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MUNICIPAL LIABILITY: BUILDING CONSTRUCTION and INSPECTION ISSUES

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INTRODUCTION

The Canadian construction industry is the third largest national industry contributing some 64 billion dollars in 2005 to the gross domestic product on an annual basis.[2] The capital expenditures for construction in Ontario were one of the largest portions of this total.[3] While the impact of this industry is national, the issuance of construction permits is local. Indeed, the regulation of building construction is usually carried out in local municipal governments. Building inspection regimes enacted provincially across the country in common law provinces, and in Ontario in particular, rely on the work of local chief building officials and their delegates. These qualified and experienced public officials engage in site plan review, building permit application review, plans examination, and building inspection -- of all sorts of construction projects to ensure a safe built form. Such projects range from the small home renovation which may take days or weeks to complete -- to the large multi-use, multi story, urban construction project taking many years to complete.

These public authorities are expected to discharge duties of care to those within a sufficient proximity to rely on them. Many large insured claims against municipalities will involve alleged breaches of these statutory construction regulation duties.[4] The *Building Code Act* does not specify when inspections may be carried out and, when and how often is a matter of policy and judgment in the circumstances.

Construction often represents the leading edge of design and building processes to renew our built environment. Such construction processes can be the straightforward transformation of the old for the new, or may additionally involve highly skilled and specialized workers and professionals using

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[2] Statistics Canada: Gross domestic product at constant dollars (1997) by industry [http://www40.statcan.ca/l01/cst01/econ41.htm]

[3] Statistics Canada: Capital expenditures for construction by sector [http://www40.statcan.ca/l01/cst01/busi01g.htm]

[4] The *Building Code Act, 1992, SO 1992, c.23, as amended*, is primarily concerned with issues of public safety as they relate to the building construction, and a good deal of the Act deals with inspection matters, including: the obligation to enforce the Act (section 3); the requirement of an inspection prior to occupancy of a building or part thereof (section 11); an inspector's legal right to enter a building or property "at any reasonable time without a warrant" where a building permit application has been made (section 12(1)); the power of an inspector to issue orders to comply (section 12(2)) and to issue orders prohibiting the covering or enclosing of any part of a building until such time as an inspector has had an opportunity to inspect (section 12(6)). Breaches of the Act constitute an offence, and persons breaching the Act are liable to be prosecuted under the *Provincial Offences Act* attracting significant fines of up to $50,000 (in the case of a corporation) hindering an inspector in the performance of his/her duties. The Regulation under the Act (often referred to as the "Code") sets out detailed performance requirements and technical specifications.

new building materials and techniques. At the same time, such renewal can take place under tremendous time constraints and budget constraints.

Over the past twenty-five years, there has been a significant increase of liability exposure for municipalities regulating the construction process. This can be partly explained by the fact that contrary to the approach taken by the English courts, Canadian courts have more broadly imposed liability against municipalities for negligent building inspection. For policy reasons, users of the built environment (whether the initial purchaser or subsequent) have been seen as deserving of protection. It has been said that there is no risk of liability in an indeterminate amount because liability will always be limited by the reasonable cost of repairing dangerous building defects to a non dangerous state. The time of exposure is limited to the "useful life of the building".[5]

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

EXPOSURE FOR FAILURE TO INSPECT

In Canada, building inspectors and municipalities owe a duty of care to the owners and users of a building. The standard of care owed by the municipality is one that includes omissions as well as actions. In other words, the municipality cannot avoid liability simply by refusing to inspect. The municipality is responsible for ensuring that a building meets building code requirements for the sake of quality and safety. This duty of care has been clearly articulated by the courts.

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[5] *Winnipeg Condo No. 36 v. Bird Construction* [1995] SCJ No. 2 ("***Winnipeg Condo***")

[6] 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),

The Leading Authority: Ingles v. Tutkaluk

The Supreme Court of Canada decision of *Ingles v. Tutkaluk*[7] is the leading authority on the duty of care owed by municipalities that conduct building inspections ("**Ingles**").

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

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

The Trial and Appellate Decisions

The trial judge allowed the action and, after deducting an amount to reflect the homeowner's contributory negligence, held the contractor and the city jointly and severally liable, and apportioned damages of $49,368.80 between them. The trial judge concluded that in light of the contractor's failure to apply for the permit until after the underpinnings were put in place, his failure to post the

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[7] *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, ("***Ingles***"). There may always be some debate on any particular fact situation as to whether a duty of care arises. Certainly the caselaw tends to the view that the foreseeability of economic loss is not by itself sufficient to create sufficient proximity of a duty of care, and danger to persons or damage to property is required, see *Winnipeg Condo.*

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 Code, the inspector failed to meet the standard of care that would have been expected of a reasonable and prudent inspector in the circumstances, and was therefore negligent.

