

IS THERE A PRIVATE LAW DUTY TO ENFORCE MUNICIPAL BY-LAWS?

BY CHARLES M. K. LOOPSTRA, Q.C.

A recent Ontario Superior Court of Justice decision has rekindled the debate on whether there is a private law duty to enforce municipal by-laws. It has been generally accepted that where enforcement is discretionary, there is no private law duty to enforce, and enforcement can be done on a selective basis¹. This is not necessarily the case with the enforcement of building codes for new construction. As stated by the Supreme Court of Canada in *Ingles v. Tutkaluk Construction Ltd.*²:

The purpose of the building inspection scheme is...to protect health and safety of the public by enforcing safety standards for all construction projects. The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the [Building Code] 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.

Negligent Building Inspections

Most provinces have adopted a mandatory duty to inspect buildings. The current *Building Code Act* in Ontario imposes a host of mandatory statutory duties which include:

- the establishment of operational policies for enforcement
- co-ordinate and oversee enforcement

- review plans and inspect construction to determine compliance with the OBC
- ensure compliance with “applicable law”

Failure to Enforce By-Laws and Building Codes

Where the municipality has discretion to enforce or not enforce its by-laws, a decision not to do so is a policy decision and immune from civil action. This principle must be qualified in the following circumstances:

- a decision not to enforce does not avoid a private law duty of care. For example, the failure to prosecute a building code offence may be a discretionary policy decision, but the failure to inspect and note the defect may be a breach of a private law duty of care resulting in negligence;³
- Where there has been a failure to even consider enforcement, there has not been a bona fide policy decision, which may give rise to a claim for negligent enforcement.⁴
- Identifying a problem and issuing orders, and then failing to do anything about it, may give rise to a breach of private law duty of care if the failure affects innocent third parties.⁵

Foley vs. Shamess

The distinction between a policy decision as to whether or not to enforce a by-law contravention and the breach of a private law duty is becoming increasingly blurred.

This is best illustrated by the *Foley v. Shames* decision⁶ released in 2005, which is under appeal.

The *Foley* case involved 3 properties joined together. For simplicity, two were owned by Shames and one by Foley. Foley brought a complaint about the condition of the Shames units in 1994 which resulted in an inspection and Notice of Violation under the Property Standards By-law of the Town of Parry Sound with respect to all 3 units. In 1995 Foley corrected all of the contraventions in his unit, but Shames did not. The failure to do so affected the structural integrity of the entire building.

In 1996 the Town writes letters to Shames with deadlines that pass and with no enforcement action taken. A letter dated September 9, 1996 asked Shames to provide assurances from an engineer that the Shames units had not deteriorated in the past two years, and that they wouldn't further deteriorate in the next two years. The assurances were not forthcoming. One year later, Foley asks the Town to conduct a further inspection.

In November of 1997 the Chief Building Official for the town issues an unsafe building order against Foley and Shames with respect to all 3 units which requires the production of an engineer's report and addresses the problem in two parts: 1) what is required to make the building temporarily safe, and 2) what permanent measures are required if the building is to remain and not be demolished. Foley hires an engineer that addresses

solutions to make the building temporarily safe, but does not address the second part of the order. Shames did not respond with a report.

The Town then brought an action for a mandatory order against Shames requiring compliance with the November 1997 order. Shames retained an engineer that addresses the issues in a report delivered in July of 1998. This led to the Town arranging for a joint report to be issued by both engineers which was delivered in March of 1999 recommending 3 options:

- 1) demolish all 3 units
- 2) repair all 3 units
- 3) demolish the Shames units and retain the Foley unit

In April of 1999 the Town brought enforcement proceedings against both Foley and Shames pursuant to the *Provincial Offences Act*. In May of 1999 Foley brought a civil action for damages against Shames and the Town, followed by a motion for an order requiring the Shames units to be demolished and leaving the Foley unit standing. This motion was denied by the court since the Town was dealing with the unsafe building and failure to comply issues, and pre-empting this process would be usurping the Town's legal jurisdiction.

