



Documentation, documentation, and more documentation: **THREE TIPS TO FIGHT OFF BUILDING INSPECTION CLAIMS**

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Legal actions against municipalities for negligent building inspections continue to proliferate. Recently, legal claims have also named the individual building inspector as a defendant. Therefore, a review of municipal inspection responsibilities and helpful steps to defend against such claims is warranted.

The Buildings and Mobile Homes Act obliges all municipalities in Manitoba to adopt and enforce the applicable building construction code or standard, usually the Manitoba Building Code, and other applicable construction codes (the "Building Codes"). They are also required to enforce their own building or construction by-laws. Unlike some other areas of municipal jurisdiction, municipalities do not have discretion with respect to the enforcement of Building Codes and building by-laws; the

Supreme Court of Canada has confirmed that municipalities *must* enforce them. Failing to do so results in liability and a successful claim against the municipality.

When conducting an inspection, the municipality and its inspector owe a duty of care to all who might be negatively affected by a lax or substandard inspection. This includes subsequent purchasers of the building. The municipal inspector must have done the inspections thoroughly and properly. The municipality and its inspector will be liable for those defects that the inspector could reasonably be expected to have detected and to have ordered remedied. If a Building Code deficiency was able to be detected on reasonable inspection, and wasn't remedied, a municipality will be liable for the failure to detect it.

In many cases, municipalities believe

they are complying with their inspection requirements, but still struggle with defending these claims because they haven't adequately protected themselves. This often means that municipalities are forced to enter into costly settlements, even where they may not have been negligent. This article provides three simple tips to help municipalities prepare themselves to defend negligent inspection claims.

DOCUMENTATION – KEEP ALL INSPECTION RECORDS IN ONE LOCATION

First and foremost, the inspector must properly carry out building inspections. But, even if a municipality complies with its obligations by performing a reasonable inspection, it may still be found liable for damages if it cannot later demonstrate, with documentation, that the inspection was properly performed. This is particularly so if the inspector is no longer employed by the municipality or is deceased. The defence of many building inspection lawsuits is hampered because records of the inspection are not kept or lost.

Municipalities should keep a complete master file for each property with copies or originals of all applications, permits, correspondence, telephone notes, plans, drawings, sketches, and every other document relevant to the building. If inspectors use a separate field notebook, copies of the relevant pages from the field notebook should be made regularly and placed in the master file. Often the litigation that results from building inspections occurs many years after the inspection so it is important that complete records be maintained for lengthy periods of time. Claims relating to inspections done 10 or 15 years previously are not unusual. Municipalities can consider storing the documents electronically or offsite if they do not have the space to maintain records.



DOCUMENTATION – ENSURE INSPECTION REPORTS ARE DETAILED

The *Municipal Act* carves out ways for municipalities to avoid liability in building inspection cases. The Act states that Municipalities are not liable for defects that are outside the scope of the inspection. They are also not liable if the municipality imposed conditions at the inspection that are not followed. The Act also does not impose liability for latent defects or any defects that the inspector would not be reasonably expected to detect at the time they inspected. These exclusions make it important for the inspection reports to be detailed.

Inspectors should use an Inspection Work Sheet or Report and record detailed notes of every inspection. In order to take advantage of the exceptions to liability in the *Municipal Act* the inspector's report should include the stage of construction, precisely what was inspected, what could not be inspected due to the state of construction, defects

and any orders to remedy deficiencies. In addition, details of who was present, what advice was provided by the owner or builder, and details of conformance with the drawings and specifications right down to the page and item number will be important information if a claim is ever filed.

In these days of everyone having a smart phone, a practice of taking photographs of inspected items and adding them to the master file, is encouraged.

AND MORE DOCUMENTATION – ENSURE THAT BUILDERS ARE AWARE OF WHEN INSPECTIONS ARE REQUIRED AND THE NOTICE REQUIREMENTS

Another way the *Municipal Act* limits liability is that builders are expected to request an inspection at the appropriate stage of construction and with reasonable advance notice before the inspection is required. However, municipalities will not be able to avoid liability by simply keeping details of when

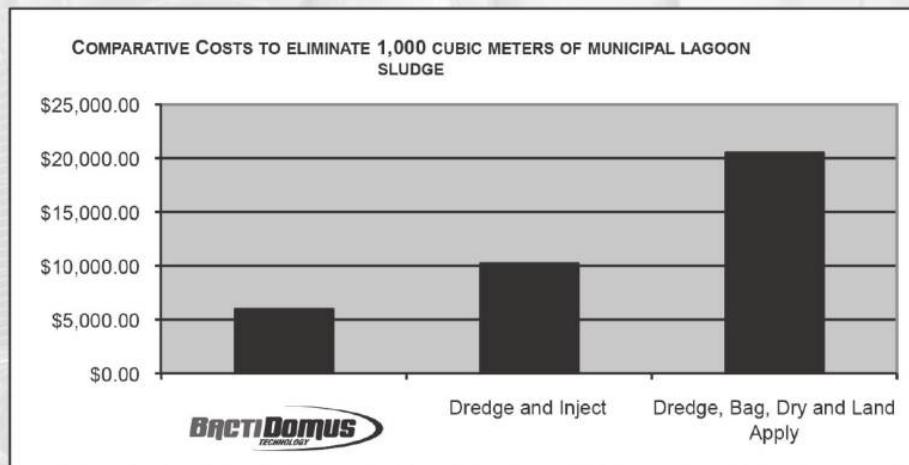
inspections are required a secret and then later saying that builders did not comply with the requirements. In the 2014 Newfoundland case of *House v. Patey*, the court found that a municipality was liable, in part because they did not make their building inspection policies known to the public.

To ensure that their requirements are complied with, municipalities should ensure that clear directions and requirements are placed on the building application and permit. It should be clear what inspections are mandated and at what stage of construction they are the owner is required to call for an inspection and how much advance notice they are required to give. These notice or information documents, as provided to a building permit applicant, should also be kept in the master file with a notation of when the document was given to the applicant.

No municipality wants to defend a claim for a negligent building inspection. But these three tips will make defending a claim less painful for all involved. ▶

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