

Changing BC's Civil Liability Laws?

The Attorney General has better options available to him . . .

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Introduction:

Changes to civil liability laws will reduce British Columbians' rights and access to justice through the courts should they be harmed in any way, anywhere, by anyone. The most disturbing aspect of these potential changes is that they will inadvertently protect wrongdoers. A single judgment in Delta in favour of 'leaky condo owners,' and a number of similar cases yet to be heard, have triggered the discussions to change BC's civil liability laws. The court has ruled regarding "leaky condos." If Attorney General Geoff Plant does not like the court's decision, the quick remedy available to him is to change the law.

But if the goal of the Attorney General's Office is to uphold justice, he has other options, which would better serve the long-term interests of BC citizens. The following proposed options, if implemented, could significantly reduce the number of construction dispute court actions. They would also contribute to improving housing quality and reward those who construct durable homes. When you consider that car consumers have "lemon laws," "recall legislation" and "return policies" for a lesser-cost purchase – an automobile, it seems outlandish that a significantly larger purchase – a home – does not have similar legislated protection and safeguards.

To prevent the construction of "disposable housing" and protect the health, safety and welfare of British Columbians, the Attorney General should first look at the following combined suggestions. The Attorney General should evaluate and develop solutions that preserve the well-being of the construction industry and its contribution to the provincial economy, the construction of durable homes, and the welfare of citizens who choose to live and invest in British Columbia. We should fix the problems that lead to construction litigation, not change the laws that provide victims a mechanism for justice when things go awry.

Mandatory warranty coverage limits are too low. *Will the current mandatory two-year labour and material, five-year water penetration and ten-year major structural warranty become the acceptable durability standard of residential construction? Is building envelope failure in year six or major structural defects found in year eleven acceptable?*

A shortage of skilled labour, *particularly in boom markets, coupled with numerous code changes requires the construction industry to be educated.*

The existence of numbered, site specific, shell and/or dissolved companies *are what have created the unfairness to deep pocket defendants in construction disputes*

Recommendation: Establish minimum performance life-cycles for housing components and systems under the BC Building Code, through industry/consumer input.

Recommendation: Graduated licensing for new and experienced workers should be implemented with mandatory upgrade courses to ensure up-to-date knowledge. With thousands of federal, provincial and municipal code changes and introduction of new designs and materials, education is key to maximizing the long-term performance of residential housing.

Recommendation: All principals of companies involved in residential construction should be registered and licensed under the Homeowner Protection Act (HPA). We recommend that government withhold building permits and licenses or issue stop work orders on projects for those principals that fail within a reasonable period to correct housing defects that do not meet minimum life-cycles established under the code (*please see top of page 3 regarding "Homeowner Protection Office (HPO) inspectors" for more details.*) This should occur regardless of the name they may operate under or whether it would affect other registered principals not responsible for the past defects. The Attorney General's concerns of 'deep pockets' bearing the brunt of paying for construction defects would be addressed without creating a need for the industry to carry large assets or insurance requirements in case of a claim. (Note: Repair costs are business tax deductions to industry players.) Such a policy would also create the incentive for those responsible to fix their mistakes at the least cost to all parties, ensure future business partners are scrutinized and, most importantly, maintain the integrity of durable housing in British Columbia. Warranties on repairs should correlate with the originally established minimum performance life-cycle.

The costs of court actions have been cumbersome on all parties involved in construction defect disputes.

Recommendation: Qualified Homeowner Protection Office (HPO) inspectors (claim adjustors) should be put in place to investigate and determine repairs under legislated warranties or products that have failed to meet the minimum performance life-cycles established under the code. A model similar to ICBC's claim procedure with an appeal process should be evaluated. Since most ICBC adjustors' findings are not appealed, is it unreasonable to expect that a similar success could be attained dealing with construction defects? Claims adjustors would meet the Attorney General's objective to substantially reduce the litigation and court costs, yet get to the business of fixing defective homes and holding the right parties responsible for their fair share. HPO inspectors should document the defects and create a central source of information to recognize defective products, withhold licenses of principals unwilling to correct defective construction, a rating system for the development industry (*see top of page 4, "reward developers and builders"*) and provide the safeguards to ensure that warranty providers and construction companies respond in a consistent manner to claims.

Costs of the claim adjustors could be assessed to the parties that are responsible for either submitting a false claim or the defect.

Municipalities would benefit from decreased liability exposure and perhaps, if successful, this process could replace the municipal "audit function" which has not shown to be effective. Staffing requirements for warranty providers would also be reduced. Some of these costs savings could be redirected to the HPO claim handling procedures.

Inconsistent interpretation of codes and performance requirements.

Recommendation: Reinstate the Building Standard Branch under the HPO for consistent interpretation of the code and performance requirements.

Past **defective housing products** include water piping, sprinkler heads, radiant panels, toilet tanks, windows and urea formaldehyde foam insulation. Homeowners are most often left to their own resources, but on rare occasion to the political will of receptive levels of government, for assistance to remedy these problems.

Recommendation: Recall products that do not meet the minimum performance life-cycles established under the code at the manufacturers' expense (labour and materials), using the model established for recall on defective automobile components. This will ensure a level playing field for all manufacturers to maintain quality control or be held to account.

*The industry needs a mechanism to **reward developers and builders** who comply with or exceed minimum standards. Currently consumers are unable to determine the difference between a poor or good developer/builder.*

Recommendation: A Builder/Developer rating system based on claims using the Ontario Home Warranty model should be considered. Warranty providers may be willing to extend coverage periods to those that have demonstrated that they are accountable for their projects.

Resolving past construction problems and pending actions.

Recommendation: Legislative changes to the conditions of licensing under the Homeowner Protection Act to require actions that have been filed against the applicant(s) under any company name be reported and a conditional license to be provided for six months (rather than one year) while the company rectifies past problems under the review of a qualified HPO inspector (claim adjustor) or reaches a financial settlement with the victims equal to the cost of their responsibility for repairs that have already been completed. If the applicant has not reported an action, and the HPO discovers one, their license should be automatically suspended until the situation is resolved as indicated above. If the owners with defects are not willing to settle with the parties for the costs established by the HPO claims adjustor, an appeal process should be created as suggested earlier, the license could be extended until the appeals process is concluded or the owner(s) of the construction defect decide to continue with their lawsuit. This could significantly reduce the costs on all parties and the number of actions.

Conclusion:

Although these suggestions, may not address all of the issues that have arisen from the “leaky condo crisis,” such as unlicensed property managers and strata corporations with internal strife, it is more likely to succeed in meeting the goal of justice for all British Columbians.

The Attorney General has better options available to him than imposing unilateral changes in civil law that broadly abolish or reduce victims’ rights without effectively dealing with root causes of a serious problem. The Attorney General’s changes, as proposed, will remove the rights of British Columbians if they are harmed in any way, anywhere, by anyone. A more positive and reasoned approach would be for the Attorney General to demonstrate the political will to work within government to resolve the factors contributing to the rise in construction litigation.