Finally, in 2000 the Chief Building Official for the Town issued an order requiring the entire building demolished, including the Foley unit. Foley appealed this order, but the appeal was denied.

The civil action against Shames and the Town was tried in 2005 and liability for negligence was apportioned 40% against the Town, 40% Shames and 20% contributory negligence by Foley. The Town's negligence was found on the following basis:

By October of 1996, the Town must have known that [Shames] would not be providing the engineering assurances requested in the Town's letter of September 9, 1996. Its failure to enforce its [Property Standards] by-law in the ensuing 12 months coupled with the ongoing deterioration of the entire building, leading to the decision ultimately made to demolish the entire building, contributed...to the damages sustained by the plaintiffs through the loss of their building⁷.

In his legal analysis, the trial judge determined that the Town owed a duty of care to Foley in its enforcement of the Property Standards By-law, and that it was reasonably foreseeable that the Town's failure to enforce the by-law against Shames would cause harm to Foley. In coming to this conclusion the judgment finds a breach of a private law duty of care for the Town's failure to carry through with the enforcement process started earlier. Even though the enforcement process was discretionary, the Town's failure to make a *bona fide* policy decision not to proceed with enforcement, effectively meant it could not rely on the policy decision defence. The trial judge stated:

No evidence was called by the Town to explain why during the 11 month period from September of 1996 to October of 1997, it did not enforce its [Property

Standards] by-law. Evidence was not put forward to suggest that for various policy reasons, the Town determined that enforcement should not proceed. A process that had been started by the Town in 1994 was still underway, but not complete, some three years later in 1997.

Discussion

Most municipalities enforce Property Standards by-laws on a complaint only basis, and do so with some reluctance. What is significant about this case is that the Town did not make a determination that the building was unsafe and did not issue an unsafe building order pursuant to the Ontario *Building Code Act* until 1997. The trial judge did not fault the Town for its failure to issue the unsafe building order at an earlier date, but rather for its failure to enforce its Property Standards By-law after it issued a Notice of Violation in 1994. The 1994 Notice identifies certain deficiencies and requires Foley and Shames “to make the said property comply with the standards prescribed by the [Property Standards By-law] should be completed as soon as possible”. The order then states that the property will be re-inspected after December 2, 1994 and “an order may be made requiring the property be repaired to conform with the standards [or be demolished].”

At first glance the Town in effect made a policy decision that indicated it would re-inspect but not necessarily enforce. This is consistent with typical practice. The failure to enforce is not actionable unless it can be shown that the Town, by its conduct, breached a separate and independent private law duty it owed to Foley. It may well be that the Town owed such a duty to Foley and that it was negligent in the way it handled

the file. The private law duty of care owed by municipalities in the case of new construction has been well established. To the best of my knowledge, it has never been extended to existing construction except through the mandatory permit process.

What is disturbing about the Foley decision is that it was extended to a Property Standards By-law which does not involve new construction. Also the statutory authority for Property Standards By-laws in Ontario does not impose mandatory duties to enforce. Even though Property Standards have now been incorporated into the *Building Code Act*, all of the enforcement provisions are discretionary. Moreover, at the time of the Town's alleged inaction, the Property Standards enforcement process was pursuant to the *Planning Act* which did not contain any mandatory statutory duties imposed on building officials that are now contained in the Ontario *Building Code Act*. Given the new statutory duties imposed on building officials by the recent amendments to the Ontario *Building Code Act*, an argument can be made that there is also a statutory duty to have an enforcement policy adopted by the municipality for property standards violations.

Although the trial judge used the Town letter of September 1996 as the trigger for the duty to enforce (since by then he held the Town must have known it was not going to get the engineering assurances sought from Shames's engineer), it is important to note that the only enforcement proceeding then pending was the 1994 Notice of Violation issued under the Property Standards By-law. As stated above, the Town had not made a policy decision to proceed beyond an inspection. Also at that time the Property Standards by-

law was enacted pursuant to the Ontario *Planning Act* which did not contain a statutory requirement for adopting an enforcement policy.

