

# **Guide to 2/5/10 Warranty Reporting**

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# Guide to 2/5/10 Warranty Reporting

The *Homeowner Protection Act* came into effect on July 1, 1999. The benefits of the home warranty insurance established by this statute, to which we will refer as a “2/5/10 warranty”, are not automatic. Strata corporations and their owners must take steps to preserve and enforce their rights. These steps are set out in their warranty certificates, the *Homeowner Protection Act* and the *Homeowner Protection Act Regulation* (the “HPA Regulation”). Failure to comply with these requirements may result in a loss of coverage.

2/5/10 warranties are issued to strata corporations, strata lot owners and the owners of residential buildings and detached homes. For ease of reference, we will refer to all of these warranty claimants as “Owners”.

**This Guide sets out steps that may be followed to reduce the risk that a 2/5/10 warranty claim will be denied (it does not address Building Envelope Renovation Warranties). While these guidelines are necessarily general, the success of each warranty claim will depend on its particular circumstances. Compliance with this Guide is therefore not a substitute for legal advice, and does not guarantee that a particular warranty claim will be approved.**

## AN OUNCE OF PREVENTION

### ✓ **Be informed.**

Section 20 of the *Strata Property Act* requires developers to deliver copies of the following documents at the first AGM:

- all original and amended plans filed with the municipality,
- all documents indicating the location of pipes, wires, cables, chutes, ducts and other facilities, if there is reason to believe that their location is not as shown on the plans,
- a list of the names and addresses of all consultants, project managers, contractors, subcontractors and persons who supplied labour or materials for the major components of the condominium,
- warranties, manuals, drawings, operating instructions, service guides, manufacturers’ documentation and other similar documents respecting the construction, installation, operation, maintenance, repair and servicing of any common property or assets,
- all contracts entered into by or on behalf of the strata corporation,

- the disclosure statement and attached contract of purchase and sale with original purchasers, which may set out additional warranties.

These documents provide critical information for the proper maintenance of the building and the enforcement of the Owners' legal rights. If copies are not already in the Owners' possession they should be requested at an early opportunity.

✓ **Implement a reasonable maintenance program.**

2/5/10 warranties exclude damage caused by inadequate or improper maintenance. Any maintenance manual provided by the builder or warranty provider should therefore be reviewed carefully. If there is no maintenance manual or the manual is unclear or incomplete, Owners should seek advice from a qualified consultant or maintenance contractor on the adequacy of their maintenance program.

✓ **Perform emergency repairs.**

Owners must take all reasonable steps to prevent damage when a defect requires "immediate attention": *HPA Regulation*, section 17(3). If time permits, the warranty provider and builder should be notified before beginning repairs. Consideration should also be given to making a claim under the Owners' property insurance.

✓ **Perform non-emergency repairs only if coverage is denied.**

Owners who perform work without first notifying their warranty provider and builder and giving them a reasonable opportunity to investigate and repair the defects may waive their warranty rights. Non-emergency repairs should only be performed after the warranty claim is reported, and both the warranty provider and builder have denied the claim.

✓ **Retain an independent consultant to prepare warranty inspection reports.**

Owners sometimes fail to report defects by a warranty deadline because they do not recognize signs of trouble. Having a consultant perform warranty inspections reduces the risk that a warranty deadline will be missed.

It may be tempting to have warranty inspections performed by a consultant who was involved in the original construction of the building or is recommended by the builder. The ideal candidate, however, is usually someone with no connection to the project and no ongoing relationship with the builder, developer or warranty provider.

Ideally, warranty inspections should be completed prior to each warranty deadline. Mould testing is also recommended for buildings showing signs of water ingress, as this may alert owners to a hazard within their building.

✓ **Maintain a warranty file.**

Keeping all warranty-related documents in one location makes it easy to keep new Council members and property managers informed. It also facilitates the preparation of notices of claim and is a handy reference for any consultants or lawyers who may be retained.

The warranty file may be organized as follows:

- *2/5/10 Warranty Certificate*: include the warranty and schedule of expiry dates.
- *Contractor Warranties*: include all warranties provided by contractors and suppliers.
- *List of Parties*: include the list of consultants, contractors and suppliers obtained from the developer.

- *Warranty Correspondence*: include in date order all correspondence with the warranty provider, builder or its contractors and suppliers regarding defects, other than those giving notice of a warranty claim.
- *Notices of Claim*: include in date order complete copies of all notices of claim under 2/5/10 and other warranties, including schedules and proofs of delivery.
- *Correspondence with the Owners' Consultants and Contractors*: include all correspondence with these parties, in date order.
- *Reports*: include all reports from consultants and maintenance contractors.
- *Maintenance Manuals*: these may be included if they are not bound separately.
- *Resolutions*: include in date order any resolutions related to the maintenance or repair of the building.
- *Disclosure Statements*: include each disclosure statement and all schedules and amendments, in date order.

