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SUCCESSFUL STRATEGIES FOR DEFENDING AGAINST NEGLIGENT BUILDING INSPECTION CLAIMS

by

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INTRODUCTION

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 to the new, or may 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.

In Ontario and elsewhere across Canada, qualified and experienced public officials engage in site plan review, building permit application review, plan examination, and building inspection, of all sorts of construction projects to ensure a safely built form. These public authorities are expected to discharge duties of care to those within a sufficient proximity who rely on them. Municipalities regularly deal with claims that involve alleged breaches of these plan review and inspection functions.

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, 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 owner or subsequent) have been seen as deserving of protection.

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.[1] This paper, therefore, focuses on situations that could become the subject of a negligence claim against a municipality and its employees, and comments on how municipalities can minimize such exposure.

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[1] 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Institute's Sixth Annual Provincial / Municipal Government Liability Conference, February 21 & 22, 2000) at p. 1 [Unpublished], and S. Ungar and D. Dimmer, "Liability Issues Under the New Building Regime (Toronto: Canadian Insight, February, 2006), Andrew Heal and L.P. Gregoire, "Municipal Liability: Building Construction and Inspection Issues", (2006) 54 C.L.R. (3d) 9.

BEST PRACTICES IN DEFENDING AGAINST BUILDING INSPECTION CLAIMS

The Leading Authority: *Ingles v. Tutkaluk*

The Supreme Court of Canada decision of *Ingles v. Tutkaluk*[2] (*Ingles*) is the leading authority on the duty of care owed by municipalities that conduct building inspections.

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. The inspectors relied instead upon the contractor's assurances that the underpinnings were properly constructed. They did not verify the information except to examine the concrete. However, it was impossible to determine by a visual inspection whether the underpinnings conformed to the Ontario building code.

The homeowners began to experience water problems in the basement shortly after the construction had been completed. They hired another contractor who determined that the underpinnings were inadequate and failed to meet the standard prescribed in the Ontario *Building Code Act* (*BCA*). 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 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

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[2] *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 [*Ingles*]

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 as was performed in the circumstances. By failing to exercise those powers to ensure that the underpinnings complied with the Building 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 two part test delineated by the English House of Lords in the case of *Anns v. Merton London Borough*[3] and first applied by the Supreme Court of Canada in 1984 in *City of Kamloops v. Neilson et al*.[4] (*Anns/Kamloops*) should be applied to determine whether a public body owes a private law duty of care.

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 the damages to which a breach of the duty would give rise (for policy reasons)?

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[3] [1997] 2 All ER 492

[4] [1984] 2 S.C.R. 2 [*Kamloops*]

The cases make clear that once a municipality does make 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 as may arise from the statutes bearing on the powers of the building inspector.

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 Court commented that the *BCA* 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 the construction had been 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 carry out an inspection rather than simply rely on assurances by the contractor that 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: conduct amounting to a flouting of the inspection scheme. The concept of "flouting" denotes conduct which extends far beyond mere negligence on the part of the owner-builder, or agreeing to start work before a permit is obtained.

Similar comments were made by the majority in the Supreme Court of Canada’s earlier decision of *Rothfield v. 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. [5]

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. Justice Bastarache, writing for the court, confirmed that a duty was still owed:

> A 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 danger. In such circumstances, for example when an owner-builder determines to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him or her, that owner-builder cannot reasonably allege that any damage suffered is the result of the failure of the building inspector to take reasonable care in conducting an inspection.[6]

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.

What Constitutes a "Reasonable Inspection"?

As noted above, 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 requisite 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.

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[5] *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 [*Manolakos*] at paras. 15-16 [emphasis added]

[6] *Ingles*, *supra* note 2 at para. 33

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.

In administering inspection regimes, municipalities are not insurers of construction work. The cases reflect that a 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. Whether an inspection has met the standard of care is a question of fact in a particular case. In *Shulist v. Waterloo (City)*,[7] the Ontario Superior Court of Justice found that a municipality cannot be placed in the position of an insurer or guarantor of the quality of work done by a contractor, nor can a municipality ensure that each section of the Building Code is followed. In this case, the plaintiff had ongoing problems with his garage. A professional engineer's report concluded that the garage's steel lintel and wood beam were undersized and not in accordance with the Ontario Building Code. The plaintiff brought an action against the municipality for failure to find the problem during the inspection. At trial, the witness for the municipality testified that the lintel had not been specifically inspected, and probably could not have been inspected because stone would have been laid above it. The witness also testified that the municipality did not ensure that the building complied with every detail of the building code. Sloan D.J. dismissed the action against the municipality.

Municipalities are not required to discover every derogation from applicable building standards nor discover every hidden defect in construction work. For example, in *Cumiford v. Powell River (District)*,[8] the court accepted the municipality's argument that it should not be liable for relatively minor deficiencies that did not seriously impact on health or safety. Similarly, in *Gorscak v. 1138319 Ontario Inc*.[9] the court dismissed a claim against a municipality arising out of an owner's complaint that the developer used a different brick type than had been set out in

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[7] (2007), 36 M.P.L.R. (4th) 125, 2007 CarswellOnt 4608 (Ont. S.C.J.)

[8] (2001), 21 M.P.L.R. (3d) 45 (B.C.S.C.)

[9] (2003) 42 M.P.L.R. (3d) 255 (Ont. S.C.J.)

the specifications between the owner and developer. The court said the municipality's duty does not cast upon the municipality an obligation to ensure that the building is constructed exactly in accordance with the specifications set out for the developer by the owner.[10] But see *Flynn v. Halifax (Regional Municipality)*,[11] where the trial judge rejected the argument that liability against a municipality should be restricted to defects relating to health and safety. The municipality did not appeal the finding against it on liability but did say it did not support the judge's conclusions that the municipality's standard of care was not limited to inspecting for matters affecting health and safety. Without deciding the issue, the Nova Scotia Court of Appeal commented that both the national and provincial building codes are said to concern matters of health and safety. "It would follow that the inspections for code compliance conducted by the municipality are intended to address matters of health and safety, broadly interpreted."[12]

The risks for municipalities are increased due to joint and several liability. 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, in practice, means that a solvent defendant (usually an insured municipality) at fault may get "stuck with the bill" where there is an uninsured or insolvent contractor.

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.

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[10] See also *Whaley v. Tam* [2003] O.J. No. 1509 (Ont. S.C.J.) where a landlord was not liable for a minor deviation regarding the height of a building railing.

[11] (2003) 8 M.P.L.R. (4th) 189 (N.S.S.C.), appeal partially allowed on other grounds (2005), 8 M.P.L.R. (4th) 151 (N.S.C.A.)

[12] (2005) 8 M.P.L.R. (4th) 151 (N.S.C.A.)

Since practices change over time, it is important that historical copies of internal procedures, standards, and guidelines be preserved 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. Record 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. However, it would be useful to have additional notes over and above checklists (e.g. inspected north-west corner of basement underpinning, met and spoke with etc.). Furthermore, documentation that lists deficiencies, instructions or orders, and follow-ups should also include and specify any corrective measures taken.