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

The Supreme Court of Canada Decision

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

The Court went on to state that in the context of municipal building inspections, the *Anns* test should be applied to determine whether a public body owes a duty of care, using the analysis of the English House of Lords in *Anns v. Merton London Borough*[8] and first applied by the Supreme Court of Canada in 1984 in *City of Kamloops v. Nielson et al.*[9] (herein "*Anns/Kamloops*"). Once a municipality makes a policy decision to inspect building plans and construction, it owes a duty of care to all who it is reasonable to conclude might be injured as a result of the negligent exercise of those powers. Such duty may be subject to limitations of policy, or such limitations may arise from the statutes bearing on the powers of the building inspector. The two related questions in the *Anns/Kamloops* analysis are, restated briefly:

1. is there a relationship of sufficient proximity; and

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

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[8] [1997] 2 All ER 492

[9] *City of Kamloops v. Nielson et al.* [1984] 2 S.C.R. 2 ("***Kamloops***")

The traditional rationale from exempting public authorities from tort liability for true policy decisions is to prevent judicial policy making (rather than permissible adjudication).[10]

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

Once the policy decision is made to inspect, in certain circumstances, the authority owes a duty of care to all who may be injured by the negligent implementation of that policy. Municipalities are created by statute and have clear responsibility for health and safety. Any policy decision as to whether or not to inspect must accord with this statutory purpose.[11] Once it is determined that an inspection has occurred and that a duty of care is owed by the public actor to all who might be injured by a negligent inspection, a traditional negligence analysis will therefore be applied. To avoid liability, the government actor (i.e. the inspector) must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent inspector in the particular circumstances. For example in Ontario, it has long been established on a traditional negligence analysis that where defective work has previously been noticed, a person conducting the inspection cannot rely on the contractor's subsequent "covering up" of similar work when he/ she fails to spot the additional defective work, and could have by uncovering some of the work for inspection purposes.[12]

In the *Ingles* case, the first step in the *Anns/Kamloops* test is 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

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

[11] A municipality was liable for a "leaky condo" in British Columbia where it failed to check compliance with building code sections dealing with wind and water resistance. The municipality unsuccessfully claimed that its building department made a policy decision to selectively check and enforce only certain sections of the applicable Code: *Strata Plan NW 3341 v. Canlan Ice Sports*, infra.

[12] *Dabous v. Zuliani* (1976) 12 OR (2d) 230 (CA)

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

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

The *Ingles* decision can be contrasted with the approach of the minority in the earlier Supreme Court of Canada decision of *Rathfield v. Manolakos*,[13] and the English House of Lords Decision, *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*[14] This would suggest that some of the principles of *Ingles* could be applied differently on different facts. In *Ingles,* the owner was also not the builder (like *Ingles*), and was relatively unsophisticated. One could well imagine a different result in a case with a sophisticated owner-builder who was the sole cause of his/her own loss by "flouting the building code regime".

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

In *Manolakos,* the trial judge found that the chief building inspector had seen the specifications and the sketch, but not examined them with the necessary care. It was undisputed that the sketch was

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[13] [1989] 2 SCR 1259

[14] [1985] AC 210

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

> "The very bylaw contemplated that breaches of the sort committed here would occur. That is the reason the powers of the building inspector extended to allowing him to halt construction and to order the correction of work not properly done for such breaches come to his attention". (at page 1276).

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

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

> "It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building bylaws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangerous health and safety. If, as I believe, owner builders are within the ambit of the duty of care owed by the building

> inspector, it would simply make no sense to proceed on the assumption that every negligent act of an owner builder relieve the municipality of its duty to show reasonable care in approving building plans and inspecting construction. **These considerations suggest that it is only in the narrowest circumstances that Lord Wilberforce's dictum will find application.** By way of example, I think that the negligent owner would be viewed as the sole source of his own loss where he knowingly flouted the applicable building regulations or the directives of the building inspector." (at page 1271) [emphasis added]

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

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

> "The municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of reasonable care when the conduct of the owner builder is such as to make it impossible for the inspector to do anything to avoid the damage. In such circumstances, for example, when an owner builder determines to flout the building bylaw, or is completely indifferent to the responsibilities that the bylaw places on him or her, that owner builder cannot reasonably allege that any damage suffered as a result of the failure of the building inspector to take reasonable care in conducting an inspection (at page 324)."

