IN THE MATTER OF the *Public Inquiries Act, 2009,* S.O. 2009, c. 33, Sched. 6

AND IN THE MATTER OF The Elliot Lake Commission of Inquiry, established by Order in Council 1097/2012 dated July 19, 2012

AND IN THE MATTER OF The Corporation of the City of Elliot Lake

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PHASE I BOOK OF AUTHORITIES OF THE CORPORATION OF THE CITY OF ELLIOT LAKE

Dated: August 8, 2013

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Court of Appeal

Schroeder, Jessup and Brooke, JJ.A.

November 7, 1969.

D.C. Lyons, for plaintiff, appellant.

Ian G. Scott, for defendant, respondent.

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1 **Schroeder, J.A.**:-- The plaintiff municipality appeals from the judgment of Haines, J., pronounced on December 6, 1968, whereby he dismissed the action for an injunction brought pursuant to s. 486 of the Municipal Act, R.S.O. 1960, c. 249, restraining the defendant, her servants, agents, successors and assigns from using the building known municipally as 169 Warren Rd. in the City of Toronto for the purpose of a multiple family dwelling-house or for the purpose of renting living accommodation therein to more than two persons or otherwise in contravention of By-law 20623, as amended, of the Corporation of the City of Toronto.

2 The defendant, a married woman, is the owner of a residential property known for municipal purposes as 169 Warren Rd. in the City of Toronto which she acquired by purchase in November, 1963. Prior to that date the property had always been used as "a private detached dwelling house" as that term is defined in s. 2(46) (b) of the plaintiff,s By-law 20623, which is the "zoning by-law" for

the City of Toronto, enacted by the Municipal Council on April 13, 1959, and approved by the Ontario Municipal Board on June 29, 1959. When the defendant entered into possession of the premises she had extensive structural alterations made therein with a view to using it as a multiple family dwelling-house. She expended approximately $20,000 in effecting these changes. Kitchens were installed on the second and third floors and extensive additions were made to the plumbing system. In the result she had constructed four rentable self-contained dwelling units with private sanitary, cooking and freezing facilities and all this work was carried out without a permit from the city as required by the building by-laws. Since that date she has occupied the ground floor as a residence for herself and her daughter and has rented the apartments on the second and third floors to tenants who are unrelated to her.

3 Section 3(1) of By-law 20623 as amended establishes "use districts" within the City of Toronto for the restrictive purposes of the ordinance and the property in question was at all relevant times within an area shown on the "district map", which is an appendix to the by-law, as an "R1" use district.

4 Section 4(1) of the by-law provides that no person shall within any district or area of the City of Toronto delineated on any district map, use any land or erect or use any building or structure except in conformity with the provisions of the by-law respecting the district or area in which such land, building or structure is located or respecting the district or area in which it is proposed to erect the same.

5 Section 6 of By-law 20623 sets out the purposes for which buildings in R1 districts may be used. Under its provisions the defendant's property, 169 Warren Rd., may be used for the purpose of a "private detached dwelling house", including the keeping therein of not more than two roomers or boarders, but it may not be used for the purpose of a multiple family dwelling-house, nor for the purpose of renting living accommodation to more than two persons. At the trial, and on this appeal, the defendant advanced four defences to the plaintiff's claim:

> (1). That the premises became a "converted dwelling house" by the introduction of kitchen facilities on the third floor at a time when that use was a permitted one in R1 districts;
>
> that the premises had continued to be used for the purpose of a "converted dwelling house" since that time and that the defendant was consequently protected by the provisions fo section 30(7)(a) of The Planning Act. R.S.O. (1960) Ch. 296;
>
> (2) that, alternatively, the premises were used for the purpose of a "private detached dwelling house @, a permitted use in R1 districts'

(3) that the definition of "private detached swelling house" in the Zoning By-law was ultra vires the plaintiff or that the plaintiff has disentitled itself to the relief it claimed because of the "deferred list" practice;
(4) that the plaintiff had disentitled itself to the relief claimed because of the "deferred list" practice hereinafter described.

6 The learned Judge rejected the first three grounds of defence enumerated above. He found as a fact that the premises had not, in the circumstances disclosed in evidence, become a "converted dwelling house" and the evidence amply supports that finding. As the premises were being occupied not only by the defendant and her daughter but by four other tenants occupying self-contained suites constructed by the defendant without a permit, the learned Judge had no hesitation in concluding that the defendant was not using the premises for the purpose of a "private detached swelling house" as that term is defined in the by-law. He further held that the municipality had not exceeded its powers under the Planning Act, R.S.O. 1960, c. 296, s. 30 [and amendments thereto], in formulating the definition of "private detached dwelling house" in By-law 20623. I entirely agree with the learned Judge's disposition of these grounds of defence and I find it unnecessary to embark upon a fresh discussion or elaboration of the points involved.

7 In her statement of defence the defendant pleaded alternatively as follows:

> In the alternative, the Defendant says that the plaintiff has disentitled itself to the extraordinary and discretionary relief sought by its continual practice of maintaining a "deferred list" of persons using premises within the Municipality in breach of the Zoning By-law against whom no action will be taken and no remedy whatever will be sought.

