

# Conkie & Company Newsletter

Legal news and views from Conkie & Company • Lawyers • November 2002

## Riverwest Strata Wins Round Two in Court

A group of condo owners in Delta recently won a second round in their long court battle to make the City of Delta pay some of their repair costs. The B.C. Court of Appeal ruled in their favour in the City's appeal of the *Strata Plan NW 3341 v. Delta* case, also known as the *Riverwest* case.

The Court's decision leaves the municipality on the hook for nearly \$2 million in the Riverwest's repair costs.

Owners of the Riverwest building are one of the few groups in British Columbia that have taken their leaky building case all the way to trial. After they won round one, Delta appealed the case, relying on two main arguments. First, they argued that the Riverwest strata's legal claim should be barred because it was brought too late. Second, they argued that the owners themselves had contributed to the damage by not getting the proper repairs done immediately.

The Court rejected both arguments. It confirmed that plaintiffs have six years in which to launch such lawsuits from the time the cause of action first arose. This is the position taken by most lawyers representing owners of leaky buildings, including Conkie & Company. Defence counsel have often asserted that the limitation period is two years after the cause of action arose, but this point is clearly settled now.

This is good news for those thinking of starting a leaky condo claim! According to the *Limitation Act*, the two-year limitation period applies to "damages in respect of injury to person or property." Is water ingress damage in respect of injury to property? The Court held that it is not. Damage caused by water ingress is intrinsic to the building itself and not, like other injuries, caused by an extrinsic act.

The Court also rejected appellant's second argument that the Strata was itself negligent. Riverwest owners had been advised by one of their experts early

on to take a number of remedial steps. They didn't immediately follow this advice, and Delta argued that this procrastination contributed to the loss they suffered.

The Court of Appeal agreed with the trial judge that the owners had, in fact, acted reasonably. In light of the Strata's overall diligence, and the enormous problems they faced, the Court was willing to excuse a decision that "in retrospect and with the wisdom of hindsight... was not the best course." Owners do not have to act perfectly, as long as they are reasonably diligent about seeking advice and attempting to address problems with their building.

The *Riverwest* case sets a good precedent for potential plaintiffs with leaky buildings. However, it should still be viewed with some caution. The only defendant fully participating in the trial and the appeal was the municipality. The developer settled prior to trial, and the building design firm and contractor also did not participate. This means that the case may not have addressed the full spectrum of issues that arise in leaky condo litigation. That said, the case does give owners a strong foundation on which to advance, and win, their case.

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We are interested in and welcome your feedback. Please let us know how we're doing by sending us e-mail at [info@conkie-law.ca](mailto:info@conkie-law.ca) or by calling us at (604) 662-7544.

# Government Plans For Civil Liability Laws Threaten Plaintiffs' Rights

*Proposed law reforms favour defendants, providing even more hurdles to plaintiffs who are already disadvantaged in the courts.*

The provincial government is considering key changes to British Columbia's civil liability laws that would curtail rights and effectively deny access to justice to many plaintiffs.

The proposed reforms were detailed in a consultation paper that included a questionnaire seeking feedback from interested parties. The deadline for submissions was October 1, 2002. The time in which to respond was too short, in our view.

Some of the proposed reforms include:

- **Changes to joint and several liability law** - providing more protection to perceived "deep pocket" defendants and reducing the rights and compensation flowing to plaintiffs
- **Elimination of vicarious liability law** - which holds employers responsible for the actions of employees
- **Changes to limitation laws** - shortening time limits on how long a person can wait before launching a civil suit
- **Class action suit restrictions** on plaintiff's rights
- **Changes to damages awards** - enforcing structured damages awards as an alternative to traditional "lump sum" awards

Conkie & Company is concerned on behalf of potential plaintiffs about many of the government's proposed changes. We welcome the decision of the Trial Lawyers Association of British Columbia to fight any proposals that would eliminate rights or deny access to justice to British Columbians. The TLABC has called on every lawyer in the province to demand a proper and fair consultation process.

For leaky condo cases, proposed changes to the longstanding principle of joint and several liability are the most serious. Consider the typical defendants in these cases: developers, contractors, subtrades, government agencies, municipalities and professional engineers and architects. If any of them have failed to design, build or certify waterproof buildings, owners should not have to lose their life savings fixing their buildings and suing these defendants, and then find they have no recourse against them if most or all of them are judgment proof or without assets.

The government's consultation paper focuses on the potential unfairness to these defendants, who, incidentally, have a strong government lobby. The Attorney General worries about justice where "one or more of the wrongdoers is insolvent [because] under the... Rules, the burden of any financial shortfall falls on the solvent defendants rather than the plaintiff. In many cases, only one of a number of defendants may

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be solvent, or insured. As a consequence, the total financial burden can be assumed by a defendant whose contribution to the damage was minor ...”

What about the plaintiffs in the leaky building crisis? As plaintiffs' counsel in leaky building cases, we know only too well the hurdles they must overcome to remediate and to litigate. The costs are very high, the risks are significant, and the length of these lawsuits can be exhausting. The obstacles to justice for owners are great enough, and they don't need or deserve yet another one. How many leaky condo owners can even afford to litigate, and how many of them get legal advice that they have a good case and a good prospect of recovery? Not a high enough percentage, as the record shows.

Should the law on joint and several liability be modified or abolished in the way the government is seeking? We at Conkie & Company say no. Joint liability developed as a legal principle for good reasons. In the context of leaky condo cases, owners already feel defeated by the lack of government help in the face of exorbitant costs to them, incurred through no fault of

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their own. Abolishing joint liability would be an unacceptable offence to these citizens who inhabit damp, mouldy and structurally unsound homes. This is a world where some defendants can open and close numbered companies on each building project in an attempt to render themselves judgment proof. Insurers insist on exclusion clauses for leaky buildings, so they don't have to cover these losses. Provincial and federal governments balk at providing leaky condo owners with a direct compensation plan. Big business finds every avenue it can think of to be judgment proof in the event of a finding of liability against those who design and built leaky condos. It is too hard as it is for owners to seek justice and fair compensation.