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

> ' "…This particular power exists for the protection of other persons, not for that of the person in default. I say nothing about the case where a local authority has failed to make known its requirements or has made requirements of an inadequate or defective nature. However, I can see no justification for extending the law of negligence by imposing on a local authority, over and above its public law and powers and duties [under certain legislation] a duty to exercise its powers of enforcement under paragraph 15 (2) owed in private law towards a site owner, who, whether with or without personal negligence, disregards the proper requirements of the local authority, duly made under paragraph 13 and duly communicated to him or persons authorized to receive them on his behalf. The practical implications of giving the defaulting owner a right to sue the local authority for damages in such circumstances needs consideration, but no elaboration" '. (at page 6)

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

The Rules of Law to Remember

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

In administering inspection regimes, municipalities are not insurers of the construction work produced. They are not required to discover every variance from applicable building standards, nor discover every hidden defect in construction work. In this regard, some provincial building statutes, such as the Ontario *Building Code Act* with which the *Ingles* case dealt, stipulate that a municipality can only be held liable for those defects which the municipal inspector could reasonably have been expected to detect, and had the power to have ordered to be remedied. In Ontario, municipalities are obliged to enforce the Act, and the role of a chief building official includes establishing operational policies to enforce the Act and the code. Again, a reasonable inspection in light of the existing circumstances is what is required. Whether an inspection has met the standard of care is a question of fact in a particular case.[15]

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[15] For example, where structural deficiencies are latent and become apparent later, the municipality may revoke an occupancy and order repairs. In *Hilton Canada v. Magil Construction* [1998] OJ No. 3069 (Superior Court) a newly constructed addition to the hotel was ordered to be closed, and repairs were ordered to be undertaken. Hilton remedied the deficiencies and sued the municipality, among others, for damages. The municipality had a policy of only conducting a limited review of engineering plans if they had been stamped by a professional engineer licensed

A municipality may limit is duty of care where it makes a true policy decision in the course of its Code enforcement functions. For example, in *Parsons v. Richmond*,[16] the City of Richmond decided as a matter of policy not to hire geotechnical engineers to determine subsoil conditions and instead consistently refrained from doing so for reasons of public economy. Instead, the policy required an outside geotechnical report and letters of assurance to address issues of subsurface soils and soil bearing capacity. The City engineer made no attempt to second guess the engineer and instead solely reviewed the report to ensure the appropriate issues were addressed.

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

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in Ontario. Under the *Building Code Act* "the design and general review of buildings must be undertaken by an architect or engineer" and the court held it was reasonable to rely on their expertise. The municipality met the applicable standard of care by ensuring a professional engineer had undertaken the design and field review. It was not liable to the owner in negligence, because its conduct met the standard of care. Similarly in *Hewitt v. Scott* [2001] OJ No. 3120 (Superior Court) the court declined to impose liability on the Township of King for negligence where a septic tank failed. Both the local township and the owner/ purchaser relied on an engineer's report identifying the septic system as complying with the then existing standards under the *Environmental Protection Act*, and the report referenced the possible future failure of the system.

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

[16] *Parsons v. Finch* [2005] BCJ No. 2697 (Superior Court). In *Parsons*, there was an express waiver of claims against the municipality, and more importantly a written acknowledgment that the owner knew "the City .. relied exclusively on the Letter of Assurance of Professional Design and Commitment for Field Review". However, contrast *Parsons* with *Dha v. City of Richmond* [1990] BCJ No. 768 (Superior Court) where the municipality did not rely on outside geotechnical reports and, in effect, the City negligently accepted building foundation plans without being fairly satisfied the soils could adequately bear the intended structures.

Summary of Sample Cases Dealing with Negligent Inspection

Case Name	Description of Case	Was Municipality Found Liable?	Others Liable?
Ingles[17]	Deficient underpinnings installed underneath footings concealed by subsequent construction. Homeowner allowed contractor to proceed to late stages of work - where underpinnings were covered - prior to issuance of permit. Unable to inspect underpinnings, Inspector took contractor's word for satisfactory installation of underpinnings. Work deficient causing leaks to basement.	YES: 14%, but 94% joint and several. Note: Ontario case where there is joint and several liability.	YES: contractor 80% and owner 6% responsible for own damages
Carson[18]	10 years after rural area house built, basement flooded as clogged drainage ditch outside of home could not hold water from thaw and heavy rain. Owner called inspector about high water level in ditch before basement flooded. Inspector saw clogged ditch and arranged for operator to clean it, but did not return to inspect ditch that operator did not clean properly causing flooding in owner's basement.	YES: 100%. Note: Ontario case where there is joint and several liability.	NO.
Riverside Developments[19]	Developer assured by building official that Developer's plans were in accordance with Building Code, and engineer not necessary to approve them. Major structural flaws were subsequently found, resulting in Mortgagee refusing financing and taking over building causing loss to Developer which had guaranteed the Mortgage. Developer sued City.	YES: 100%. Note: Ontario case where there is joint and several liability.	NO.
Flynn[20]	Contractor built exterior walls of house defectively. Inspector issued occupancy permit after inspection despite known outstanding deficiencies	YES: 50% damages were joint and several. Note: damages assessed partly proportionate and partly joint and several as Nova Scotia Courts have discretion to apportion liability on joint and several or proportionate basis.	YES: contractor 50% damages were joint and several. Contractor also liable for separate damages.

[17] *Ingles, supra.*
[18] *Carson v. Gloucester (City),* [2000] O.J. No. 3863 (SCJ).
[19] *Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village),* [2004] O.J. No. 151 (SCJ), aff'd and var'd on other grounds [2005] O.J. No. 3326 and (CA).