8 It is to this plea that the learned Judge gave effect in dismissing the action. He declined to grant the injunctive relief sought by the plaintiff on the ground that when a plaintiff seeks an equitable remedy his claim is subject to any matters of equity that can be raised by way of defence. While recognizing that the by-law was valid on its face in that it applied generally to all owners of property in specified areas of the municipality, he held that discrimination occurred in the administration of the by-law by the municipal officials acting under the direction of the Property Committee, a standing committee of the City Council which was concerned with the administration of the impugned by-law and by-laws dealing with cognate matters. He held that in placing certain violators on a "deferred list" of known offenders against whom no prosecution should be brought or continued during the current year, subject to an annual review of such cases, the City had acted inequitably and had disentitled itself to equitable relief. The ratio decidendi of his judgment appears in the following extract from the learned Judges reasons, [1968] O.J. No. 1343, [1969] 1 O.R. 655 at p. 660, 3 D.L.R. (3d) 498 at p. 503:

> An injunction is an extraordinary and discretionary remedy. To obtain an injunction a plaintiff must come to Court with clean hands. He who seeks equity

> must do equity. In my opinion, the plaintiff municipality has acted inequitably by maintaining the "deferred list". The practice is secretive, it is not made known to all who might wish to avail themselves of it, by the plaintiff. It is open to political abuse and law enforcement is thereby tainted with potential political favouritism. It permits the continuance of a prohibited use of one premises while prohibiting it in the neighbourhood. As I said previously, the practice constitutes de facto licensing and amendment by the Committee of the zoning by-law in individual cases. To grant the city an injunction in this case would be to sanction that practive, and in the exercise of my discretion, I refuse to do it.
>
> This does not mean that I am in any way declaring the by-law invalid. All I am saying is that having failed to act equitably, the city has precluded itself from invoking the equitable jurisdiction of this Court to restrain the breach of the by-law by the defendant. It can still prosecute for breach of the by-law in the criminal Courts where the existence of the practice of the "deferred list" is no defence. Section 486 of the Municipal Act is still available to a ratepayer to take action. And finally, it is always open to the plaintiff to discontinue the practice of the "deferred list", thereby removing the inequty.

9 The learned Judge proceeded to say that had he granted the injunction sought herein he would have done so conditionally upon the practice of maintaining the "deferred list" being discontinued and on "the zoning by-law being enforced equally against all citizens in breach thereof". Having regard to the ground upon which the judgment in appeal is founded it is desirable that I should outline the manner in which the "deferred list" came into being and was maintained. The Committee on Buildings and Development, comprised of nine aldermen, one controller, and the Mayor (officio) heard applications brought before it from time to time by or on behalf of persons who were offending against the zoning ordinance and desired relief from its provisions, either before a prosecution was commenced or while one was pending. The practice had been in existence since 1949, if not earlier, and related only to the zoning by-law. Applications for the purpose stated were brought forward in most cases by an alderman representing the ward in which the particular property was located, and in other cases by persons directly concerned or by a solicitor acting on their behalf. It would appear from the minutes of the Committee, dated February 11, 1949, that certain criteria were laid down to regulate or govern the practice. I quote from those minutes as follows:

> In the matter of applications for use of land or buildings on a temorary basis in areas covered by Residential By-laws, or where action is deferred for a limited time, it is suggested that the following conditions apply, along with the date-limitation in any of such cases: (1) no change of occupant. (2) no sub-letting of space or assigning the use (3) no change in the class of work in respect of which action has been deferred (4) no enlargement of the operation or premises

covered in such deferredd action.

10 In reaching its determination in cases dealt with by it the Committee considered whether non-enforcement of the by-law in certain instances would be injurious to the area in question. It should be observed that its meetings were open to the public and, in fact, notices were sent to ratepayers' associations which might be interested, accompanied by an agenda relative to the meeting of which notice was given. Such notices made no that some relief from the provisions of the zoning by-law was being sought by a certain applicant or applicants. It is true that the existence of the list was not publicized since it was doubtless considered that widespread publication of the practive might result in a flood of applications however unmeritorious.

11 It is of prime importance that the Committee did not inaugurate a policy of granting perpetual immunity to violators of the by-law but merely deferred action in cases which on due consideration they approved, since the responsible officials were required to inspect all listed properties annually and make annual reports to the Committee which reviewed the list from year to year in the light of reports submitted by the investigators. I pause to state that some cases were brought to light in which the properties had been on the deferred list for many years. In the case of one Mrs. Shaw, who owned 324 Russell Hill Rd., prosecution had been instituted in 1962. She appealed to her ward alderman who brought the case before the Committee which, upon consideration, directed that the property be placed on the deferred list, with the result that the prosecution was discontinued. It was still on the list notwithstanding the fact that Mrs. Shaw had sold the property in 1966 to a purchaser who was still using it contrary to the provisions of the by-law. At the end of 1967 there were 80 properties on the "deferred list", 20 of which were within a radius of one and one-half miles of the defendant's premises.

12 Whatever may be said as to the propriety or impropriety of the practice followed by the Committee in establishing and maintaining the "deferred list", which the learned trial Judge so sharply criticized, certain findings made by him are not supported by the evidence. He stated that the "deferred list" comprised the names of persons using premises in breach of the zoning by-law against whom no legal action of any kind would be taken or continued. The evidence established that there was a regular review of the list and it can fairly be inferred that the named persons on the list might be removed therefrom and those persons prosecuted or sued if, in the opinion of the Committee, the circumstances warranted such action. There was no justification for finding that the list was "secret", with all the sinister implications to which that suggestion gives rise. While admittedly the practice was not publicized, and perhaps for good reasons, applications for relief were heard at public meetings of the Committee, notices of which were sent to interested ratepayers' associations. The evidence does not support the inference that the "deferred evidence does not support the inference that "deferred list" was reviewed by the Committee pro forma as stated by the learned Judge, nor that there were "no express or logical criteria for initial admission to the list". In 1949, as already stated, guidelines were laid down as set out in the minutes of the Committee, and there is nothing in the evidence to suggest that the members of the Committee did not consider each case on its merits, or that in reaching their conclusions they were improperly motivated. It may well

