Is the Province Liable?:

Leaky Condo

Owners in British Columbia Seek Compensation in the Courts

PATRICK DONNELLY obtained a B.A. in History at the University of Western Ontario. He completed his LL.B. at the University of Victoria in 1999 and will be articling at the law firm of Osler, Hoskin & Harcourt in Toronto.

I. Overview

A. Introduction

On September 29, 1999, the Vancouver Sun reported that Jim Currie, the former head of the British Columbia Building Standards Branch, had been warning the Minister of Housing as early as the 1980s that the provisions of the British Columbia Building Code were inappropriate for the province's coastal climate.[1] This revelation was merely the latest in a long series of frustrations for BC condominium owners. Due to a number of factors, including faulty construction techniques and the use of questionable building materials, condominiums failed to remain watertight. Furthermore, due to building design, there was no means for water to escape once inside the building structure. Buildings affected began to rot from the inside out, leading to the current "leaky-condo crisis," which has resulted in estimated costs to homeowners of between $500 and $800 million.[2]

Condominium owners naturally sought answers as to who was responsible and who could be made to compensate them for their losses. Their frustration mounted when it became apparent that a large proportion of the repair bill was going to fall upon their own shoulders. Condominiums were often sold without express warranties by the developer, and common law warranties were applicable only in limited circumstances. For those fortunate enough to be covered under the common law, recovery proved difficult as many developers worked through project-specific limited liability companies whose assets were depleted once the building was finished. Finally, a voluntary, industry-run warranty program, in place since 1975, proved to be ineffective.

Claims in tort provided some promise because a broader spectrum of defendants was available. Architects, engineers, subcontractors, building inspectors, and others who were not involved in contractual relationships with condominium owners were also named as defendants. However, courts have thus far only allowed recovery for owners' repair costs where the defect in construction created a "substantial danger."[3] The scope of what constitutes a substantial danger has yet to be determined, but owners are likely precluded from relief where the construction is shoddy but not dangerous.

1 P. Fong, "Building Condo Chief Predicted Condo Rot: Health of occupants and structural integrity sacrificed to energy conservation, letter says" *The Vancouver Sun* (29 September 1999) A4.

2 British Columbia, *The Renewal of Trust in Residential Construction* (Victoria: Commission of Inquiry into the Quality of Condominium Construction in British Columbia, 1998) at 14; hereinafter cited as "the Barrett Report."

3 See *Winnipeg Condominium Corp. No. 36* v. *Bird Construction,* [1995] 1 Supreme Court Reports 85.

In response to the growing crisis, the provincial government in 1998 appointed a Commission of Inquiry, headed by former Premier David Barrett. The Barrett Commission made 82 recommendations, mainly concerned with how to avoid similar problems in the future. The province also provided $75 million to establish a reconstruction fund, which was created under the newly implemented Homeowner Protection Act.[4] The fund lasted for less than a year before it was bankrupted by the vast number of claims made by condominium owners.

In light of the possibility that adherence to the Building Code was a partial cause of condo leakage, it seems that the province itself may not have discharged its responsibility to affected owners. The province probably acted carelessly in failing to ensure that the Building Code was appropriate for the West Coast climate. Whether or not this amounts to legal negligence is a matter that may soon be before the courts. Furthermore, by failing to act once it possessed knowledge of the dangers posed by condo leakage, the province may have breached a duty to warn homeowners of the risks. For owners of leaky condominiums seeking relief, the possibility of a damages award against the province should provide a small ray of sunshine in an otherwise gloomy outlook.

B. The Leaky-Condo Problem

The Barrett Commission Report cites a number of factors which led to the leaky-condo crisis.[5] Among these are the use of building materials based on their aesthetic qualities rather than water resistance, ineffective monitoring by municipal inspectors, a lack of accountability by builder/developers, and the failure of architects and engineers to ensure quality construc-

4 Statutes of British Columbia 1998, chapter 31.

tion. The major cause of condo leakage is the widespread failure of building envelopes, which include a building's roof, walls, and materials inside of the walls. In an effort to maximize energy conservation, buildings were designed to be air and water-tight without accounting for the possibility that water might somehow get into the building walls. In any case, the end result of the leaky condo crisis is that condominium owners are stuck with properties that have been significantly devalued and average repair costs of $23,300 per affected unit.[6]