BUILDING PERMIT AND INSPECTION REGIMES ACROSS 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 the protection of public health and safety through the establishment and enforcement of construction regulations which impose uniform minimum standards for the construction of buildings.[13]

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

> The legislative scheme [the Ontario *BCA*] 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 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

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

> 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.**[14]

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.[15]

The following provinces and territories adopt or adapt the model national codes:

New Brunswick	Province-wide adoption of the National Fire Code. Province-wide adoption of the National Plumbing Code with some modifications. Individual municipalities adopt the National Building Code.
Newfoundland and Labrador	Province-wide adoption of the National Fire Code and aspects of the National Building Code pertaining to fire and life safety that are cross-referenced in the National Fire Code. Municipalities individually adopt the National Building Code. No province-wide building or plumbing code.
Nova Scotia	Province-wide adoption of the National Building Code, with some modifications and additions, and the National Plumbing Code. No province-wide fire code, however, some municipalities adopt the National Fire Code.
Manitoba and Saskatchewan	Province-wide adoption of the National Building Code, National Fire Code and National Plumbing Code with some modifications and additions.
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 National Plumbing Code.

[14] *Ingles, supra* note 2 at para. 23 [emphasis added].

[15] "Model Code Adoption Across Canada", National Research Council Canada, February 14, 2005, online at: http://www.nationalcodes.ca/ncd_model-code_e.shtml.

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 model national 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 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.

ONTARIO'S LEGISLATIVE SCHEME

In Ontario, the legislative scheme and standards relevant to building inspectors are set out in the *Building Code Act*[16] (*BCA*). Under the *BCA*, each municipality is responsible for the enforcement of the Act in its municipality. 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.[17]

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[16] *Building Code Act, 1992*, S.O. 1992, c. 23, as amended [*BCA*]. The *BCA* establishes the regulatory structure and includes a number of provisions relating to inspection matters, including: the responsibility to enforce the Act (s. 3); the requirement of an inspection prior to occupancy of a building or part thereof (s. 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 (s. 12(1)); the power of an inspector to issue orders to comply (s. 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 (s. 13(1)).

Breaches of the *BCA* 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).

[17] *Ibid*. s. 3

The standards for construction are contained in a regulation passed pursuant to the *BCA*, commonly known as the "Code" (Building Code).[18] The Building Code sets out criteria governing design and construction methods and materials to be used in the construction of all buildings falling within the Act.

Pursuant to the *BCA*, no person shall construct or demolish a building unless a permit has been issued therefor by the chief building official;[19] further, the chief building official is required to issue the permit unless the proposed building, construction, or demolition will contravene the *BCA* or the Building Code or any other applicable law.[20]

The *BCA* regime lists certain mandatory inspections that must be carried out by the municipality. There is also a list of discretionary inspections. The case law provides that once a municipality decides to carry out an inspection, it must do so in a non-negligent manner.[21]

Changes to the Ontario Building Code Regime

Overview

The province conducted a major review of the building area and enacted Bill 124[22] which contained significant amendments to the *BCA*. The province developed extensive regulations in conjunction with the new legislation and has recently brought in a new 2006 Building Code.[23]

Some of the significant changes under the new regime include:

(i) allowing municipalities to outsource plan review and construction inspection functions to Registered Code Agencies (RCAs);

(ii) limiting building permit fees to the reasonable costs of the municipality in administering and enforcing the Act in its jurisdiction;

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[18] O.Reg. 350/06, formerly O. Reg. 403/97 made under the *Building Code Act, 1992* [Building Code]

[19] *BCA*, *supra* note 16, s. 8

[20] *BCA*, *supra* note 16, s. 8(2)

[21] *Manolakos*, *supra* note 5; *Ingles*, *supra* note 2

[22] *Building Code Statute Law Amendment Act, 2002*, S.O. 2002, c. 9 [Bill 124]

[23] Most of the requirements of the new 2006 Building Code came into force on December 31, 2006.

(iii) new provisions setting out the role of designers and the role of builders;

(iv) provisions setting out the role of the chief building official and the role of inspectors;

(v) requiring municipalities to establish and enforce a code of conduct for the chief building official and inspectors;

(vi) providing that the chief building official, municipal inspectors and designers must meet the qualifications and requirements in the building code (these are set out in the regulations and generally require persons to pass certain examinations and be registered with the Ministry);

(vii) the building code contains insurance requirements for certain persons involved in the building industry;

(viii) under the plan examination process, the chief building official or a RCA may allow the use of materials, systems and building designs that are not authorized in the building code if, in their opinion these alternatives will achieve the level of performance required by the Code;

(ix) providing that at certain stages of construction specified in the building code, the prescribed person must notify the chief building official or the RCA that the construction is ready to be inspected;

(x) after the notice is received an inspector must carry out the inspection required by the building code within the prescribed period; and

(xi) the 2006 Building Code is written in an objective-based format to promote innovation and flexibility in design and construction.

Time will tell whether the legislative reforms will be a positive development for municipalities. Some of the positive aspects are that the reforms impose statutory roles on others involved in the building industry, impose insurance requirements on others, require builders to notify municipalities that a certain stage of construction is ready to be inspected, and set out the stages of construction that need to be inspected by municipalities.

Role of Various Persons

One of the important new provisions is section 1.1 of the *BCA* that identifies the role of various persons involved in the building process. Subsection 1.1(1) of the Act provides that:

> [i]t is the role of every person who causes a building to be constructed,
>
> (a) to cause the building to be constructed in accordance with this Act and the building code and with any permit issued under this Act for the building;
>
> (b) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official; and
>
> (c) to ensure that the construction is carried out only by persons with the qualifications and insurance, if any, required by this Act and the building code.[24]

This subsection imposes an obligation on owners to ensure that a building is constructed in accordance with the Building Code and the permit that has been issued.

Section 1.1 of the *BCA* also identifies the different roles of designers, builders, registered code agencies, chief building officials and inspectors. The builder is required to ensure that construction does not proceed without a permit, to construct the building in accordance with the permit, to use appropriate building techniques and, when site conditions affect compliance, to notify the designer, an inspector or the registered code agency, as appropriate. The designer is required to provide designs which are in accordance with the *BCA* and Building Code and which are sufficiently detailed to permit the design to be assessed, to provide only those designs for which the designer is qualified, and to conduct general reviews of matters for which the designer is qualified.

The chief building official is expected to establish operational policies for the enforcement of the *BCA* and the Building Code, to coordinate and oversee the enforcement of the *BCA* and the

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[24] *BCA*, *supra* note 16, s. 1.1(1)

Building Code and to exercise powers and perform duties in accordance with the standards established by the Code of Conduct. An inspector is expected to exercise the powers and perform the duties under the *BCA* and the Building Code in connection with reviewing plans, inspecting construction and issuing orders in accordance with the *BCA* and the Building Code. An inspector must also only exercise those powers and duties in respect of which he or she has the qualifications to do so and to exercise powers and perform duties in accordance with the standards established by the applicable Code of Conduct. The major benefit to municipalities of this section is that there are positive statutory duties imposed on others involved in the building industry, other than simply the municipality and its staff.