be that others sitting in their place might have taken a different view of some of the matters brought before them and might have exercised their discretion in a different manner, but that is not a final test, and certainly it affords no ground for the suggestion that the Committee's actions or any of them were tainted with mala fides or fairly attracted the severe general condemnation of the Committee's conduct pronounced upon it by the learned Judge. A careful perusal of the evidence does not lead reasonably or fairly to any such conclusion, much less does the evidence disclose arbitrariness or lack of good faith on the part of the Committee in the discharge of its duties which would justify the invocation against their action of the unclean hands doctrine, even if the maxim upon which that doctrine is based were applicable here.

13 The action is brought pursuant to s. 486 of the Municipal Act which reads:

> 486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

14 In One Chestnut Park Road Ltd. et al. v. City of Toronto, [1964] S.C.R. 287 at pp. 290-1, 43 D.L.R. (2d) 390 at p. 393, Judson, J., stated:

> Municipal by-laws usually provide for a penalty for non-observance but the legislature has recognized that unless there is a stronger remedy, a penalty may become a mere licence fee. Something equivalent to s. 497 [now 486] may be traced back in the legislation to 4 Edw. VII (1904), c. 22, s. 19.
>
> .....
>
> There is every reason why the section should be so construed according to its plain terms as to give the municipality a right of action. The municipality, acting within the limites of its legislative power, has an interest in the specific perfomrance of its by-laws and in the logical plaintiff to enforce them.

It is provided by s. 7 of the Municipal Act:

> 7. The inhabitants of every county, city, town, village and township are a body coporate for the purposes of this Act.

As members of the city corportation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a

prosecution or in a suit for inunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as parens partriae charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorny-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.

15 The Attorney-General is in a different position from the ordingary litigant, for he represents the public interest in the community at large; when he intervenes to ask for relief the Courts should pay great heed to his intervention and only refuse relief in the most exceptional circumstances: Atty-Gen'l v. Harris, [1961] 1 Q.B. 75.

16 In my opinion the city, acting in a more restricted sphere in the enforcement of its own by-laws, is likewise in a different position from the ordinary litigant. The inhabitants of the municipality are sufficiently interested in the dispute to warrant intervention by the corporation for the purpose of asserting public rights, and the dispute is not one between individuals. Rather it is one between the public and a small section of the public refusing to comply with the by-law. In suits in which the Court's equitable jurisdiction is invoked and the clean hands doctrine is pleaded regard must be had to the nature of the relief sought and the character in which the plaintiff is suing. It would be a most extraordinary result if in a suit brought by an individual taxpayer, a course sanctioned by s. 486 of the Municipal Act, the relief were to be granted, but in a suit brought by the city, representing the general body of ratepayers, the suit should fail. The result appears even more incongruous when it is considered that the mere passing of a by-law by a municipal corporation does not cast any legal duty on the municipality to see to its enforcement: Brown v. City of Hamilton (1902), 4 O.L.R. 249 (per Chancellor Boyd).

17 Counsel for the respondent relied upon a judgment of the Supreme Court of Louisiana in support of his proprosition:

> City of New Orleans v. Levy (1957), 98 So. 2d 210. In two other American decisions cited by appellant's counsel the Courts declined to give effect to an equitable defence based on the fact that other citizens were suffered to violate the municipal ordinance restricting the use of property: City of St. Louis v. Friedman (1949), 216 S.W. 2d 475, and Kovach v. Maddux (1965), 238 F. Supp. 835, where it was held that the doctrine of unclean hands should not be applied where the result would be refusal to enforce a claim in which the public had a direct and substantial interest. The latter two authorities are in harmony with the trend of authority in this Province: Re Cosentino and City of Toronto, [1934] O.W.N. 343; Re Rex v. Roulet, [1937] O.R. 912, [1937] 4 D.L.R. 459; Re Joy Oil Co. Ltd. and City of Toronto, [1934] O.R. 243, [1937] 1 D.L.R. 541, 67 C.C.C. 325. It was made plain in the cases lastly cited that the Court had no right to interfere

> with the discretion of the City Council in the carrying out of the by- law and that unless the by-law was invalid on its face by reason of discrimination the Court should not intervene. The by-laws under consideration were valid and the discrimination occurred only in their administration by the city authorities, a matter which was held not to constitute a ground for interference by the Court. The correctness of those decisions has never been challenged in our Courts and in the light of the principle which they lay down, interference by the Court with the exercise of discretion on the part of the members of the Committee would be wholly unwarranted.

18 If, then, the Court has no power to control directly the exercise of Council's discretion in the manner of administration of the by-law under review, can it do so indirectly by refusing to grant injunctive relief to the city except upon the condition that it exercise its powers in an manner agreeable to the Court's view? To ask this question is to answer it. There can be little doubt that this was in the mind of the learned Judge when one reads in his reasons that had he granted the injunction sought he would have done so on condition that that "deferred list" practice should be discontinued. Whether the method pursued by the city was to place names on a deferred list or to put files pertaining to the properties in question in a drawer of a filing cabinet marked "inactive" or "deferred", or whether it adopted some other method of segregation can make little difference. The placing of names on the "deferred list" was the system which the Committee chose to follow in recording its decision in cases in which, in its judgment, enforrcement of the by-law should be postponed.