The conclusion I draw from this case is that once you go down any enforcement road, you need to be concerned about the consequences of failing to go all the way down the road at a reasonable speed. It is clear that the Town ultimately acted by issuing an unsafe building order. However, the consequences of that order to Foley were such that according to the trial judge it was too late in the day to save the building from demolition. In that respect he stated:

The weight of the evidence suggests that an enforcement proceeding would not have resulted in expensive repairs being carried out to the building. No policy reason was put forward by the Town to explain why it did not move to demolish [the Shames units], and to recover the costs of such work against the owners.

The lessons to be learned from the *Foley* case are:

1. Once you commence enforcement proceedings, you may in effect have made a policy decision to enforce, even though you may have qualified your notice with respect to further action.
2. You should always consider the consequences of your failure to enforce.
Will someone be injured (whether physically or economically) if you do not proceed with enforcement?

3. Are you acting at a reasonable speed? If you issue a notice of contravention requiring certain action, are you waiting too long for a response?

¹ *Toronto v. Polai* [1970] 1 O.R. 483 (C.A.) aff'd [1973] S.C.R. 38

² [2000] 1 S.C.R. 298

³ *Kamloops v. Nielsen* [1984] 2 S.C.R. 2

⁴ *Oosthoek v. Thunder Bay* (1995), 30 O.R. (3d) 323 (C.A.)

⁵ *Foley v. Shames* (2005) 22 M.P.L.R. (4th) 50 (Ont. S.C.J.)

⁶ *ibid*

⁷ *ibid*, at p. 91

**IS THERE A PRIVATE LAW DUTY TO ENFORCE MUNICIPAL BY-LAWS?
FOLEY v. SHAMESS REVISITED**

BY CHARLES M. K. LOOPSTRA, Q.C.

In a previous article entitled “Is There a Private Law Duty to Enforce Municipal By-laws?”¹ the implications of the decision of *Foley v. Shames*² were discussed. This was a trial decision by the Ontario Superior Court of Justice that held the Town of Parry Sound 40% liable for the damages sustained by Foley, the owner of one of three connected row units in a 100 year old building as a result of an unsafe building order issued by the Town against Foley and Shames, (Shames being the owner of the other two units), that ultimately led to the demolition of all three units. The Town’s negligence was found on the following basis:

By October of 1996, the Town must have known that [Shames] would not be providing the engineering assurances requested in the Town’s letter of September 9, 1996. Its failure to enforce its [Property Standards] by-law in the ensuing 12 months coupled with the ongoing deterioration of the entire building, leading to the decision ultimately made to demolish the entire building, contributed...to the damages sustained by the plaintiffs through the loss of their building.

In his legal analysis, the trial judge determined that the Town owed a duty of care to Foley in its enforcement of the Property Standards By-law, and that it was reasonably foreseeable that the Town’s failure to enforce the by-law against Shames would cause harm to Foley. In coming to this conclusion the judgment finds a breach of a private law duty of care for the Town’s failure to carry through with the enforcement process started earlier. Even though the enforcement process was discretionary, the Town’s failure to

make a *bona fide* policy decision not to proceed with enforcement, effectively meant it could not rely on the policy decision defence. The trial judge stated:

No evidence was called by the Town to explain why during the 11 month period from September of 1996 to October of 1997, it did not enforce its [Property Standards] by-law. Evidence was not put forward to suggest that for various policy reasons, the Town determined that enforcement should not proceed. A process that had been started by the Town in 1994 was still underway, but not complete, some three years later in 1997.