Case Name	Description of Case	Was Municipality Found Liable?	Others Liable?
Strata Plan[21]	Due to water leakage significant rot was found in structural framing of condo a year after it was built. Municipality had improperly approved faulty development plans that did not meet Code requirements. Municipality did not enforce all parts of the Code in its inspections.	YES: 20% joint and several	YES: 80% Developer, Contractor, and Engineer.
Kamloops[22]	Foundation of house was set on loose fill contrary to approved plans. Inspector issued stop work order, but work continued and house was completed. House sold 3 years later and new owner sued for defective foundation.	YES: 25%: joint and proportionate. Note: in Ontario would be joint and several.	YES: Vendor 75%.
Rothfield[23]	After retaining wall cracked, inspector ordered 20 day wait period, after which Inspector allowed backfilling around wall. Months later wall collapsed. Owners had delayed in giving Municipality timely notice to inspect.	YES: 70% joint and proportionate. Note: in Ontario would be joint and several.	YES: Owners 30%.

OVERVIEW OF DIFFERING INSPECTION REGIMES ACROSS COMMON LAW PROVINCES OF CANADA

Building codes play a central role in the establishment of standards for the construction of buildings.

In general, the purpose of building regulatory legislation is for protection of public health and safety through the establishment and enforcement of construction regulations which impose uniform minimum standards for the construction of buildings[24]. The Supreme Court of Canada clearly spelled this out in *Ingles*:

> The legislative scheme [the Ontario *Building Code Act*] is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities. Sections 5 and 6 of the Act require that building plans and

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[20] *Flynn v. Halifax (Regional Municipality)*, [2005] N.S.J. No. 175 (CA).
[21] *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*, [2001] B.C.J. No. 1723 (SC), aff'd [2002] B.C.J. No. 2142 (CA).
[22] *Kamloops*, supra.
[23] *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 ("***Rothfield***").
[24] J. Levitt, "Building Codes: Origins, Enforcement & Liabilities" (Paper presented to the Canadian Bar Association's 2002 National Law Conference) at p. 1.

> 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 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.**[25]
> [emphasis added]

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.[26]

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.

[25] *Ingles, supra*, at para. 23.
[26] http://www.nationalcodes.ca/ncd_model-code_e.shtml

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

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

The Potential Impact of Joint and Several Liability on Municipalities

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

What this means for a municipality is that, for instance, even where it is found to be only 14% at fault and the contractor 80% at fault for damages suffered by a homeowner, the plaintiff is entitled to collect 94% of the judgment from the municipality.[27]

Legislative Responses: the Ontario Example

In Ontario, the Building Regulatory Reform and Advisory Group (BRRAG) assisted successive Ontario governments who have now proceeded with substantial reform to the *Ontario Building Code Act*.[28] Among other things, the reforms, now mostly enacted as discussed below, are intended to:

- Permit outsourcing of building inspections to qualified registered code agencies, and immunity from suit in such case;
- To enact an ultimate limitation period (done separately under the *Limitations Act, 2002*, and it is now 15 years);
- To require provincially wide mandated building permit forms to ensure consistency;
- To list "applicable law" (as a chief building official *must* issue a construction permit if it complies with the Code and applicable law);
- Enact a code of conduct for chief building officials and to ensure they and code agents are properly qualified and experienced, in recognition of their important public safety role in the built environment;
- To move the building code into a more object based code with performance equivalents, rather than dictating construction processes to take advantage of innovation and improving standards;
- To speed up the building permit review process, mandating a decision within a range from 10 days for houses to 30 days for complex buildings

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[27] *Ingles*, supra.

[28] This reform is not entirely to BRRAG's satisfaction, nor without some controversy.

Some recent case law in Ontario has held that a 15 year ultimate limitation period means just that - "no if ands, or buts". Thus, where the alleged negligent inspection at issue occurred 15 years before the action was commenced, the transition provision of January 1, 2004 was not, in that case, held to apply to extend the ultimate limitation period.[29] However, the move to objective based codes and the existence of a Code of Conduct for chief building officials will only serve to increase the importance of ongoing education about changes and improvements to building processes and materials. Inspectors will be held to a standard expecting them to be reasonably aware of new practices and procedures in the construction industry. For example, a plans examiner who fails to require self closing devices on all interior fire separation floors may be liable particularly where it involves a life safety matter the importance of which is well known in the industry.[30]

SHIFTING EXPOSURE

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

As stated above, bill 124 amends the *Building Code Act*.[31] Most of these amendments came into effect on July 1, 2005. The result was the creation of registered code agencies[32] ("**RCA**"). The role of an RCA is to exercise powers and perform duties in connection with the review of building permit plans and inspections formerly the sole purview of chief building officials and their delegates under the *Building Code Act*.[33] In effect, this allows the privatization of public law duties and the 'contracting out" of building inspections. Some have criticised this as a provincial "attempt to privatize liability". Absent from the legislation is any provision that builders carry insurance, although for market reasons most carry third party liability insurance, and some first party insurance.