19 No doubt, to persons who are obliged to comply with the by-law this practice may present the appearance of political favouritism or it may smack of discrimination. It is one of the difficult problems of administration to decide what acts are harmless in themselves in particular circumstances or, in isolated instances, must be forbidden in the public interest, or what acts may be tolerated without doing injury to the public interest. Without embarking on a wide-ranging inquiry into all these other cases which are, in reality, res inter alios acta, the Court cannot determine whether the decision of the Committee was right or wrong, fair or unfair, in the particular circumstances. Be that as it may, that course is not open to us in these proceedings and the Court has neither the right nor the power to control the exercise of Council's discretion by either direct or indirect means, except, possibly, in a case where Council lays down a general policy not to enforce its restrictive zoning by-laws: Vide R. v. Commissioner of Police, Ex. p. Blackburn, [1968] 2 W.L.R. 893.

20 In my view the equitable principle on the basis of which the learned trial Judge purported to exercise his discretion herein was not applicable for the reasons already stated. It could have no application for still another reason. The maxim "he who comes into equity must come with clean hands" which has been involked mostly in cases between private litigants, requires a plaintiff seeking equitable relief to show that his past record in the transaction is clean: Overton v. Banister, (1844), 3 Hare 503, 67 E.R. 479; Nail v. Punter (1832), 5 Sim. 555, 58 E.R. 447; Re Lush's Trust

(1869), L.R. 4 Ch. App. 591. These cases present instances of the Court's refusal to grant relief to the plaintiff because of his wrongful conduct in the very matter which was the subject of the suit in equity. The maxim must not be interpreted and applied too broadly as, e.g., against a plaintiff who had not led a blameless life. In Dering v. Earl of Winchelsea (1787), 1 Cox 318, 29 E.R. 1184, Lord Chief Baron Eyre stated at pp. 319-20:

> It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in thos Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of.

The misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the compaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of Jones v. Lenthal (1669) 1 Chan. Cas. 154, 22 E.R. 739:

> "... that the iniquity [sic] must be done to the defendant himself."

This limitation was overlooked in the American authority cited by respondent's counsel (supra). Thus if it were established that the Committee of Council acted arbitrarily, wrongly and unfairly in postponing action against those persons whose names were placed on the "deferred list" thereby, in effect, granting them temporary exemption from the restrictions of the by-law, there would not be that immediate and necessary relationship between their conduct in those other cases and the case at hand which would provide an apprpriate foundation for the application of the maxim.

21 Finally, there has been on the part of the defendant a persistent and deliberate flouting of the law which in itself is injurious to the public interest, and the fine leviable under the by-law enacted under statutory sanction has proven ineffective to secure her compliance with the law. She was prosecuted, convicted, and her conviction was sustained on appeal. Moreover, she has declared her intention to continue to disobey the restrictions of the by-law until she is compelled to comply with them.

22 Counsel for the appellant advanced a technical argument based on s. 9 of the Municipal Act which provides that the powers of a municipal corporation shall be exercised by its council; that the acts of the Committee cannot bind the Council unless they are authorized in advance or subsequently ratified and that there was no evidence of either authorization or ratification. Having

regard to my conclusion on the other branch of the case I do not find it necessary to express an opinion upon this submission.

23 With deference to the judgment of the learned trial Judge I am firmly of the opinion that his descretion in refusing to grant an injunction as asked was exercised upon an erroneous principle. I would allow the appeal with costs, set aside the judgment in appeal, and direct that judgment issue granting relief in the terms sought by the appellant together with the costs of the action. In view of the extensive alterantions made by the plaintiff to her premises, and as she may find it necessary to dispose of them and acquire a substitute property where she may lawfully engage in her present means of livelihood, the judgment should provide for a suspension of the operation of the injunction for a period of 12 months, reserving leave to either party to apply before the expiration of that period for a variation of the terms of the stay so granted in the light of a possible change in circumstances.

24 Jessup, J.A.:-- The circumstances and issues in this appeal are fully set forth in the judgment of my learned brother Schroeder, J.A., which I have been privileged to read. I concur in his disposition of the case, including the suspension of the operation of the injunction sought, but I do so for different reasons.

25 I also agree there is no merit in the first three grounds of defence pleaded by the respondent.

26 With respect to the facts bearing on the fourth ground of defence, I agree with the conclusions of the learned trial Judge [1968] O.J. No. 1343 at (para9), that;

> ... They give rise to the inference that the Committee on Building and Development is engaged in doing indirectly the very thing which, if inserted in the by-law, would make it invalid, namely, discrimination amongst property holders. In substance, the Committee is operating a licensing system under which certain citizens who manage to get on the Committee's "deferred list" are permitted to continue a breach of the zoning by-law.

27 The learned trial Judge went on to say:

> The "deferred list" comprises names of persons using premises in breach of the zoning by-law against whom no legal action of any kind will be taken or continued.

While the "deferred list" is considered annually by the Committee on Buildings and Development, many properties have been on it for 10 to 15 years or more, and there is evidence of very few instances of properties being removed from the list and made subject to action even though, as in the case of the neighbouring property 324 Russell Hill Rd., there were changes in occupancy in contravention of the conditions lad down by the Committee in 1949 for continued position on the list of "temporary" deferments from prohibitory action. Nevertheless, deferment from prosecution

or action was on a year to year basis so that it would be more accurate to say that inclusion in the "deferred list" amounts, only as a practical matter, to a grant of immunity from future legal action.