Qualifications (The* Ennis *Decision)

The new legislative regime establishes qualifications for the Chief Building Official, inspectors, Registered Code Agencies and designers. The province has set up an examination system, along with a registration system.[25] From a liability perspective, municipalities should be able to defend against general allegations relating to qualifications and competence of inspectors in claims advanced against the municipality if the employees involved have the required qualifications. Municipalities have now gone through this demanding exercise which applies to all inspectors.

The Ontario Divisional Court recently dealt with the qualification requirements under the Building Code regime which pertrained to otherwise qualified architects and engineers. In *APEO v. Ontario (Minister of Municipal Affairs and Housing*[26]*)*, the court held that professional engineers and architects were excluded from the competing regulatory scheme of the *BCA* and Building Code which, it found, attempted a parallel regulation of competence and character control. Such regulation would be competent legislation, but was impermissible in the subordinate form of regulations passed by orders in council. The Ontario Association of Architects ("OAA"), which had reached a temporary accommodation with the Ministry, intervened to support the Association of Professional Engineers of Ontario ("APEO").

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[25] See the Ministry's website at www.obc.mah.gov.on.ca. regarding the new regime.

[26] (2007), 225 O.A.C. 287, 2007 CarswellOnt 3162 (Div. Ct.)

The “practice of professional engineering” is a defined term under the *Professional Engineers Act* and means “any act of designing, composing, evaluating, advising, reporting, directing or supervising, wherein the safeguarding of life, health, property or the public welfare is concerned and that requires the application of engineering principles”. A significant component of the practice of professional engineering relates to building design and general review of those buildings during construction. Both “design” and “general review” are terms of art and are defined in the *Professional Engineers Act*. A “general review” assesses general conformity of the construction to the design and is not *per se*, an evaluation of a structure’s conformity to the Building Code.

APEO licence holders share with architects the exclusive right to design and conduct general reviews of buildings. A Joint Practice Board helps to avoid confusion and conflicts between the two professions. In the history leading to the enactment of Bill 124, the Trow Report and BRAGG reports had as a major theme streamlining the building approval process, and neither report identified significant concerns in the participation of engineers and architects in that process.

Ultimately for the court, the overlay of the new Building Code qualification system did little to advance public safety and appeared to intrude, by regulation and not legislation, on the exclusive mandate of the APEO and OAA to qualify, govern and discipline their respective members. Most interestingly the court said: “If truth be told, the [new] Building Code is a professional regulatory act in search of a profession”.

Registered Code Agencies

Under the new legislation, municipalities may outsource certain building code functions to Registered Code Agencies (“RCA”). Pursuant to section 4.1 of the *BCA*, a municipality may enter into agreements with RCA’s to perform functions set out in the agreement. Municipalities may want to consider using this discretionary option where the municipality itself does not have the necessary resources. As a result of concerns raised, the government amended the provisions which would have allowed certain classes of applicants for permits to appoint their own RCA.

Application Form for Permits

The Province has also introduced a common application form for a permit to construct or demolish. All municipalities are to use the form which is available on the Ministry's website. The form includes a requirement to attach documents dealing with "applicable law" (see discussion below) and schedules for designer information and sewage system installer information.

Emerging Risk Management Techniques

Applicable Law

The regulations now contain an expansive definition of "applicable law" for the purposes of section 8 of the *BCA*. The regulation lists numerous sections contained in other provincial acts which the chief building official should review to determine whether the proposal complies with applicable law. The intent of this change is to provide clarity as to the meaning of applicable law.[27] The Ministry has indicated that the list of applicable law will continue to be reviewed on an ongoing basis.

For the purpose of considering the issuance of a permit, applicable law expressly includes, amongst other things:

(i) section 33 of the *Ontario Heritage Act*, with respect to the consent of the Council of a municipality for the alteration of a property;

(ii) section 34 of the *Ontario Heritage Act*, with respect to the consent of the Council of a municipality for the demolition of a building;[28]

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[27] See former section 1.1.3.3 of Ontario Regulation 403/97, as amended, now superceded by Ontario Regulation 350/06, section 1.4.1.3.

[28] There was support in the case law under the old regime that applicable law included the provisions under the *Ontario Heritage Act*. See *Roman Catholic Episcopal Corp. for the Diocese of Peterborough v. Cobourg (Town)* (1998), 40 O.R. (3d) 187 (Ont. Ct. Gen. Div.).

(iii) section 41 of the *Planning Act*, with respect to the approval by the Council of the municipality or the Municipal Board of plans and drawings (dealing with site plan approval);

(iv) by-laws made under section 34 (Zoning By-laws) or 38 (Interim Control By-laws) of the *Planning Act*.

The expanded definition should eliminate some of the legal challenges that have occurred in the past over what constitutes "applicable law". One example was the somewhat conflicting decisions dealing with the issue of site plan approval which issue should be clarified by the expanded definition of applicable law.[29]

There is still a positive obligation on the chief building official to issue a permit unless the proposed construction will contravene the *BCA*, the Building Code, or other applicable law.[30]

Municipalities have successfully relied upon subsection 8(2) of the *BCA* in defending actions wherein plaintiffs have alleged that the issuance of a building permit resulted in a nuisance being created which detrimentally affected their property. In these circumstances the courts have consistently found that common law nuisance is not a ground upon which a municipality can refuse to issue a permit and therefore a municipality cannot be found liable for issuing a permit.[31] This issue should remain unchanged under the new regime.

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[29] See *e.g.*, *Quay West v. Toronto (City)* (1989), 47 M.P.L.R. 109 (Ont. H.C.J. Div. Ct.), leave to appeal to Ont. C.A. dismissed at 111; *1063590 Ontario Ltd. v. Etobicoke (City) Chief Building* Official (1994), 24 M.P.L.R. (2d) 90 (Ont. Ct. J. (Gen. Div.)); *Forster v. Waterloo (City)* (1993), 14 M.P.L.R. (2d) 164 (Ont. Ct. J. (Gen. Div.)); *Revenue Properties Co. v. Toronto (City)* (1984), 26 M.P.L.R. 165 (Ont. Co. Ct.); *Polla v. Toronto (City) Chief Building Official*, (2000) 15 M.P.L.R. (3d) 103 (Ont. S.C.J.); *Philpott v. Innisfil (Town)* (2007), 32 M.P.L.R. (4th) 60, 2007 CarswellOnt 1777 (Ont. S.C.J. (Div. Ct.).

[30] *Mayhew v. Hamilton (Township) Chief Building Official* (2002), 30 M.P.L.R. (3d) 219 (Sup. Ct.); *1562850 Ontario Ltd. V. Toronto* (City) *Chief Building Official* [2004] O.J. No. 1555 (Ont. S.C.J.); *Ayerswood Development Corp. v. London (City)* [2005] O.J. No. 356 (Ont. S.C.J.), rev'd on other grounds [2006] O.J. No. 2213 (Ont. S.C.J. (Div. Ct.)).

