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# MINIMIZING AND DEFENDING AGAINST NEGLIGENT BUILDING INSPECTION CLAIMS

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## Introduction

There are several reasons why the regulation of building construction is a significant source of municipal liability in Canada. Firstly, the volume and value of the construction industry in Canada is significant; Canadians spent over 74 billion dollars on construction in 2007,<sup>1</sup> although the value of construction across Canada has been steadily decreasing since the second half of 2008 as a result of the global economic slowdown.<sup>2</sup> Secondly, the supervision of construction, especially residential or small scale non-residential construction, is often performed by persons who lack specialized and technical knowledge of construction practices. These non-experts have come to rely on municipalities to independently confirm that construction work has been performed properly. Thirdly, in many provinces, solvent and well-insured municipalities often end up footing the bill for entire judgments no matter the extent of municipal liability due to joint and several liability and the fact that co-defendants such as contractors are often insolvent or with limited insurance. Finally, the Canadian jurisprudence has interpreted “building code negligence” in such a way that has resulted in relatively broad municipal liability as compared to the English and American positions<sup>3</sup> by:

- expanding the class of persons to whom a private law duty of care is owed by municipalities to, essentially, anyone who may be harmed by faulty construction including subsequent purchasers, visitors, neighbours and mortgagees;
- expanding the scope of the duty of care through demanding interpretations of the standard of care applicable in particular instances; and,
- narrowing the applicability of defences available to municipalities such as limitations defences<sup>4</sup> and contributory negligence.

In addition, most provincial governments have been reluctant to grant statutory immunity to municipalities or place limitations on the duty or standard of care associated with building inspections, or to limit joint and several liability.

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<sup>1</sup> Statistics Canada, Summary Table: Value of building permits by type, available at <http://www40.statcan.gc.ca/l01/cst01/manuf16-eng.htm>

<sup>2</sup> Statistics Canada, *The Daily* for December 4, 2008, available at <http://www.statcan.gc.ca/daily-quotidien/081204/dq081204a-eng.htm>

<sup>3</sup> D.G. Boghosian and J.M. Davison, *The Law of Municipal Liability in Canada*, Toronto: LexisNexis Canada, 1999 at §5.90

<sup>4</sup> *York Condominium Corporation No. 382 v. Jay-M Holdings Limited* (2007), 84 O.R. (3d) 414 (C.A.)

The kinds of claims made against municipalities in building code negligence actions are varied and may include issues such as:

- poor workmanship, even if the poor workmanship did not result in an immediate code violation, but caused subsequent damage such as water penetration;
- failure to build in accordance with approved permit plans where, for example, there is a change in dimensions or a substitution of materials (all of which may also trigger a contractual remedy against the builder who may well be insolvent);
- failure to adhere to the manufacturer's specifications, especially if the manufacturer's specifications are an essential part of the construction process (such as TGI or Exterior Insulation and Finish (EIF) systems);
- grading and siting problems resulting in water draining towards the foundation as opposed to away from it (this is often due to landscaping work done after the final inspection or to building the foundation at a different geodetic elevation than shown on the approved plans);
- technical or minor code deficiencies that have no impact on the structural integrity of the building or the health and safety of its occupants;
- failure to identify code deficiencies during construction when the permit is still outstanding and no final inspection has been called for;
- consequential damage as a result of code deficiencies discovered many years later when the building permit files no longer exist; and,
- failure to comply with other regulatory requirements (e.g. "applicable law").

This paper provides an overview of the source of municipal liability and the basic principles of building code negligence actions with reference to the leading Canadian case law in this area.

### **Source of Liability for Negligent Building Inspections**

A municipality's obligations with respect to building codes, permits and inspections, and its liability for the negligent undertaking and fulfillment of those obligations, must be understood in the context of the purposes of construction regulations and the role of municipalities in administering and enforcing the regulations vis-à-vis the roles of other players in the construction process.

## *Purposes of Construction Regulation*

The construction industry is a complex and technical service and manufacturing industry that is driven primarily by private interests and market activity. Standardized and publicly-enforced building codes were introduced into this primarily private context because codes contribute to the following public or collective interests, among others:

- permitting the efficient transfer of skills, materials and manufactured products between jurisdictions;
- significantly reducing transaction costs on a project-by-project basis by providing a baseline for contractual negotiations; and,
- increasing the quality (i.e. safety, reliability and durability) of all construction projects generally for the benefit of private parties and the public broadly.

Under the Canadian constitution, the provinces and territories have jurisdiction to legislate the area of construction, although model building, fire and plumbing codes are prepared on a national basis under the direction of the Canadian Commission on Building and Fire Codes.<sup>5</sup>

The model national building codes have four top-level purposes, which are:

*to limit the probability that, as a result of the design, construction and demolition of a building:*

- *Safety:* a person in or adjacent to the building will be exposed to an unacceptable risk of injury due to fire, structural failure, hazards in use and construction, and unwanted entry;
- *Health:* a person will be exposed to an unacceptable risk of illness due to indoor conditions, unsanitary conditions, noise, vibration and the escape of hazardous substances;
- *Accessibility:* a person with a physical or sensory limitation will be unacceptably impeded from accessing or using the building or its facilities; and,
- *Fire and Structural Protection:* the building or adjacent buildings will be exposed to an unacceptable risk of damage due to fire or structural insufficiency, or the building or part thereof will be exposed to an unacceptable risk of loss of use also due to fire or structural insufficiency.

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<sup>5</sup> The chart at Appendix "A" summarizes the positions of the provinces and territories with respect to the adoption and adaptation of model national codes.

In other words, the purpose of construction regulations is to protect the health and safety of building inhabitants and the general public and to ensure a minimum standard of construction across the municipality/province/country.