28 In my view the following findings of fact and inferences of the learned trial Judge are amply supported by the evidence [at pp. 658-60 O.R., pp. 501-3 DL.R.]:

> The list is created and maintained by the plaintiff's Committee on Building and Development, a standing Committee of the Council, which reports to the Council and is concerned largely with zoning and building by-law matters.
>
> The practice of the Commitee through the "deferred list" enables it not only to prevent the commencement of criminal or civil prosecutions but to halt proceedings already under way.
>
> The "deferred list" is created in circumstances which warrant the conclusion that it is secret. Reference to it in terms does not appear on the Committee's agenda and its existence is not pulicized and is unknown to persons otherwise familiar with the municipal law field such as ratepayers' organizations and solicitors. No notices of application to be on the list are sent to neighbour or ratepayer groups. Mr. Courneyea, the Chief Zoning Inspector, has been instructed by the Commissioner to make no reference to the list to citizens he visits in the course of his inspections.
>
> The files of the Committee, including the "deferred list" file are maintained by the City Cleark. They are apparently not available generally to the public and were made available to counsel for the defendant in this case only after an order of the Court had been made.
>
> Application for inclusion on the list is frequently made at the instance of the alderman for the ward in which the property is situate. The evidence of Mr. Wellwood, the Commissioner, is that invariably a successful motion to include a property is moved that alderman.
>
> There is no express or logicial ciriteria for initial admission to the list. It is apparent that a substantial number of properties have achieved inclusion notwithstanding that proceedings against them were commenced on the basis of compalints.

> The "deferred list" is reviewed by the Committee annually . . . and many properties have maintained their place on the list over many years. The criteria set out for maintenance of the list have not been regularyly or consistently applied.
>
> The "deferred list" provides other advantages to its membership. In cases where a licence is required from the Municipality of Metropolitan Toronto (which has assumed by its statute all licensing powers of the component municipalities) or from departments of the provincial Government as for example in the operation of a nursing home or a nursery school, the Committee requests the licensing authority to grant a licence notwithstanding the ordinarily fatal objection that the house in question violates the zoning by-law.
>
> A number of "deferred list" files, in evidence, reveal the extent and nature of the practice carried on by the plaintiff's Committee. For example, 324 Russell Hill Rd., a substantial residence in the defendant's neighbourhood, was iriginally owned by a Mrs. Mablel Shaw who gave evidence. She commenced to use her premises as a multiple dwelling. After complaints had been made to the municipal authorities she received a notice to terminate her use of the property under the provisions of the zoning by-law. She did not terminate the use and she consequently received another letter from the Commissioner indicating that proceedings would be taken. On receipt of that letter she telephoned her alderman and referred the matter and the letter to him. She heard nothing further except that the matter had been looked after. The file reveals that her premises were placed on the "deferred action list". Criminal proceedings which had been commenced and adjourned were withdrawn. No injunction proceedings were begun. Without further ado, her premises remained on the list notwithstanding that they have been sold twice over in recent years.
>
> > ... the practice is secretive, it is not made known to all who might whish to avail themselves of it, by the plaintiff. It is open to political abuse and law enforcement is thereby tainted with potential political favouritism. It permits the continuance of a prohibited use of one premises while prohibiting it in the immediate neighbourhood. As I said previously, the practice constitutes de facto licensing and amendment by the Committee of the zoning by-law in individual cases.

29 In his statement of law and fact, filed, cousel for the appellant concedes, "The 'deferred list' practice is admittedly open to abuse". However, it is to be emphasized that the learned trial Judge

made no finding of corruption in the "deferred list" practice. There was absolutely no evidence of impropriety of that or like nature. In the absence of such evdence it is to be assumed that in placing properties on the "deferred list" the members of the Committee on Buildings and Development exercised bona fides the disscretion they undoubtedly have in the enforcement of the city's zoning enactment: Brown v. City of Hamilton (1902), 4 O.L.R. 249. It would appear the "deferred list" practice had its origin in the immediate post-war years when action was deferred with respect to non-conforming uses which had their inception during the war years under the shelter of the mergency regulations.

30 I have no doubt, however, that the result is discriminatory and therefore inequitable vis-a-vis the respondent and but for one consideration I would deny the appellant the remedy it seeks on the ground that to obtain eqitable relief against the respondent it must have done equity to her. That consideration is that the public has a direct and substantial interest in the enforcement of the by-law and such public interest must prevail over the private interest of an admitted flagrant transgressor. I take that to be the ratio of a United States District Court in Kovach v. Maddux (1965), 238 F. Supp. 835. Circumstances can be conceived, however, where it would be in the public interest to deny equitable relief to a muncicipality in a case of this kind. If, for instance, the adminstration of by-law were tainted with corruption or where it was being enforced against only a discriminated few of those within its purview, it would not be in the public interest to lend judicial contenance to a veritable travesty in the administration of the law. In such a case I would not hesitate to deny the remedies of equity to a municipality even though to do so might be a side wind influence its manner of administering the law. In my opinion the mandamus cases, where the Courts have refused the remedy of mandamus when its grant would have the effect of directing an infraction of the law, are to be distinguished.

31 In the result, as I have said, I would dispose of the appeal as proposed by Schroeder, J.A.

32 Brooke, J.A.:-- I have had the privilege of reading the judgment of my learned brothers and I concur that this appeal must be allowed and that the order sought should go. My reasons for so doing are as follows.