The Ontario Court of Appeal in a decision released on August 18, 2008, dealing with an appeal by the Town as well as cross appeals by both Foley and Shames, allowed the Town's appeal and dismissed the cross appeals.³

In dealing with the Town's appeal, the Court of Appeal held that the trial judge had erred by finding that the Town was negligent for failing to demolish the two Shames units by October, 1997 thereby allowing the Foley unit to be spared from ultimate demolition due to ongoing deterioration of the building. The trial judge had stated that "no policy reason was put forward by the Town to explain why it did not move to demolish [the two Shames units], and to recover the cost of such work as against the owners.

In allowing the Town's appeal, Justice Laskin of the Court of Appeal stated:

In my view, finding the Town negligent for failing to undertake a partial demolition of the building was unreasonable. Although the Town owed a duty to the Foley's to enforce its property standards by-law, it owed no duty to them to undertake a partial demolition. For it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners. See Frouse v. Hik, 1993 CanLII 2815 (B.C.S.C.) and Nesbitt Aggregate Ltd. v. Smiths Construction Co. (Arnprior), [2000] O.J. No. 1233 (Ont. S.C.J.)...In effect, the trial judge forced the Town to solve the very problem the owners of the building could not solve on their own. Both the Shamesses and the Foleys were well aware of the option of a partial demolition and well aware of its expense and risks. They would not agree to undertake it. Why, I ask rhetorically, should the Town be required to do it for them?

The thrust of the decision in absolving the Town of any liability is the finding that the Town had acted in a reasonable manner in the circumstances. The decision also reinforces the principle that enforcement procedures are discretionary, and the method of enforcement chosen amounts to a policy decision that is not subject to liability. What is not clear from the decision is if there is potential liability from the exercise of the municipality's discretion not to enforce at all in certain circumstances, assuming the

legislation does not impose mandatory enforcement. Applying the rationale of the decision, that a municipality is not liable for its enforcement decisions if it acts reasonably and in good faith would suggest no liability for lack of enforcement if it was a bona fide policy decision made in good faith.

On the other hand, the court stated that “the Town owed a duty to the Foleys to enforce its property standards by-law”. This implies a mandatory obligation to act. Failing to act, even in the context of a policy decision to not enforce, may constitute a breach of a private law duty. This is a troublesome conclusion, given the fact that the underlying legislation at the time did not include a mandatory obligation to enforce.

I suspect that the court did not address this issue with clarity because it was more concerned about absolving the Town on the basis of it acting in a reasonable manner. It is suggested that counsel acting for municipalities be aware that this decision not be strictly read to conclude that in all circumstances failure to enforce will result in a breach of a private law duty. If however, a decision is made to enforce, and is then carried out in a negligent manner, the enforcement may be subject to liability.

Conclusion:

Where the municipality has discretion to enforce or not enforce its by-laws, a decision not to do so is a policy decision and immune from civil action.⁴ This principle must be qualified in the following circumstances:

- a decision not to enforce does not avoid a private law duty of care. For example, the failure to prosecute a building code offence may be a discretionary policy

decision, but the failure to inspect and note the defect may be a breach of a private law duty of care resulting in negligence;⁵

- Where there has been a failure to even consider enforcement, there has not been a bona fide policy decision, and therefore may give rise to a claim for negligent enforcement.⁶
- Acting in an unreasonable manner or in bad faith in the enforcement process, may give rise to a breach of private law duty of care if the failure affects innocent third parties.⁷

¹ Municipal Liability Risk Management, Vol.8, No.3, at 38

² *Foley v. Shames* (2005) 22 M.P.L.R. (4th) 50 (Ont. S.C.J.)

³ 2008 ONCA 588

⁴ *Arsenault v. Charlottetown (City)*, (1992), 90 D.L.R. (4th) 379 (P.E.I.C.A.)

⁵ *Kamloops v. Nielsen* [1984] 2 S.C.R. 2

⁶ *Oosthoek v. Thunder Bay* (1995), 30 O.R. (3d) 323 (C.A.)

⁷ *Foley v. Shames*, *supra*, rev'd by C.A.