Developments in Building Liability: Solutions to Manage Inspection and Code Claims

Canadian Institute Provincial/Municipal Liability Conference – February 27, 2014

By

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The views expressed herein are solely in relation to the laws as they apply to Ontario. The author gratefully acknowledges the input of his colleagues Diana Dimmer and Susan Ungar of the City of Toronto's Legal Division, and LP Gregoire of Gowlings LLP with a prior versions of this paper published in 2006 and 2007. The assistance of F. Philip Carpenter, for updating this paper is also gratefully acknowledged. Any errors or omissions in this paper are those of the author alone.

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INTRODUCTION

In Ontario, the legislative scheme and standards relevant to building inspectors are set out in the *Building Code Act*, *1992*.[2] Under the *Act*, each municipality is responsible for the enforcement of the Act in its municipality. Section 3 of the *Act* provides that the council of each municipality shall appoint a chief building official and such inspectors as are necessary for the enforcement of the *Act* in the areas in which the municipality has jurisdiction.

Pursuant to section 8 of the *Act*, no person shall construct or demolish a building unless a permit has been issued therefor by the chief building official. Further, under section 8(2) of the *Act* the chief building official is required to issue the permit unless the proposed building, construction or demolition will contravene the *Act* or the Building Code or any other applicable law.

The *Building Code Act* regime lists certain mandatory inspections that must be carried out by the municipality, as well as a list of discretionary inspections. The leading case law provides that once a municipality decides to carry out an inspection, it must do so in a non-negligent manner.[3] The standards for construction are contained in a regulation passed pursuant to the *Building Code Act* commonly known as the "Code" (the Building Code).[4] The *Code* sets out criteria governing design and construction methods and materials to be used in the construction of all buildings falling within the *Act*.

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[2] S.O. 1992, c.23. [the "*Act*" or *Building Code Act*].
[3] *Rothfield v. Manolakos* [1989] 2 S.C.R. 1259 [*Manolakos*]; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 [*Ingles*].
[4] See e.g. *Building Code,* O. Reg. 350/06, referred to generally herein as the *Code* or the *2006 Code.* Effective January 1, 2014, the revised *Code* comes into effect, see *Building Code,* O. Reg. 332/12 as am, referred to herein as the *2014 Code*.

In Ontario, and elsewhere across Canada, qualified and experienced public officials engage in site plan review, building permit application review, plans examination, and building inspection - of all sorts of construction projects to ensure a safe built form. Such projects range from the small home renovation which may take days or weeks to complete to the large multi-use, multi - story, urban construction project taking many years to complete.

These public authorities are expected to discharge duties of care to those within a sufficient proximity to rely on them. Many large insured claims against municipalities will involve alleged breaches of these statutory construction regulation duties.[5] The *Code* now requires a municipality to be responsive to 'requests' for inspections as set out in Division C, section 1.3, following the issuance of a building permit.

Construction often represents the leading edge of design and building processes to renew our built environment. Such construction processes can be the straightforward transformation of the old for the new, or may additionally involve highly skilled and specialized workers and professionals using new building materials and techniques. At the same time, such renewal can take place under tremendous time constraints and budget constraints.

Over the past twenty-five years, there has been a significant increase of liability exposure for municipalities regulating the construction process. This can be partly explained by the fact that

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[5] The *Building Code Act,* is primarily concerned with issues of public safety as they relate to the building construction, and a good deal of the *Act* deals with inspection matters, including: the obligation to enforce the *Act* (section 3); the requirement of an inspection prior to occupancy of a building or part thereof (section 11); an inspector's legal right to enter a building or property "at any reasonable time without a warrant" where a building permit application has been made (section 12(1)); the power of an inspector to issue orders to comply (section 12(2)) and to issue orders prohibiting the covering or enclosing of any part of a building until such time as an inspector has had an opportunity to inspect (section 13(1)). Breaches of the *Act* constitute an offence, and persons breaching the Act are liable to be prosecuted under the *Provincial Offences Act* attracting significant fines of up to $50,000 (in the case of a corporation) hindering an inspector in the performance of his/her duties. The *Code* sets out detailed performance requirements and technical specifications.

contrary to the approach taken by the English courts, Canadian courts have more broadly imposed liability against municipalities for negligent building inspection. For policy reasons, users of the built environment (whether the initial purchaser or subsequent) have been seen as deserving of protection. It has been said that there is no risk of liability in an indeterminate amount because liability will always be limited by the reasonable cost of repairing dangerous building defects to a non-dangerous state. The time of exposure is limited to the "useful life of the building".[6]

It appears that, most commonly, claims brought against a municipality relating to deficient building plans and/or the inspection of a building will be framed in negligence.[7] This paper, therefore, focuses on situations that could become the subject of a negligence claim against a municipality and its employees, and how to minimize such exposure.

WHAT IS THE STANDARD OF CARE IMPOSED BY BUILDING INSPECTIONS?

The Leading Authority: Ingles v. Tutkaluk

The Supreme Court of Canada decision of *Ingles v. Tutkaluk Construction Ltd.*[8] is the leading authority on the duty of care owed by municipalities that conduct building inspections.

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[6] *Winnipeg Condominium Corporation No. 36 v. Bird Construction,* [1995] 1 S.C.R. 85, [1995] S.C.J. No. 2 at para. 50 [*Winnipeg Condo*].

[7] Diana W. Dimmer, "Municipal Liability for Plan Examination and Builder Inspections" (Paper presented to the Canadian Institute's Sixth Annual Provincial / Municipal Government Liability Conference, February 21 & 22, 2000) at p.1[Unpublished], and S. Ungar and D. Dimmer, "Liability Issues Under the New Building Regime (Toronto: Canadian Insight, February, 2006).

[8] *Ingles*, *supra*. note 3. There may always be some debate on any particular fact situation as to whether a duty of care arises. Certainly the case law tends to the view that the foreseeability of economic loss is not by itself sufficient

In *Ingles*, the homeowner hired a contractor to renovate his basement. This project required the installation of underpinnings under the existing foundation to prevent the walls from collapsing. Although the contract specified that the contractor would obtain a building permit prior to commencing construction, the contractor convinced the home owner that construction should commence before the building permit was obtained. By the time the permit was issued, the underpinnings had been completed, but were concealed by subsequent construction. Because it had been raining the day of the first inspection, the inspector could not dig a hole next to the underpinnings to determine their depth. He relied instead upon the contractor's assurances that the underpinnings were properly constructed. He did not verify the information except to examine the concrete. However, it was impossible to determine by visual inspection whether the underpinnings conformed to the Ontario building code.

The homeowners began to experience flooding in the basement shortly after the construction had been completed. They hired another contractor who determined that the underpinnings were completely inadequate and failed to meet the standard prescribed in the Ontario *Building Code Act*. The contractor made the repairs. The homeowners sued the first contractor in contract, and the city for negligence. The homeowners were not entirely unsophisticated, as both were local university professors. However, they had no specialized construction knowledge.

The Trial and Appellate Decisions

The trial judge allowed the action and, after deducting an amount to reflect the homeowner's contributory negligence, held the contractor and the city jointly and severally liable and

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to create sufficient proximity of a duty of care, and danger to persons or damage to property is required, see *Winnipeg Condo, supra* note 6.

apportioned damages of $49,368.80 between them. The trial judge concluded that in light of the contractor's failure to apply for the permit until after the underpinnings were put in place, his failure to post the permit as required, and his failure to notify the inspector that the underpinnings were being installed, it would have been reasonable to have conducted a more thorough inspection. The legislation authorized a more vigilant inspection than was performed in the circumstances. By failing to exercise those powers to ensure that the underpinnings complied with the *Code*, the inspector failed to meet the standard of care that would have been expected of a reasonable and prudent inspector in the circumstances, and was therefore negligent.