33 This is an appeal from the judgment of Haines, J., pronounced on December 6, 1968, dismissing the action brought by the appellant for an injunction pursuant to s. 486 of the Municipal Act, R.S.O. 1960, c. 249. The order sought in that action was an order restraining the respondent from using the house at 169 Warren Rd., in the City of Toronto for the purpose of a multiple family dwelling-house or otherwise in contravention of By-law 20623 of the Corporation of the City of Toronto.

34 The house in question was used as private resident until 1963 when it was purchased by the respondent and then converted into a multiple family dwelling place with six suites. At all material times, five of these suites have been occupied by tenants and the sixth by the respondent and her family.

35 I think it is clear that while the respondent bought this property believing that she might use it as an income prperty, she knew that this use was contrary to the zoning by-law. The respondent was prosecuted, convicted and fined for her breach of the by-law and her appeal from that conviction failed. Since that date she has, nevertheless, continued to use the premises in breach of the by-law and her evidence given at the trial was that she proposed to continue to do so if this was at all possible.

36 It is not, I think, without significance that prior to purchasing the house at 169 Warren Rd., the respondent had owned premises not too distant from there which she had operated on the same basis.

37 The defence advance by the respondent at the trial was that the appellant disentitled itself to the equitable relief by way of injunction as it had practised discrimination against her by enforcing the by-law against her and not against others whom it protected from prosecution. The evidence led in support of this defence was that there were in the immediate area some fifteen other houses all of which operated in contravention of the by-law and all of which were, along with many others, named on "the deferred list" kept by the City of Toronto which protected them from prosecution.

> Respondent pleads this defence as follows"
>
> In the alternative, the defendant says that the plaintiff has disentitled itself to the extraordinary and discretionary relief sought by its continual practice of maintaining a "deferred" list of persons using premises within the Municipality in breach of the zoning by-law against whom no action will be taken and no remedy whatever will be sought.

38 Of the facts as he found them, the learned trial Judge said [[1969] 1 O.R. 655 at p. 658, 3 D.L.R. (3d) 498 at p. 501]:

> The facts supporting this defence are worthy of special consideration because, in my opinion, they form the basis on which the Court should exercise its discretion. They give rise to the inference that the Committee on Building and Development is engaged in doing indirectly the very thing which, if inserted in the by-law, would make it invalid, namely, discrimination amongst property holders. In substance, the Committee is operating a licensing system under which certain citizens who manage to get on the Committee,s "deferred lists" are permitted to continue a breach of the zoning by-law.

The facts as the learned trial Judge found them are quoted in the reasons for judgment of my brother Jessup.

39 During the war years, certain of the prohibiting provisions respecting the use of land in zoning

by-laws were suspended by orders made pursuant to special legislation. In 1949 this legislation was still in force although it was expected that it would soon be repealed and it was in this climate that the Property Committee of the appellant presumably in the hope of achieving uniformity in dealing with applications respecting the temporary use of property, passed the following resolution which is recorded in minutes of its meeting of February 11, 1949. The resolution contains conditions to be applied to all such cases upon a decision being made that a forbidden use might continue on a temporary basis or deferring prosecution for that purpose. That resolution provided:

> In the matter of applications for use of land or buildings on a temporary basis in areas covered by residential by-laws, or where action is deferred for a limited time, it is suggested that the following conditions apply, along with the date limitation in any such cases --
>
> "1. No change of occupant.
>
> 2. No subletting of space or assinging the use.
> 3. No change in the class of work in respect of which action has been deferred.
> 4. No enlargement of the operation or premises covered in such deferred action."
>
> Moved by Alderman Sims that the foregoing recommendations of the Commissioner of Property be approved, such conditions to apply to all such future applications of a similar nature, and to include such applications dealt with at today's meeting, which was carried.

40 There was very little evidence as to the conditions which prevailed at the time of the passing of this resolution. The probability is that there were a considerable number of premises being used in violation of the suspended prohibitory provisions of the by-laws. I think it is probable that what was sought by the resolution was an orderly termination of these uses. The deferred list, then, if this was its origin, and I believe it was, was born of necessity and not for the purpose of some motive which might be criticized.

41 In the years following the repeal of the legislation, to which I have referred, a number of premises have been added to the deferred list and, indeed, many of the premises on that list have been there for some 10 to 15 years. There is, however, really very little evidence as to the bases upon which any of these premises were admitted to the deferred list other than the evidence of the Commissioner of Property that the Committee composed of nine aldermen and a comptroller and to which the mayor of the corporation is a member of ex officio, consider amongst other things whether or not harm would be done to the area by deferring action against the owner of the premises which they suspect is in violation of the by-law.

42 The resolution quoted makes reference to a date limitation in any such case and the committee then decided that such deferment should be reviewed annually and that annual inspections of each

premises be carried out by the appellant,s employees, having regard to the conditions laid down in that resolution. Such annual inspections have been carried out. I do not agree with the findings of the learned trial Judge that such inspections were "done on a pro forma basis", rather I think that they were done properly and efficiently. However, it seems that in some instances little, if anything, was done by the Committee as a result of the facts which were revealed by the findings on the inspection. The evidence with respect to the use of 324 Russell Hill Rd. can lead only to the conclusion that either the policy of 1949 was ignored or some other new criteria had been adopted which is not revealed. In that case, the premises had been sold twice after a deferment had been granted to one Mrs. Shaw when she was then the owner. Notwithstanding the change of occupant on the two occasions, no prosecution or action was taken. It is true that there is a suggestion of a legal non-conforming use of the premises, but the advice of the City Solicitor was that they should prosecute and, notwithstanding this and the change in circumstances, nothing appears to have been done and the property continues to be operated as a multiple family swelling-house in violation of the by-law, so far as this record is concerned. The deferment in this case was granted to Mrs. Shaw in 1962. It was granted to her when she appealed to the alderman who represented the ward in which it was situate who apparently made representations to the Property Committee and, accordingly, Mrs. Shaw and her premises were placed on the deferred list and the prosecution pending against her was discontinued.