[31] See *e.g.*, *Alaimo v. York (City) (Chief Building Official)* (1995), 26 M.P.L.R. (2d) 69 (Ont. Ct. J. (Gen. Div.)); *Stanoulis v. City of Toronto*, 1995 CarswellOnt 2789 (Ont. Gen. Div.), leave to appeal refused by 1996 CarswellOnt 716 (Ont. C.A.); *Seymour's Men's Wear Ltd. v. Beaches Holdings and City of Toronto*, unreported decision of MacFarland J. dated June 10, 1999.

New 2006 Building Code

As noted above, further significant changes were brought about through the introduction of the new 2006 Building Code effective this past January 2007. The Province has indicated that the new code accomplishes the following:

(i) sets out new energy–efficient requirements (these requirements are phased in under the code);
(ii) establishes new construction standards that will make buildings more accessible to people with disabilities;
(iii) facilitates the building of small care homes;
(iv) makes constructing small residential buildings easier;
(v) contains a new format that allows more creativity and building design while maintaining public safety;
(vi) boosts Ontario's building industry by encouraging innovation in building design and products.

These latter two items substantially add to the responsibilities and therefore potential risks faced by municipalities. The 2006 Building Code is written in an objective-based format. This means that in addition to including prescriptive requirements, the new code contains objectives explaining the rationale behind the requirements. Builders and designers will now be able to propose alternative designs and building materials that comply with the objectives of the Code. The Ministry's website contains the following description:

> Existing Codes are prescriptive – they describe "what" you have to do. The new objective-based Code adds the desired result or "why". For continuity, the objective-based Code continues to contain prescriptive requirements known as "acceptable solutions" but these are linked to the higher "objectives" of the Code. Designs and proposals that meet the objectives are considered "alternate solutions".

Arguably, the ability of designers and builders to use materials, systems and building designs, not expressly set out in the Code is not completely new as since 1993, Chief Building Officials have had discretionary authority to allow the use of "equivalents" to the requirements of the

building code if, in the Chief Building Official's opinion, the proposed equivalent would achieve the level of performance required by the code.[32]

The new 2006 Building Code however, expands all of this by allowing designers and builders to use alternative technical solutions to the prescriptive and performance-based technical requirements. This imposes new obligations on municipalities to try and evaluate innovative proposals with the inherent difficulties and risks that flow from this added responsibility. At the trial division level in *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*,[33] the court noted this additional difficulty:

> The standards for larger more complicated structures are commonly expressed as design objectives. A designer will propose to meet the design objective by an individual plan. This allows professional designers the flexibility to employ custom methods or materials to suit the requirements of a specific building while meeting the objective.
>
> The latter form of regulation, stipulating a design objective, provides challenges to Municipal Inspectors. It is easier to assure compliance with criteria or a minimum stipulation than to be satisfied that a design objective has been met. This sort of inspection is inherently more difficult….[34]

It is foreseeable that difficulties will arise when a municipality does not have the resources or expertise to properly assess or evaluate an objective based design. Is there an obligation to review the permit application in these circumstances? In *Craft-Bilt Materials Ltd. v. Toronto (City)*,[35] recently affirmed,[36] the court was dealing with a *BCA* appeal from the City's refusal to issue a building permit for sunroom panels. The Chief Building Official took the position that she was unable to evaluate the structural sufficiency of the sandwich panels based on the material submitted with the permit application, and further, that her staff did not have the

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[32] See Section 9 of the *Building Code Act*, 1992, as amended. The Act also gives powers to the Building Materials Evaluation Commission (B.M.E.C.) (s. 28) and to the Minister (s. 29) to authorize the use of any innovative material, system or building design.

[33] (2001), 22 M.P.L.R. (3d) 173 (B.C.S.C.), affirmed (2002), 5 B.C.L.R. (4th) 250 (B.C.C.A.)

[34] *Ibid* at para. 48, 49

[35] (2006), 28 M.P.L.R. (4th) 274, 2006 CanLII 39465 (Ont. S.C.J.) (including corrigendum released April 16, 2007)

[36] (2008), 2008 CarswellOnt 51 (Div. Ct.)

expertise to do so. The Chief Building Official's position was that subsection 9(1) of the BCA afforded her the discretion to decide whether or not to evaluate the product in question. It had been suggested that the applicant have its panels evaluated by the Building Materials Evaluation Commission ("BMEC"). There was evidence that the applicant and some of its competitors ha d previously received approval from the BMEC for the use of very similar products. There was some evidence that the panels had apparently been in use for 20 years (without 'H' stiffeners) and were thus not an innovation. Further, while there was some evidence that other municipalities had approved the same materials, there was no evidence that the City of Toronto had approved the panels without H Channels (with the exception of two permits which had been inadvertently issued) . It was common ground that the Building Code required under Part 4 that structural members must have sufficient capacity and integrity to safely resist all loads. However, the issue was whether the City could sufficiently evaluate the panels to determine whether these panels met the requirements of Part 4 of the Code. The design was sealed by a professional engineer. The court said that: "The Chief Building Official cannot choose to disregard [section 4.1.1.4] of the Code because it requires her officials to exercise more judgment in processing applications for building permits. It cannot be rendered nugatory by the chief building official's discretion in subsection 9(1) [the equivalent section in the *BCA*].

The Divisional Court agreed with the motions judge that s. 9 of the *BCA* should be interpreted in a manner "which does not affect the duty of chief building officials to evaluate building permit applications for compliance with the Building Code where the application relies on the use of building designs that are authorized in the Building Code, such as design methods based on load testing pursuant to subclause 4.1.1.4(1)(b)(ii)." In addition, the Divisional Court found that both prescriptive and performance based requirements are "authorized" in the Building Code. We will have to see how the new regime is dealt with by the parties in the industry, municipalities and the courts, where arguably the new Code introduces more discretion.

ULTIMATE LIMITATION PERIODS (THE *JAY-M HOLDINGS* DECISION)

Ontario's new *Limitations Act, 2002* came into force on January 1, 2004. One of the significant changes brought on by the new Act is the establishment of a basic limitation period of two years. This is the applicable limitation period for alleged building inspection negligence. However, the

two year limitation period starts to run from the day on which the claim was discovered.[37] The common law discoverability rule is that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff through the exercise of reasonable diligence. The discoverability rule was expressly held to apply to building inspection negligence cases in *Kamloops v. Nielsen*.[38]

The new *Limitations Act* codifies the discoverability principle providing that the two year limitation period will start on the earlier of

a) the date when the person first knew that the injury, loss or damage had occurred, that the injury, loss or damage was caused by or contributed to by an act or omission done by the defendant or respondent to the claim, and that a proceeding would be the appropriate means to seek to remedy the injury, loss or damage; and

b) the date on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to above.[39]

Section 18 of the new *Limitations Act* addresses the time period for commencing a claim for contribution and indemnity. The two year period applies and starts to run on the day the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought.