The Court of Appeal set aside the decision, holding that by allowing the construction to initially proceed without a permit, the homeowner had removed himself from the class of persons to whom the city owed a duty of care.

The Supreme Court of Canada Decision

The Supreme Court of Canada found that the Court of Appeal erred in concluding that the homeowner, through his own negligence, removed himself from the class of persons to whom a duty of care was owed, and restored the apportionment of liability of the trial judge.

The Court went on to state that in the context of municipal building inspections, the *Anns* test should be applied to determine whether a public body owes a duty of care, using the analysis of the English House of Lords in *Anns v. Merton London Borough*[9] and first applied by the Supreme Court of Canada in 1984 in *City of Kamloops v. Neilson et al*.[10] (herein

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[9] [1977] 2 All ER 492, [1977] UKHL 4 (HL).

[10] *City of Kamloops v. Nielson et al.* [1984] 2 S.C.R. 2 [*Kamloops*]. The *Anns/Kamloops* test was reviewed by the Supreme Court of Canada in the non-building code case of *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5,

"*Anns/Kamloops*"). Once a municipality makes a policy decision to inspect building plans and construction, it owes a duty of care to all who it is reasonable to conclude might be injured as a result of the negligent exercise of those powers. Such duty may be subject to limitations of policy, or such limitations may arise from the statutes bearing on the powers of the building inspector. The two related questions in the *Anns/Kamloops* analysis are, restated briefly:

1. Is there a relationship of sufficient proximity; and

2. Are there considerations that would limit the scope of duty owed, the class of persons to whom it is owed, or damages (for policy reasons)?

The traditional rationale from exempting public authorities from tort liability for true policy decisions is to prevent judicial policy making (rather than permissible adjudication).[11]

The Supreme Court of Canada held that to avoid liability the city must show that its inspectors exercised a standard of care that would be followed by an ordinary, reasonable and prudent building inspector in the same circumstances. Where the circumstances vary, the standard of care may vary. For example, a building inspector should take greater care if inspecting key structural elements, is put on notice of the possibility of defects, or the contractor is known to be reckless or is acting suspicious.[12]

[2010] 1 S.C.R. 132 [*Pinkerton's*], wherein they reviewed the municipal building inspector cases of *Kamloops, Ingles,* and *Manolakos,* at paras. 46-51 to analogize to the government mining inspectors who owed a *prima facie* duty of care to the murdered miners in that case.

[11] See for example, D. McKnight, *Parsons v. Richmond*: A Recent Foray into the Law of Municipal Building Inspection Policy (Toronto: Canadian Insight, February, 2006) and A. McNeely, "Negligent Inspection Claims and the Ontario Building Code Act", (Toronto: Canadian Insight, February, 2006).

[12] *Ingles, supra* note 3 at para. 40-43.

PROCEDURES AND STEPS THAT INSPECTORS SHOULD TAKE TO PROTECT THEMSELVES AND MUNICIPALITIES FROM LIABILITY

Building code statutes typically confer a review and inspection power, but leave the scale on which it is to be exercised to the discretion of the public authority, so that where the authority elects to perform the authorized act, and does so negligently, there is a duty at the operational level to use due care.

Once the policy decision is made to inspect, in certain circumstances, the authority owes a duty of care to all who may be injured by the negligent implementation of that policy. Municipalities are created by statute and have clear responsibility for health and safety. Any policy decision as to whether or not to inspect must accord with this statutory purpose.[13] Once it is determined that an inspection has occurred and that a duty of care is owed by the public actor to all who might be injured by a negligent inspection, a traditional negligence analysis will therefore be applied. To avoid liability, the government actor (i.e. the inspector) must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent inspector in the particular circumstances. [14] For example in Ontario, it has long been established on a traditional negligence analysis that where defective work has previously been noticed, a person conducting the inspection cannot rely on the contractor's subsequent "covering up" of similar work when

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[13] A municipality was liable for a "leaky condo" in British Columbia where it failed to check compliance with building code sections dealing with wind and water resistance. The municipality unsuccessfully claimed that its building department made a policy decision to selectively check and enforce only certain sections of the applicable Code: *Strata Plan NW 3341 v. Canlan Ice Sports* [2001] B.C.J. No. 1723 (B.C. Sup. Ct.).

[14] Whether the standard of care is limited to only inspecting for issues affecting health and safety was considered by the Nova Scotia Court of Appeal in *Flynn v. Halifax Regional Municipality,* 2005 NSCA 81 at para. 29-30 [*Flynn*] but not conclusively determined. The court in *Flynn* did reiterate the position in *Manolakos* and *Ingles* that municipalities are not insurers for workmanship and will not be liable for failing to detect every deviation from the code where inspections are carried out according to an inspection scheme based on good faith policy decisions (*Flynn, ibid* at para. 31).

he/she fails to spot the additional defective work, and could have by uncovering some of the work for inspection purposes.[15]

In the *Ingles* case, the first step in the *Anns/Kamloops* test was met. A *prima facie* duty of care arose by virtue of the sufficient relationship of proximity between the homeowner and the city, such that it was foreseeable that a deficient inspection of the construction of the underpinnings could result in damage to the property or injury to the owners. With respect to the second step of the test, the *Building Code Act* was enacted to ensure the imposition of uniform standards of construction safety. In this case, a policy decision was made to inspect construction even if it had commenced prior to the issuance of a building permit. Once the city chose to inspect, and exercised its power to enter upon the premises to inspect, it owed a duty of care to actually inspect and not rely on contractor assurances the work was done correctly.

While it is clear that the homeowner was also negligent in relying on the contractor's advice that it was appropriate to proceed with construction before the permit was obtained, the City could not rely on this to avoid a finding of a duty of care. To avoid liability entirely on the basis that the homeowner was the sole cause of the loss, the City had to show that the homeowner's conduct was the only source of his loss - amounting to a flouting of the inspection scheme. The concept of "flouting" denotes conduct that extends far beyond mere negligence on the part of the owner-builder, or agreeing to start work before a permit is obtained.

The *Ingles* decision can be contrasted with the approach of the minority in the earlier Supreme Court of Canada decision of *Rothfield v. Manolakos*,[16] and the English House of Lords Decision,

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[15] *Dabous v. Zuliani* (1976) 12 O.R. (2d) 230 (Ont. C.A.).
[16] *Manolakos*, *supra* note 3.

Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.[17] This suggests that some of the principles of *Ingles* could be applied differently on different facts. In *Ingles,* the owner was also not the builder (like *Ingles*), and was relatively unsophisticated. One could well imagine a different result in a case with a sophisticated owner-builder who was the sole cause of his/her own loss by "flouting the building code regime".

Owner-builders are in a better position to ensure that a building is built in accordance with the relevant building regulations, and from this it may be argued that they are not entitled to rely on the municipality to excuse them from their own mistakes.