II. Tort Liability

A. Potential Defendants (and Why They May be Immune from Liability)

1. The Builder/Developer

There is no general common law warranty available to purchasers of new homes. The common law distinguishes between houses (or condominiums) that were completed at the time of purchase and those that were not. For owners whose units were completed at the time of purchase, the common law does not provide relief and the doctrine of *caveat emptor* applies. For those who purchased before completion, the transaction would be subject to an implied warranty that the house was fit for habitation and constructed in a good and workmanlike manner using suitable materials. Professor Mary Anne Waldron reasons that the distinction was made because the purchaser of a completed house could inspect the building before buying. This would not be possible where the building was not yet completed.[7] Professor Waldron further notes that while courts have been willing to give a fairly broad definition to what constitutes an incomplete house, this still leaves many homeowners without protection.[8]

There has been a voluntary, industry-run warranty program in British Columbia since 1975. However, the New Home Warranty program did not operate at arms-length from industry and generally was not effective because of stringent conditions on the recovery of claims. The program covered only patent defects in workmanship, materials, and the building envelope; and only for one year. Most defects came to light only after the warranty had expired.[9] Perhaps the most significant result of the program to homeowners is that it delayed the implementation of a statutory warranty scheme by the provincial government until 1998.[10]

Due to privity of contract, common law warranties and express warranties given by builder/developers would only apply to the initial purchaser of the condominium. Owners without warranties and secondary purchasers who did not buy from the builder/developer were forced to look to tort law for a cause of action. In *Winnipeg Condominium Corporation No. 36* v. *Bird Construction*[11], the Supreme Court of Canada allowed an action by a secondary purchaser against the builder of a condominium building, although the Court was careful to limit when relief would be available. For the majority, Justice LaForest stated that the duty of care could be breached when a failure to use due care in constructing the building resulted in a "substantial danger to health and safety." As will be discussed later, what constitutes a "substantial danger to health and safety" may be difficult for the courts to define. While it is reasonable to limit liability in such cases, the distinction is likely to prove unworkable for buildings which take years to rot to the point of presenting a health or safety risk.

5 See note 2 at v-vi.
6 See above at 13.
7 Mary Anne Waldron, "How T-Rex Ate Vancouver: The Leaky Condo Problem" (1999) 31 Canadian Business Law Journal 335 at 340-341.
8 See above at 341-342.
9 See note 2 at 44-46.
10 See above at 44; for more on the Homeowner Protection Act, see note 7 at 358-364.
11 See note 3.

One final barrier remains for the condo owners who are fortunate enough to have a cause of action against builders/developers. The corporate structure of most builders/developers precludes recovery against individual defendants. Moreover, these corporations often take the form of project-specific companies whose assets are depleted once the project is finished. Hence, even for condominium owners who have judgments in their favour, recovery may be impossible.

2. Architects/Engineers

Architects and engineers are frequently named as defendants by plaintiff condominium owners and strata corporations. One reason why they make attractive defendants is that their liability insurance ensures some recovery by plaintiffs in the event of a successful result at trial. As there is no contractual relationship between architects/engineers and the homeowners, any relief sought must be in tort. One potential problem in recovery is the courts' insistence on distinguishing between physical damage to property and pure economic loss. Where either injury to person or physical damage to property occurs as a result of the negligent performance of an architect or engineer's duties, it is clear that tort liability may follow.[12] On the other hand, where the damage is pure economic loss, recovery is not guaranteed. Most of the losses to condo owners are the costs of repair. Courts consider this to be pure economic loss despite the fact that the repair is undertaken to prevent the almost inevitable damage to property that may have been caused, at least in part, by the negligence of the architects and engineers. In *Winnipeg Condominium,* the Supreme Court of Canada held that tort liability could ensue for pure economic loss where the failure of architects and engineers, among others, resulted in a substantial danger to health and safety.[13] The problem with this, however, is that when a defect is shoddy, but does not constitute a substantial danger, recovery will be prohibited. By denying relief in these circumstances, courts effectively are punishing condominium owners who work promptly to mitigate the damage caused by the negligence of those who were involved in the construction process.

3. Municipal Inspectors

In *Kamloops (City)* v. *Neilson*[14] a municipality was held to be liable for negligence when a municipal building inspector did not adequately inspect the foundation of a building under construction. As Professor Waldron discusses, the province responded by passing legislation that made it very difficult to bring lawsuits for negligent inspection.[15] A statutory waiver of liability for inspectors, along with a six month limitation period, will make it very difficult for condominium litigants to bring a successful action against municipalities for negligent inspection.