Another significant change introduced by the new *Limitations Act* is the provision of an ultimate limitation period of 15 years that runs from "the day on which the act or omission on which the claim is based took place", as opposed to the day on which the claim was discovered.[40] This is a significant improvement for municipalities and other entities involved in the construction industry.

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[37] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s.4

[38] [1984] 2 S.C.R. 2; see also *Ordog v. Mission (District)* (1980), 31 B.C.L.R. 371 (B.C.S.C.); *Swagar v. Vek* (1998), 49 M.P.L.R. (2d) 294 (B.C.S.C.); *Mulholland v. Van Zwietering* (1998), 49 M.P.L.R. (2d) 304 (B.C.S.C.)

[39] *Limitations Act, 2002*, *supra*, s.5

[40] Ibid, s.15

The issue as to how the transition provisions apply to the fifteen-year ultimate limitation period was recently addressed by the Ontario Court of Appeal in the case of *York Condominium Corporation No. 382 v. Jay-M Holdings Limited and the City of Toronto.*[41] In that case, the plaintiff sued the City for alleged negligent inspection in failing to detect that certain demising walls within the condominium building were not fire rated and in issuing a building permit for the construction of the building. An occupation permit was issued by the City on February 14, 1978. The plaintiff alleged that it did not discover the damage until May 2004, after the new Act came into effect, and commenced its action on June 22, 2005. The City brought a motion for a determination that section 15 of the new Act, which sets out the fifteen-year ultimate limitation period, was a bar to the action and sought an order that the action be dismissed accordingly.

The transition provisions set out in section 24 establish which limitation period (the former six-year limitation period or the new two-year limitation period) would apply where the act or omission took place before the new Act came into force, but the action was commenced afterwards. The applicable transition provision hinges on whether the claim was discovered before or after the new Act came into force. The issue in this case was whether the transition provision ought to be interpreted such that the fifteen-year ultimate limitation period only starts to run from January 1, 2004, the date that the new Act came into force. The effect of this interpretation is that the fifteen-year ultimate limitation period would not have any impact until January 1, 2019, fifteen years after the new Act came into force.

At the motions level, Justice Ground ruled in favour of the City. On appeal, the Court of Appeal ruled in favour of the plaintiff finding that the transition provisions postpone the starting date for the 15 year ultimate limitation period to January 1, 2004.

Other provinces have enacted ultimate limitation periods that have been applied retrospectively. In British Columbia, there is a 30-year ultimate limitation period. In the buildings case of *Armstrong v. West Vancouver*, [42] the British Columbia Court of Appeal upheld the trial judge's decision to dismiss a claim based on the ultimate limitation period of thirty years prescribed in

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[41] 30 M.P.L.R. (4th) 161, 2007 CarswellOnt 345 (Ont. C.A.), additional reasons in 31 M.P.L.R. (4th) 218 (C.A.), leave to appeal refused by 2007 CarswellOnt 5635 (S.C.C.)

[42] (2003), 223 D.L.R. (4th) 102, 2003 CarswellBC 265 (C.A.)

the *British Columbia Limitation Act*. The court said that the scheme of the *Limitation Act* precludes commencement of a fresh cause of action for building damage on a change of ownership. Similarly, in *410727 B.C. Ltd. v. Dayhu Investments Ltd.*.[43] the British Columbia Court of Appeal dismissed a claim against the builder and municipality for faulty renovation work done more than 30 years before the claim was commenced. The ultimate limitation period applied despite the fact the plaintiff did not discover the defects until 2002 when the building was destroyed by fire. In both of those cases, the court relied heavily on the policy considerations for having ultimate limitation periods.

410727 B.C. Ltd. was cited in *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.,*[44] where the court found that the Town was negligent in its review of the condo corporation's building plans and in its inspections of the construction of the buildings, and that its negligence caused or contributed to the defects in the building. The corporation had engaged a consultant to inspect its building after their property manager sent it a letter in 1993 advising it to review certain aspects of the building's construction due to problems recently discovered at another project. The consultant's report confirmed the potential defects raised in the letter from the property manager. The corporation commenced an action against the city in 2001. The court found that the cause of action related to defects which had been noted in the letter were outside the applicable limitation period of six years, as the corporation had been given notice of those defects in 1993. However, other causes of action related to defects that were not noted in the letter and that the consultant would not have been able to discover were found to be within the limitation period. The municipality, which had admitted negligence but argued that the claim was out of time, was found liable with respect to those defects.

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[43] (2004), 214 (D.L.R. (4th) 467, 2004 CarswellBC 1526 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 422.

[44] (2007), 33 M.P.L.R. (4th) 91, 2007 CarswellOnt 1071 (Ont. S.C.J.)

DEFENCES AVAILABLE TO MUNICIPALITIES

Use of Registered Code Agencies (RCA's)

There is some protection in the Act where the municipality has relied upon a registered code agency. Under section 31(4) of the Act, a municipality is not liable for any damage resulting from an act or omission by a chief building official or inspector if the act was done or omitted to be done in reasonable reliance on a certificate issued by a RCA.

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

(i) Review designs and other materials to determine whether the proposed construction of a building complies with the building code;

(ii) Issue plan review certificates;

(iii) Issue change certificates;

(iv) Inspect the construction of a building for which a permit has been issued under this Act;

(v) Issue final certificates.[45]

The *BCA* provides that a principal authority (municipality) is not liable for any harm or damage resulting from the following:

(a) 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

(b) 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

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[45] *BCA, supra* note 16, s. 15.15. The powers and duties of Registered Code Agencies are enumerated at ss. 15.14 - 15.22.

> 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.[46]

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

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

Once appointed, an RCA cannot be terminated except in accordance with the *BCA*. 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.[47]

Further, 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, the *BCA* now requires the chief building official to determine within a specified period whether to issue the building permit or to refuse to issue it.[48]

The *BCA* requires that RCAs maintain insurance coverage.[49] This will translate 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 $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.[50] Assuming that RCAs do not have assets to cover a claim that

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[46] *Ibid*. ss. 31(3) and (4)

[47] *Ibid*. s. 15.20(3)

[48] *Ibid*. s. 8(2.2)

[49] *Ibid*. s. 15.13(1)

[50] Building Code, *supra* note 18, s. 3.6.2.3. Also, in Ontario the usual minimum insurance coverage for architects and engineers who may have had a role in *BCA* review is $250,000, so a minimum of $1 million is an improvement over the existing coverages from the owner's and municipality's perspective.

exceeds the insurance limits, creative plaintiff's counsel may target principal authorities as a deep pocket from which to try to recover the excess.