In *Manolakos,* the trial judge found that the chief building inspector had seen the specifications and the sketch, but not examined them with the necessary care. It was undisputed that the sketch was only a rough and ready drawing and the project if built in accordance with the specifications, would be seriously deficient. Further, in the *Manolakos* case, the building inspector himself testified that the proposed steel reinforcement was wholly inadequate to support the structure, and that if he had seen the sketch, he would not have issued the permit. Despite the manifest inadequacy of the plan, the City issued a permit for the construction in the *Manolakos* case. This was apparently in accordance with its usual practice of construction projects of this kind where the City relied on onsite inspections to ensure standards were met. Thereafter while the City bylaw placed responsibility on the owner to summon the building inspector for the onsite inspection. The owner failed to give notice in good time and the defects were not caught. For the majority court in *Manolakos*, there was nothing in the nature of the breach that would support

[17] [1985] A.C. 210 (H.L.) [*Peabody*].

the view that the owner should not be entitled to rely on the building inspector to ensure that the project was up to standard.

The minority view was that the responsibility of the building inspector to discover and correct breaches of the building bylaw was completely negated by the respondent's oversight. The majority view was that the owners should bear some responsibility for the loss because of their failure to summon the inspector in good time, but not all of the loss. In accordance with the *Manolakos* case, the owners were held contributorily negligent in the amount of 30% with the contractors and the building inspectors being liable for 70%. Further, the majority court held that "it was really [the contractors'] fault rather than the owner's that the building inspector was not notified at the appropriate time".

In both the *Manolakos* case and in *Ingles*, the owner-builder was a simple resident who had no specialized construction knowledge. It is certainly possible that the minority view in *Manolakos* amplified by the approach English House of Lords in *Peabody* could lead, in an appropriate case, to a finding of one of the "narrowest of circumstances" described by the majority court in *Manolakos*:

> It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building bylaws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangerous health and safety. If, as I believe, owner builders are within the ambit of the duty of care owed by the building inspector, it would simply make no sense to proceed on the assumption that every negligent act of an owner builder relieve the municipality of its duty to show reasonable care in approving building plans and inspecting construction. **These considerations suggest that it is only in the narrowest circumstances that Lord Wilberforce's dictum will find application.** By way of example, I think that the negligent owner would be viewed as the sole source of his own loss where he knowingly

> flouted the applicable building regulations or the directives of the building inspector.[18]

In *Ingles* by the time the permit was issued, the underpinnings had been completed and were concealed. It was impossible to determine by visual inspection whether they conformed to the building code.

In *Ingles* the entire court reaffirmed the Canadian approach over the English approach:

> The municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of reasonable care when the conduct of the owner-builder is such as to make it impossible for the inspector to do anything to avoid the damage. In such circumstances, for example, when an owner builder determines to flout the building bylaw, or is completely indifferent to the responsibilities that the bylaw places on him or her, that owner-builder cannot reasonably allege that any damage suffered as a result of the failure of the building inspector to take reasonable care in conducting an inspection.[19]

The more narrow English approach is set out in the *Peabody* case, where the House of Lords unanimously determined the question is whether the municipal power being exercised exists for the protection of other persons, or for the person in default. The House of Lords quote from the Court of Appeal Judgment:

> '…This particular power exists for the protection of other persons, not for that of the person in default. I say nothing about the case where a local authority has failed to make known its requirements or has made requirements of an inadequate or defective nature. However, I can see no justification for extending the law of negligence by imposing on a local authority, over and above its public law and powers and duties [under certain legislation] a duty to exercise its powers of enforcement under paragraph 15 (2) owed in private law towards a site owner, who, whether with or without personal negligence, disregards the proper requirements of the local authority, duly made under paragraph 13 and duly communicated to him or persons authorized to receive them on his behalf. The practical implications of giving the defaulting owner a right to sue the local

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[18] *Manolakos, supra* note 3 at paras. 15, 16 [emphasis added].
[19] *Ingles*, *supra* note 3 at para. 33.

> authority for damages in such circumstances needs consideration, but no elaboration'.[20]

When enforcing building codes, municipalities owe a duty of care not only to owner-builders (and negligent owner-builders), but also to other classes of persons who could suffer damage from construction defects, including subsequent purchasers, visitors, neighbours, and mortgagees. Risk management considerations - the desire to avoid injury to persons or property, and lawsuits against the municipality resulting from construction that does not conform to the applicable building codes - require that inspection functions be carried out with the required standard of care to protect the interest of all classes of persons to whom a duty of care might be owed, regardless of the negligence of an owner-builder.

The Rules of Law to Remember

In order to avoid liability for negligent inspection, a municipality must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector faced with the same circumstances. The measure of what constitutes a "reasonable" inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, and whether the inspector had a chance or opportunity to discover the harm, but through action or inaction failed to do so.

In administering inspection regimes, municipalities are not insurers of the construction work produced.[21] They are not required to discover every variance from applicable building standards, nor discover every hidden defect in construction work. In this regard, some provincial building statutes, such as the Ontario *Building Code Act* with which the *Ingles* case dealt, stipulate that a

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[20] *Peabody, supra* note 13 at p. 6.
[21] See e.g. *Flynn, supra* note 14 at para. 31

municipality can only be held liable for those defects which the municipal inspector could reasonably have been expected to detect, and had the power to have ordered to be remedied. In Ontario, municipalities are obliged to enforce the Act, and the role of a chief building official includes establishing operational policies to enforce the Act and the code. Again, a reasonable inspection in light of the existing circumstances is what is required. Whether an inspection has met the standard of care depends on the facts in a particular case.[22] The precise articulation of the standard of care is a question of law. Whether the facts found by the trial judge met the standard of care is a question of mixed law and fact and appellate courts will defer to the findings of the trial judge unless there is a clear extricable error of law.[23]

A municipality may limit is duty of care where it makes a true policy decision in the course of its code enforcement functions. For example, in *Parsons v. Finch*,[24] the City of Richmond decided

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[22] For example, where structural deficiencies are latent and become apparent later, the municipality may revoke an occupancy and order repairs. In *Hilton Canada v. Magil Construction* [1998] O.J. No. 3069 (Ont. Sup. Ct.) a newly constructed addition to the hotel was ordered to be closed, and repairs were ordered to be undertaken. Hilton remedied the deficiencies and sued the municipality, among others, for damages. The municipality had a policy of only conducting a limited review of engineering plans if they had been stamped by a professional engineer licensed in Ontario. Under the *Building Code Act* "the design and general review of buildings must be undertaken by an architect or engineer" and the court held it was reasonable to rely on their expertise. The municipality met the applicable standard of care by ensuring a professional engineer had undertaken the design and field review. It was not liable to the owner in negligence, because its conduct met the standard of care. Similarly in *Hewitt v. Scott* [2001] O.J. No. 3120 (Ont. Sup. Ct.) the court declined to impose liability on the Township of King for negligence where a septic tank failed. Both the local township and the owner/ purchaser relied on an engineer's report identifying the septic system as complying with the then existing standards under the *Environmental Protection Act*, and the report referenced the possible future failure of the system.

Conversely, in *Carson v. City of Gloucester* [2001] O.J. No. 3863 (Ont. Sup. Ct.) the municipality was liable for the failure to properly clear a drainage ditch. Ten years prior, a home was built in a low lying area, but all pursuant to plans filed with the local municipality. High water levels were noted in the basement sump and the town sent a backhoe operator to clear the ditch on a Saturday. Despite the clearing work, a flood occurred. Having undertaken the clearing work, the court found a duty of care. Further, the court reasoned the *Drainage Act* imposed a positive duty to ensure drainage ditches in good working order, and that the failure to inspect the clear out work after the initial flood was a breach of the standard of care.

[23] *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 37; see also *Flynn, supra* note 14 at para. 31.