B. Potential Liability of the Provincial Government

1. The Building Codes

Among the parties whose role in the condominium crisis was examined by the Barrett Commission were the provincial government, as administrators of the provincial Building Code,[16] and the City of Vancouver, whose Building By-law essentially mirrors the provincial code. The BC Building Code is based on the National Building Code, a model code created by

12 McLachlin & Wallace, *The Canadian Law of Architecture and Engineering,* (Toronto: Butterworth, 1987) at 139.

13 See note 10; see note 7 at 350.

14 [1984] 2 Supreme Court Reports 2.

15 See note 7, at 347-349. For example, section 285 of the Municipal Act, Revised Statutes of British Columbia 1996, chapter 323, establishes a six month limitation period for commencing actions against municipality, while section 286 requires notice be given within two months of the damage being sustained. Section 294(8) of the Vancouver Charter, Statutes of British Columbia 1953, c.55 now provides that there is no legal duty to ensure that any building plans approved by the City comply with any enactments, and that the City and its employees may not be held liable for any failure to enforce or detect contraventions of the Building Code.

16 A regulation made pursuant to s. 692 of the Municipal Act, Revised Statutes of British Columbia 1996, chapter 323.

the National Research Council, which has been voluntarily adopted by the provinces with a view to implementing relatively uniform building standards across the country.

There has been much debate as to the extent to which the building codes have contributed to the leaky condo crisis. Their insistence on air and water-tight buildings has proven to be impractical in the rainy West Coast climate as it is virtually impossible to ensure that the building remains absolutely sealed. The use of these "face-sealed" systems has led to widespread failure of building envelopes when moisture becomes trapped within them. A more appropriate approach would be to anticipate the ingress of water into a building and to attempt to minimize its effects.

Compounding the problem is the use of polyethylene as both an air and vapour barrier. The Building Code does not expressly require the use of polyethylene, but it was often required by inspectors.[17] The Barrett Commission noted that the use of polyethylene was inappropriate for taller buildings that were exposed to wind-driven rain.[18]

Barrett acknowledged that the building codes did not take into account the "unique building envelope needs of B.C.'s coastal climate."[19] Generally, though, the Barrett Commission downplayed the role of the building codes:

> The Provincial [Building] Code is intended to represent minimum standards regarding life safety, health, and structural sufficiency of buildings. It is neither a textbook on building design, nor a criterion for quality or workmanship… The Commission was unable to find evidence that the building code, per se, has caused the [leakage] problems.[20]

2. Crown Liability Generally

Even assuming that the province acted carelessly in its adoption of the Building Code, it is far from certain that the government would be held liable in tort to condominium owners. Not all governmental action is subject to judicial scrutiny. The courts tend to respect the division of power between the legislative and judicial branches of government and recognize that they may not be equipped to assess the complex decision making process of government policy makers.[21] Furthermore, there is a concern that a flood of litigants could claim damages as a result of even the most broadly applicable governmental decisions. Finally, the concern that the government should not be an insurer at the expense of taxpayers is especially relevant in the leaky-condo context. Courts faced with the question of whether the province was negligent will be certain to weigh these factors against the irresponsible actions of the province and the resulting effect on condominium owners.[22]

In order to obtain damages in tort against the province, claimants will have to establish that the government breached a duty of care to condominium owners. The test for whether a duty of care exists is set out in Lord Wilberforce's judgment in *Anns* v. *London Merton Council*.[23] The first question to be asked is whether there is a sufficiently close relationship of proximity between the parties so that in the contemplation of the authority, carelessness on its part might cause damage to the other party. The province, in enacting the Building Code, almost certainly did so with the intent to ensure the protection of occupiers of property. Likewise, the Municipal Act grants the authority to municipalities "for the health, safety and protection of

17 See note 2 at 21.
18 See above at 22.
19 See above at 23.
20 See above at 19-20.
21 L. Klar, "Extending Tort Liability of Public Authorities" (1990) 28 Alberta Law Review 648 at 650.
22 See A. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1996) at 613-614. Justice Linden points out that it is odd that courts should be so reluctant to use tort law as a means to review governmental action when review already occurs under the following mechanisms: the Charter and Constitution, administrative law, ombudsman, human rights agencies, contract law, and the criminal law.
23 [1978] Appeal Cases 728 (House of Lords). The reasoning in *Anns* was adopted by the Supreme Court of Canada in *Kamloops* v. *Neilson,* see note 14.

persons and property" to pass bylaws regulating the construction of buildings.[24] Consequently, it would seem that in choosing to regulate construction, both the province and the various municipalities are under a *prima facie* duty of care to condominium owners.