### *Roles of Participants in Construction Process*

The specific roles, responsibilities and powers of municipalities provided by provincial legislation and local regulation vary across Canada. Generally speaking, the municipality's role in the construction process is to determine whether<sup>6</sup> and how to enforce applicable codes and regulations, and, in accordance with legislation and policy, to independently review the sufficiency of construction. In performing this role, the municipality is fulfilling a public role in aid of public interests, which nonetheless gives rise to a private law duty to owners, occupiers, neighbours, subsequent purchasers, etc. The narrative underlying this private law duty of care is that owners may lack the knowledge and expertise to effectively oversee contractors who will inevitably make mistakes or purposely cut corners in performing work for the owners.<sup>7</sup> In the case of third parties such as occupiers and subsequent purchasers, there is no privity of contract with the builder, hence the only recourse is through an action in tort. As a result of this imbalance of power between owners, occupiers and builders and the foreseeable consequences of that imbalance, the jurisprudence dictates that the municipality ought to have owners and third parties in contemplation in fulfilling its oversight role.<sup>8</sup>

Although it is undoubtedly true that most owners will have significantly less knowledge of specific building code requirements and construction techniques than builders, designers and building department agents of municipalities, it is questionable whether the courts, guided by Supreme Court of Canada jurisprudence, have struck the right balance to remedy owners'

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<sup>6</sup> Some provincial building legislation permits municipalities to determine whether or not to adopt and enforce building codes or enact by-laws related to building construction. Other legislation, including the *Ontario Building Code Act*, creates a mandatory duty on municipalities to enforce the Code.

<sup>7</sup> *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 ("Rothfield"); *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 at para. 29 ("Ingles")

<sup>8</sup> *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 ("Kamloops")

vulnerability in the construction process. Building statutes and codes have always created an obligation upon owners to ensure that construction proceeds in accordance with the building code, including obligations regarding the permit application and approval process and the inspections process. Notwithstanding these obligations, the courts have refused to absolve municipalities of liability or find significant contributory negligence on the part of owners where owners permit work to begin without a building permit, or fail to call for inspections at the appropriate times.<sup>9</sup> The standard for a complete defence on account of the plaintiff's contributory negligence has been set so high at "flouting" the applicable building code that it is unlikely that a municipality will ever be able to reach it in any case where the municipality has been involved at all in the permit and inspection process. In refusing to find significant contributory negligence in such cases, the courts have failed to recognize the relative "strengths" of owners in the construction process, which include:

- the ability to determine project parameters, specifications, budget, etc.;
- the ability to choose designers, contractors, engineers, etc. with appropriate skills, experience and insurance;
- the option to undertake or to determine not to undertake the risks of a construction project;
- greatest resources relative to other players to devote to a particular project; and,
- greatest incentive to ensure successful outcome including protection of investment and desire for particular finished product.

In contrast, municipalities, in almost all cases, must undertake their role in the construction process with no control over the abilities of the players (including their insurance coverages), using very limited and divided resources. Significant municipal liability means that taxpayers end up paying for the costs of private construction ventures over which they have no control.

Recent trends in the case law regarding governmental negligence generally suggest a shift away from the trend of increasing the scope of liability for governments, and provide new

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<sup>9</sup> *Rothfield; Ingles*

analytical tools for determining regulatory negligence by governments.<sup>10</sup> These trends include a focus on the distinction between private and public duties in regulatory schemes and consideration of whether the plaintiff is in a special position as compared to the general public in relation to the administration of the regulatory scheme by the governmental authority.

While it is unlikely that advocates will ever be able to reverse the well settled law that a municipality owes a private law duty of care to owners and third parties in performing its role in the building construction process, the scope of the duty of care is still uncertain and may be influenced in order to minimize municipal liability. Amendments to building construction legislation and codes, such as the recent amendments to the *Ontario Building Code Act* and the *Ontario Building Code*, may provide advocates a basis for arguing for narrower liability, although the shift to objective-based codes which give more discretion to code officials will likely increase the risk of municipal liability in some areas.

Every case is ultimately decided on its facts. However, the context of the municipality as fulfilling a public duty in the building code scheme and the roles and obligations of other parties is an important backdrop for determining liability in particular cases. Defence advocates must use arguments and evidence from municipal witnesses and experts so that the context remains alive for judges hearing building code negligence cases.

### **Duty of Care**

In the leading Supreme Court of Canada cases on building code negligence, *Kamloops*, *Manolakos* and *Ingles*, the court does not effectively distinguish between the issue of whether a duty of care exists and the issue of the content of that duty of care. The court manipulates the “scope” of the *duty of care* in its *Anns* test analysis such that its finding that the *standard* of care was breached is an implicit, foregone conclusion. Accordingly, the legal principles outlined below with respect to the duty of care in negligent building inspection cases

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<sup>10</sup> C. Loopstra and D. Earthy. Regulatory Negligence: Negligence With or Without a Difference?. Canadian Institute, 14<sup>th</sup> Annual Provincial/Municipal Government Liability Conference (Feb 7 & 8, 2008); *Holtslag v. Alberta*, [2006] 380 A.R. 133 (C.A.)

could just as appropriately be listed in the section on standard of care below.

*Municipalities are not strictly liable for all defects or building code deficiencies*

It is well settled law that there is no tort of breach of statute or breach of statutory duty in Canada. The fact that statutory or regulatory standards have been breached in a particular case, and therefore that the statute/regulation was not fully enforced by a government authority, is not conclusive of a breach of a duty of care on the part of government authority.<sup>11</sup>

The extent of the duty of care to be exercised by municipalities is not such as to make the municipality an insurer of the construction work with respect to building code compliance. The municipality will be liable for those defects which it could reasonably be expected to have detected and to have ordered remedied.<sup>12</sup> Of course this statement begs the question – which defects should a municipality be expected to order remedied?

The municipality does not have an obligation to ensure that construction is completed exactly in accordance with the specifications set out in the contract between the owner and the builder.<sup>13</sup> Minor technical breaches of the building code that do not have a real impact on safety will not give rise to liability.<sup>14</sup> There is some support in lower court decisions for the proposition that the municipality's duty is limited to reviewing/inspecting and remedying deficiencies that pose a risk to health and safety.<sup>15</sup> However, it has also been argued in several cases and implicitly stated in the Supreme Court of Canada building code jurisprudence that all building code requirements are matters of health and safety, and therefore there will be liability for all non-minor deficiencies that could have or ought to have been remedied. This issue has been directly addressed by an appeal court only once, in *Flynn*

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<sup>11</sup> *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan* (2008), 2008 SCC 42

<sup>12</sup> *Rothfield; Ingles* at para. 9

<sup>13</sup> *Gorscak v. 1138319 Ontario Inc.* (2003), 42 M.P.L.R. (3d) 255 (Ont. S.C.J.)