[24] *Parsons v. Finch* [2005] B.C.J. No. 2697 (B.C. S.C.). In *Parsons*, there was an express waiver of claims against the municipality, and more importantly a written acknowledgment that the owner knew "the City .. relied

as a matter of policy not to hire geotechnical engineers to determine subsoil conditions and instead consistently refrained from doing so for reasons of public economy. Instead, the policy required an outside geotechnical report and letters of assurance to address issues of subsurface soils and soil bearing capacity. The city engineer made no attempt to second guess the engineer and instead solely reviewed the report to ensure the appropriate issues were addressed.

Finally, it would be prudent to note that generally the negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care when exercising inspection duties.

Overview of Inspection Regimes Across Common Law Provinces of Canada

Building codes play a central role in the establishment of standards for the construction of buildings. In general, the purpose of building regulatory legislation is for protection of public health and safety through the establishment and enforcement of construction regulations which impose uniform minimum standards for the construction of buildings.[25]

The Supreme Court of Canada clearly spelled this out in *Ingles*:

> The legislative scheme [the Ontario *Building Code Act*] is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities. Sections 5 and 6 of the Act require that building plans and specifications be inspected before a permit is issued to ensure that they conform with the building code. Sections 8 to 11 set out the powers of the inspector to ensure that all work that is being completed conforms with the permit and, as a result, with the building code. Inspectors are given a broad range of powers to enforce the safety standards set out in the code, from ordering tests at the owners' expense, to ordering that all work cease in general. Section 9 grants inspectors the

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exclusively on the Letter of Assurance of Professional Design and Commitment for Field Review". However, contrast *Parsons* with *Dha v. Ozdoba* [1990] B.C.J. No. 768 (B.C. S.C.) where the municipality did not rely on outside geotechnical reports and, in effect, the City negligently accepted building foundation plans without being fairly satisfied the soils could adequately bear the intended structures.

[25] J. Levitt, "Building Codes: Origins, Enforcement & Liabilities" (Paper presented to the Canadian Bar Association's 2002 National Law Conference) at p. 1.

> power to order builders not to cover work pending inspection, or to uncover work when there is reason to believe that any part of the building has not been constructed in compliance with the Act. The purpose of the building inspection scheme is clear from these provisions: to protect the health and safety of the public by enforcing safety standards for all construction projects. **The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the Act. Therefore, municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers.**[26]

Under Canada's constitution, provinces and territories regulate design and construction of new houses and buildings, and the maintenance and operation of fire safety systems in existing buildings. While the model national building, fire and plumbing codes are prepared centrally under the direction of the Canadian Commission on Building and Fire Codes, adoption and enforcement of the codes are the responsibility of the provincial and territorial authorities having jurisdiction.[27]

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[26] *Ingles, supra* note 3 at para. 23[emphasis added].

[27] Established by the National Research Council Canada, information on the Canadian Commission on Building and Fire Codes and National Model Construction Code can be found online: National Research Council Canada, "National Model Construction Codes," online: National Research Council Canada < http://www.nationalcodes.nrc.gc.ca/eng/national_codes_list.html >

The following provinces and territories adopt or adapt the National Model Construction Codes:[28]

New Brunswick, Nova Scotia, Manitoba and Saskatchewan	Province-wide adoption of the National Building Code, National Fire Code and National Plumbing Code with some modifications and additions.
Newfoundland and Labrador	Province-wide adoption of the National Fire Code and the National Building Code, except aspects pertaining to means of egress and to one- and two-family dwellings within Group C in Part 9. No province-wide plumbing code.
Northwest Territories, Nunavut and Yukon	Territory-wide adoption of the National Building Code and National Fire Code with some modifications and additions. Yukon adopts the NPC.
Prince Edward Island	Province-wide adoption of the National Plumbing Code. Province-wide fire code not based on the National Fire Code. Major municipalities adopt the National Building Code.

The following provinces publish their own codes based on the National Model Construction Codes:

Alberta and British Columbia	Province-wide building, fire, and plumbing codes that are substantially the same as National Model Codes with variations that are primarily additions.
Ontario	Province-wide building, fire and plumbing codes based on the National Model Codes, but with significant variations in content and scope. The Ontario Fire Code, in particular, is significantly different from the National Fire Code. Ontario also references the Model National Energy Code for Buildings in its building code.
Quebec	Province-wide building and plumbing codes that are substantially the same as the National Building Code and National Plumbing Code, but with variations that are primarily additions. Major municipalities adopt the National Fire Code.

[28] Government of Canada, "Model Code Adoption Across Canada," online: National Research Council Canada <http://www.nationalcodes.nrc.gc.ca/eng/code_adoption.html.>

Impacts of Joint and Several Liability on Municipalities

It is worthwhile to note that in most provinces where the negligence of two or more defendants is found to have contributed to the damages suffered by a plaintiff, the responsibility to pay for the loss will be apportioned by the court among defendants on the basis of joint and several liability. From this point, the defendants bear the risk of non-recovery *inter se*, which means practically that a solvent defendant (usually an insured municipality) at fault may get "stuck with the bill" where there is an uninsured or insolvent contractor.

What this means for a municipality is that, for instance, even where it is found to be only 14% at fault and the contractor 80% at fault for damages suffered by a homeowner, the plaintiff is entitled to collect 94% of the judgment from the municipality.[29]

Legislative Responses: the Ontario Example

In Ontario, a number of years ago, the Building Regulatory Reform and Advisory Group (BRRAG) assisted successive Ontario governments who have now proceeded with substantial reforms to the *Ontario Building Code Act*.[30] Among other things, the reforms were intended to:

- Permit outsourcing of building inspections to qualified registered code agencies, and immunity from suit in such case (this has not happened much in practice since the 2006 amendments);

- To enact an ultimate limitation period (done separately under the *Limitations Act, 2002*, and it is now 15 years);

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[29] *Ingles*, *supra* note 3.
[30] This reform is not entirely to BRRAG's satisfaction, nor without some controversy.

- To require province-wide mandated building permit forms to ensure consistency;

- To list "applicable law" (as a chief building official *must* issue a construction permit if it complies with the Code and applicable law);

- Enact a code of conduct for chief building officials and to ensure they and code agents are properly qualified and experienced, in recognition of their important public safety role in the built environment;

- To move the building code into a more object based code with performance equivalents, rather than dictating construction processes to take advantage of innovation and improving standards;

- To speed up the building permit review process, mandating a decision within a range from 10 days for houses to 30 days for complex buildings.

The move to objective based codes and the existence of a code of conduct for chief building officials has increased the importance of ongoing education about changes and improvements to building processes and materials. Inspectors will be held to a standard expecting them to be reasonably aware of new practices and procedures in the construction industry. For example, a plans examiner who fails to require self-closing devices on all interior fire separation floors may be liable particularly where it involves a life safety matter the importance of which is well known in the industry.[31]

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[31] *Bakhtiari v. Axes Investment* [2001] O.J. No. 4720 (Ont. Sup. Ct.), appeal allowed in part to increase municipal exposure [2004] O.J. No. 302 (Ont. C.A.).

