

2-5-10 Warranties during the COVID-19 Pandemic

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LESPERANCE MENDES

Suite 550 - 900 Howe Street
Vancouver, BC Canada V6Z 2M4
t 604-685-3567
f 604-685-7505
www.lmlaw.ca

John G. Mendes
604 685 4822
jgm@lmlaw.ca

Sat D. Harwood
604 685 3550
sdh@lmlaw.ca

COVID-19 has created many challenges for owners, strata corporations and strata managers. This article reviews issues and problems that may arise in relation to 2-5-10 warranty claims. It is not intended as a comprehensive guide to all issues arising under such warranties, and should be read in conjunction with the Lesperance Mendes' 2-5-10 *Warranty Guide*, a free copy of which may be obtained from John Mendes or Sat Harwood.

The guidelines proposed below are general in nature and are not a substitute for legal advice on any specific claim. **Readers are encouraged to obtain a copy of their 2-5-10 warranty policy, to verify their warranty expiration dates, and to seek legal advice on their particular circumstances.**

MAINTENANCE AND REPAIRS

The Province's current *List of COVID-19 Essential Services* covers a broad range of parties providing building maintenance and repairs:

- Plumbers
- Electricians
- Elevator maintenance providers
- Fire safety and sprinkler systems
- Building systems maintenance and repair technicians
- Engineers
- Other service providers who provide services that are necessary to maintaining the safety, sanitation and daily essential operation of residences and commercial buildings
- Construction work, in accordance with Public Health Officer direction, including:
 - Construction firms
 - Skilled trades and professionals
 - Construction and light industrial machinery
 - Equipment rental

While there are no legal impediments to many maintenance activities, finding someone who is ready, willing and able to do the work may become a concern. BC

contractors and consultants are not immune to the unprecedented contraction of the Canadian economy.

Once a service provider is identified, inquiries should be made about COVID-19 risk mitigation practices. For example, will workers have access to a washroom or hand sanitizer? Will surfaces that may be touched by workers or occupants (i.e. handles, railings, panels, elevator buttons, doors) be sanitized at the beginning and end of every workday?

✓ **Continue building maintenance unless prohibited by law**

Owners may wish to pause ongoing maintenance out of a concern for their safety or the strata's finances. Doing so could be risky, however, since 2-5-10 warranties exclude damage caused by improper maintenance.

Building maintenance should therefore continue unless prohibited by law. In many instances, maintenance activities take place in areas where social distancing is feasible, such as building exteriors or utility rooms, and can be completed safely.

Owners should keep records if they are unable to engage a consultant or contractor to undertake necessary inspections or work. This will help prove that the strata made reasonable efforts to inspect or maintain assemblies.

✓ ***Perform emergency repairs unless prohibited by law***

Owners must take all reasonable steps to prevent damage when a defect requires “immediate attention”: *HPA Regulation*, section 17(3). Emergency repairs should therefore be performed unless they are prohibited by regulatory authorities.

Records should be kept of any difficulty finding someone to complete repairs.

✓ ***Advise owners of maintenance and repair activities***

To encourage social distancing, owners should be notified of the timing and location of work around the strata corporation, and asked to avoid those areas. If the work will take place in a high traffic area, such as a lobby or parkade, it may be necessary to close off all or part of the area while the work is underway, and inform owners of alternate routes.

WARRANTY REPORTING

✓ ***Continue to report defects to the warranty provider and builder.***

The Provincial government has not suspended deadlines for reporting warranty defects at the time of writing. Strata corporations and owners must therefore report warranty defects to the warranty provider and builder by the applicable deadline in order to preserve coverage.

✓ ***Retain consultants to prepare end-of-warranty reports.***

Strata corporations sometimes fail to report defects by a warranty deadline because they fail to recognize signs of trouble. Having a consultant perform end-of-warranty inspections reduces the risk that a defect will be missed. Warranty inspections and reports should therefore continue to be commissioned and submitted to the extent possible during the COVID-19 pandemic.

✓ ***Rely on owner surveys instead of in-suite consultant inspections***

Warranty inspections in common areas can generally be completed without contravening the social distancing requirements imposed by COVID-19. Strata lot inspections are another matter.

Owners and tenants will understandably be concerned about allowing someone into their homes. Consultants will be equally concerned about entering someone’s living area. In smaller units or units with more than one occupant, it may not be possible to observe social distancing requirements.

Owner surveys may replace in-suite inspections to get around these problems. When working with your consultant to prepare owner surveys consider the following:

- The questionnaire should explain which areas should be examined and when, and what occupants should be looking for. Consider including

photographs of problem conditions that may not be obvious to laypeople.

- Occupants should be given an email address to send photographs of any problem areas, and asked to include necessary details in the email (the exact location of the area, who took the photo and when).
- Occupants should be given a deadline for returning the survey and be informed of the importance of meeting this deadline.