Limiting the Duty of Care Through Policy Decisions

An important consideration which would fall within the issue of duty of care is whether the alleged negligent act was a policy or operational decision. Municipalities may be able to successfully exempt themselves from liability where they can show the actions in question involved a policy decision. The policy decision immunity is not available in respect of decisions involving the performance of statutory duties, whereas in an appropriate case it should be available where the decision was made in the course of exercising statutory powers.[51] This issue was clarified by the Ontario Court of Appeal's decision in *Kennedy v. Waterloo County Board of Education*.[52] The court had to consider whether the policy/operational analysis can have any application where the duty of care on the government agency does not arise as a result of a relationship of proximity, but where it is imposed by statute. The Court of Appeal said that "in effect, the legislature has already made its policy decision by mandating the statutory duty" and that "the policy/operational dichotomy and the exempting effect of a policy decision are not applicable where a duty of care is imposed by statute rather than arising at common law".[53] The legislative changes under the *Building Code Act* contain many mandatory obligations, including the requirement to carry out certain mandatory inspections. A municipality will likely be unable to raise a policy defence if it completely fails to carry out any of these mandatory obligations. What remains to be seen is whether municipalities can rely upon a policy decision that sets out the extent or scope of its inspection scheme.

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[51] *Just v. British Columbia.*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689; *Hilton Canada Inc. v. Magil Construction Ltd.* (1998), 47 M.P.L.R. (2d) 182 (Ont. Gen. Div.)

[52] (1999), 45 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused {1999} S.C.C.A. No. 399; see also: *Restoule v. Strong (Township)*, (1999), 4 M.P.L.R. (3d) 163 (C.A.) for a similar result regarding the statutory duty to keep highways under repair.

[53] *Ibid* at pp. 7 and 9

At times it is difficult to distinguish between a policy decision and operational decision. A policy decision usually involves social, political and economic factors. The operational area concerns the practical implementation and performance of a policy.[54]

In the case of *Hilton Canada Inc. v. The City of Mississauga*,[55] the City of Mississauga successfully argued that it had a long standing policy in place to issue building permits and conduct inspections with regard to certain structural design matters in a cursory manner only. In 1986, Hilton Canada submitted plans prepared by an architect for approval of the construction of an addition to a hotel. A structural engineer was also retained to ensure that the building was constructed in accordance with the structural requirements under the Building Code. The plans bore the stamp and seal of the structural engineer. In 1990, serious structural deficiencies were detected. Extensive remedial work had to be undertaken during which time the hotel was closed. Hilton claimed against the municipality for the cost of the remedial work as well as damages for loss of profit.

The trial judge reviewed the *Ontario Building Code Act* and the relevant sections of the Building Code that were in effect at the time the permit was issued. She noted that the Code required that a building of this type be designed by both an architect and, with respect to the structural elements, a professional engineer, that the drawings bear the seal of an architect and, with respect to the structural drawings, a professional engineer, and that review of the construction be carried out by both an architect and, in the case of the structural elements, a professional engineer. She also noted that both the Act and the City's design review engagement confirmation form, signed by Hilton's representative, placed the obligation to retain the architect and professional engineer on the owner of the building.

The City's evidence was that following enactment of the *Ontario Building Code Act*, the City developed a policy respecting the Act's application to building projects in Mississauga. Pursuant to the policy, the City's Building Department conducted a detailed examination of the architectural drawings for compliance with the safety requirements contained in Part 3 of the

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[54] *Just*, *supra* note 30.

[55] (1998), 47 M.P.L.R. (2d) 182 (Ont. Gen. Div.).

Code. Part 3 included requirements pertaining, *inter alia*, to sprinkler systems, fire safety, exits, signing and health matters. City staff felt the need to conduct a thorough review pursuant to Part 3 because they had noticed that architects often made mistakes in its application. In contrast, with respect to the structural requirements found in Part 4 of the Code, the City policy required the plans examiner to conduct only a cursory review of the drawings submitted by the owner's structural engineer. That review was relatively limited. The plans examiner simply ensured that the structural plans bore the stamp or seal of a professional engineer licensed in Ontario, that loading values referred to in the plans were correct (which could be verified by reference to the Code without any calculations), and that a soils report was included if one was required.

The trial judge found that the City's policy of undertaking only a cursory review of the engineering plans submitted was reasonable given the high number of applications processed by the building department in a year. She accepted that a true policy decision had been made, involving staffing and budgetary considerations. As such she held that the policy of the City of Mississauga to rely on the owner's engineer to perform the appropriate calculations required under the *Building Code*, rather than hiring structural engineers capable of verifying those calculations, could not form the basis of liability under the private law duty of care. She further found that as the City's policy was *bona fide* and rational and had been implemented without negligence, liability did not otherwise arise.[56]

Similarly, in *Lyons v. Grainger*[57] the court accepted that there was no liability against the Town regarding its failure to require or examine plans or inspect the grading of lots as it had made a policy decision not to deal with those matters. The court also said that the level of resources devoted to building inspections was a policy matter. Further, in *Johnston v. P.E.I.*[58] the province's regulations passed under the *Planning Act* which affected the development of all pending and future shopping centres were held to be pure policy decisions which could not be reviewed on a private law standard of reasonableness. In *Homburg Canada Inc. v. Halifax*

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[56] See also *William F. White Limited v. Toronto (City) Chief Building Official* (1999) 44 O.R. (3d) 750 wherein the court relied on *Hilton* finding the City acted reasonably in relying upon the consulting engineers hired by the applicant for the building permit.

[57] (1994) 16 C.L.R. (2d) 279 (Ont. Gen. Div)

[58] (1995), 26 M.P.L.R. (2d) 161 (P.E.I. S.C.)

(Regional Municipality)[59] the Nova Scotia Court of Appeal dismissed a claim by the plaintiff that it had suffered a loss of property value due to the unsightly premises of a neighbouring property. The court reviewed the relevant legislation noting that it gave the municipality a discretion to order an owner to remedy unsightly premises. The court noted that the municipality was not obligated to order owners to remedy unsightly premises, and that it needed to make choices and consider budgetary issues that brought into play matters of policy.

In the British Columbia case of *Parsons v. Finch*[60], the owner had built his house in an area which was identified on a City reference map as a site that may contain peat or other soil types that could constitute a poor foundation. Prior to granting the permit, the City required the owner to provide a geotechnical engineering analysis of the soil conditions and other assurances as set out in the city's by-law and the B.C. Building Code. The owner complied with the requirement and submitted a soils report, plans and three letters of assurance all of which were signed and sealed by a geotechnical engineer. One of the letters assured that the structural and geotechnical components of the plans and supporting documents complied with the building code and that the engineer would be responsible for field reviews during construction. The other letters gave assurances regarding the structural capacity of the building and a geotechnical review of the bearing capacity of the soil and compaction of engineered fill. The house was damaged when settlement occurred as a result of inadequately prepared subsoil. The owner sued the City for the cost of repairs alleging that the City was negligent in failing to carry out proper inspections of the property, in relying on the certification of an engineer, and in not ensuring compliance with the building code and related statutes and by-laws. The court dismissed the action finding that the City's practice of relying upon reports submitted by a geotechnical engineer where a building inspector determined that a subsurface investigation was warranted was a true policy decision and that the City was therefore immune from liability. The court also stated that at the operational implementation level of this policy, an appropriate standard of care was met by the City when its structural engineer merely ensured that the soils report was provided, that the information concerning the bearing capacity of the footings was present on the drawings, and

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[59] (2003), 228 D.L.R. (4th) 646 (N.S.C.A.)