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[29] *York Condo 382 v. Jay-M Holdings and City of Toronto* [2006] OJ No.246. Justice Ground dismissed a claim against the municipality as statute barred.

[30] *Bakhtiari v. Axes Investment* [2001] OJ No. 4720 (Superior Court), appeal allowed in part to increase municipal exposure [2004] OJ No. 302 (Court of Appeal)

[31] *Building Code Act, 1992,* S.O. 1992, Chapter 23 ("***Building Code Act***") amended by the *Building Code Statute Law Amendment Act, 2002* ("**Bill 124**").

[32] *Building Code Act, supra,* section 1.1(5).

[33] Most provisions of Bill 124 took effect on July 1, 2005 while some were postponed to come into effect January 1, 2006.

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

Immunity from Acts or Omissions of Registered Code Agents

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

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

1. Review designs and other materials to determine whether the proposed construction of a building complies with the building code.

2. Issue plan review certificates.

3. Issue change certificates.

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

5. Issue final certificates.[34]

The *Building Code Act*[35] provides that a principal authority is not liable for any harm or damage resulting from any act or omission:

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

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[34] *Building Code Act, supra,* section 15.15. The Powers and Duties of Registered Code Agencies are enumerated at sections 15.14 to 15.22.
[35] Sections 31(3) and (4).

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

Before the amendments, the principal authorities were liable for the negligence of their chief building officials and inspectors. These provisions serve to create a shield around the principal authorities protecting them from claims of negligence made against an RCA or by a person authorized by an RCA or a chief building official or inspector who reasonably relied on information from an RCA or by a person authorized by an RCA, provided the RCA continues and has not been .

Limitations to the Immunity

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

An RCA or a person authorized by an RCA is not responsible for the issuance of a permit. This function remains a responsibility of the municipality. In addition, for the first time, the *Building Code Act* requires the chief building official to determine within a specified period whether to issue the permit or to refuse to issue it.[36]

Once appointed, an RCA cannot be terminated except in accordance with the *Building Code Act*. Upon the RCA's termination, the principal authority is responsible for ensuring that the remaining functions of the agency are performed by it or another RCA.[37]

The *Building Code Act* provides that a principal authority shall establish and enforce a code of conduct for the chief building official and inspectors.[38] In keeping with the principles enunciated in *Ingles*, the code of conduct establishes the minimum standard against which the acts or omissions of the chief building official and inspectors will be measured.

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[36] Section 8(2.2).
[37] Section 15.20(3).
[38] Section 7.1(1).

The *Building Code Act* requires that RCAs maintain insurance coverage.[39] 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.[40] Assuming that RCAs do not have assets to cover a claim that exceeds the insurance limits, creative plaintiff's counsel may target principal authorities as a deep pocket from which to cover the excess.

DEFENCES AVAILABLE TO MUNICIPAL INSPECTORS

Long ago, municipalities enjoyed immunity under the common law principles that the "crown can do no wrong." Indeed in Ontario, modern statutes such as the *Crown Liability Act*, and *Proceedings Against the Crown Act* expanded the liability of the provincial Crown in most cases to that of a natural person.[41] This immunity has been diminished over the years by a number of Canadian court decisions and statutes.[42] The following is an overview of defences still available in addition to the immunity provided in the *Building Code Act* from the negligence of a RCA or a person authorized by a RCA.

Limitations Periods

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

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[39] Section 15.13(1).

[40] *Building Code Act*, *supra*, O. Reg. 403/97, section 2.21.2.3.(1)(f)(i)(A). Also, in Ontario the usual minimum insurance cover for architects and engineers is $250,000 who may have had a role in *Building Code Act* review, so a minimum of $1 million is an improvement over the existing coverages that may be triggered from the owner's and municipality's perspective.

[41] Unlike provinces which are constitutionally empowered, municipalities are empowered under various provincial municipal statutes, like the *Municipal Act*. Many municipalities have their own enabling statutes in Ontario, for example the various *City of Toronto* Acts.

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

The New Limitations Act[43], in Ontario, stipulates that for actions based in negligence, the limitation period is two years from the date the cause of action was discovered by the party suffering the loss. This is the applicable limitation period for alleged building inspection negligence, except those more than 15 years ago. The discoverability rule means that a cause of action arises for the purposes of a limitation period when the plaintiff discovers the material facts upon which it is based or when they ought to have been discovered by the plaintiff by exercising reasonable diligence.[44] Persons shall be presumed to have discovered the loss when it actually occurred unless they can prove that they discovered the loss only sometime after its occurrence.[45]

Also the *New Limitations Act* shortens rather than lengthens the time for contribution and indemnity in Ontario. Now there is two years from the time of notice of claim, and the section of the *Negligence Act* which permitted a contribution claim for one year from the date of judgment or settlement is repealed.