✓ **Keep owners informed**

Strata corporations should inform owners of when and where the consultant will attend, so that they can avoid those areas. They should also be assured that the consultant will not enter any suites, and will rely on surveys to determine in-suite conditions. Strata corporations should stress the importance of each owner completing his or her in-suite inspections and returning the survey in a timely manner.

✓ **Include a detailed cover letter with the warranty report(s)**

Warranty reports should be accompanied by a detailed 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 for the relevant warranty coverage, especially if these are not thoroughly described in any consultants' reports enclosed with the notice.

For some areas, it is difficult if not impossible to identify each and every location where a defect or damage is present. This is the case for problems

that are costly to investigate comprehensively, such as concealed conditions (i.e. plumbing defects or water penetration inside walls). Conditions inside strata units and on decks and other common property requiring unit access are also difficult to investigate thoroughly. For most strata corporations, an inspection of every suite would be costly and take some time to complete. Consultants usually address this problem by inspecting a random sample of locations.

The warranty cover letter should describe all defects and damage as systemic. This is particularly important for defects and damage in strata lots and adjacent assemblies such as decks that are disclosed by owner questionnaires during the pandemic. With no opportunity to verify these conditions, strata corporations should describe these problems as systemic in their cover letter and offer to work with the warranty provider to determine their extent after social distancing requirements are lifted.

To guard against any potential arguments that may be made in respect of historical warranty reporting, the following should also be enclosed with the cover letter, consultant reports and owner surveys:

- Copies of any historical warranty inspection reports and all other consultant's reports.
- Copies of all prior warranty reporting correspondence with the builder and warranty provider.
- Copies of any current or historical lists of defects, water ingress and/or resultant damage prepared by the strata council and/or strata manager.

✓ **Consider how to deliver the warranty notice**

Section 16(1) of the *HPA Regulation* requires that *both* the warranty provider and builder be notified in writing of a warranty claim “*within a reasonable time after the discovery of a defect and before the expiry of the applicable home warranty coverage.*”

Many businesses have shut down or reduced their office staff in an effort to protect their staff and the public. This poses a challenge for warranty reporting since there is no guarantee that offices will be open to receive registered mail or courier packages, or to accept personal service of documents. There is also no guarantee that registered mail, courier or process serving will continue to be available when the time comes to deliver the warranty claim.

Owners should therefore contact their warranty provider and builder well in advance of a warranty deadline to confirm their current address and whether their office is open and able to accept deliveries. In addition, both the warranty provider and builder should be asked if they will accept delivery of the

warranty claim by email and file share program, in case courier and personal service is disrupted. One warranty provider has indicated on its website for some time that it prefers delivery by email.

Where possible, deliver the warranty package well in advance of the warranty deadline. This avoids last minute problems that can arise when an office closes early or a courier is unavailable.

When delivering the warranty notice by email, make sure that the attachments to the email are not too large to be received. This is a common problem for reports that include high-resolution photographs or drawings. The safe course is to use a file share program or to divide the report(s) into multiple emails.

However the notice is delivered, obtain proof of delivery. When delivering by email, ask the recipient to acknowledge receipt by reply email. Delivering the notice early will give the warranty provider and builder time to acknowledge receipt before the warranty deadline, and will reduce anxiety.

LITIGATION DEADLINES

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

On March 18, 2020, the BC Government declared a 14-day province-wide state of emergency in response to the COVID-19 pandemic. The state of emergency was subsequently extended to April 14, 2020. Further extensions are possible but uncertain at this time.

The Province and Courts have followed suit by suspending some litigation deadlines:

- Filing deadlines under the *Supreme Court Civil Rules* were suspended effective March 18 until May 1, 2020.
- On March 19, 2020, all regular Supreme Court operations were suspended until further notice.

- On March 26, 2020, the BC Government issued an order in council suspending all limitation periods. The suspension runs from the date the order in council was issued until the state of emergency expires or is cancelled.

The March 26, 2020 order in council suspends the limitation periods for suing warranty providers, builders and others responsible for construction defects. These limitation periods are two years, although their commencement depends on the circumstances of each case, and certain claims against municipal governments may be subject to a shorter six-month limitation period.

At this time, it is unknown how long claimants will have to file lawsuits once limitation periods start to run again. To err on the side of caution, owners whose limitation periods may expire over the next few months should ensure that they are

ready to file claims once the state of emergency is lifted.

In addition, none of the orders made to date suspends deadlines for delivering important notices, such as 2-5-10 warranty defect notices. Strata corporations who wish to sue for negligent building approval and inspection must also comply with the requirement in the *Local Government Act* and *Vancouver Charter* that municipalities and regional districts be notified of claims within two months of damage occurring (subject to extension by the Court in appropriate circumstances). Notice deadlines in warranties provided by contractors, suppliers or manufacturers are also not extended by these orders.

Owners should therefore continue to seek timely (and socially distanced) legal advice during the pandemic. The Province has facilitated such advice by declaring lawyers and paralegals an essential service.

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