43 Counsel for the appellant, with great candour, has stated in his memorandum of fact and law that the deferred list practice is "admittedly open to abuse". He is no doubt referring to the fact that elected representatives as members of the Property Committee were called upon to judge an application by one of their colleagues on behalf of a constituent for relief from prosectuin or from the provisions of the zoning by-law. The learned trial Jude said of the practice [at p. 660 O.R., p. 503 D.L.R.]: "It is open to political abuse and law enforcement is thereby tainted with potential political favouritism." His words reflect a concern which may be similar to that reflected in the statement made by counsel. However, I hasten to point out that the judgment in appeal contains no finding of corruption in the practice under consideration nor do I think it is fair to leave the suggestion that there was anything sinsiter about the manner in which the Committee proceeded in arriving at its decisions in realtion to the practice.

44 Municipal council has a discretion as to when it will prosecute for a breach of or sue to enforce the provisions of the zoning by-law. To deny the discretion in municipal council would be to place the most technical breach of the by-law beside the most blatant and to remove from consideration the harm done to the offender and the value to the community of the proposed proceedings when considering when they ought to be taken. The discretion when to prosecute or when to sue which rests with the municipal corporation or the comparable discretion which rests with public authorities charged with the responsibility of enforcing the rights of the public when they are violated, is one of the great strengths of our system of justice. It is true that the Court cannot interfere with that discretion and the remedy by way of injunction provided by s. 486 of the Municipal Act should not be used for this purpose. On the other hand, and equally important, the Court must see to it that its processes are never used to accomplish a wrong against any person and,

of course, this is so irrespective of who applies for the remedy. There may well be circumstances where it would be in the public interest to refuse relief by way of injunction to a plaintiff wether a municipal corporation or otherwise in this type of action and some actions where wrongful discrimination could be shown would fall within the class of cases to which I refer.

45 I conclude that the conditions laid down in the 1949 resolution are no longer enforced or they are no longer regularly enforced. Indeed, on the evidence, once admitted to the deferred list comparative immunity exists. I therefore agree with the learned trial Judge that the practice, as it is carried out today, is discriminatory as against the respondent. However, in my view, that is not sufficient grounds in this case to deny the relief sought by the appellant. The public has a direct and a substantial interest in the enforcement of this by-law and in the circumstances here public interest must prevail over the private interest of one wh has admittedly flouted this law for so long. It is in this respect that I hold that the learned trial Judge erred in denying the appellant the order which it sought.

46 I would, therefore, allow the appeal as proposed by my brother Schroeder.

Appeal allowed.

Indexed as:

R. v. Sault Ste. Marie (City)

Her Majesty The Queen on the information of Mark Caswell, appellant;
and
The Corporation of The City of Sault Ste. Marie, respondent.

[1978] 2 S.C.R. 1299

1978 CanLII 11

Supreme Court of Canada

1977: October 13, 14 / 1978: May 1.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- Public welfare offences -- Mens rea -- Reasonable mistake as a defence -- Scope of defence of due diligence -- Offences not requiring proof of mens rea but not strict liability offences.

Criminal law -- Duplicity -- Water pollution -- Provision prohibiting discharging or depositing or causing or permitting discharge that may impair water quality -- Test for duplicity -- The Ontario Water Resources Commission Act, R.S.O. 1970, c. 332, s. 32(1) -- Criminal Code, ss. 724, 731.

The respondent City entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which runs into Root River. The method of disposal adopted was the "area" or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel. The side had previously been covered with a number of fresh water springs that flowed into the creek. Material was dumped to submerge these springs and the garbage and wastes dumped over this material, ultimately to within twenty feet of the creek. Pollution resulted and the company was convicted of a breach of s. 32(1) of The Ontario Water Resources Commission Act. The City also charged under

that section, which provides that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof is guilty of an offence. In dismissing the charge against the City the trial judge found that the City had nothing to do with the actual operations, that the company was an independent contractor and that its employees were not employees of the City. On appeal by trial de novo the judge found that the offence was one of strict liability and he convicted. The Divisional Court set aside the charge as duplicitous and also held that it required mens rea with respect to causing or permitting the discharge. The Court of Appeal, while rejecting the ground of duplicity as a basis to quash, as there had been no challenge to the information at trial, agreed that mens rea was required and ordered a new trial.

Held: The appeal and cross-appeal should be dismissed.

The primary test for duplicity should be the practical one based on the only valid justification for the rule against duplicity, the requirement that the accused know the case he has to meet and be not prejudiced in the preparation of his defence by ambiguity in the charge. In this case there was nothing ambiguous or uncertain in the charge. Section 32(1) is concerned with only one matter, pollution, and only one generic offence was charged, the essence of which was "polluting". As the charge was not duplicitous it was not necessary to consider whether a duplicity objection can be raised for the first time on appeal.

Regarding mens rea the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal mens rea must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast "absolute liability" entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries, [1971] S.C.R. 5, and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care. Three categories of offences are therefore now recognised (first) offences in which mens rea must be established, (second) offences of "strict liability" in which mens rea need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available, and (third) offences of "absolute liability" where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are prima facie in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act.