The Developing Property Standards Cases

Added in 1997, the property standards provisions of the *Building Code Act* the property standards provisions give municipalities the power to enact and enforce property standards for maintenance and occupancy of buildings. Where buildings are non-compliant, municipalities may make remedial orders, emergency orders and provides for appeal and review mechanisms.[32]

While the current property standards provisions of the *Building Code Act* did not apply, the case of *Foley v. Shamess* centered on a 100 year old building that the Foleys and the Shamess owned and lived in. [33] The Shamess owned two of the three units, and the Shamess units were run down and unoccupied. The Foley unit needed some repair, but tenants occupied the main floor and top floor. In 1994 the Town of Parry Sound issued notice of violation under its property standards by-law, resulting in some repairs. By 1997 the Shamess units deteriorated further, leading the chief building official to declare the entire building unsafe under then s. 15(3) of the *Building Code Act*, and make short and long term repairs. When no repairs were done, the Town prohibited use or occupancy of the building. After no resolution to deal with the building could be reached, the Town ordered the building demolished and in 2001 it was.

The Foleys sued the Shamess and the Town, claiming against the town for failure to enforce its property standards by-law. It is clear that once "the Town made a policy decision to enact a property standards by-law, it could be liable to property owners for the negligent enforcement of its by-law."[34] As the timeline of 1994 to 2001 suggests, the decision to demolish was not rushed

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[32] *Building Code Act, supra* note 2, ss. 15.1-15.8. Additional unsafe building powers are found at ss. 15.9-15.10
[33] 2008 ONCA 588, [2008] O.J. No. 3166 [*Foley*]
[34] *Ibid,* at ¶ 26.

and the Court of Appeal reversed the trial judge's findings of negligence on the part of the Town for failing to undertake a partial demolition. The Court of Appeal found that "a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners."[35] The Court of Appeal, when faced with the reasonable actions of the chief building official in trying to bring the Foleys and Shamess together to repair and remedy their property could find no duty for the Town to do, or pay for, the repairs (partial demolition) that the owners themselves were not willing or able to do.[36]

Enforcement of property standards, especially in emergencies, is not cheap. In one recent case the City of Ottawa claimed recovery for $428,105.50 in the costs of demolition, engineering and other costs under s. 15.10 of the *Building Code Act* after a number of orders to remedy an unsafe building went unheeded, leading to an emergency order under s. 15.10. The court approved Ottawa's costs subject to review of the demolition invoice.[37]

The Ontario Court of Appeal also visited the issue of property standards in the case of *Davis v. Guelph (City)* where a homeowner claimed for damages to her pool stemming from property standards orders issued under the city's standing water bylaw and remedial actions taken in draining the pool to a minimal level.[38] While not a claim in negligence, under the judicial review process, the Superior Court judge who reviewed the property standards orders quashed them and ordered the pool repair costs allocated as between the parties.

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[35] *Ibid.,* at para 29
[36] *Ibid.* at paras. 26-31
[37] *Ottawa (City) v. TKS Holdings Inc.,* 2011 ONSC 7633, [2011] O.J. No. 6135
[38] *Davis v. Guelph (City),* 2011 ONCA 761, [2011] O.J. No. 5439 [*Davis*]

The Court of Appeal allowed Guelph's appeal. Among other reasons for allowing the appeal, the Court of Appeal found that the Superior Court of Justice to which Davis appealed the property standards orders did not have the jurisdiction to apportion the costs. Besides, Davis had commenced a separate civil action for the damages to the pool, which had been dismissed, and therefore the issue was *res judicata* when the property standards orders came to the Superior Court of Justice for appeal.[39]

At least one court has held on an appeal of a property standards order that there is a distinction between s. 15.9 and 15.10 orders. In *Gordon v. North Grenville (Municipality),* the court held that s. 15.9 orders to remedy an unsafe building required the property standards officer to allow for some reasonable time period for the owner to remedy the property. In *Gordon*, this meant that the immediate evacuation of a psychiatric care facility pursuant to two property standards orders under s. 15.9 of the *Building Code Act*, two days after a failed fire drill, were made without jurisdiction. The court held, with reference to s. 15.9(4), 15.9(6) and in contrast to s. 15.10, that some reasonable time for remedial steps should be allowed under s. 15.9, whereas chief building officials can take "any measures necessary" under s. 15.10, subject to court confirmation as required by that section.[40]

That negligent enforcement of property standards by-laws is not new, although tying it to the provisions found in ss. 15.1-15.10 of the *Building Code* may be. Indeed the decision in *Foley* considers *Oosthoek v. Thunder Bay (City),* where negligent enforcement of a by-law prohibiting connections of rain-water trough pipes to the sewer system led to liability on the part of Thunder

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[39] *Ibid.,* at paras. 52-56.
[40] See G*ordon v. North Grenville (Municipality),* 2011 ONSC 2222, [2011] O.J. No. 1632 at paras. 20-24, 36-40 and 42-45

Bay for sewer backups because there was no evidence that non-enforcement was the basis of a policy decision.[41] In addition to the civil law suit referred to in *Davis,* and the decision in *Foley*, other unsuccessful lawsuits have been attempted. For example, the city of Mississauga was found not liable for enforcement of its property standards by-law and water run-off that damaged one neighbour's property after the renovations of adjoining property.[42]

The proper role of property standards inspectors, mandatory periodic inspections and mandatory minimum property standards were all on the agenda for the policy roundtables conducted as part of the Elliot Late Commission of Inquiry into the Algo Centre Mall roof collapse.[43] Depending on the recommendations, property standards may be an area for future legislative action and litigation, whether for negligence in failing to ensure property standards are met, or judicial review of remedial orders.

LEGAL LIMITS FOR SUING MUNICIPAL INSPECTORS FOR NEGLIGENCE

In addition to true policy decisions by a municipality to rely on the review work of others, there have been statutory reforms to reduce exposure to inspection claims by having qualified third parties perform certain code review functions.

As stated above, Bill 124 amended the *Building Code Act*.[44] Most of these amendments came into effect on July 1, 2005. The result was the creation of registered code agencies ("RCA"). [45]

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[41] *Oosthoek v. Thunder Bay (City),* [1996] O.J. No. 3318, 30 O.R. (3d) 323 (C.A.) [*Oosthoek*]
[42] *Kay v. Caverson,* 2011 ONSC 4528, [2011] O.J. No. 3639
[43] Ontario, Elliot Lake Commission of Inquiry, Roundtable Agenda, online: Elliot Lake Inquiry <http://www.elliotlakeinquiry.ca/roundtables/pdf/Part-1-Roundtable_Agenda.pdf>.
[44] *Building Code Act, supra* note 2, as am by the *Building Code Statute Law Amendment Act, 2002*, S.O. 2002, c. 9 (formerly Bill 124) [*Bill 124*].

The role of an RCA is to exercise powers and perform duties in connection with the review of building permit plans and inspections formerly the sole purview of chief building officials and their delegates under the *Building Code Act*.[46] In effect, this allows the privatization of public law duties and the "contracting out" of building inspections. Some have criticised this as a provincial "attempt to privatize liability". Absent from the legislation is any provision that builders carry insurance, although for market reasons most carry third party liability insurance, and some first party insurance.

Generally, the stated intended purposes behind the amendments were: to improve the accessibility of the inspection process, to reduce costs to users, to allocate liability more fairly, and to improve the level of safety and quality in construction.

The amended *Building Code Act* uses the term "principal authorities" to mean the Crown, the council of a municipality, an upper-tier municipality, a board of health, a planning board, or a conservation authority. The *Act* now provides a shift of liability from the principal authorities to the RCAs for their performances or intended performance of an act or omission.

Some of the functions that an RCA may be appointed to perform in respect of the construction of a building are the following:

1. Review designs and other materials to determine whether the proposed construction of a building complies with the building code.
2. Issue plan review certificates.
3. Issue change certificates.

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[45] *Building Code Act, ibid.* s. 1.1(5).
[46] Most provisions of Bill 124 took effect on July 1, 2005 while some were postponed and came into effect January 1, 2006.

