

HPO's Residential Construction Performance Guide: A Solid Foundation for Consumer Protection?

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HPO's 2014 Residential Construction Performance Guide: A Solid Foundation for Consumer Protection?

The Homeowner Protection Office updated its *Residential Construction Performance Guide* (the “Guide”) in 2014.¹ According to its introduction, the purpose of the Guide is to “provide advance information to both residential builders and to owners of new homes as to how warranty providers will evaluate claims”. To this end, the Guide summarizes 2-5-10 warranty coverage and adds 78 new construction standards to those in the original version, released in 2011.

The aim of the Guide is commendable. The *Homeowner Protection Act* declares that the purpose of 2-5-10 warranties is to “strengthen consumer protection for buyers of new homes”.² Clarifying minimum construction standards furthers this objective.

The Guide has set its sights high. Unfortunately, it has missed the mark in a number of ways.

A. Limited Consultation

HPO developed the Guide in consultation with warranty providers and various industry organizations. The list of these organizations at Appendix A7 of the Guide reveals they are situated primarily in

Ontario, which has a different home warranty regime than BC.

Local organizations that represent homeowners (such as PAMA and CHOA) do not appear to have been consulted. The Guide would have benefited from consultation with the constituency that 2-5-10 warranties were designed to protect.

B. The 15 Month Trap

The consequences of failing to consult with homeowners are best illustrated by the Guide’s approach to 15 month warranty coverage for “defects in materials and labour”. The Guide advises that many serious defects are covered for only 15 months, the shortest coverage available under common property warranties.

For example, section 14.20 introduces a new performance standard for decks, a term used throughout the Guide to refer to decks and balconies.³ This section observes that common property decks are covered for only 15 months “where the water penetration is not into the building envelope”. Five year building envelope defect coverage is limited to “the portion of the deck causing unintended water penetration into the new home”.

¹ <https://www.hpo.bc.ca/residential-construction-performance-guide>.

² Section 2(1).

³ The construction industry often distinguishes between “decks” over occupied space (i.e. a rooftop deck), and “balconies” that project out from a building.

One interpretation of this section is that 5 year coverage for decks is available only if there is leaking into exterior walls, and only for that part of the deck responsible for the leakage. A defect causing water damage in other parts of the deck (i.e. a leak in the middle of the deck) is covered for 15 months only. This interpretation would severely limit building envelope defect coverage for a building component that was a common cause of costly repairs during the “leaky condo crisis” of the 80’s and 90’s.

The Guide also downgrades coverage for other potentially serious defects to only 15 months. Efflorescence on concrete or masonry (section 1.1), spalling concrete (section 1.3), detached parging (section 1.9), condensation in crawlspaces, basements and attics (sections 1.13, 1.14, 5.6 and 8.3), condensation in windows (section 3.9), and leaking dryer ducts (section 15.8) are relegated to the earliest warranty deadline. For homes that are not stratified this deadline is 12 months.

Anyone who works with condominiums knows that limiting warranty coverage to 15 months leaves most owners unprotected. The *Strata Property Act* does not require a strata’s first annual general meeting to be held until 6 weeks after a majority of strata lots have been conveyed or 9 months after the date of the first conveyance, whichever is earlier.

This means that throughout much of their first year, many condominiums are controlled by their developer. Because developers bear the cost of warranty repairs during this period, they are unlikely to present a resolution to hire a consultant at the first AGM, or to otherwise ensure

that defects are reported before the 15 month warranty deadline.

The result is that many owners have only a few months to convene a SGM, hire a consultant and deliver a 15 month end-of-warranty report. Few strata corporations can move this quickly.

C. Watered-Down Building Envelope Coverage

The Guide states that warranty providers “will require evidence of actual water penetration or evidence that the water penetration is substantially likely to occur and cause material damage to the new home within the five-year period if the defect is not repaired.”

The Guide fails to point out that there is no Court decision requiring leakage or damage by the five year anniversary of a home, or that there are other reasonable interpretations of this coverage that are more favourable to homeowners. In our view, building envelope coverage that does not require leakage within five years is more consistent with the wording and consumer protection objectives of the *Homeowner Protection Act*.

D. Mixed Messages

These shortcomings might be overlooked if HPO made it clear that the Guide reflects the views of the insurance and construction industries, and is not intended to be legally binding. But HPO’s message on the intent of the Guide is mixed.

The introduction to the 2014 Guide states that its standards are not binding, even on warranty providers:

The participating warranty providers have generally agreed to use the Guide in order to help determine whether or not a defect claim is covered by their policy of home warranty insurance, however, they are not bound by it. When the Guide conflicts with legislation, regulation, or generally accepted industry standards, the warranty providers can be expected not to follow the Guide....

Nothing in this Guide alters any rights or obligations of any party under the *Homeowner Protection Act*, the regulations or any other applicable laws.

The Guide is therefore not intended to describe how *Courts* will interpret 2-5-10 warranties. It instead describes how *warranty providers* may interpret these warranties (unless they choose not to).

While this disclaimer clarifies that the Guide has no legal effect, other HPO publications send a different signal. For example, HPO's website states:

This Guide is an essential reference tool for owners of homes with home warranty insurance and Licensed Residential Builders. Revised and expanded in 2014, it explains how new homes should perform and *which defects are covered under home warranty insurance in British Columbia*.

Similarly, HPO's 2013 *Guide to Home Warranty Insurance in British Columbia* advises at page 10 that the 2011 Guide "explains how new homes should perform and *which defects are covered under home warranty insurance*."

A reader of these publications may understandably be left with the mistaken impression that the Guide is authoritative.

E. Conclusion

There are two lessons to be learned from HPO's Guide.

The first is that owners should engage a qualified consultant to review their condominium's building envelope as early as possible. The Guide suggests that some common defects in building envelopes are covered for only 15 months or two years. Strata corporations should therefore report any building envelope defects before the 15 month or 2 year anniversary of their warranties to reduce the risk that their claim will be denied by their warranty provider.

Second, the Guide should not be taken as the final word on warranty coverage. A strata corporation should seek legal advice before dropping a significant claim because of limitations in the Guide. This advice should be sought promptly, given the various deadlines for taking legal action.

The Guide is a blueprint for consumer protection that is in need of further revision. We encourage HPO to return to the drawing board on this worthwhile project.