<sup>14</sup> *Whaley v. Tam*, [2003] O.J. No. 1509 (S.C.J.) ("*Whaley*"); *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 (Ont. S.C.J.) ("*Carleton*")

<sup>15</sup> *Cumiford v. Powell River (District)* (2001), 21 MPLR (3d) 45 (B.C.S.C.); *Ontario New Home Warranty Program v. Stratum Realty Development Corp.*, [2005] O.J. No. 165 (Ont. S.C.J.); *Whaley; Carleton*

v. Halifax Regional Municipality.<sup>16</sup> The trial judge states:

[127] The defendants, HRM and Mr. Williams, claim the scope of the duty is limited to issues that relate to “health and safety”. They rely upon *Cumiford v. Powell River (District) (2001)*, 21 M.P.L.R. (3d) 45 (B.C.S.C.). They claim there is no liability for deficiencies that affect the “performance but not the structural integrity” of the building. The court in *Cumiford* cited *Anns, Kamloops, Rothfield and Ingles* for the proposition that “[n]ot all violations will result in known or foreseeable harm ... The scope of the duty of care owed in the present circumstances is confined to deficiencies that may affect the health and safety of future occupants” (para. 86).

...  
[129] I see no basis on which to limit the standard of care in the manner suggested by the defendants. The governing legislation does not suggest such a limitation, and there is no evidence that the Municipality had a policy that imposed one. The building inspector was obliged to carry out the inspections according to the policy in a reasonable manner; I do not see any authority requiring me to relieve the municipality of liability for negligence simply because it claims the resulting defects are not matters of “health and safety.” (emphasis added)

The Nova Scotia Court of Appeal declined to rule on this point, while affirming the trial decision:

[29] HRM has not appealed the judge’s finding of liability. The municipality does not, however, endorse the judge’s conclusion that HRM’s standard of care is **not** limited to inspecting for matters affecting health and safety. HRM contends that the trial judge erred “in holding that the Halifax Regional Municipality could be held responsible for damages flowing from negligent inspection of buildings, in circumstances which did not create health and safety issues . . .”. It is HRM’s submission that the judge held the municipality to a higher standard of care than is warranted at law.

[30] For the purposes of this appeal, that issue need not be conclusively determined. As the *Flynns* are not represented by counsel, we do not have balanced legal argument on this issue. It is, therefore, not appropriate to embark upon a detailed examination of the extent of the private law duty of care of municipalities save as is necessary in the context of this case to do justice between the parties. Without endorsing in full the analysis of the trial judge, I am satisfied the municipality’s standard of care articulated by the judge, if in error, favoured the position of the *Flynns*. As noted by counsel for HRM, the case law speaks of inspection schemes in the context of municipalities’ responsibility for “health and safety” (see, for example, *Ingles*, supra, at para. 10). I interpret those words as having broad meaning consistent with the purpose of the building codes. The minimum standards set by the NBC and, consequently, the Nova Scotia Building Code, are said to concern matters of health and safety as is evident in the excerpt from the preface to the NBC set out at para. 17, above. Arguably, then, non-compliance with the building Code, does impact 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. (emphasis added)

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<sup>16</sup> *Flynn v. Halifax Regional Municipality* (2003), 219 N.S.R. (2d) 345 (S.C.), aff’d (2005), 2323 N.S.R. (2d) 293 (C.A.)

Until there is a more definitive statement from an appeal court in a case with appropriate facts, this issue will continue to be a source of controversy and uncertainty in municipal liability. One way to address the uncertainty on this point is to analyze code deficiencies and associated damages into three categories:

- deficiencies that are not significant structural defects or health and safety issues;
- deficiencies that are significant structural defects or health and safety issues, but are not discoverable on a reasonable review or inspection; and,
- deficiencies that are significant structural defects or health and safety issues, and are discoverable on a reasonable inspection.

Clearly there will be liability for the third category of deficiencies, and arguably there should be no liability for the first two categories. This analysis may assist in settlement negotiations or in limiting the quantum of damages recovered at trial. This approach is an alternative to the common approach taken by lawyers and judges of assessing liability in terms of consequential damages as a whole, which can have the effect of leading to strict liability on municipalities where there have been significant damages suffered by third parties.

### *Policy Decision Immunity*

A true “policy” decision by a governmental body is not subject to review by the courts, although there may be tort liability for the negligent implementation of a policy (i.e. for negligent “operational” activities).<sup>17</sup> Where a municipality makes a policy decision to regulate construction<sup>18</sup> or implement a particular inspection scheme, it will be liable for the negligent implementation of the regulations or inspection scheme.<sup>19</sup> A municipality cannot make a policy decision to avoid particular obligations or inspections mandated by legislation.

The following decisions with respect to plans review and inspection schemes have been held to be true “policy” decisions exempting the municipality from liability:

- a decision not to conduct soils inspections or independently review soils reports

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<sup>17</sup> *Brown v. British Columbia* (Minister of Transportation and Highways), [1994] 1 S.C.R. 420

<sup>18</sup> See footnote 6 above.