The second step of the *Anns* test involves asking whether there is a policy reason for denying the existence of the duty. In the context of public authorities, this involves a determination of whether the actions in question were a matter of policy or whether they were part of the operational stages of an activity. It is only the latter that will give rise to a duty of care.

The leading Canadian case on government liability is *Just* v. *British Columbia*.[25] In *Just,* a large rock fell from a ledge and landed on the plaintiff's car, injuring the plaintiff and killing his daughter. The issue before the Supreme Court of Canada was whether the failure of inspectors to remove the hazard constituted a breach of the province's duty of care to the Plaintiff. In *Just*, Supreme Court Justice Cory discussed the difference between policy and operations. According to Justice Cory, policy decisions are usually made by persons of a high level of authority. Moreover,

> [t] rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.[26]

Therefore, in order to be exempted from negligence liability, a decision must be a 'true policy decision.' Justice Cory gave the example of a decision concerning the inspection of lighthouses. If a decision not to inspect lighthouses was made on the basis that the available funds were required elsewhere, then this would be a *bona fide* policy decision that would be unassailable.[27] On the other hand, once the decision to inspect lighthouses was made, the system of inspections would have to be reasonable and reasonably carried out; only the initial decision to inspect would be protected as a true policy decision.[28] The net result of the Supreme Court's decision in *Just,* which allowed the plaintiff's claim against the province, was "a significant shrinking of the scope of 'true policy decisions'."[29] Professor Klar refers to these types of decisions as "threshold decisions," and states that, "they decide in general terms whether something will or will not be done."[30] Further, "details… regarding the manner and characteristics of the project fall into the operational aspect of government."[31]

Just probably represents the high-watermark for restricting governmental immunity from negligence actions. In *Brown* v. *British Columbia*,[32] the Supreme Court appears to have backtracked somewhat from *Just*. The plaintiff was injured when his car skidded on a patch of black ice and went down an embankment. Justice Cory clarified his comments in *Just* when he stated that policy decisions were not to be limited to so-called "threshold" decisions made at the highest level of authority. Hence in *Brown,* the decision to have road crews on a summer schedule despite the presence of icy roads was not one that gave rise to a finding of negligence.

3. Legislative Decisions

While *Brown* may cast some doubt as to the scope of a true policy decision, it is undeniable that the trend since *Just* has been to make governmental bodies more accountable in

24 Revised Statutes of British Columbia 1996, chapter 323, section 694(1).
25 [1989] 2 Supreme Court Reports 1228.
26 See above.
27 See above at 1242; a true policy decision will be subject to review if it was not *bona fide*. See above at 1245 and *Kamloops v. Neilson,* note 14; at 35.
28 See note 25 at 1243.
29 See note 21 at 653.
30 See above at 653.
31 See above.
32 [1994] 1 Supreme Court Reports 420.

tort. The effect of this increased sphere of liability on the exercise of uniquely governmental actions remains to be seen. *Welbridge Holdings Ltd.* v. *Greater Winnipeg (Corporation)*[33] has often been cited in support of the proposition that a governmental body, in exercising its legislative powers, does not owe a duty of care to any member of the public. The municipality passed a zoning bylaw that was subsequently struck down as invalid due to a failure to follow the required procedures. A builder who relied on the bylaw brought an action seeking damages caused after the bylaw was struck down.

Justice Laskin found that a duty of care was not owed by the municipality:

> The defendant is a municipal corporation with a variety of functions, some legislative, some with also a *quasi*-judicial component… and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a *quasi-judicial* duty.
>
> A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or *quasi-judicial* level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court… It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.[34]

In *Welbridge*, Justice Laskin used traditional administrative law classifications of governmental action to outline when a duty of care might be owed. Legislative and quasi-judicial functions were exempted from a duty of care while administrative or ministerial powers were not. Justice Laskin's reasoning, however, was the same as that which would later be espoused in *Anns* by Lord Wilburforce — when the Crown was exercising its discretionary authority, it would be exempt from a duty of care. [35]