Consider scanning all of these documents into an electronic file that may be easily copied and distributed.

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## REPORT EARLY AND OFTEN

### ✓ **Notify both the warranty provider and builder, in writing.**

Section 16(1) of the *HPA Regulation* requires that both the warranty provider and builder be notified in writing of a warranty claim. A common mistake is to notify the builder but not the warranty provider. This sometimes occurs if the builder was initially responsive to claims. When the builder stops returning calls the Owners will turn to the warranty provider. At that point, they may discover that the warranty provider will not respond to the claim, on the grounds that it was not notified prior to the warranty deadline.

### ✓ **Notify early.**

Many Owners believe they can wait until the relevant warranty deadline to report their claim. But section 16(1) of the *HPA*

*Regulation* requires that notice be given “within a reasonable time after the discovery of a defect and before the expiry of the applicable home warranty coverage.” A notice of claim should therefore be sent as soon as the Owners have reason to believe that a defect may exist.

### ✓ **Notify before the warranty deadlines.**

Notices of claim must be received by both the warranty provider and builder before expiry of the relevant warranty deadline. Whenever possible, deliver the notice at least one week prior to the deadline, and confirm that it has been received before the deadline passes. Owners should create periodic reminders in their calendars to ensure that notices of claim are delivered in a timely manner.

✓ **Consider whether the claim should be reported under both common property and strata lot warranties.**

Some common property defects may result in damage to strata lots. For example, roof leaks may damage the ceilings and floors of the unit below them. The warranty provider or builder might also argue that because the legal boundary between a strata lot and the common property building exterior is in the middle of the exterior walls and roofs (section 68(1) of the *Strata Property Act*), some common property defects and damage extend into strata lots and must be reported under both common property and strata lot warranties.

There are no cases on whether common property defects must be reported under both common property and strata lot warranties. If time permits, confirm which warranty applies with the warranty provider and builder. If left in doubt, consider reporting the defect under both the common property and strata lot warranties.

✓ **Be thorough.**

Section 16(1) of the *HPA Regulation* requires claimants to give “written notice in reasonable detail that provides particulars of any specific defects covered by the home warranty insurance”. The notice of claim should therefore include a cover letter that sets out:

- the strata plan number and civic address of the condominium,
- the warranty certificate number(s),
- a thorough description of any known or suspected defects and damage, especially if these are not clearly set out in any consultants’ reports enclosed with the notice.

The following should be enclosed with this letter:

- a copy of any warranty inspection reports and all other consultant’s reports,
- a copy of all prior correspondence with the warranty provider and builder related to the defects in the claim,
- a copy of any other documentation in the Owners’ possession that provides details of the defects or damage.

If the warranty provider or builder has a standard form notice of claim, it should be completed and included with the notice package.

✓ **Check the address.**

Warranty certificates sometimes give an address for the warranty provider or builder that is out-of-date, or give no address at all. If time permits, have the warranty provider and builder confirm (preferably in writing) that they will accept delivery of the warranty notice at their last known address.

Where this is not possible, the address of the warranty provider or builder may be obtained by conducting a search of the corporate registry in Victoria. The quickest way to obtain a search is through a registry agent (such as Dye & Durham 1-800-665-6211). If there is more than one possible address, it is preferable to err on the side of caution and deliver the notice to all known addresses.

✓ **Obtain proof of delivery.**

Because the notice of claim is so important, Owners should ensure that they will be able to prove its timely receipt. This means the notice should never be sent by regular mail, especially if there is a looming warranty deadline. The safest

course is to have a process server deliver the notice and provide an affidavit confirming its receipt by the warranty provider and builder. If other means of delivery are used, obtain written confirmation prior to the warranty deadline from the warranty provider and builder that the notice of claim has been received. Keep a complete copy of the warranty claim and all enclosures to ensure there is no confusion about what was reported.

✓ **Be cooperative.**

The warranty provider or builder can request further information after receiving the notice of claim. They are also entitled to reasonable access to inspect or repair the property. Failure to provide such information or access may result in the claim being denied or some defects or damage being excluded from coverage.

✓ **Get a second opinion.**

Warranty providers and builders are legally required to repair defects covered

by the 2/5/10 warranty. Because they bear the cost of these repairs, however, there is a risk that corners will be cut.

A consultant can advise if proposed warranty repairs will be effective. Any concerns expressed by the consultant should be communicated to the warranty provider and builder promptly.

✓ **Seek legal advice promptly if a warranty deadline may have been missed.**

While the warranty provider and builder will likely deny a claim reported after the warranty deadline, all may not be lost. Some warranty certificates do not set out the correct warranty commencement and expiry dates (defined in section 5 of the *HPA Regulation*). In other cases, the warranty provider and builder may have been provided with effective notice of the defect in earlier correspondence and reports. Courts may also order “relief from forfeiture” if it would be inequitable to deny coverage because of imperfect compliance with warranty terms.