[60] *Parsons v. Finch*, [2005] 2005 CarswellBC 2967 (B.C.S.C.) affirmed 2006 CarswellBC 2918 (B.C.C.A), leave to appeal refused by 2007 CarswellBC 817 (S.C.C.).

that the necessary letters of assurance were submitted in conformity with the building by-law. The decision in *Parsons* is consistent with those discussed above, as the City's policy decision in *Parsons* also related to economic factors such as staffing and budgetary considerations. In fact, the court noted that the City had never employed a geotechnical engineer to perform inspections and that it did not have such expertise on staff. However, it is noted that the legislation supported the City's defence allowing it to rely upon professional engineers.

However, in the British Columbia case of *Strata Plan NW 3341 v. Canlan Ice Sports Corp*.,[61] the court rejected the municipality's argument that it could rely on the policy defence. Here the municipality had passed a by-law providing that every permit application must contain all information necessary to establish compliance with the Provincial building code. The building code contained certain provisions dealing with control of rain penetration. However, the municipality said that the Building department's practice was not to take steps to ensure compliance with this part of the code. The court found that the municipality could not rely on this as the by-law was all-inclusive in its adoption of the building code for regulation. As the decision to not deal with certain aspects was made only at the departmental level and also conflicted with the by-law, it was not a true policy decision which immunized the municipality from liability. Accordingly, in British Columbia, where the legislation is permissive, it will be problematic if a municipality decides to enforce the entire provincial building code but fails to exercise reasonable care in ensuring compliance therewith.

Also, in *Gibbs v. Edmonton (City)*[62], a municipality was found liable for damages suffered by a plaintiff who had purchased a new home which had been partly built on disturbed soil caused by the much earlier excavation of the lands by the City for a sewer tunnel. The court rejected the City's argument it could rely on a policy defence. The court found the City liable for approving the subdivision, redistricting the land, closing the road and selling the road to the developer. The court found that even though these decisions were made by a high level authority such as the municipal council, they did not qualify as policy decisions. The decisions were not based on financial, economic, social or political factors. Further, the provincial regulations required that

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[61] *Supra* note 33

[62] (2003) 37 M.P.L.R. (3d) 194 (Alta. C.A.), approving (2001) 20 M.P.L.R. (3d) 277 (Alta. Q.B.)

the City consider soil characteristics and related issues in considering the application for a subdivision. The court concluded that:

> "Clearly, the nature of the backfilled soil, and the resulting potential for subsidence were matters which should have been considered by the City before approving the subdivision. This duty of the City is even stronger in this case, where it had special knowledge of the hidden danger, and where the danger was not a naturally existing one, but rather one created by the City in the construction of a storm sewer."

In the recent decision of *Adams v. Borrel*[63] the decisions of the defendant AgCan to investigate, diagnose and eradicate a pest affecting the potato crop were found to be policy decisions and not operational decisions. Once the policy decisions had been made, there were no negligent actions by AgCan that caused the damage to the crops of the various potato farmers. Similarly, in *City Sand & Gravel Ltd. v. Newfoundland (Minister of Municipal and Provincial Affairs),*[64] the Newfoundland Court of Appeal found that the decision to allow residential development in an area that required an amendment to the Regional and Municipal Plans had financial, social and economic ramifications. Thus, the approval of the development was a policy decision that exempted the Board from the imposition of a tort law duty of care in respect thereof.

However, in *Smith v. Saskatoon (City)*[65] the Saskatchewan Court of Queen's Bench held the city liable for negligence in the operational aspects of its policy decision. The court cited *Just v. British Columbia* for the proposition that if the City's procedure for maintaining its electrical distribution system was a "policy" decision, that decision provided an exemption from liability. The court found that the City's policy of inspecting, maintaining and upgrading its equipment with the most potential for problems (transmission lines and substations) was reasonable. However, again relying on *Just v. British Columbia*, the city could be held liable for the implementation of those decisions. In this case, the city failed to inform its customers, including the plaintiff, that it relied on them to alert the electrical department of potential problems with its

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[63] (2007), 2007 CarswellNB 111 (N.B.Q.B.)

[64] (2007), 36 M.P.L.R. (4th) 185, 2007 CarswellNfld 255 (Nfld. C.A.)

[65] (2007), 33 M.P.L.R. (4th) 243, 2007 CarswellSask 229 (Sask. Q.B.)

connectors, such as flickering lights. Because the city was negligent in the operational aspect of its policy decision, it was liable to the plaintiffs for the fire damage they incurred.

Municipal Employees

In general, the Ontario legislation does not provide the type of protection found in some of the other provinces' legislation. Section 31(1) of the Ontario Act provides protection to municipal employees like the Chief Building Official and inspectors from liability for acts done in good faith in the execution or intended execution of any power or duty under the Act or for any alleged neglect or default in the execution in good faith of that power or duty. This section is very limited in value in that subsection 31(2) goes on to provide that the above subsection does not relieve a municipal corporation of liability in respect of a tort committed by its chief building official or inspectors. The Act also provides protection to municipalities dealing with orders for unsafe and dangerous/emergency conditions. In Ontario, certain BCA provisions provide that a municipality is not required to compensate an owner for anything done by a chief building official or inspector in the reasonable exercise of their powers under certain emergency power sections.[66]

THE ROLE OF THE EXPERT WITNESS

The opinion of an expert is a well established exception to the common law rule excluding opinion evidence. However, courts in Canada still struggle with assessing an expert's independence and reliability while continuing to preserve litigation privilege. Counsel retaining the expert plays an important role in allowing the expert to retain his or her independence while also ensuring that the expert's evidence will be effective in the context of litigation, or other tribunal or administrative proceedings.

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[66] See *BCA, supra* note 16, ss, 15.4(3), 15.7(4), 15.10(4)

The Independence of the Expert

In determining the admissibility of expert evidence, the court will look at several factors, including: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of any exclusionary rule; and (4) a properly qualified expert. [67] However, the court will also take into account other considerations, including the independence of the expert.

The assessment of an expert's independence is critical in determining the weight which will attach to his or her evidence.[68] Considering that the role of the expert is to assist the trier of fact by providing a "ready-made inference",[69] it is essential that the expert maintain his or her independence within the adversarial arena of litigation and "not assume the role of an advocate."[70]

With respect to the issue of independence, Canadian cases have applied the English case of *Ikarian Reefer,*[71] where the English Court of Queen's Bench (Commercial Court) developed a list of principles to be used in assessing an expert witness' duties and responsibilities.[72]

One case where the *Ikarian Reefer* decision has been adopted is *Interamerican Transport Systems v. Canadian Pacific Express and Transport Ltd.* [73] In *Interamerican*, the Ontario Court (General Division) reviewed the *Ikarian Reefer's* emphasis on the need for objectivity and independence in expert opinions.