Welbridge was decided before the Supreme Court narrowed the scope of governmental immunity in *Just*. However, courts have continued to apply *Welbridge* in situations where a government's legislative function has been the subject of an action.[36] It is suggested that *Welbridge* should not be used by a court in order to avoid the closer judicial scrutiny of governmental action called for by *Just*. Justice Laskin's analysis in *Welbridge* was essentially the policy/operational test, but with different terminology. Instead of policy decisions, Justice Laskin referred to legislative and quasi-judicial powers. Less discretionary, operational powers were referred to as "administrative or ministerial" or "business powers."[37] Whereas Justice Laskin's test is essentially the same as the policy/operational test, it suffers from the same weakness as its successor — the characterization of governmental functions into clearly defined categories does not take into account the inevitable overlap between the categories.[38]

There is no doubt that what have previously been referred to as legislative decisions have many of the characteristics of true policy decisions as described by Justice Cory in *Just*. However, many governmental actions which might be considered to fall in the legislative sphere also have operative characteristics. This is true with respect to the decision to enact a

33 (1970) 22 Dominion Law Reports (3d) 470 (Supreme Court of Canada).
34 See above at 477.
35 *Welbridge* was applied in *Kwong* v. *R.*[1979] 2 Western Weekly Reports 1; affirmed 12 Canadian Cases on the Law of Torts 297 (Supreme Court of Canada). In both cases, claims of government negligence based on a failure to regulate were denied.
36 See *Birch Builders* v. *Esquimalt (Township)* (1992), 90 Dominion Law Reports (4th) 665 at 671 (British Columbia Court of Appeal), where Justice Hollinrake states, "I do not think that the principles enunciated by the Supreme Court of Canada in the *Just* case apply to a case such as this where what is under attack is what, in my opinion, is the legislative function of the municipal council."
37 See note 33 at 477.
38 See *Anns,* note 23 at 754 where Lord Wilberforce states that "although the distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many operational powers or duties have in them some element of 'discretion'."

building code pursuant to the authority granted under the Municipal Act. The initial decision to do so was a true policy decision. The decision would have been made at a high level — either by a municipal council or by the Lieutenant Governor in Council, depending on which building code is applicable. A further characteristic of a true policy decision is that it must be made on the basis of political, economic, or social factors. The decision to implement a building code is certainly political and is based at least in part on a desire to protect the home-owning public — a social concern. To this extent, a court may be justified in refusing to find a cause of action on the basis that the implementation of the building codes was a true policy decision.

It is suggested, however, that there is also an operational element in the enacting of a building code. The implementation of the initial policy decision to enact a code would involve establishing precise technical standards that make up the scheme of the building code. This decision would be more operational in nature since it would be based on administrative direction, expert or professional opinion, and technical standards rather than on larger political, economic, or social factors.[39]

4. Duty to Warn and the Crown

As mentioned above, it appears that members of the provincial government had some indication that the Building Code was inadequate as far back as the 1980s. By failing to act on this information, it is suggested that the province may have breached a duty to homeowners to warn them of the impending damage that they faced. One group upon whom a duty to warn is frequently imposed is product manufacturers.[40] In *Dagneault* v. *Interior Roads Ltd.*, Justice Goldie gave a general description of when a common law duty to warn will arise: "Generically, such a duty [to warn] has been recognized where it is within the reasonable expectation of one party that a failure to warn may be likely to result in harm to another."[41]

There is a number of cases where the Crown has been held to have had a duty to warn those who have been placed in a dangerous situation as a result of the Crown's action or inaction.[42] Such a duty arose in *Grossman et al.* v. *The King.*[43] The appellant in this case was preparing to land his airplane at the Saskatoon Airport. Upon seeing workers on the runway, he diverted his course and landed on a grass runway. While taxiing to a stop, he crashed into a ditch that had been cut across the runway. The appellant's plane was damaged beyond repair and his passenger was injured. The Supreme Court of Canada allowed the appeal, finding a duty of care based on common law occupiers' liability. Justice Taschereau found that the airport employee had a duty to persons using the airport to warn of existing dangers.