<sup>19</sup> *Kamloops*

prepared by professional engineers;<sup>20</sup>

- a decision not to require plans and not to conduct inspections relating to lot grading and drainage;<sup>21</sup>
- a decision to conduct only a cursory review of structural plans stamped by a professional engineer.<sup>22</sup>

In 2006, amendments were made to the *Ontario Building Code Act* and associated regulation, which specify a prescribed set of mandatory inspections which must be conducted by the municipality or registered code agency upon receiving notification of readiness for inspection by the permit holder.<sup>23</sup> Thus, Ontario municipalities may not make a policy decision not to perform the mandatory inspections, which are:

- readiness to *construct* footings,
- substantial completion of footings and *foundations* prior to commencement of backfilling,
- substantial completion of structural framing and ductwork and piping for heating and *air-conditioning* systems, if the *building* is within the scope of Part 9 of Division B,
- substantial completion of structural framing and roughing-in of heating, ventilation, *air-conditioning* and air-contaminant extraction equipment, if the *building* is not a *building* to which Clause (c) applies,
- substantial completion of insulation, *vapour barriers* and *air barriers*,
- substantial completion of all required *fire separations* and *closures* and all fire protection systems including standpipe, sprinkler, fire alarm and emergency lighting systems,
- substantial completion of fire access routes,
- readiness for inspection and testing of,
  - building sewers and building drains,
  - water service pipes,
  - fire service mains,

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<sup>20</sup> *Parsons v. Finch* (2006), 60 B.C.L.R. (4<sup>th</sup>) 73 (C.A.), leave to appeal to S.C.C. dismissed; although compare *Dha v. Ozdoba* (1990), 39 C.L.R. 248 (B.C.S.C.)

<sup>21</sup> *Lyons v. Grainger*, [1994] O.J. No. 47 (Gen. Div.)

<sup>22</sup> *Hilton Canada Inc. v. Magil Construction Ltd.* (1998), 47 M.P.L.R. (2d) 182 (Ont. Gen. Div.)

<sup>23</sup> *Building Code Act*, 1992, S.O. 1992, c. 23, s. 10.2; *Building Code*, O.Reg. 350/06, Division C, art. 1.3.5

- drainage systems and venting systems,
- the water distribution system, and
- *plumbing* fixtures and *plumbing* appliances,
- readiness for inspection of suction and gravity outlets, covers and suction piping serving outlets of an *outdoor pool* described in Clause 1.3.1.1.(1)(j) of Division A, a *public pool* or a *public spa*,
- substantial completion of the circulation / *recirculation system* of an *outdoor pool* described in Clause 1.3.1.1.(1)(j) of Division A, a *public pool* or *public spa* and substantial completion of the pool before it is first filled with water,
- readiness to *construct* the *sewage system*,
- substantial completion of the installation of the *sewage system* before the commencement of backfilling,
- substantial completion of installation of *plumbing* not located in a structure, before the commencement of backfilling, and
- completion of *construction* and installation of components required to permit the issue of an occupancy permit under Sentence 1.3.3.1.(2) or to permit occupancy under Sentence 1.3.3.2.(1), if the *building* or part of the *building* to be occupied is not fully completed.

Within the scheme of mandatory inspections, on matters not addressed by the statute or regulations, policy decisions such as a decision not to inspect EIFs for compliance with manufacturer's installation requirements (except to the extent that the requirements overlap with code requirements) should continue to be immune from review by the courts on negligence standards.

*There may be a duty to enforce building codes*

It is generally accepted that where enforcement of a municipal by-law is discretionary, there is no private law duty to enforce the by-law, and enforcement may be done on a selective basis.<sup>24</sup> However, this principle does not necessarily apply in the case of enforcement of building codes or building by-laws, especially where there is an explicit statutory duty on municipalities to enforce the building codes. In *Ingles*, the court states:

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<sup>24</sup> *Polai v. City of Toronto*, [1973] S.C.R. 38 (S.C.C.), aff'g (1970), 1 O.R. 483 (C.A.); *Arsenault v. Charlottetown* (1992), 90 D.L.R. (4th) 379 (P.E.I.C.A.).

*The purpose of the building inspection scheme is clear from these provisions: to protect the health and safety of the public by enforcing safety standards for all construction projects. The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the [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. (emphasis added)<sup>25</sup>*

The following principles with respect to building code enforcement can be drawn from the case law:

- a municipality may be liable for failing to take steps to prosecute or enforce a stop work order where it has failed even to consider taking those steps. However a good faith policy decision not to prosecute or enforce likely will not give rise to liability;<sup>26</sup>
- a municipality may be liable for failing to use powers available to its inspectors to ensure that unsafe work ceased and was corrected;<sup>27</sup>
- failing to follow through with enforcement or 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.<sup>28</sup>

*What is the duty if a building permit is still outstanding?*

It is not uncommon that the relationship between an owner and builder will break down and litigation will commence in the middle of a construction project due to the builder's deficient work. In such cases, municipalities are often sued either by the owners or third-partied by the builder's for negligent plans review or inspection based on the inspections that have taken place, even though the permit is still outstanding and no final inspection has taken place. In other cases, owners and builders may call for inspections early in a project, and then continue construction without further involvement from the municipality, only to sue the municipality for negligence after construction is completed.

The argument that will be made by plaintiffs is that the inspection process is a multi-step process, and that municipal liability attaches to any negligent step in that process. On the other hand, municipalities will likely argue that liability in negligence should not attach until a final

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<sup>25</sup> *Ingles*, at para. 23

<sup>26</sup> *Kamloops; Oosthoek v. Thunder Bay* (1996), 30 O.R. (3d) 323 (C.A.)

<sup>27</sup> *Rothfield*

<sup>28</sup> *Foley v. Shames* (2008), 2008 ONCA 588 (CA), rev'g (2005) 22 M.P.L.R. (4<sup>th</sup>) 50 (Ont. S.C.J.)

inspection has taken place, occupancy has been granted, and the permit file has been closed. The strength of these competing arguments will depend on the facts of each case; for example, glaring and serious structural deficiencies that were not caught on a framing inspection are not likely to be saved by an “open permit” argument if significant damages have already been suffered by the owner or third parties. Defence counsel should consider the following points:

- the municipality is not the supervisor or insurer of the construction contract and the mandatory inspection scheme should not be used to force municipalities to become contract supervisors or insurers;
- construction does not always follow the linear progression imagined by the inspection scheme, so there may be good reasons that the code is not fully enforced at each “stage”;
- in appropriate circumstances, the municipality could argue that it would have corrected its earlier “mistakes” in later inspections had construction continued; and,
- the plaintiff may not have suffered damages yet if construction is still ongoing and rectification can be ordered by the municipality.