The government's proposed changes are a step backwards from the perspective of plaintiffs' rights. We at Conkie & Company urge the government to consider these changes carefully and the potentially damaging ramifications they might have for plaintiffs in civil litigation suits and any citizen of British Columbia who may face such an action in the future.

## Resources

*If you are concerned about these proposed changes, we urge you to let your voice be heard. If you require more information, a number of web sites offer a range of responses that may assist you in forming your reaction.*

- *The Attorney General's web site is available at <http://www.ag.gov.bc.ca>*
- *The Trial Lawyers Association of British Columbia has created a general information sheet on the proposed changes, available at <http://www.tlabc.org/images/AttackOnCivilJustice.pdf>*
- *The Law Society of British Columbia has posted its comprehensive response letter to the government's proposed changes. [http://www.lawsociety.bc.ca/new/body\\_whatsnew-civilreview\(ltr\).html](http://www.lawsociety.bc.ca/new/body_whatsnew-civilreview(ltr).html)*
- *A brief outline of the proposed changes with links is available at the Continuing Legal Education web site. Please see: <http://www.cle.bc.ca/CLE/Stay+Current/Collection/2002/4/02-misc-civilliabilityproject.htm>*

## Conkie & Company: Firm Notes

**Office Bash:** About 100 friends, clients and legal colleagues helped Conkie & Company celebrate its move to new offices in Yaletown earlier this year. The party, held June 7, was catered by Boleto's restaurant, which put out a tantalizing display of hors d'oeuvres, cocktails and B.C. wines ... Since its inception in 1993, Conkie & Company has practised from the old Randall Building on Georgia St. Faced with a growing staff and an increasing work load, the firm finally moved in March to its present digs in Yaletown. We love our newly designed character offices, so on Friday afternoons, instead of rushing home for the weekend, we put out a bowl of chips, crack open the beer and cider and kick back a little. And trying out the new restaurants in Yaletown has been our new hobby.

**Not just leaky condos:** Contrary to what you might think from the stories in this newsletter, we handle more than leaky condo cases at this firm. Copyright disputes intrigue us, and we manage various issues for clients in the entertainment industry, such as reviewing and negotiating contracts in radio, TV, music and film. We have some cross-border practice, too, with a number of American clients and law firms who may have need of a British Columbia lawyer to attend in court for them

here, perhaps to compel production of documents, or interview or depose witnesses.

**Appointments:** Jennifer Conkie has recently accepted new appointments to two committees. She is a member of the Advisory Committee for the Sarah McLachlan Music Outreach Program, which is an Arts Umbrella Project. Her committee provides advice for this after school arts program for inner city elementary and high school students. Jennifer is also a recent recruit to the Women's Advisory Committee for the Canadian Bar Association, B.C. Branch. The Committee will be planning a conference and recommending policy directions for the CBA for women in the law ... We are attending the upcoming Bench & Bar Dinner on November 21, 2002, to support and foster strong ties between our judges and colleagues in the courtroom and to honour winners of various professional awards.

**Conkie-law.ca:** Conkie & Company recently launched its new web site, which has garnered positive comments from colleagues and clients alike. Design firm dmorton publishing used a graphical motif based on the windows of Scottish architect Renee Mackintosh. You can visit the site at <http://www.conkie-law.ca>.

# CMHC Class Action Alleges Agency Role in B.C.'s Leaky Condo Crisis

A class action lawsuit has been launched against the Canada Mortgage and Housing Corporation alleging that the government agency has played a significant role in the leaky condo crisis on Canada's West Coast.

The action, which commenced March 30, 2001 in the Supreme Court of British Columbia, is at the certification stage, *the 'who' and the 'what'* of the lawsuit, where it is determined what questions are to be addressed at trial and who is eligible to be included as a plaintiff. The certification hearing took place in early September with Justice Macaulay reserving his decision until a later date. The statement of claim points out that the CMHC approves building plans in accordance with the National Building Code. CMHC-approved buildings, therefore, are represented to have structural sufficiency, quality and durability for a reasonable life and/or the term of the insured mortgage. As well, these buildings would be presumed safe for the health of their occupants. As these buildings did not perform up to the standard of this representation, owners are seeking compensation.

CMHC is the federal government's national housing agency established under the *Canada Mortgage & Housing Corporation Act*. It acts as an insurer of construction and conventional mortgage loans made in

Canada. CMHC is joined in the class action suit for allegedly approving plans for buildings when it ought to have known that the building code did not meet the requirements for constructing condominiums in the climate of the West Coast. The Attorney General of Canada and the Province of British Columbia are also named in the action. The lawyer acting for the plaintiffs, Patrick Guy, practises in Victoria.

Interestingly, the case has attracted a group of supporters that usually appear as defendants in individual litigation cases: members of the construction industry, including developers, contractors and architects.

Members of the construction industry support this action against CMHC because it is their contention that the leaky condominium epidemic was caused by a faulty building code. The counter-argument to this position is that the problem did not lie with a faulty code, but with shoddy workmanship and design. A finding by the courts that the epidemic was caused by an inadequate building code would effectively insulate the construction industry from claims of shoddy workmanship, or so the supporters of this legal action hope. This would have far-reaching implications for strata owners entering into litigation.

This newsletter will track the report and the certification hearing when it becomes available.

## Conkie & Company Newsletter

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The *Newsletter's* goal is to keep readers informed with news and information on key legal issues that may be of interest to our clients, legal colleagues and partners in the commercial business community.

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