit, as it may exercise discretion and rely on site inspections to ensure compliance with standards. Permit can issue if inadequate, but cannot be issued if it is clear that it does not meet Code. Sometimes the owner will be contributorily negligent if they do not ask for inspection, but this does not relieve building official of duty to ensure building to Code and standards. Official should have issued a stop work order and required whatever was necessary for him to ensure the work met Code and standards.

Ingles v Toronto 2000 SCC

Another foundation case. Contractor hired to renovate basement and install underpinnings under existing walls as part of work. Work started without a permit. Eventually obtains a permit but underpinning work done and concealed by subsequent work. Building official could not inspect so could not tell whether work met Code but takes contractor's word that installed to Code. Flooding started after the work. Inspection revealed that underpinnings were not constructed to Code.

Once there is a policy that must inspect for Code compliance then there is a duty to carry out inspection. Failure to do so is a breach of duty and liability will result. In Manitoba the Buildings and Mobile Homes Act imposes a duty to administer and enforce the Code.

City found 14% liable. The Court found a more vigilant inspection was required, and that the building official had powers available to require the work be uncovered but failed to use them.

Principles from the SCC cases:

A municipality may be liable if

- it does not take steps to enforce a stop work order where it has failed to even consider whether to take this step. However, if it thought seriously and in good faith about what action to take, then it may not be liable, and

A municipality may be also be liable if:

- fails to use its powers to require an inspection and ensure the work complies with the Code.





Planning Act Enforcement Powers
available to building officials

ENFORCEMENT

Authority to inspect and enforce

175(1) A designated employee or officer of a planning district or municipality may, in accordance with the requirements of this Part, enter land or a building

- (a) to conduct an inspection to determine if a person is complying with any of the following:
 - (i) a by-law adopted under this Act that the district or municipality is authorized to enforce,
 - (ii) the terms or conditions of a permit, approval or order made or issued under this Act, and
- (b) to take any action authorized under this Act or a by-law to enforce or remedy a contravention of any matter referred to in clause (a).

Related inspection powers

175(2) When conducting an inspection, the designated employee or officer may

- (a) request that anything be produced to assist in the inspection;
- (b) make copies of anything related to the inspection; and
- (c) on providing a receipt, remove a record, document or other item related to the inspection.

No interference

175(3) No person may interfere with a designated employee or officer who is conducting an inspection or enforcement action.

Requirements

176(1) An inspection or enforcement action under section 175 must take place at a reasonable time and after reasonable notice has been given to the owner or occupier of the land or building. The designated employee or officer may enter the land or building in question only with the consent of the occupier or under authority of a warrant issued under section 177.

Identification

176(2) The designated employee or officer must, upon request, produce identification showing that he or she is authorized by the planning district or municipality to conduct the inspection or enforcement action.

No notice in emergencies

176(3) In an emergency, or in extraordinary circumstances, the designated employee or officer is not required to give reasonable or any notice to enter land or a building, and may take any inspection or enforcement action without the consent of the owner or occupier of the land or building and without a warrant.

Warrant

177 A justice, upon being satisfied by information on oath that

- (a) a designated employee or officer has been refused entry to land or a building that he or she is entitled to inspect or carry out an enforcement action on; or
- (b) a designated employee or officer reasonably anticipates that entry to the land or building will be refused;

may, upon application without notice, issue a warrant authorizing the designated employee or officer and any other person named in the warrant to enter the land or building and conduct an inspection or enforcement action.

Order to remedy contravention

178(1) If the designated employee or officer finds that a person is contravening

(a) a by-law adopted under this Act that the planning district or municipality is authorized to enforce; or

(b) the terms or conditions of a permit, approval or order made or issued under authority of this Act;

the designated employee or officer may issue a written order requiring the person to remedy the contravention.

Content of order

178(2) The order may

(a) direct the person to stop doing something, or to change the way in which the person is doing it;

(b) direct the person to take any action or measure necessary to remedy the contravention and, if necessary, to prevent a recurrence of the contravention;

(c) state a time within which the person must comply with the order; and

(d) state that if the person does not comply with the order within the specified time, the district or municipality may take any action required to remedy the contravention, at the expense of the person.

