

Building Inspectors

LIMITING MUNICIPAL LIABILITY

Who might bring a claim against a municipality?

Long list of people who might bring a claim against a municipality as a result of inspections:

- original property owners,
- builders,
- subsequent owners and occupiers,
- neighbours,
- parties financing building construction or development.

What can a municipality be liable for?

If found liable, a municipality can be responsible for paying for costs such as:

- repairing the building defect,
- repair of damage to property,
- loss of income,
- loss of equity, could include damages related to collapse of a project,
- personal injury damages if someone is physically injured as a result of a defect.

When can a claim be brought?

In Manitoba, a claim must be brought within 2 years under the

- Limitations of Actions Act (negligence), and
- Public Officers Act

The limitation period starts running from the date the cause of action arose.

For the negligent issuance of a building permit, this means 2 years from the date the permit was issued.

WHAT IF THE DEFECT IS DISCOVERED AFTER THE DEADLINE?

- Defects are often not discovered until long after expiry of the limitation period.
- Courts can extend the deadline to the date the problem could or should have been discovered.
- If discovery of the defect requires technical expertise, clock does not start until expert investigation discloses enough to notify plaintiff of an actionable problem.
- If defect discovered after expiry of the limitation period: 1 year to apply to court to extend time limit and get permission to sue.
- The Manitoba Limitations of Actions Act sets an ultimate limitation deadline of 30 years.

Standard of care

The standard applied to an inspector's actions are those of an

“Ordinary, reasonable and prudent inspector in the same circumstances”.

What will the standard be?

Determination of the standard to apply to a specific situation may consider the:

- nature of the development;
- size and complexity of the building;
- likelihood of harm resulting;
- gravity of potential harm;
- cost of preventing or remedying the harm.

Was the standard met?

- Whether the standard was met depends on the specific facts of each case. Case law provides general principles and guidance only.
- Buildings and Mobile Homes Act requires that every municipality **MUST** adopt and enforce the Building Code.
- Liability can arise in 2 main areas of an inspector's work:
 1. plan review and permit approval; and
 2. inspection.

Plan review and permit approval

- Plans do not have to show every detail re: code compliance.
- Plans may be insufficient but if they do not point to a problem may be no liability if a defect is discovered.
- Plans that are inadequate on their face and show a departure from the Code or an issue with safety will attract liability.
- Inspectors should be able to rely on sealed engineered plans as sufficient to support the issuance of a permit and avoid liability.

Inspections

- Focus is on health and safety.
- No duty to continuously monitor construction. Intermittent inspections are reasonable.
- Reasonable to rely on builder to notify inspector for inspections as per permit conditions.
- It is recognized that inspectors will most likely only do a visual inspection, BUT you must do more than a visual inspection when warranted (i.e. important structural elements or uncover work to confirm code compliance). Relying on builder's word that construction meets Code is not enough.
- Although Code compliance is the main focus of inspector's obligations, it is not the only focus. If the construction does not meet "good building practices" or "general safety fitness", the inspector must do more.

Municipal Act - inspection liability

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.

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.

Municipal Act - inspection liability

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.

What if you find a Code violation?

- Take reasonable steps in the circumstances.
- Focus on health and safety.
- Take the same factors into account that went into determining the standard, and consider the nature of the defect or Code violation.
- Review what do your policies and practices say you should do.
- Notice to owner and builder may address liability to them, but it will not protect against liability to others and subsequent owners.
- Steps to take may include
 - notice of violation,
 - stop work order,
 - monitoring and
 - follow up actions to ensure problem remedied and Code complied with.

What if owner/builder refuses to remedy the violation?

To avoid liability, you need to demonstrate that you have done everything you reasonably can to remedy the problem in these circumstances.

Courts do recognize that municipalities do not have unlimited financial or human resources.

Health or safety violations

The municipality may be required to take further enforcement action such as

- applying to the Court of Queen's Bench for an injunction requiring the person to comply,
- issuing a penalty notice under the Municipal By-law Enforcement Act if the municipality has established an administrative penalty system,
- charging the person with an offence under the Provincial Offences Act if the municipality has passed a by-law implementing this Act.
- If too expensive to go to court, at least show you considered the option and decided not to take it for certain reasons. You must consider obvious options.

What if there was negligence in the issuance of the permit or in the inspections?

- The municipality is a good target: insurance available to pay for the damages, always around and easy to find, not bankrupt.
- The Tortfeasors and Contributory Negligence Act: as long as the municipality has any liability, it can be required to pay all of the damages and be left chasing the other responsible parties.
- The property owner may share some responsibility for the damages, but their actions are not a bar to recovery unless their actions made it impossible for the inspector to discover the problem.

Municipal liability does not make the inspector liable

Even if negligent, an inspector is not liable for damages if they result from the inspector's actions carried out in good faith in the performance or intended performance of the inspector's powers, duties or functions.

Protection from liability

403(1) A member of a council or council committee, or a municipal officer or volunteer worker is not liable for any loss or damage suffered by a person by reason of anything said or done or omitted to be done by the member, officer or volunteer worker in good faith in the performance or intended performance of powers, duties or functions under this or any other Act.

RISK MANAGEMENT STRATEGIES

- **Maintain proper and complete documents and notes.**
- **Review the municipality's practices and policies to see if they meet the standard of a reasonable inspector. If they do not, then change them.**
- **Ensure your actions are consistent with the established practices and policies. If the circumstances suggest that you should deviate from them, make sure to explain and note in the file.**
- **Review your building by-law. What does it say, what does it allow you to require on issuance of a permit, does it require you to undertake actions that you are not doing or that you are not capable of doing? Suggest required changes if needed.**

MORE RISK MANAGEMENT STRATEGIES

- Review the form of permits, forms, and handouts. Do they adequately address the way you do or want to do your job (i.e. timing of and calling for inspections).
- Review the by-law appointing you or creating the inspector position. What does it say? Is it clear enough to ensure that the inspector has all the needed administrative and enforcement powers under the Municipal and Planning Acts?
- Educate the public: make them understand what you do and don't do. Use handouts and make information available on the municipal website.

CONCLUSION

- Court cases look at everything in the rear view mirror, with the benefit of 20/20 hindsight. You need to know that you may have to explain the actions you are taking today, to a court 5 years from now.
- If you can reasonably explain, you will probably be OK. If you think there might be a problem doing so, then think twice before acting, or not acting.
- The cost of repairing something is almost always lower than the cost of the damages that will result from a problem after something goes wrong.
- In the end guide your actions by what you consider and determine is reasonable in the circumstances.

Thank you

GO JETS GO !!!!!