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## PROTECT YOUR RIGHTS

✓ **Mediate disputes.**

Schedule 2 of the *HPA Regulation* allows Owners to refer warranty disputes to mediation. Mediation is a cost-effective process with a proven track record of settling construction disputes.

✓ **Enforce warranty rights in a timely manner.**

All lawsuits must be commenced within a deadline known as a limitation period. The deadline for suing warranty providers and builders to enforce 2/5/10 warranties

is not set out in the *Homeowner Protection Act* or its regulations. Section 22 of the *Insurance Act* states that actions to enforce certain contracts of insurance “must be commenced within one year after the furnishing of reasonably sufficient proof of a loss or claim under the contract”. Until a Court rules that this section does not apply to 2/5/10 warranties, which are a form of insurance, warranty providers and builders can argue that actions to enforce a warranty must be commenced within

one year. To preempt this argument, consider commencing any legal action for breach of warranty within one year of reporting the claim.

✓ **Consider other legal remedies.**

2/5/10 warranties do not provide comprehensive coverage for all defects. A gap in coverage may arise if defects fall under an exclusion, if a warranty deadline has been missed, or if the estimated cost of repairs exceeds the warranty's monetary limits. For common property warranties the limits per building will usually be \$100,000 times the number of strata lots or \$2.5 million, whichever is less (*HPA Regulation*, section 12).

Owners should consider their other legal remedies to guard against the risk of a gap in warranty coverage. These include:

- *Other warranty claims:* Some contractors, manufacturers and suppliers provide warranties on their own work or materials (i.e. windows, waterproof membranes). These warranties should be reviewed promptly as they sometimes contain short deadlines for giving written notice of a claim and suing. Compliance with these warranties may also impact 2/5/10 warranty coverage, since section 11(1)(e)(ii) of the *HPA Regulation* allows warranties to exclude damage caused or made worse by a "failure ... to comply with the warranty requirements of the manufacturers of appliances, equipment or fixtures".
- *Negligence claims:* All parties involved in the design, construction or inspection of a building may be sued in negligence in certain circumstances. Claims seeking damages for the cost of repairing the building itself are subject to a six year limitation period. Claims for damage to other property

(i.e. strata lot contents) or for bodily injury or illness are generally subject to a two year limitation period.

Section 286 of the *Local Government Act* requires written notice of certain claims for damages to be given to municipalities within "two months from the date on which the damage was sustained", unless the claimant has a reasonable excuse and the municipality has not been prejudiced by the delay. Section 294(2) of the *Vancouver Charter* prescribes a similar deadline for claims against the City of Vancouver.

- *Misrepresentation claims:* Developers and others involved in the marketing and sale of real estate may be sued for misrepresentation under the common law. In addition, the *Real Estate Development Marketing Act* requires developers to deliver a disclosure statement to all purchasers that accurately sets out all "material facts" regarding a condominium. If the disclosure statement contains a misrepresentation, the developer, its directors and other representatives may be liable to a purchaser. The limitation period for common law misrepresentation claims is two or six years, depending on the loss or damage claimed. The limitation period for *Real Estate Development Marketing Act* claims is two years from when the misrepresentation first came to the attention of the purchaser.
- *Claims against the Owners' contractors or consultants:* In some instances, defects can be made worse by incompetent work recommended or performed by the Owners' consultants or contractors. A claim for breach of contract or negligence may be feasible, depending on the

circumstances. Claims against these parties may be subject to notice deadlines, limitation periods and arbitration clauses set out in their contracts. Otherwise, they are subject to a two or six year limitation period, depending on the type of loss or injury claimed.

- *Claims against property insurers:* Many property insurance policies exclude the cost of repairing construction defects, but cover the cost of repairing damage to building contents, and arguably the building itself, that results from such defects. All policies prescribe deadlines for giving notice of a claim, delivering a proof of loss, and suing the insurer for breach of the policy.

Because the commencement and expiry of the foregoing notice deadlines and limitation periods depends on the circumstances of each case, early legal advice should be sought on these and other remedies that may be available.

✓ ***Consider a claim on the one year warranty on repairs.***

The *HPA Regulation*, Schedule 3, section 8 requires that all repairs and replacements be warranted against defects until the first anniversary of the completion of the work or the expiry of the applicable warranty coverage, whichever is later. While this section does not require that a formal notice of claim be given, it is prudent to notify the warranty provider and builder of any concerns with warranty work prior to the earlier of these two deadlines.

✓ ***Know your rights.***

It is often said that a home is our most important investment. 2/5/10 warranties are an important protection for this investment. If a warranty claim is not satisfactorily resolved in a timely way, Owners should give early consideration to seeking legal advice on their warranty rights and other legal remedies.

**LESPERANCE MENDES is a Vancouver law firm representing strata corporations and owners with construction liability claims.**