Review by board or council

178(3) A person against whom an order is made under this section may require the board or council to review it by making a written request to the board or council no later than 14 days after the order was made.

Powers of board or council

178(4) After receiving the written request to review the order, the board or council must review the order and may confirm, vary, or rescind the order.

District or municipality remedying contraventions

179(1) A planning district or municipality may take any action or measure that is reasonable to remedy the contravention if

- (a) the designated employee or officer has given a written order under section 178;
- (b) the order contains the statements referred to in clauses 178(2)(b) and (d);
- (c) the person to whom the order was directed has not complied with the order within the time period specified in the order; and
- (d) the deadline for requesting a review under subsection 178(3) has passed or, if a review of the order has been requested, and the decision of the board or council was to allow the district or the municipality to take the action or measure.

Costs

179(2) The costs of an action or measure taken by a planning district or municipality under this section are a debt owing to the district or municipality by the person who contravened the by-law.

Injunction

180 A planning district or municipality may apply to the Court of Queen's Bench for an injunction or other order to enforce a by-law made under this Act, or to restrain a contravention of the by-law, without initiating a prosecution thereof. The court may grant or refuse to grant the injunction or other order, or may make any other order that it considers fair and just.

OFFENCES AND PENALTIES

Offences

181(1) Every person is guilty of an offence who contravenes

- (a) a provision of this Act;
- (b) a by-law adopted under this Act; or
- (c) the terms or conditions of a permit, approval or order made or issued under this Act.

Orders in addition to penalty

182(2) When a person is convicted of an offence, a justice may, in addition to imposing a penalty under subsection (1), order the person to do one or both of the following:

- (a) comply with the provision of this Act or the by-law that the person contravened;
- (b) pay to the planning district or municipality the amount of the costs incurred by the district or municipality as a result of the contravention.

**Building
officials can
take any
number of
steps under the
Planning Act
and building
by-laws**

- Exercise powers to inspect and require builder to provide reasonable access, including uncovering work.
- Verbal or written direction to builder to comply or take action.
- Require builder to supply supporting professional confirmation that Code met.
- Issue a stop work order.
- If the builder fails to comply, charge with an offence under the Provincial Offences Act or Municipal By-law Enforcement Act.
- If access is refused, obtain a warrant to enter property.
- Apply to the Court of Queen's Bench for an order requiring the builder to comply with the Building By-law and Code.

**What steps to
take?**

**Important
considerations**

- The likelihood or probability of harm occurring.
- The seriousness of the risk.
- The cost to the municipality to take action and remedy the violation.
- The reliability of the information provided by the builder.
- The practicality of obtaining a warrant, charging with an offence or applying to Court for an order.
- The goal is to gain voluntary compliance as much as possible, with the least amount of time and cost to the municipality.
- What gets taken into account and what is a priority in weighing the various interests changes in each circumstance. There are no hard and fast rules.

**DOCUMENT...KEEP TRACK...DOCUMENT....FOLLOW
UP...DOCUMENT**

Municipal insurer legal counsel says claims are on the rise and are mainly about inspections dealing with structural and building envelope cases. Biggest challenge they have is with the lack of information available to defend. Often claims arise long after construction, when building officials have moved on or retired. The availability of records also deteriorates over time.

DOCUMENT...KEEP TRACK...DOCUMENT...FOLLOW UP...DOCUMENT

Key takeaway is the need to document your actions:

- What was inspected?
- What was found?
- What was the builder told to do?
- What follow up actions were taken and why?

Taking cell phone photos is a huge help. Emails allow for easy communication that can be found and relied on later. Documenting why certain action is or is not taken is also helpful for understanding why a building official did what they did at the time.

The more the building official can show that they seriously considered what action to take and why, the more likely that decision will be respected by the Court and found not to be negligent, even where the action is to take no further enforcement steps.

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You can't stop someone from suing you, but you can ensure they will have a very hard time doing it successfully.

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THANK YOU