In actions where there are open permit files, municipalities ought to carefully consider taking proactive enforcement steps which may limit liability to the plaintiffs and potential liability to third parties and may mitigate or crystallize the damages.

### **Standard of Care**

A municipality will be liable for a breach of a private law duty of care where its agents (building code officials, inspectors, etc.) failed to meet the applicable standard of care in discharging their duties. According to basic negligence principles, the standard of care is determined by weighing the likelihood or probability of the harm occurring and the gravity of the risk against the purpose of the defendant’s conduct and the cost or burden on the defendant of eliminating the risk.<sup>29</sup> Municipal agents must meet the standard of what an ordinary, reasonable and prudent person (i.e. building official, plans examiner, inspector) would have done in similar circumstances with the same degree of skill and experience in a particular professional or

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<sup>29</sup> This basic principle of negligence law provides credence to the argument, discussed above, that municipalities ought only to be liable for serious structural or health and safety deficiencies, and not for all code deficiencies.

specialized calling. Any custom, practice or policy in place in the industry/municipality, as well as professional standards, statutory and regulatory standards and guidelines are relevant to determining the appropriate standard of care. In this regard, the Supreme Court of Canada has recently confirmed that the allegedly negligent conduct is judged against the policies and procedures in place at the time of the conduct.<sup>30</sup> Thus, for example, a building inspector who performed an inspection in the 1970s or 1980s, when inspectors were generally not as well qualified or well trained as they are today, ought to be judged against 1970s or 1980s standards, not against today's more rigorous standards.

The chart at Appendix "B" provides a summary of selected cases relating to building code negligence, and sets out the applicable standard of care in particular circumstances.

#### *Evidence*

The basic principles of negligence law relating to the standard of care dictate that the following kinds of evidence ought to be called by municipalities in their defences:

- policies and practices in place in the defendant municipality at the time of the alleged negligent conduct;
- policies and practices in place in the similarly situated/sized municipalities at the time of the alleged negligent conduct;
- training and qualifications of municipal agents;
- scale of operations and resources available to building department in defendant municipality;
- costs to municipality of enforcement processes.

The costs and availability of these kinds of evidence may be a significant limitation on the proper defence of a municipality in building code negligence actions. Municipalities must make attempts to marshal this evidence early in a case so that defence counsel can realistically assess the strength of the defence for the purpose of developing litigation strategy.

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<sup>30</sup> *Hill v. Hamilton-Wentworth Police Services Board*, [2007] 3 S.C.R. 129

### *Role of Experts*

Experts such as professional engineers or experienced building code officials from a municipality other than a defendant municipality are often involved in building code negligence cases by giving evidence and opinion as to:

- whether building code deficiencies exist;
- the methods and costs of remedying deficiencies;
- establishing the standard of care (i.e. whether deficiencies ought to have been discovered and remedied on reasonable plans review or inspection); and,
- whether the plans review or inspections accorded with any policies in place in the municipality.

Where the costs of remediation versus diminution in value may be an issue in quantifying damages, it may also be necessary to retain a valuation expert.

### *Plans Review*

A building plans examiner is not expected to ensure that plans comply with every detail of the relevant building code, especially when the plans involve minor projects and simple sketches. The examiner must ensure that the plans do not contain an obvious error and that they are sufficiently detailed to allow for construction. There has been conflicting case law in different jurisdictions as to the extent that plans examiners may rely on plans, reports, and certifications by professional engineers without performing an independent review of their contents. A plans examiner clearly has a duty to ensure that the application, including any engineering plans and reports, includes all the information necessary to determine compliance with the building code, and that he or she reviews all of the areas of the application that have not been certified as compliant by an engineer. A best practice to avoid future liability is to obtain the acknowledgement of the owner that the municipality is relying on engineering documents in particular areas/for particular purposes and will not be performing an independent review or inspection.

## Building Inspections

The standard of care for building inspections was articulated in *Ingles*:

*As I have stated above, to avoid liability the city must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector in 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, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury; see, for example, **Ryan v. Victoria**, supra, at para. 28. For example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection in light of all of the circumstances; see, for example, **Rothfield v. Manolakos**, supra, at pp. 1268-69. (emphasis added)<sup>31</sup>*

Where an inspection was not called for at the appropriate time, and work has been covered up so that it cannot be properly inspected by the inspector, an inspector ought to carefully consider making an order to uncover the work or requiring that the owner obtain an engineer's certification of compliance before permitting work to continue. More thorough inspections and enforcement measures may be warranted where the inspector has reason to be wary of the builder's skills, experience or compliance with the code.

## Damages

### *Quantification of Damages*

The general principle of damages is that the damages awarded should be limited to the lesser of the diminution in value or the cost of the repair. In building code litigation, the diminution in value is often determined by the cost of rectification. However, the diminution in value may be less than the rectification cost where code deficiencies are patent and there is

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<sup>31</sup> *Ingles* at para. 40

no duty on the plaintiff to disclose them to a potential purchaser, or where the cost of complete demolition plus the base property value is less than the cost of remediation. In any event, it is advisable to look at the quantification of damages early in any litigation in order to develop the appropriate litigation and remediation strategy and to retain the appropriate experts.

### *Mitigation of Damages*

Generally speaking, plaintiffs have a duty to mitigate their damages, and a failure to do so may limit the amount they may recover. In many significant building code cases, plaintiffs do not have the financial ability to rectify serious deficiencies before recovering judgment. Even if full rectification is not possible before judgment, plaintiffs have a duty to take steps to prevent escalating losses.