In *Kamloops*, the Supreme Court of Canada held that the discoverability rule applies to building inspection negligence cases.[46] In Ontario, *The New Limitations Act*, also imposes on would-be plaintiffs an ultimate statutory limitation period of fifteen years from the date on which the damage or loss actually occurred.[47] In other words once fifteen years have passed since the date of the actual damage or loss incident, a plaintiff is barred from making a claim regardless of when the loss was discovered.

In the context of municipalities being the targets of defendants such as contractors or third party purchasers, such defendants will have a maximum of two years from when they were served with the statement of claim to commence a third party proceeding for contribution and indemnity against

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[43] *Limitations Act*, S.O. 2002, c. 24, Schedule B, section 4, ("***The New Limitations Act***").
[44] *The New Limitations Act, supra*, ss. 5(1).
[45] *The New Limitations Act, supra*, ss. 5(2).
[46] *Kamloops*, supra
[47] *The New Limitations Act, supra*, ss. 15(2).

a municipality.[48] Thus, it is important to investigate and determine whether any other parties or professionals were involved in plans examination, or field review. Typically in Ontario certificates must be filed with the municipality issuing the permit indicating ongoing review by a qualified professional (usually an architect or structural engineer) in projects to which certain portions of the *Building Code Act* apply. In large projects it is the rule rather than the exception that many specialized consultants are retained by the owner or his/ her architect, to address sub-disciplines such as: geotechnical engineering, structural engineering, electrical engineering, HVAC system engineering, fire protection, and so on.

Accordingly, a plaintiff will have two years from the time of discovering that it has a cause of action against a municipality with respect to negligent inspection of construction or negligent approval of building plans to sue the municipality for its losses. Moreover, the plaintiff is barred from claiming against the municipality regardless of the date the plaintiff discovered the damage or loss to their property or person caused by their negligent approval of plans or negligent building inspection, if fifteen years have passed since the date on which the actual loss or damages occurred.

Other Legal Limits on Suing Municipal Inspectors for Negligence

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

Provincial statutes relating to municipalities must be examined in order to determine if or when, and under what circumstances, a municipality might be immune from legal action for negligence. In one case, for instance, a statutory immunity from failing to enforce a by-law was held not to apply to a negligent building inspection as the immunity applied only to failures to enforce a by-law by the institution of civil proceeding or prosecution.[49] In another case, a municipal inspector was found to be immune by statute from liability for failing to monitor a provisional occupancy permit - that was provisional upon the land owner complying with a restrictive covenant not to dump soil and other

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[48] *The New Limitations Act, supra,* ss. 18.

[49] *Wilson v. Robertson* (1991), 43 C.L.R. 117 (BCSC).

material on the land - on the basis that the inspector failed to ensure the covenant was being adhered to by the landowner who had ignored the covenant.[50]

A municipality will not be generally liable for the policy decisions it makes, as policy decisions do not impose on the municipality a duty to the public. However, a municipality will have a duty to the public if it decides to implement its policy, and it will thus be liable where it does so negligently. In other words, if a municipality implements a regime for building inspections as a matter of policy, it has a corresponding duty to the public to follow through and ensure that inspections are done in a manner and to an extent which is consistent with that policy. It remains open to a municipality, in making its discretionary policy choices, however, to decide that it will implement only a limited inspection regime, but only where such a decision is clearly rationally connected to the municipal policy decision. For example, once a municipality has undertaken a limited inspection regime under the Ontario *Building Code Act*, it is not open to selectively enforce other parts or less of the Act.

In some jurisdictions a municipal inspector's duty to inspect may be limited to inspecting plans and not actual structures, to ensure only that plans have been approved by certified engineers or architects. If an inspection regime so limits a municipal inspectors duties, and it is found, after construction has taken place, that the engineer was negligent in drawing or approving the plans, the inspector will not be found negligent as his duty only extended to relying on the expertise of the engineer or architect. In this regard, section 290 of the British Columbia *Local Government Act*[51], for instance, allows municipalities to avoid liability for issuing building permits if the plans were certified by an engineer or architect. Accordingly, this Act effectively limits the duty of the municipal inspector. The municipal inspector will not have a duty, and will thus not be liable because he has no duty, to uncover faulty work that derives from the negligence of an engineer or architect.