4. Inspect the construction of a building for which a permit has been issued under this Act.

5. Issue final certificates.[47]

The *Building Code Act* provides that a principal authority is not liable for any harm or damage resulting from any act or omission:

- resulting from any act or omission by an RCA or by a person authorized by an RCA in the performance or intended performance of any function set out in section 15.15; or

- resulting from any act or omission in the execution or intended execution of any power or duty under this *Act* or the regulations by their respective chief building official or inspectors if the act was done or omitted in reasonable reliance on a certificate issued or other information given under this *Act* by an RCA or by a person authorized by an RCA.[48]

Before the amendments, the principal authorities were liable for the negligence of their chief building officials and inspectors. These provisions serve to create a shield around the principal authorities protecting them from claims of negligence made against an RCA or by a person authorized by an RCA or a chief building official or inspector who reasonably relied on information from an RCA or by a person authorized by an RCA.

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[47] *Ibid*. s. 15.15. The Powers and Duties of Registered Code Agencies are enumerated at sections 15.14 to 15.22.
[48] *Ibid*. ss. 31(3) and (4).

Limitations to Immunity

Despite the stated objectives of the amendments, there is, nonetheless, some residual exposure to the principal authorities. If the RCA is terminated, liability falls back on the municipality.

An RCA or a person authorized by an RCA is not responsible for the issuance of a permit. This function remains a responsibility of the municipality. In addition, for the first time, the *Building Code Act* requires the chief building official to determine within a specified period whether to issue the building permit or to refuse to issue it.[49]

Once appointed, an RCA cannot be terminated except in accordance with the *Building Code Act*. Upon the RCA's termination, the principal authority is responsible for ensuring that the remaining functions of the agency are performed by it or another RCA.[50]

The *Building Code Act* provides that a principal authority shall establish and enforce a code of conduct for the chief building official and inspectors.[51] In keeping with the principles enunciated in *Ingles*, the code of conduct establishes the minimum standard against which the acts or omissions of the chief building official and inspectors will be measured. These codes of conduct should be publicly available.[52]

The *Building Code Act* requires that RCAs maintain insurance coverage.[53] This translates into a greater layer of protection for principal authorities, but not an absolute one. For example, the regulations provide that RCAs must maintain coverage of at least $1,000,000 per claim and

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[49] *Ibid*. s. 8(2.2).
[50] *Ibid*. s. 15.20(3).
[51] *Ibid*. s. 7.1(1).
[52] *Ibid,* s. 7.1(4), see e.g. Toronto, *City of Toronto Code of Conduct for Chief Building Official and Inspectors,* online: Toronto Building <http://www1.toronto.ca>
[53] *Ibid*. s. 15.13(1).

$2,000,000 in the aggregate if the person billed $100,000 or more in fees in the 12 months immediately before the issuance of the policy.[54] Assuming that RCAs do not have assets to cover a claim that exceeds the insurance limits, creative plaintiff's counsel may target principal authorities as a deep pocket from which to cover the excess.

Long ago, municipalities enjoyed immunity under the common law principles that the "crown can do no wrong." Indeed in Ontario, modern statutes such as the *Proceedings Against the Crown Act* expanded the liability of the provincial Crown in most cases to that of a natural person.[55] This immunity has been diminished over the years by a number of Canadian court decisions and statutes. The following is an overview of defences still available in addition to the immunity provided in the *Building Code Act* from the negligence of a RCA or a person authorized by a RCA.

Limitations Periods

All provinces have limitation periods barring plaintiffs from taking legal action against wrongdoers after a certain amount of time. Therefore, when a statutory limitation period expires for the plaintiff, he is barred from taking legal action against a municipality. The passage of time if it does not create a legal defence may also serve to make proof of causation difficult.

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[54] See *2006 Code*, supra note 4 s. 3.6.2.3 (1)(f), which is replicated in the new *2014 Code, supra* note 4, s. 3.6.2.3(1)(f). Also, in Ontario the usual minimum insurance cover for architects and engineers is $250,000 who may have had a role in *Building Code Act* review, so a minimum of $1 million is an improvement over the existing coverages that may be triggered from the owner's and municipality's perspective.

[55] *Proceedings Against the Crown Act,* R.S.O. 1990, c. P.27. Unlike provinces, which are constitutionally empowered, municipalities are empowered under various provincial municipal statutes, like the *Municipal Act, 2001,* S.O. 2001, c. 5. Many municipalities have their own enabling statutes in Ontario, for example the various *City of Toronto* Acts, most recently embodied by the *City of Toronto Act, 2006,* S.O. 2006, c. 11, Sched. A.

In Ontario, the discoverability rules still apply to determine the date on which the limitation period begins to run. However, the limitation period has been shortened generally from six years to two years.

The Limitations Act, 2002[56] stipulates that for actions based in negligence, the limitation period is two years from the date the cause of action was discovered by the party suffering the loss. This is the applicable limitation period for alleged building inspection negligence, except those more than 15 years ago. The discoverability rule means that a cause of action arises for the purposes of a limitation period when the plaintiff discovers the material facts upon which it is based or when they ought to have been discovered by the plaintiff by exercising reasonable diligence.[57] Persons shall be presumed to have discovered the loss when it actually occurred unless they can prove that they discovered the loss only sometime after its occurrence.[58]

Each deficiency for which a municipality might be liable is separately discoverable. In *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.* the Ontario Court of Appeal rejected the town of Grey Mountain's appeal based on the theory that "once damage, any damage, is discovered or reasonably could have been discovered, the cause of action has accrued" and therefore the actions were statute-barred since the statement of claim was issued six years after the condominium corporation was informed of the first of three serious latent defects, which the town admitted it should have discovered during its inspections.[59] In *Blue Mountain* the Ontario Court of Appeal carves out an exception to the general principle in *Peixeiro v. Haberman*, that

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[56] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4, [*Limitations Act*].
[57] *Ibid.*, s. 5(1).
[58] *Ibid.*, s. 5(2).
[59] *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.,* 2008 ONCA 384, [2008] O.J. No. 1893 [*Blue Mountain*] at paras. 7-16, 57.

once "the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of damage nor the type of damage need be known."[60]

Justice Epstein held that the single cause of action paradigm should not be applied to construction deficiency cases.[61] Justice Epstein writes at para. 71: "In my view therefore, given the inherently latent nature of construction defects, and given that they will often be discovered over a period of time, it is neither logical nor fair to deny innocent victims an opportunity to seek redress for the wrongs done to them, based solely on the single cause of action paradigm." The key, according to the Court of Appeal is whether the deficiencies and defects were independently discoverable or were related. If independently discoverable, one latent defect will not appear to trigger discoverability for all defects not yet discovered and the limitation period for those undiscovered deficiencies would continue to run.[62]

In *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.*,[63] the Ontario Court of Appeal clarified the issue of whether the ultimate limitation period of 15 years begins to run for claims which occurred prior to 2004, but were discovered after the *Limitations Act*, *2002* went into effect. In this case, the plaintiff condominium corporation had discovered that the condominium building's demising walls were not fire-rated in accordance with the appropriate building code, and brought an action against the developer and against the respondent City. The parties agreed that the last act on part of the City had taken place in February 1978. The Plaintiff had

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[60] [1997] 3 S.C.R. 549, [1997] S.C.J. No. 31 at para. 18
[61] *Blue Mountain, supra* note 55 at para. 69.
[62] *Blue Mountain, ibid* at paras. 72-73.
[63] 2007 ONCA 49, rev'g [2006] O.J. No. 246 (Ont. Sup. Ct.) in which Justice Ground dismissed a claim against the municipality as statute barred under the new *Limitations Act*. Leave to appeal to the Supreme Court of Canada refused, [2007] S.C.C.A. No. 154.

discovered their claim in May 2004, after the *Limitations Act, 2002* went into effect and brought its claim in June 2005.

