Dolden Wallace Folick
INSURANCE LAWYERS

Insurance Law Update

MANAGING YOUR RISK www.dolden.com

February 10, 2006

MUNICIPAL LIABILITY: CAN A MUNICIPALITY AVOID A DUTY OF CARE BY REQUIRING PROFESSIONAL CERTIFICATION OF CONSTRUCTION PROJECTS?

ISSUE

Since the Supreme Court of Canada's 1984 decision in *City of Kamloops v. Nielsen*, municipal governments responsible for regulating construction activities have faced potential exposure to liability when major post-construction problems are encountered. In part to limit that exposure, municipal authorities in British Columbia have, since the early 1990's, typically required professional certification of building plans and construction activities in certain circumstances, including multi-unit housing developments and difficult soil conditions. Municipal authorities have often argued that the adoption of and adherence to such a policy of professional certification absolved them of any duty of care. A recent decision of the Supreme Court of British Columbia, *Parsons v. Richmond*, addresses this question.

DECISION

In *Parsons*, the Plaintiffs constructed a home in the City of Richmond. As per the City's policies, the building department required the involvement of a professional engineer given the potential geotechnical issues in the area. The Plaintiffs retained a geotechnical engineer who made recommendations for soil preparation and signed letters of assurance regarding building code compliance of the geotechnical and structural components of the project. The City conducted neither a substantive review of the geotechnical design nor an inspection of the soil conditions or preparation. The home eventually experienced significant differential settlement due to inadequate preparation of the soil prior to construction. The homeowners sued the City in negligence.

The central defence raised by the City was that its reliance upon the certification by a professional engineer negated any duty of care the City may have otherwise owed to the homeowner. The Court agreed. In effect, the Court stated that Richmond's decision not to carry out a substantive review or inspection of geotechnical issues, but rather to rely upon the certification of a registered professional retained by the homeowner, was a *bona fide* policy decision which exempted Richmond from any duty of care in that regard. Since no duty of care was owed to the Plaintiffs, Richmond could not be held liable for any damages suffered by them.

DOLDEN WALLACE FOLICK LLP
Tenth Floor - 888 Dunsmuir Street | Vancouver. British Columbia. Canada. V6C 3K4 | TELEPHONE 604-689-3222 FAX 604-689-3777

DISCUSSION

The *Parsons* decision has particular relevance in British Columbia, where the "professional certification" approach is widely followed by municipal authorities and where claims arising from leaking, sinking or sliding homes are not uncommon. However, the principles may be applicable in other jurisdictions, depending on the governing legislation and the extent to which a similar approach is followed.

The *Parsons* decision must, however, be considered in its factual context. There was no suggestion in *Parsons* that the City had in fact reviewed or inspected the geotechnical aspects of the project. In contrast, municipalities making arguments along the lines accepted by the Court in *Parsons* are often met with evidence that the building inspector was actively involved in the very issues that the municipality claims were left entirely to the judgment of a registered professional. Where such involvement can be demonstrated, it is doubtful that the municipality will be permitted to argue that it relied solely on the registered professional and a duty of care will almost certainly be owed.

PRACTICAL IMPACT ON THE INSURANCE INDUSTRY

The *Parsons* decision to some extent confirms what municipalities have long argued – that reliance upon professional certification can absolve them of any duty of care. Not every construction claim will support a defence based on the reasoning in *Parsons* and the strength of the defence will depend on the facts of a particular case.

However, this decision is likely to reduce the willingness of British Columbia municipalities to contribute towards the settlement of construction defect claims in circumstances where the municipality obtained professional assurances. In multi-party litigation, such as "leaky condo" claims, given the prospect for joint and several liability, this may result in increased pressure on other parties to contribute a greater share of any settlement.

AUTHOR Ronald A. Hatch
Direct Line: 604-891-0358 *E-mail:* rhatch@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 *E-mail:* aeged@dolden.com