The plaintiff in *Jane Doe* v. *Metropolitan Toronto (Municipality) Police Commissioners*[44] alleged that the police breached a duty to warn her of the presence of a serial rapist in her neighbourhood. All of the rapist's prior attacks were confined to women living in second or third floor apartments within a single neighbourhood in Toronto. Justice MacFarland found in favour of the plaintiff on the basis that by failing to warn the plaintiff of the presence of the rapist in the neighbourhood, the defendants were grossly negligent.[45]

39 See Justice Cory's discussion in *Just,* note 25 at 1240.

40 See *Buchan* v. *Ortho Pharmaceutical (Can.) Ltd.* (1986), 25 Dominion Law Reports (4th) 658 (Ontario Court of Appeal); *Hollis* v. *Dow Corning Corp.*, [1995] 4 Supreme Court Reports 634.

41 [1995] 8 Western Weekly Reports 168 at 178 (British Columbia Court of Appeal).

42 See *O'Rourke et al.* v. *Schacht*, [1976] 1 Supreme Court Reports 53; *The King* v. *Hochelaga Shipping and Towing Company Ltd.*, [1940] 1 Supreme Court Reports 153; *D.B.* v. *British Columbia (Superintendent of Family and Child Services)* [1997] 30 British Columbia Law Reports (3d) 201 (British Columbia Supreme Court); *Mitchell* v. *Vancouver* 10 Canadian Cases on the Law of Torts 139 (British Columbia Supreme Court).

43 [1952] 1 Supreme Court Reports 571.

44 (1998) 39 Ontario Reports (3d) 487 (Ontario Court General Division).

45 See above at 524. By failing to warn, the defendants were also found to be in breach of the plaintiff's equality rights under section 15 of the Canadian Charter of Rights and Freedoms. Liability under section 15 arose following the Court's findings that the warning was not given on the misguided basis that the women in the neighbourhood, once warned, would become hysterical and scare off the rapist.

The potential impediment to finding a duty to warn is that courts seem to require a pre-existing duty of care. In *Grossman,* a duty of care was owed by the Crown to users of the airport by virtue of the common law of occupiers' liability. In *Jane Doe,* the police were held to have both statutory and common law duties of public protection.[46] As stated above, the government was under a duty to homeowners to use reasonable care in creating the technical standards that comprise the Building Code. A litigant who establishes a duty of care must still establish breach of duty, causation, and damage. Justice Cory in *Just* suggested that where a duty of care is established, policy-type considerations such as budgetary concerns can be taken into account in determining the standard of care. Hence, where the passage of legislation or regulations is involved, it can be expected that the standard of care will be easily met. Therefore, it is possible that in failing to amend the Building Code once its inadequacies came to light did not amount to a breach. However, it is harder to accept the failure of the government to take any action at all once it learned of the Code's inadequacies. In failing to act, it is argued that the province breached a duty to warn condominium owners of the dangers posed by the faulty construction of their buildings.

III. Synthesis and Conclusions

Condominium owners who are forced to look to the courts for relief face a number of impediments. Remedies for breach of warranty are available only to original, pre-completion purchasers, and there are significant impediments to enforcing judgments against builders/developers. The liability of municipalities and their building inspectors has been significantly limited by statute. Following the Supreme Court's decision in *Winnipeg Condominium,* tort recovery against builder/developers, architects, and engineers will only be allowed where the defect caused by the defendants' negligence amounts to a substantial danger to health and safety. Such a restriction is unworkable in a situation involving the type of damage sustained by condominiums where progressive and unrelenting rot inside the walls of the building will take years to cause a substantial danger. Litigants should not be forced to wait before having a cause of action, nor should they be denied relief when they take prompt action to repair the defect.

For condominium owners faced with the long term rotting of their homes, negligence claims against the provincial government may offer some relief. By adopting the Building Code and not warning the public when its problems became apparent, the province played a significant role in the "leaky condo crisis." Whether the courts will find the Crown liable in tort remains to be seen.

In the final analysis, there are policy reasons for and against finding the province liable. The government should not have to shoulder the burden every time a group suffers an unfortunate loss, especially when it is the taxpayers of the province that ultimately foot the bill. Those who support governmental immunity will claim that a government that acts irresponsibly should be held accountable only at the polls. Accountability at the polls is essential, but a government that acts negligently should also be held accountable in the courts.

46 See also *Mochinski* v. *Trendline Industries Ltd.* (1996), 29 Canadian Cases on the Law of Torts (2d) 1, where the Crown was held to have a common law and statutory duty of care that could not be delegated to contracting road crews. The duty of care gave rise to a duty to warn of hazards facing users of the roads.