The Court reversed an order which dismissed action and determined on the basis of the *Limitation Act*'s transition provisions that if a claim is not discovered until after January 1, 2004, but the act or omission took place before that date, the ultimate limitation period of fifteen years starts to run as if the act or omission had taken place on January 1, 2004.

The implication of this case for municipalities is very significant as it potentially leaves them "open" to any pre-2004 claims until January 1, 2019.

In the context of municipalities being the targets of defendants such as contractors or third party purchasers, such defendants will have a maximum of two years from when they were served with the statement of claim to commence a third party proceeding for contribution and indemnity against a municipality.[64] Thus, it is important to investigate and determine whether any other parties or professionals were involved in plans examination, or field review. Typically, in Ontario, a qualified professional (usually an architect or structural engineer) must file certificates with the municipality issuing the permit indicating ongoing review in projects to which certain portions of the *Building Code Act* apply. In large projects it is the rule rather than the exception that many specialized consultants are retained by the owner or his/her architect, to address sub-disciplines such as: geotechnical engineering, structural engineering, electrical engineering, HVAC system engineering, fire protection, and so on.

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[64] *Limitations Act, 2002 supra* note 44, s. 18.

Legal Limits on Suing Municipalities

Statutes granting immunity to municipalities from being sued for negligence will be strictly construed. In addition, clauses in building permit applications or plans examinations purporting to limit review to "general regulatory compliance only" will not protect exposure to third party purchasers or users.

Provincial statutes relating to municipalities must be examined in order to determine if or when, and under what circumstances, a municipality might be immune from legal action for negligence. In one case, for instance, a statutory immunity from failing to enforce a by-law was held not to apply to a negligent building inspection as the immunity applied only to failures to enforce a by-law by the institution of civil proceeding or prosecution.[65] In another case, a municipal inspector was found to be immune by statute from liability for failing to monitor a provisional occupancy permit - that was provisional upon the land owner complying with a restrictive covenant not to dump soil and other material on the land - on the basis that the inspector failed to ensure the covenant was being adhered to by the landowner who had ignored the covenant.[66]

A municipality will not be generally liable for the policy decisions it makes, as policy decisions do not impose on the municipality a duty to the public. However, a municipality will have a duty to the public if it decides to implement its policy, and it will thus be liable where it does so negligently. In other words, if a municipality implements a regime for building inspections as a matter of policy, it has a corresponding duty to the public to follow through and ensure that inspections are done in a manner and to an extent which is consistent with that policy. It remains

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[65] *Wilson v. Robertson* (1991), 43 C.L.R. 117 (B.C. Sup.Ct.).
[66] *Century Holdings Ltd. v. Delta (District)* (1994), 19 M.P.L.R. (2d) 232 at pp. 243-4 (B.C.C.A.), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 293.

open to a municipality, in making its discretionary policy choices, however, to decide that it will implement only a limited inspection regime, but only where such a decision is clearly rationally connected to the municipal policy decision. For example, once a municipality has undertaken a limited inspection regime under the Ontario *Building Code Act*, it is not open to selectively enforce other parts or less of the *Act*.

In some jurisdictions a municipal inspector's duty to inspect may be limited to inspecting plans and not actual structures, to ensure only that plans have been approved by certified engineers or architects. If an inspection regime so limits a municipal inspectors duties, and it is found, after construction has taken place that the engineer was negligent in drawing or approving the plans, the inspector will not be found negligent as his duty only extended to relying on the expertise of the engineer or architect. In this regard, section 290 of the British Columbia *Local Government Act*,[67] for instance, allows municipalities to avoid liability for issuing building permits if the plans were certified by an engineer or architect. Accordingly, this provision effectively limits the duty of the municipal inspector. The municipal inspector will not have a duty, and will thus not be liable, because he or she has no duty to uncover faulty work that derives from the negligence of an engineer or architect.

Not every loss can be connected to a municipal regulation or inspection regime, and hence in some fact circumstances no duty will arise. For example, regarding flooding caused by landfill placed on its land by a co-defendant, as this was a matter not governed by a by-law and no approval from the municipality had been sought or provided;[68] or to refrain from exercising a

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[67] R.S.B.C. 1996, c. 323.
[68] *Wakelin v. Superior Sanitation Services Ltd.* (1993), 17 M.P.L.R. (2d) 34 (P.E.I. Sup.Ct.).

right, such as resort to legal process, provided it is not done with malice or bad faith so as to constitute an abuse of the right.[69]

The Owner-Builder's Negligence

Construction contrary to the building code would be illegal and courts are reluctant to sanction illegal contracts.[70]

In order for a negligent municipal inspector to be absolved of all liability for losses resulting from faulty construction on the basis that the owner/builder contributed to their own losses, the municipality must show that the owner-builder knowingly flouted the applicable building regulations or the directives of the building inspector, thereby totally failing to acquit themselves of the responsibilities that rested on them, such that it was not possible for the inspector to take reasonable measures to ensure that the construction was done in accordance with applicable building standards. In short, it must be demonstrated that the owner/builder was the sole cause of his or her own loss. The type of behaviour by the owner/builder that might be considered "flouting" of the building regulations or the directives of the inspector involve situations where it was impossible for the inspector, upon full exercise of his statutory powers, to conduct a reasonable inspection.[71]

It is important to reiterate that where an owner/builder negligently contributed to their own loss, but it is found that the municipal inspector was also negligent, the negligence of the

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[69] *Saint-Laurent (Ville) v. Marien* [1962] S.C.R. 580.

[70] *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd*. [1983] O.J. No. 3181 (Ont. C.A.).; and *Victor Couto's Bridal Corner Ltd. v. Alliance Trade Centre Inc.* [1998] O.J. No. 5476 (Ont. Gen. Div.) Courts seem less reluctant to enforce contracts where no building permit was applied for (*Chris Nash Building Inc. v. Gibson* [2002] O.J. No. 1083 (Ont. Sup .Ct.)).

[71] Jeff Levitt, "*Municipal Building Department Liability: Rothfield Explained and Regained in Ingles*", Case Comment (2000) 5 D.M.P.L., June 2000, vol. 5, Issue 18.

owner/builder does not provide the municipality with a defence as to its own negligence, but, rather, will be a matter relevant to the apportionment of liability between the municipality and the negligent owner/builder. For instance, plaintiffs who built their residence and occupied it in contravention of a statute were held to be disentitled to claim damages sustained to their residence by contaminants in municipal sewage that flowed through a stream that ran onto their property on the basis that the municipality allowed for construction in violation of the building code, but the municipality was found liable for the contamination of the land on which the residence was built.[72]

Fault on the Part of Others (Besides Plaintiff)

Municipal Inspector's Delegation of Duty

A municipality may be able to delegate its duty of care and thus absolve itself of potential liability where it hires specialized labour to perform work and monitor its own work. There are exceptions to this rule, the major one being that the person employing the independent contractor may not delegate the duty of care when the work to be done is inherently dangerous. In such cases, the municipality has an independent duty to see that the work is performed with reasonable care. Thus, a municipality was held liable for loss or injury arising from the negligence of an independent contractor in the excavation of a trench across a busy intersection,[73] in constructing a sewer which resulted in contamination of a nearby well,[74] and in constructing sewers with the result of destroying lateral support for adjacent buildings.[75]

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[72] *Gambo (Town) v. Dwyer* (1990), 49 M.P.L.R. 257 (Nfld. Sup. Ct.).
[73] *Canada (Attorney General) v. Biggar (Town)* (1981), 10 Sask. R. 401 (Sask. Dist. Ct.).
[74] *Beaulieu v. Riviere-Verte Village* (1970), 13 D.L.R. (3d) 110 (Q.C.A.).
[75] *Canada Trust Co. v. Strathroy (Town)*, [1956] O.J. No. 200 (Ont. C.A.).