In appropriate cases, municipalities may wish to enter into creative financing arrangements with the plaintiff, without admitting liability, in order to minimize and crystallize the plaintiff's damages. A good example where this approach was used is *YRCC No. 772 vs. Richmond Hill et al.*<sup>32</sup> In that case, the municipality was the deep pocket defendant in a \$51,000,000 lawsuit relating to a luxury high-rise condominium building which had been found to be structurally unsafe. The remediation costs amounted to approximately \$6,000,000, whereas a failure to remediate would have resulted in a total loss approaching the amount claimed. The municipality only had insurance coverage for \$10,000,000. The municipality entered into a financing agreement with the condominium corporation to assist in the remediation in exchange for an assignment of the proceeds of litigation. Ultimately, the municipality was repaid in full and all of the defendants contributed proportionate amounts based on their insurance coverages.

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<sup>32</sup> *YRCC No. 772 vs. Richmond Hill* [2003] O.J. No. 5072, [2004] I.L.R. 1-4259 (S.C.J.); see also *YRCC No. 772 v. Lombard Canada Ltd.* (2007), 85 O.R. (3d) 294, aff'd (2008), 69 C.L.R. (3d) 66, [2008] O.J. No. 1377(C.A.)

### *Joint and Several Liability*

In a case where two or more defendants have caused the plaintiff's loss through the negligent fault of each of the defendants, joint and several liability means that each defendant is liable to the plaintiff for the full amount of the plaintiff's loss (joint liability) and for the proportionate amount of the loss caused by the defendant (several liability). Although the plaintiff cannot recover more than the total amount of the loss, the plaintiff may recover the entire judgment from any one of the defendants, and the defendants are left to pursue each other for indemnification of the amount paid to the plaintiff.

To give an example, a plaintiff claims \$225,000 for building code deficiencies against the builder, the designer and the municipality. The builder is insolvent and asset-less, the designer has only \$50,000 in insurance coverage, and the municipality has \$1,000,000 in insurance coverage. At trial, the judge finds the builder 60% at fault, the designer 30% at fault, and the municipality 10% at fault for the plaintiff loss, and damages are awarded at \$200,000. The defendants are severally liable to the plaintiff for the following amounts:

Builder	\$120,000
Designer	\$60,000
Municipality	\$20,000

If there was no joint liability, the plaintiff would only be able to recover \$70,000, being \$50,000 from the designer (assuming no assets other than insurance) and \$20,000 from the municipality. Under joint and several liability, the plaintiff can recover the entire \$200,000 from the municipality, and leave the municipality to pursue indemnification from the designer. Thus the municipality will end up paying the plaintiff \$150,000 after recovering \$50,000 from the designer's insurer. This example makes it clear why joint and several liability is known as the "1% rule"; if a defendant is at least 1% at fault, the defendant could be on the hook for 100% of the judgment.

## Conclusions

The general sentiment amongst municipalities and the municipal bar is undoubtedly that the courts have set a very high bar to attain in fulfilling the municipality's role in the construction process. The agents of many municipalities do not have the resources, training or sophistication to make the kinds of judgments and decisions that the case law requires. Municipalities must do their best to ensure that building officials understand the principles outlined in this paper in addressing the risks of municipal liability through the creation of operational policies and procedures. Creating and retaining good, thorough records of all aspects of building permit file from plans review to inspections to consideration of enforcement steps is fundamental to successfully defending or efficiently settling building code negligence cases.

As an advocate, be on guard against the following manipulations of negligence law and the trial process that tend to increase municipal liability:

- characterizing the scope of the duty of care so that standard of care is implicit;
- focusing on the alleged negligence of the municipality as a whole, rather than on the conduct of any particular individual (plans examiner, inspector);
- determining matters of judgment, which are replete in building code cases, with perfect hindsight, rather than on the basis of what was reasonable at the time in the circumstances;
- allowing a judge's common sense conclusions regarding the standard of care to substitute for appropriate evidence from first-hand and expert witnesses; and,
- keep the context of the building code and the scope of the municipality's public role alive before judges.

Some pointers for developing a litigation strategy in building code cases are:

- marshal evidence, including expert evidence, early in the case;
- analyze building code deficiencies and damages into the three categories outlined above;
- consider assisting plaintiffs with rectification of deficiencies to mitigate/crystallize damages and turn down the heat in litigation; and,
- consider appropriate enforcement steps in open permit cases.

## Appendix “A”

The following chart summarizes the positions of the provinces and territories with respect to the adoption and adaptation of the model national codes:<sup>33</sup>

Alberta	Province-wide building, fire, and plumbing codes that are substantially the same as national model codes with variations that are primarily additions.
British Columbia	Province-wide building, fire, and plumbing codes that are substantially the same as national model codes with variations that are primarily additions.
Manitoba	Province-wide adoption of the National Building Code, National Fire Code and National Plumbing Code with some modifications and additions.
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.
Northwest Territories	Territory-wide adoption of the National Building Code and National Fire Code with some modifications and additions.
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.
Nunavut	Territory-wide adoption of the National Building Code and National Fire Code with some modifications and additions.
Ontario	Province-wide building, fire and plumbing codes based on the national model codes, but with significant variations in content and scope. The Ontario Fire Code, in particular, is significantly different from the National Fire Code. Ontario also references the Model National Energy Code for Buildings in its building code.
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.
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.
Saskatchewan	Province-wide adoption of the National Building Code, National Fire Code and National Plumbing Code with some modifications and additions.
Yukon	Territory-wide adoption of the National Building Code, National Fire Code and National Plumbing Code with some modifications and additions.