Not every loss can be connected to a municipal regulation or inspection regime, and hence in some fact circumstances no duty will arise. For example, regarding flooding caused by landfill placed on its land by a co-defendant as this was a matter not governed by a by-law and no approval from the municipality had been sought or provided;[52] or to refrain from exercising a right, such as resort to

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[50] *Century Holdings Ltd. v. Delta (District)* (1994), 19 M.P.L.R. (2d) 232 at pp. 243-4 (BCCA), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 293.
[51] R.S.B.C. 1996, Chapter 323.
[52] *Wakelin v. Superior Sanitation Services Ltd.* (1993), 17 M.P.L.R. (2d) 34 (P.E.I.S.C.).

legal process, provided it is not done with malice or bad faith so as to constitute an abuse of the right.[53]

The Owner-Builder's Negligence

Construction contrary to the building code would be illegal and courts are reluctant to sanction illegal contracts.[54]

In order for a negligent municipal inspector to be absolved of all liability for losses resulting from faulty construction on the basis that the owner/ builder contributed to their own losses, the municipality must show that the owner-builder knowingly flouted the applicable building regulations or the directives of the building inspector, thereby totally failing to acquit themselves of the responsibilities that rested on them, such that it was not possible for the inspector to take reasonable measures to ensure that the construction was done in accordance with applicable building standards. In short, it must be demonstrated that the owner/ builder was the sole cause of his own loss. The type of behaviour by the owner/ builder that might be considered "flouting" of the building regulations or the directives of the inspector involve situations where it was impossible for the inspector, upon full exercise of his statutory powers, to conduct a reasonable inspection.[55]

It is important to reiterate that where an owner/ builder negligently contributed to their own loss, but it is found that the municipal inspector was also negligent, the negligence of the owner/ builder does not provide the municipality with a defence as to its own negligence, but, rather, will be a matter relevant to the apportionment of liability between the municipality and the negligent owner/ builder. For instance, plaintiffs who built their residence and occupied it in contravention of a statute were held to be disentitled to claim damages sustained to their residence by contaminants in municipal sewage that flowed through a stream that ran onto their property on the basis that the

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

[54] *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd*. 1983 CarswellOnt 732 (OCA). See Note 80 at p. 406; and *Victor Couto 's Bridal Corner Ltd. v. Alliance Trade Centre Inc.* 1998 CarswellOnt 5072 (Ont. Gen. Div.) and see Note 47 at para. 21. Courts seem less reluctant to enforce contracts where no building permit was applied for (*Chris Nash Building Inc. v. Gibson* [2002] O.J. No. 1083 (SCJ)).

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

municipality allowed for construction in violation of the building code, but the municipality was liable for the contamination of the land on which the residence was built.[56]

Fault on the Part of Others (Besides Plaintiff)

Municipal Inspector's Delegation of Duty

A Municipality may be able to delegate its duty of care and thus absolve itself of potential liability where it hires specialized labour to perform work and monitor its own work. There are exceptions to this rule, the major one being that the person employing the independent contractor may not delegate the duty of care when the work to be done is inherently dangerous. In such cases, the municipality has an independent duty to see that the work is performed with reasonable care. Thus, a municipality was held liable for loss or injury arising from the negligence of an independent contractor in the excavation of a trench across a busy intersection,[57] in constructing a sewer which resulted in contamination of a nearby well,[58] and in constructing sewers with the result of destroying lateral support for adjacent buildings.[59] However, a municipality is usually not liable even where negligent where the loss is pure economic loss where no risk of injury to persons or property.[60]

Intervening Acts

If an act by a third party or stranger causes a loss that was not reasonably foreseeable to a building inspector, the inspector will likely not be found to be the cause of the loss and so will avoid liability. Acts found to have not been reasonably foreseeable include theft of or mischief involving heavy construction equipment;[61] the removal by Halloween madcaps of lanterns and planks placed across a trench dug on the side of a street;[62] and the failure by villagers to fasten planks during replacement after having removed them.[63] These obvious types of situation are reflected in the older caselaw.

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[56] *Gambo (Town) v. Dwyer* (1990), 49 M.P.L.R. 257 (Nfld. S.C.).
[57] *Canada (Attorney General) v. Biggar (Town)* (1981), 10 Sask. R. 401 (Dist. Ct.).
[58] *Beaulieu v. Riviere-Verte Village* (1970), 13 D.L.R. (3d) 110 (Q.C.A.).
[59] *Canada Trust Co. v. Strathroy (Town)*, [1956] O.J. No. 200 (C.A.).
[60] *Wirth v. City of Vancouver* [1990] 6 WWR 225 (BCCA)

[61] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality)* (1991), 88 Sask. R. 281 (QB), aff'd 109 Sask. R. 33 (C.A.).; *Wright v. McCrea*, [1965] 1 O.R. 300 (C.A.); *Hewson v. Red Deer (City)* (1977), 146 D.L.R. (3d) 32 (Alta. C.A.).
[62] Matheson v. Patrick Construction Co. (1953), 9 W.W.R. (N.S.) 443 (Sask. Dist. Ct.).
[63] *Danberg v. Village of Canwood*, [1932] 2 W.W.R. 320 (Sask. C.A.).