However, a municipality is usually not liable even where negligent where the loss is pure economic loss where there is no risk of injury to persons or property.[76]

Intervening Acts

If an act by a third party or stranger causes a loss that was not reasonably foreseeable to a building inspector, the inspector will likely not be found to be the cause of the loss and so will avoid liability. Acts found to have not been reasonably foreseeable include theft of or mischief involving heavy construction equipment,[77] the removal by Halloween madcaps of lanterns and planks placed across a trench dug on the side of a street,[78] and the failure by villagers to fasten planks during replacement after having removed them.[79]

Acts that were found to have been reasonably foreseeable thus resulting in municipal liability for negligence include damage to the area around a manhole on a busy sidewalk caused by heavy cement trucks driving over the sidewalk when travelling to and from a construction site,[80] the removal of a readily moveable unfastened wooden manhole cover,[81] and the obstruction of a reservoir spillway caused partly by the diversion of an unknown person and partly by children leaving logs and boards in the reservoir.[82] These cases generally involve the failure by the municipality to inspect for, and take measures to prevent, the foreseeable type of hazard from which the loss or injury arose.[83]

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[76] *Wirth v. City of Vancouver* [1990] 6 WWR 225 (B.C.C.A.)
[77] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality)* (1991), 88 Sask. R. 281 (Sask. Q.B.), aff'd 109 Sask. R. 33 (Sask. C.A.); *Wright v. McCrea*, [1965] 1 O.R. 300 (Ont. C.A.); *Hewson v. Red Deer (City)* (1977), 146 D.L.R. (3d) 32 (Alta. C.A.).
[78] *Matheson v. Patrick Construction Co*. (1953), 9 W.W.R. (N.S.) 443 (Sask. Dist. Ct.).
[79] *Danberg v. Village of Canwood*, [1932] 2 W.W.R. 320 (Sask. C.A.).
[80] *Jones vs. Vancouver (City)*, [1979] 2 W.W.R. 138 (B.C.S.C.).
[81] *Franchetto v. C.P.R.* (1961), 31 D.L.R. (2d) 449 (Alta. C.A.).
[82] *Lewis v. North Vancouver (District)* (1963), 40 D.L.R. (2d) 182 (B.C. Sup. Ct.).
[83] David Hillel *et al*, eds., *Thompson Rogers on Municipal Liability*, (Aurora, Ontario: Canada Law Book, 1996).

The Plaintiff's Duty to Mitigate Damages

A plaintiff that has suffered, and claims damages from a defendant for losses, has a duty to lessen or mitigate the damages suffered, which includes taking steps to prevent further loss. The duty to take reasonable steps to mitigate damages applies equally to claims against municipalities.[84]

A plaintiff's failure to mitigate damages could reduce the amount of damages awarded to the plaintiff where the municipality is liable for negligent inspection. Examples are: failing to repair damage to a drain pipe eventually leading to the need to install a new sewer system,[85] failing to take available steps to prevent water escaping from a municipal water-line from entering the plaintiff's basement,[86] failing to minimize water damage to electronic equipment parts following a flood in the basement where they were stored,[87] and failing to seek injunctive[88] or mandatory[89] relief when it would have been reasonable to do so for the purpose of mitigating damages. Further examples include doing "absolutely nothing" in the face of mounting losses[90] and deliberately avoiding steps to mitigate the loss.[91] A failure to mitigate may also occur when the plaintiff unreasonably incurred expenses that added to the claim, such as engaging in hopeless litigation.[92]

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[84] *Bell v. Sarnia (City)* (1987), 37 D.L.R. (4th) 438 (Ont. H.Ct.J.).
[85] *Clarke v. Torbay (Town)* (1978), 22 Nfld. & P.E.I.R. 527 (Nfld. Sup. Ct.).
[86] *Tower Estates Ltd. v. Winnipeg (City)* (1993), 86 Man. R. (2d) 163 (Man. Q.B.).
[87] *Industrial Teletype Electronics Corp. v. Montreal (City)*, [1977] 1 S.C.R. 629.
[88] *Timberline Haulers Ltd. v. Grande Prairie (City)* (1988), 59 Alta. L.R. (2d) 43 (QB), aff'd [1990] A.J. No. 845.
[89] *Marlay Construction Ltd. v. Mount Pearl (Town)* (1989), 47 M.P.L.R. 80 (Nfld. Sup. Ct.), rev'd on other grounds [1996] N.J. No. 256.
[90] *Priestly-Wright v. Alberta* (1986), 48 Alta. L.R. (2d) 339 (Alta. C.A.).
[91] *Crestpark Realty Ltd. v. Riggins* (1975), 21 N.S.R. (2d) 298 (N.S. Sup. Ct.).
[92] *MacInnes v. Inverness (County)* (1995), 29 M.P.L.R. (2d) 69 (N.S.C.A.).

Inspectors' Reasonable Procedures and Steps

Sometimes, regardless of its best efforts, a municipality may find its conduct to be the subject of a lawsuit. The internal procedures, standards, and guidelines and contemporaneous notes and records can be used to measure whether the inspector's performance was reasonable in the circumstances, and are the best evidence of what occurred at the time.

Since practices change over time, it is important that historical copies of internal procedures, standards, and guidelines be preserved at the time litigation is commenced so that it can be well established whether the inspector or particular municipal employee met the standard or the guideline in force when the alleged wrong occurred. Records retention policies (regarding electronic or other documents) are best not to permit destruction for at least 15 years.

Checklists for various types of inspection are common and are frequently useful provided they have actually been filled out. It defeats their purpose if oral evidence is required to prove the actual inspection or review was carried out that is not apparent from the documentation otherwise not completed and dated. Furthermore, documentation that lists deficiencies, instructions or orders, and follow-ups should also reveal the follow up on corrective action.

CONCLUSION

Municipalities owe a duty to take reasonable care when carrying out building permit review and building inspection.

A local municipality is usually responsible for ensuring the legal and safe construction of buildings. Even in the best of circumstances, a municipality may find itself defending a lawsuit based on an act or omission of its chief building official or one of his/her delegates. However, as

long as the plans examiner or inspector exercised the standard of care that would be expected of an ordinary, reasonable, and prudent inspector in the circumstances, a municipality (and its insurer), ought to be able to avoid liability.

There are various defences available to a municipality, including whether the inspector acted with reasonable care, whether a limitation period expired, whether a limited inspection policy can be established, whether there was the flouting of applicable building regulations by the owner-builder, whether there was a delegation of duty to a registered code agent, and whether an intervening act caused the loss. The failure of a claimant to mitigate his/her damages should also be considered.

Due to the nature of construction, there will always be inherent risks leading to inevitable situations of liability exposure. In the end, those municipalities who best manage the risks associated with their review and inspection obligations will be in the best position to manage and defend any exposure.