<sup>33</sup> Chart based on: [http://www.nationalcodes.ca/ncd\\_model-code\\_e.shtml](http://www.nationalcodes.ca/ncd_model-code_e.shtml)

Appendix “B” – Selected cases on building code negligence

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Kamloops v. Nielsen</i>, [1984] 2 S.C.R. 2 (S.C.C.)</p>	<p>An owner builder failed to build a foundation in accordance with approved building plans. The city’s building inspector made three inspections in accordance with municipal by-laws and then issued a stop work order against the property. The house was later sold to the plaintiff who had no knowledge of the state of its foundations. The plaintiff’s own contractor inspected the house but did not inspect the foundations, and was not a defendant in the action.</p> <p>The plaintiff sued the city and the vendors when he discovered that the foundations had subsided.</p>	<p>Potentially dangerous to persons and property due to deficient foundations.</p>	<p>The municipality ought to have given serious consideration to taking steps to prosecute or enforce the stop work orders, and to take those steps if there were no good faith policy reasons for not doing so.</p>	<p>Municipality – 25% Vendor – 75%</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Rothfield v. Manolakos</i>, [1989] 2 S.C.R. 1259 (S.C.C.) (Vernon, B.C.)</p>	<p>Building permit issued for retaining wall without engineer's plan in accordance with usual discretionary practice, since adequacy of design, etc. could be assessed on site.</p> <p>Owners and contractor failed to call for inspection of wall as required by by-law at appropriate stage. A crack appeared in the wall, and a city inspector was called. Inspector unable to properly inspect because backfilling had already taken place. City engineer advised waiting 20 days to check for further cracking or movement of the wall before continuing backfilling.</p> <p>The wall later collapsed, and it was determined that it was inadequately designed and built, which would have been discovered on a reasonable inspection had the city inspected at the appropriate time.</p>	<p>Potentially dangerous to persons and property due to risk of retaining wall failing.</p>	<p>Inspector should have ordered the cessation of work and whatever corrective measures were necessary to ensure that the retaining wall was up to standard.</p> <p>The failure of the owners and contractors to call for an inspection at the appropriate time did not acquit the city of its responsibility to use its powers to enforce the by-law.</p>	<p>Municipality – 70%</p> <p>Plaintiffs – 30%</p>
<p><i>Dha v. Ozdoba</i> (1990), 39 C.L.R. 248 (B.C.S.C.) (Richmond, B.C.)</p>	<p>Building permit issued by City to plaintiffs for house on vacant land in area known to have peat in the subsoil. Plans certified by engineer as to Code compliance, but no soils report in application.</p> <p>Foundations later subsided due to inadequate soil preparation and excavation.</p>	<p>Potentially dangerous to persons and property due to deficient foundations.</p>	<p>Although plans examiner not required to ensure compliance with every aspect of the Code, it was clear that application was insufficient to determine compliance of foundation plan with respect to soil conditions.</p> <p>Plans examiner's reliance on engineer's certification not reasonable in circumstances.</p>	<p>Municipality – 33%</p> <p>Engineer – 66%</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Mortimer v. Cameron</i> (1992), 9 M.P.L.R. (2d) 185 (S.C.J.), var'd (1993), 17 O.R. (3d) 1 (C.A.) (London, ON)</p>	<p>The plaintiff, while roughhousing with a friend, tripped and fell through a wall enclosing an exterior landing to the ground 10 feet below and suffered serious spinal injuries.</p> <p>Building permit issued in 1972 without drawings and with insufficient information to determine code compliance.</p>	<p>Dangerous to persons</p>	<p>Municipality should not have issued permit without drawings and should have noticed structural deficiencies in exterior landing wall on inspection.</p> <p>Wall clearly not sufficient as barrier to prevent falls from landing because studs spaced too far apart.</p>	<p><u>Trial/Appeal:</u></p> <p>Municipality – 80%/40%</p> <p>Owner – 20%/60%</p>
<p><i>Hilton Canada Inc. v. Magil Construction Ltd.</i> (1998), 47 M.P.L.R. (2d) 182 (Ont. Gen. Div.) (Mississauga, ON)</p>	<p>Initial drawings for hotel addition were deficient, but permit was issued on the basis that engineer would monitor construction and prepare updated drawings.</p> <p>Building constructed in accordance with updated plans, but structural deficiencies later surfaced.</p> <p>Review and inspection process only confirmed construction in accordance with updated engineer certified plans pursuant to longstanding, unwritten City policy.</p> <p>City ordered remedial work when deficiencies became apparent.</p>	<p>Serious and dangerous structural deficiencies that could cause building collapse.</p>	<p>Policy decision to rely on engineer's certification for structural plans based on social, political and economic factors. Accordingly, the policy was not reviewable by the court in a tort claim.</p> <p>Policy implemented non-negligently. Site inspections carried out diligently in accordance with policy. Reasonable reliance by City on engineer's certification. Deficiencies not obvious on face of plans.</p>	<p>Actions against engineers and architect settled before trial.</p> <p>No liability against municipality.</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Ingles v. Tutkaluk Construction Ltd.</i>, [2000] 1 S.C.R. 298 (S.C.C.) (Toronto, ON)</p>	<p>Permit for basement lowering and underpinning obtained 2 weeks after construction began.</p> <p>Two different city inspectors unable to inspect underpinnings fully, but they determined that construction was in accordance with permit based on inspection of visible parts of underpinnings and assurances of contractor that work complied with plans.</p> <p>Plaintiff experiencing leaks in basement, and new contractor discovered underpinnings were deficient. Plaintiff sued for cost of remedying deficient underpinnings, although plaintiff suffered no property damage directly related to deficient underpinnings.</p>	<p>Potentially dangerous to persons and property due to deficient foundations.</p>	<p>Inspector should not have relied on assurance of contractor unknown to inspector.</p> <p>Inspector should have used statutory powers to uncover underpinnings or have engineer's report prepared at plaintiff's expense.</p> <p>Plaintiff not sole source of own loss, though contributorily negligent.</p>	<p>Municipality - 14%</p> <p>Contractor – 80%</p> <p>Plaintiff – 6%</p>
<p><i>Bakhtiari v. Axes Investments Inc.</i> (2001), 24 M.P.L.R. (3d) 248 (S.C.J.), var'd apportionment of liability (2004), 69 O.R. (3d) 671 (C.A.) (Toronto, ON)</p>	<p>Fire in an apartment building spread throughout the building due to a lack of a self-closing device on the door to the apartment where the fire started, and a malfunctioning SCD on a stairwell door.</p> <p>Approved building plans did not including SCDs on suite doors.</p> <p>Several people died in the fire and the plaintiffs suffered catastrophic injuries from smoke inhalation.</p>	<p>Serious danger to life safety</p>	<p>Municipality had a responsibility under its own building by-law not to issue permit if plans did not comply with by-law. Plans examiner issued permit in 1974 notwithstanding non-compliance with by-law requirement for SCDs on all suite doors. There was no reasonable explanation for the issuance of the permit in such circumstances.</p> <p>On appeal, the court noted that the municipality had many opportunities over the years to inspect and require the installation of SCDs.</p>	<p><u>Trial/Appeal:</u></p> <p>Municipality – 20%/35%</p> <p>Owners – 70%/45%</p> <p>Fire starter (tenant) – 10%/20%</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Cumiford v. Powell River (District)</i> (2001), 21 MPLR (3d) 45 (B.C.S.C.) (Powell River, B.C.)</p>	<p>The plaintiff was a subsequent purchaser of a very poorly constructed house, including an improper framing and poor foundation. She sought damages for all building code violations.</p> <p>Municipality issued a building permit despite a lack of drawings in application and with knowledge of lack of ability of builder, and his tendency to ignore building code requirements. Some inspections took place and serious code deficiencies were noted, but no stop work order was issued.</p> <p>Occupancy permit was issued despite many deficiencies, some serious.</p>	<p>Some serious structural risks, others not dangerous</p>	<p>Municipality's duty of care limited to deficiencies that may affect health and safety of future occupants. Deficiencies that were risks to health and safety were foundation and framing deficiencies.</p> <p>Municipality should have issued stop work order when foundation and framing deficiencies were noted, and should not have issued occupancy permit.</p>	<p>Municipality – 25% Builder – 75%</p>
<p><i>Flynn v. Halifax Regional Municipality</i> (2003), 219 N.S.R. (2d) 345 (S.C.), aff'd (2005), 2323 N.S.R. (2d) 293 (C.A.) (Halifax, N.S.)</p>	<p>House constructed under building permit with some deficiencies, including cracking concrete slab and 14-foot window wall that shook in the wind.</p> <p>Shaking wall inadequately designed and braced. Code requirement for engineered design of wall not noticed in plans review or inspections.</p>	<p>Deficiencies arguably not dangerous.</p>	<p>Reasonable plans review and inspections would have noted deficiencies in shaking wall. Could have been remedied at construction stage at minimal cost.</p> <p>Municipality not liable for deficiencies in concrete slab because policy of no inspections of interior footings.</p>	<p>Municipality – 33% Contractor – 33% Principal of contractor – 33% Contractor parties also liable for other defects.</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<p><i>Whaley v. Tam</i>, [2003] O.J. No. 1509 (S.C.J.)</p>	<p>The plaintiff fell head-over-heels off of a third storey balcony of a friend's apartment and suffered severe injuries.</p> <p>The balcony railing was 41.25 inches high, while the building code mandated 42 inch high railings.</p> <p>The plaintiff sued the owners of the apartment building.</p>	<p>Potentially serious danger to life safety, but technical breach.</p>	<p>Implementation of building code standards necessarily involves a margin of error.</p> <p>A mere technical breach of the standard does not give rise to a cause of action.</p>	<p>No liability.</p>
<p><i>Parsons v. Finch</i> (2006), 60 B.C.L.R. (4<sup>th</sup>) 73 (C.A.), leave to appeal to S.C.C. dismissed April 19, 2007, No. 31803 (Richmond, B.C.)</p>	<p>City issued building permit to plaintiffs for house on vacant land, relying on geotechnical engineering report obtained by plaintiffs certifying compliance with Code with respect to structural elements of plans and soil preparation and excavation requirements. Engineer also provided field report with respect to site preparation.</p> <p>Plaintiffs acknowledged in writing that City was relying on engineer's certification and would not undertake independent geotechnical review or inspection.</p> <p>Foundations later subsided due to inadequate soil preparation and variable site excavation.</p>	<p>Potentially dangerous to persons and property due to deficient foundations.</p>	<p>Limited review of plans to determine that plans had been certified by professional engineer rather than review for compliance with Code met standard of care.</p> <p>Section 755.4 of By-law [enacted after <i>Dha, supra</i>] stating no liability for reliance on engineer's certification provided complete defence to claims of negligence.</p>	<p>No liability (trial adjourned against deceased engineer)</p>