> An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a

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[67] *R. v. Mohan*, [1994] 2 S.C.R. 9

[68] William G. Horton & Michael Mercer, "Expert Witness Evidence in Civil Cases", presented at the Fourth Annual Conference on Evidence Law, Osgoode Hall Law School, Toronto, September 19-20, 2007 (updated version of paper previously published in the Advocates Quarterly, 2004, v. 29 p. 153.) at 2. The updated version of the article is available at www.williamghorton.com.

[69] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 2001) at 12.27

[70] *Ibid* at 12.44

[71] [1993] 2 Lloyd's Rep 68 (Q.B.D. (Comm. Ct.)

[72] Horton, s*upra* note 68 at 10

[73] [1995] O.J. No. 3644 at paras. 61, 59

> fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanour of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact that he is being paid or that the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.[74]

The Ontario Court's emphasis on independence is also found in *Amertek Inc. v. Canadian Commercial Corp.*,[75] where the choice between the parties' conflicting expert reports was made by evaluating the apparent independence of the experts.[76]

> [The Plaintiff's expert] prepared his reports and gave his evidence in a very professional manner – "you ask for my expert opinion on the topic, here it is, let the chips falls [sic] where they may". He has no links or ties with any of these litigants…In my view, [Defendant's expert's] field and depth of learning was not as vast as [the Plaintiff's expert]. Moreover, it is trouble that [he] has ties to the client who called him as a professional witness. Since 1985, [he] has been U.S. legal counsel to [the Defendant] in at least fourteen (14) U.S. cases and he testified that he saw [the Defendant] as a valuable client and a source for future work referrals…Hopefully, it was only because this was his maiden voyage that [Defendant's expert] strayed from the role and path of the expert witness and took on the role of advocate when, on two occasions, he commented on the evidence of [a witness] by saying: "That does not ring true with me".[77]

An expert will reveal his or her lack of independence if he or she appears to become part of the prosecution team by, for example, dealing with numerous sources for information but failing to acknowledge them in the report. Referring to *Ikarian Reefer*, the Ontario Court of Justice in *Ontario (Superintendent of Financial Services) v. Norton*[78] stated:

> I wish to set out what I consider to be the basic duties and obligations of an expert witness, namely, the expert evidence as presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. The expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his or her

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[74] *Ibid* at para. 61

[75] [2003] 229 D.L.R. (4th) 419 (Ont. S.C.)

[76] Horton, s*upra* note 68 at 13

[77] *Amertek, supra* note 75 at para. 449

[78] [2007] C.E.B. & P.G.R. 8237 (Ont. C.J.)

> expertise. The expert must never assume the role of an advocate in the case. The expert should clearly spell out any issue or question falling outside his expertise. The expert must clearly spell out the facts, materials, sources and assumptions upon which the expert has relied for his/her opinion. There should not be omitted material facts which could detract from his opinion.[79]

An expert's report may be rejected if either the substance or the tenor of the report is generally found to be "advocacy dressed up as expert opinion."[80] In *Dulong v. Merrill Lynch Canada Inc.*, the expert's report was criticized for "arguing the facts and generally advocating [the expert's] client's position with respect to them throughout--similar to what one would expect from counsel's closing argument."[81]

The court may be inclined to make a special inquiry into the independence of an expert if a party attempts to use the evidence of an "in-house" expert. Although the issue is not determinative, the court may consider the expert's employment relationship or retainer with the party proffering the evidence of the expert, as they did in *R. v. Inco Ltd*[82]:

> The independence required of experts may be the subject of special inquiry, particularly where an "in-house" expert is proffered by one of the parties. The inquiry requires that the trial judge, on a *voir dire*, look beyond the witness' employment relationship or retainer and consider the basis on which the opinion is proffered. Unless the terms of the retainer make the witness an obvious "co-venturer" with the party, as in the case where the witness worked on a contingency fee arrangement which was dependent on the outcome of the case, the trial judge must examine the actual opinion evidence to be offered in a *voir dire*. The proposed expert's independence can be tested in the usual way, by cross-examination on his or her assumptions, research and completeness. The trial judge can then assess whether the expert has assumed the role of advocate.[83]

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[79] *Ibid* at para. 62

[80] *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 at para. 30 (S.C.J.)

[81] *Ibid.*

[82] (2006), 80 O.R. (3d) 594 (S.C.J.)

[83] *Ibid* at para. 42

Maintaining Independence in Report Writing

Expert reports are first and foremost expected to be objective and unbiased.[84]

Steps that can be taken by experts to reduce intentional or unintentional bias include:

- The expert must not accept an engagement where they have any doubts as to their actual and perceived objectivity and independence and their ability to maintain their objectivity as the engagement progresses;
- The expert must ensure that they view evidence being gathered from both parties' perspective. What else could a document mean? What are the possible motivations for someone to have told the expert something in an interview? Who could be spoken with to confirm or dispel the key assumptions to the theory of what may have occurred?
- The draft report should be reviewed by another professional in the expert's office (or equivalent), and they should review the report on the basis that they are acting for the opposing party;
- The expert must review their stated and implicit assumptions to identify alternative assumptions and consider which are more plausible/reasonable;
- The expert should consider whether they would be content with the report's wording and "feel" if the report was concerning them (that is, is the report polite in its choice of words, tone, and findings, neutrally setting out the findings);
- The expert should leave the draft report overnight (or longer if possible) to allow a final review after some time has passed.

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[84] The Harvard Business Review reported on a survey of accountants in the U.S. who were given information related to a traffic accident and asked to quantify the damages. Half of the respondents were informed that they were retained by counsel for the accident victim and the other half by counsel to the insurer. The survey found that the plaintiff "experts" found loss of income to be, on average, 30% higher than the findings of the defendant "experts". The survey highlights the ease with which unintentional bias can enter into an expert's work product.

Justice McLachlin has summarized the importance of maintaining objectivity and remaining unbiased (with recognition of experts' occasional past failings in this area) by stating:

> Above all, experts must restore the Court's faith in them by reaffirming their objectivity. An expert who contests too obviously for one side or the other loses his or her credibility …The expert must always bear in mind that regardless of who is paying him, his duty is to tell the truth, his role is to assist the Court. If he does less, he will fail his duty to the Court and, in all probability, his obligations to his client.[85]

There are numerous papers and articles addressing professionalism in the presenting of expert testimony, almost all of which is relevant to the expert in preparing his or her report. Advice such as being professional, well-prepared, a good educator, using a controlled presentation style, speaking clearly and in a straight-forward manner, don't criticize other experts – are areas to consider researching.

CONCLUSION

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

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 examiner or inspector in the circumstances, a municipality (and its insurer), ought to be able to avoid liability.

There are various defences that may be 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 a flouting of applicable building regulations by the owner-builder, whether there was a delegation of duty to a registered code agency, and whether the defect involves a health or safety matter.

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[85] W. David Griffiths, "Expert Witnesses--the Good, the Bad and the Ugly", 1997 J. Bus. Valuation 347 quoting B. McLachlin, "The Role of the Expert Witness" (September 1990), 14:3 Prov. Judges Journal 3.

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