“Defending Against Negligent Inspections Claims: Best Practices to Reduce Costly Actions”

Andrew J. Heal, LL.M.
416.583.5901
aheal@healandco.com

Larry Ptashynski
Manager of Inspections
City of Vaughan
905.832.8511
larry.ptashynski@vaughan.ca

Overview

- some strategies for defending claims
- discuss early challenges to claims in the land use planning context
- cover how to prepare for documentary and oral discovery
- discuss what lawyers defending you require
- Case Studies
- Some do's and don'ts of Building Inspection

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

MCHUMOR by T. McCracken

"I haven't found anything wrong yet, but it's OK for you to go ahead and worry a bit longer."

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Statutory Regime

Building Code Act, 1992

Building Code, 2006

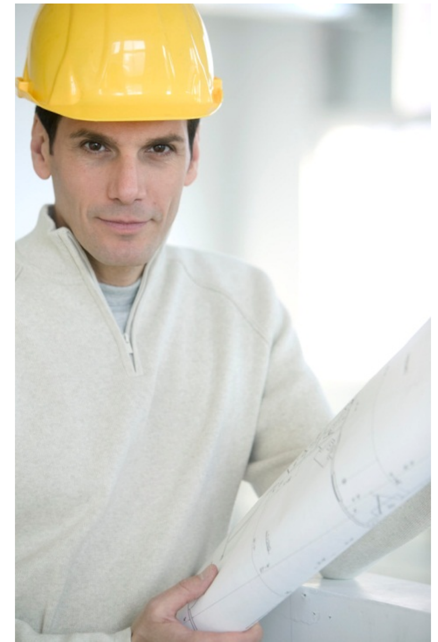
Planning Act, as amended

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Municipality's Duty of Care

Ingles - duty owed even to negligent owner

Rothfield v. Manolakos dissent: neither the owners nor their contractors gave the requisite notice to the City for critical inspections. The owners were in breach of their obligation to the City and failure to give notice rendered it impossible for the City to fulfill its duty



- It is the owners through their contractors who should ensure that a building is safe, structurally sound, and compliant with the by-law, and who must ensure that notice of inspection is given

The City is not an insurer of compliance with by-laws and an insurer of proper design and workmanship of a project undertaken by an owner

Inspectors’ Standard of Care

- Municipalities are not Insurers
- Exercise Reasonable Care
- Powers Available to Inspectors

Mandatory Inspections

Mandatory inspections (1.3.5.1 Code)

S. 10.2(1) - requirement to notify CBO that construction ready for inspection at each stage of construction specified in Code

S. 10.2(2) – after notice received, inspector shall carry out inspection within prescribed period

- 2 days (1.3.5.3 Code)

Discretion to pass by-law requiring additional notices at other stages of construction

No guidance re HOW to conduct inspection

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Plans Review

- Duty to take reasonable care in reviewing plans
- Standard of care – reasonableness
- Municipality may be liable if it fails to detect a defect in plans which a prudent examiner would detect and require to be corrected
- Reasonable reliance on plans stamped by professional architects or engineers – may escape liability

Reliance on Professionals

Policy Defence

Architects, Engineers, RCA's

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Turning now to the building process as it is forensically reviewed in the litigation process…

Preparing for Discoveries

In Ontario, discovery has two aspects

- documentary (Rule 30)
- oral (Rule 31)
- and now… discovery plans!

Discovery Plan

What is a discovery plan?

- an attempt to engage counsel early in the narrowing of the scope of a lawsuit
- discovery limited to 7 hours per party to the lawsuit
- buzzword: proportionality
- becomes a written roadmap for the lawsuit
  - when the documentary productions are due
  - when the examinations will take place
  - the order of discovery, the issues to be examined on
  - still early days, many forms

Proportionality!

Rule 1.04 (1.1)

- "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding"

Duty to ensure documents preserved once litigation commences

Documentary Discovery

happens first

at least 30 days before discovery, best if it is 60 days before

make sure you have a meeting with the lawyer (in person) to review the documents

is this all the documents that there are?

electronic documents? email? internal document program?

is anything privileged? if so, do not produce

Oral Discovery

- happens next
- ensure the person knowledgeable is discovered i.e. the staff member with the most involvement with the matters
- not necessarily the most senior staff

"Ladies and Gentlemen, this trial will take approximately one week despite the defendant's obvious guilt."

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

In Ontario, three main early challenges to a claim

- motion to strike (Rule 21)
- dismissal for delay (Rule 24)
- summary judgment (Rule 20), new as of January 1, 2010

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

motion to strike (Rule 21)

motion to dismiss for delay (Rule 24)

motion for summary judgment (Rule 20)

whole process expensive

if unsuccessful, risk partial indemnity costs

don’t do it if you are essentially not saving much time or money, have the trial

New Ontario Rules

"mini-trials"

judges can order that oral evidence be presented by one or more parties, with or without limits on its presentation [Rule 20.04(2.2)]

appears to be solely within judge's discretion - no mechanism for the parties to require oral evidence

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Turning now to some case studies…

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Case Study #1

actual deficiencies – absence of weepholes, thickness of poured slab, other minor deficiencies or those not apparent during mandated inspections

lawyers perspective only – well after final inspection expert retained

-only able to review documents

-no inspector interviews

-last inspection 2003 (involved orders to comply from 2001 and 2003)

-experts report 2011 (10 years later)

-legal process expensive, and added little to underlying knowledge of the matter

Case Study #2

-second case different, involved post construction orders (here building without a permit)

-lawyer retained first again

-after a long time, expert finally retained

-expert concludes no inspection failure

-attends site reviews available documentation

-and lawyer assists with written statements from builder's engineers who did review at the time

-report in 2010 for construction in 1997

Case Study #3

-major mess, 5 homes similar problems

-hiring expert early

-did it help?

-actually yes, because there were problems that needed to be addressed

-preservation of evidence

-explaining personally to homeowners that their problems could be fixed, not a hopeless disaster

-dealing with strong personalities and homeowners among themselves who were getting worked up

-having expert at mediation

Case Study #4

-problems with foundation wall height, outside Part 9 scope

-should have been designed by an engineer

-was not

-liability clear, municipality missed it

-however, we looked at reasonable remediation options, and cost

-appropriate repair by claimant

-at plans review, should have been evident a professional engineer should have been involved

-block was used, poured concrete called for

-but no damage associated with deficiency

-settled for not much more than defence costs

Case Study #5

-residential building constructed and inspected

-occupancy without final inspection

-fire subsequent to occupancy

-multi million dollar claim

-allegations of negligent plans review and inspection

-in fact, plans examiner still around and retained calculations of the floor space and the mezzanine

-external engineer confirmed municipality's interpretation

-discovery revealed owner made significant post permit ceiling changes and may have created their own Part 3 contraventions and never called for inspection

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Some Dos and Don’ts

Don’ts

If you record an inspection, don’t fail to record what specifically was inspected

don’t close open permit files without at least a letter, and (best practice) some further inspection

don’t ignore work done without a permit

Do's

Follow internal practices, guidelines

Date attendances and make some narrative notes

Make contemporaneous records

Note on exceptions basis

Show follow up on corrective action

© Heal & Co. LLP | Construction Lawyers | www.constructionlawyer.ca

Do’s

If you feel something was missed (by you or someone else), discuss with your peers and your senior staff

A Municipality should always put its public duty above any private law negligence concerns

Questions?