Case	Facts	Nature of Risk	Duty/Standard of Care	Liability Apportionment
<i>Holtslag v. Alberta</i> , [2006] 380 A.R. 133 (C.A.)	Plaintiffs alleged that Alberta's Director of Building Standards had breached a duty of care by approving the use of untreated pine shakes as a roofing material under the Building Code. The shakes rotted within 5 years of installation.	No risk to health or safety.	<p>The court refused to find a novel private law duty of care owed by the Director of Building Standards to the plaintiffs.</p> <p>Not sufficiently proximate relationship between statutory duty and individual plaintiffs. Duty is to public as a whole. Further, decision to approve shakes in product listing was immune policy decision, and recognizing duty of care would lead to unlimited liability.</p>	No liability
<i>Foley v. Shames</i> (2008), 2008 ONCA 588 (CA), rev'g (2005) 22 M.P.L.R. (4 <sup>th</sup> ) 50 (Ont. S.C.J.) (Parry Sound, ON)	<p>Foley, the plaintiff, was the owner of 1 unit in a 3-unit building. Shames owned the other two units. After a complaint by Foley, Town issued Property Standards orders to comply against all 3 units. Foley complied, while Shames did not, which threatened structure of entire building.</p> <p>Town later issued unsafe building orders due to deterioration in Shames units, which required both owners to retain engineers to address temporary and long-term remedial measures. Foley addressed temporary measures only, Shames did not respond.</p> <p>After failed and stalled enforcement proceedings, Town ordered entire building demolished.</p> <p>Foley sued Shames and Town for losses.</p>		<p>Although Town had a duty to Foley to enforce property standards by-law, no duty to undertake partial demolition of Shames units.</p> <p>Town acted reasonably in the circumstances.</p>	<p><u>Trial/Appeal:</u></p> <p>Municipality – 40%/No liability</p> <p>Shames – 40%/66%</p> <p>Foley – 20%/33%</p>