Acts that were found to have been reasonably foreseeable thus resulting in municipal liability for negligence include damage to the area around a manhole on a busy sidewalk caused by heavy cement trucks driving over the sidewalk when travelling to and from a construction site;[64] the removal of a readily moveable unfastened wooden manhole cover;[65] and the obstruction of a reservoir spillway caused partly by the diversion of an unknown person and partly by children leaving logs and boards in the reservoir.[66] These cases generally involve the failure by the municipality to inspect for, and take measures to prevent, the foreseeable type of hazard from which the loss or injury arose.[67]

The Plaintiff's Duty to Mitigate Damages

A plaintiff that has suffered, and claims damages from a defendant for losses, has a duty to lessen or mitigate the damages suffered, which includes taking steps to prevent further loss. The duty to take reasonable steps to mitigate damages applies equally to claims against municipalities[68].

A plaintiff's failure to mitigate damages could reduce the amount of damages awarded to the plaintiff where the municipality is liable for negligent inspection. Examples are: failing to repair damage to a drain pipe eventually leading to the need to install a new sewer system;[69] failing to take available steps to prevent water escaping from a municipal water-line from entering the plaintiff's basement;[70] failing to minimize water damage to electronic equipment parts following a flood in the basement where they were stored;[71] and failing to seek injunctive[72] or mandatory[73] relief when it would have been reasonable to do so for the purpose of mitigating damages. Doing "absolutely nothing" in the face of mounting losses"[74] and deliberately avoiding taking steps to mitigate the loss.[75] A failure to

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[64] *Jones vs. Vancouver (City)*, [1979] 2 W.W.R. 138 (B.C.S.C.).
[65] *Franchetto v. C.P.R.* (1961), 31 D.L.R. (2d) 449 (Alta. C.A.).
[66] *Lewis v. North Vancouver (District)* (1963), 40 D.L.R. (2d) 182 (B.C.S.C.).
[67] David Hillel *et al*, eds., *Thompson Rogers on Municipal Liability*, (Aurora, Ontario: Canada Law Book, 1996).
[68] *Bell v. Sarnia (City)* (1987), 37 D.L.R. (4th) 438 (OHCJ).
[69] *Clarke v. Torbay (Town)* (1978), 22 Nfld. & P.E.I.R. 527 (Nfld. S.C.).
[70] *Tower Estates Ltd. v. Winnipeg (City)* (1993), 86 Man. R. (2d) 163 (Q.B.).
[71] *Industrial Teletype Electronics Corp. v. Montreal (City)*, [1977] 1 S.C.R. 629.
[72] *Timberline Haulers Ltd. v. Grande Prairie (City)* (1988), 59 Alta. L.R. (2d) 43 (QB), aff'd [1990] A.J. No. 845.
[73] *Marlay Construction Ltd. v. Mount Pearl (Town)* (1989), 47 M.P.L.R. 80 (Nfld. S.C.), rev'd on other grounds [1996] N.J. No. 256.
[74] *Priestly-Wright v. Alberta* (1986), 48 Alta. L.R. (2d) 339 (C.A.).
[75] *Crestpark Realty Ltd. v. Riggins* (1975), 21 N.S.R. (2d) 298 (S.C.).

mitigate may also occur when the plaintiff unreasonably incurred expenses which added to the claim, such as engaging in hopeless litigation.[76]

Inspectors' Reasonable Procedures and Steps

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

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

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

Indicators of Exposure

Each case turns, in some measure, on its facts. Or else we could do as was said in *Shakespeare's Henry VI, Part II* and "get rid of all of the lawyers".[77] However, we offer below some indicators that a building permit application or inspection file may become problematic, or indicate some exposure when adjusting or otherwise considering a claim.

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[76] *MacInnes v. Inverness (County)* (1995), 29 M.P.L.R. (2d) 69 (N.S.C.A.).

[77] "DICK: The first thing we do, let's kill all the lawyers." *2 Henry VI*, IV, ii. Arguments would still exist however about a given set of circumstances; and thankfully despite Dick's advice, now half a millennium ago, *good* lawyers continue to be important and necessary.

- The contractor has gone out of business.
- The initial building permit application was incomplete.
- You are dealing with the key areas of inspection: foundation, plumbing, HVAC, etc.
- Work was covered over before inspection could take place.
- There were long construction delays in completion of the work.
- The builder constructed outside of its usual areas of expertise.
- An inspection was not capable of being carried out.
    - What would an ordinary, reasonable and prudent inspector in the same circumstances have done?
        - Was this done?
        - Could the inspector reasonably be expected to have detected the defect?
        - Did the inspector have the power to have the defect remedied?

CONCLUSION

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

A local municipality is usually responsible for ensuring the legal and safe construction of buildings. Even in the best of circumstances, a municipality may find itself defending a lawsuit based on an act or omission of its chief building official or one of his/ her delegates. However, as long as the plans examiner or inspector exercised the standard of care that would be expected of an ordinary, reasonable, and prudent inspector in the circumstances, a municipality (and its insurer), ought to be able to avoid liability.

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

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