Section 32(1) being a provincial enactment does not create an offence which is criminal in the true

sense; and further the words "cause" and "permit" which are frequently found in public welfare statutes do not denote clearly either full mens rea or absolute liability and therefore fit much better into an offence of the strict liability class. As the City did not lead evidence directed to a defence of due diligence and the trial judge did not address himself to the availability of such a defence there should be a new trial to determine whether the City was without fault.

Cases Cited

Sherras v. De Rutzen, [1895] 1 Q.B. 918; R. v. Prince (1875), L.R. 2 C.C.R. 154; R. v. Tolson (1889), 23 Q.B.D. 168; R. v. Rees, [1956] S.C.R. 640; Beaver v. The Queen, [1957] S.C.R. 531; R. v. King, [1962] S.C.R. 746; Kipp v. A.G. (Ont.), [1965] S.C.R. 57; R. v. Surrey Justices, ex parte Witherick, [1932] 1 K.B. 450; R. v. Madill (No. 1) (1943), 79 C.C.C. 206; R. v. International Nickel Co. of Canada (1972), 10 C.C.C. (2d) 44; Kienapple v. The Queen, [1975] 1 S.C.R. 729; R. v. Matspeck Construction Co. Ltd., [1965] 2 O.R. 730; Ross Hillman Limited v. Bond, [1974] 2 All E.R. 287; R. v. Woodrow (1846), 15 M. & W. 404; R. v. Stephens (1866), L.R. 1 Q.B. 702; Proudman v. Dayman (1941), 67 C.L.R. 536; R. v. Strawbridge, [1970] N.Z.L.R. 909; R. v. Ewart, [1906] N.Z.L.R. 709; Sweet v. Parsley, [1970] A.C. 132; Woolmington v. Director of Public Prosecutions, [1935] A.C. 462; R. v. McIver, [1965] 2 O.R. 475; Maher v. Musson (1934), 52 C.L.R. 100; R. v. Patterson, [1962] 1 All E.R. 340; R. v. Custeau, [1972] 2 O.R. 250; R. v. Larocque (1958), 120 C.C.C. 246; R. v. Regina Cold Storage & Forwarding Co. (1923), 41 C.C.C. 21; R. v. A.O. Pope, Ltd. (1972), 20 C.R.N.S. 159, aff'd 10 C.C.C. (2d) 430; R. v. Hickey (1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416; R. v. Servico Limited (1977), 2 Alta. L.R. (2d) 388; R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81; R. v. Hawinda Taverns Ltd. (1955), 112 C.C.C. 361; R. v. Bruin Hotel Co. Ltd. (1954), 109 C.C.C. 174; R. v. Sheridan (1972), 10 C.C.C. (2d) 545; R. v. Cherokee Disposals & Construction Limited, [1973] 3 O.R. 599; R. v. Liquid Cargo Lines Ltd. (1974), 18 C.C.C. (2d) 428; R. v. North Canadian Enterprises Ltd. (1974), 20 C.C.C. (2d) 242; Lim Chin Aik v. The Queen, [1963] A.C. 160; Reynolds v. Austin & Sons Limited, [1951] 2 K.B. 135; R. v. Pee-Kay Smallwares, Ltd. (1947), 90 C.C.C. 129; Hill v. The Queen, [1975] 2 S.C.R. 402; R. v. Gillis (1974), 18 C.C.C. (2d) 190; Groat v. City of Edmonton, [1928] S.C.R. 522; Chasemore v. Richards (1859), 7 H.L.C. 349; Millar v. The Queen, [1954] 1 D.L.R. 148; R. v. Royal Canadian Legion, [1971] 3 O.R. 552; R. v. Teperman and Sons, [1968] 4 C.C.C. 67; R. v. Jack Crewe Ltd. (1975), 23 C.C.C. (2d) 237 referred to.

APPEAL and CROSS APPEAL from a judgment of the court of Appeal for Ontario [(1976), 13 O.R. (2d) 113.] allowing an appeal by the Crown and ordering a new trial after a judgment of the Divisional Court [13 O.R. (2d) 116.] allowing an appeal by the accused and quashing, after trial de novo, a conviction on a charge under s. 32(1) of The Ontario Water Resources Commission Act.

R.M. McLeod and J.N. Mulvaney, Q.C., for the appellant. R.J. Rolls, Q.C., and R.S. Harrison, for the respondent.

Solicitor for the appellant: Minister of the Attorney General for Ontario, Toronto.
Solicitors for the respondent: Fasken & Calvin, Toronto.

The judgment of the Court was delivered by

DICKSON J.:-- In the present appeal the Court is concerned with offences variously referred to as "statutory," "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (Sherras v. De Rutzen [[1805] 1 Q.B. 918.]) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea: (R. v. Prince [(1987), L.R. 2 C.C.R. 154.]; R. v. Tolson [(1889), 23 Q.B.D. 168.]; R. v. Rees [[1956] S.C.R. 640.]; Beaver v. The Queen [[1957] S.C.R. 531.]; R. v. King [[1962 S.C.R. 746.]). Blackstone made the point over two hundred years ago in words still apt: "... to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will ...," 4 Comm. 21. I would emphasise at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.

The appeal raises a preliminary issue as to whether the charge, as laid, is duplicitous, and if so, whether ss. 732(1) and 755(4) of the Criminal Code preclude the accused City of Sault Ste. Marie from raising the duplicity claim for the first time on appeal. It will be convenient to deal first with this preliminary point and then consider the concept of liability in relation to public welfare offences.

The City of Sault Ste. Marie was charged that it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972 and September 11, 1972. The charge was laid under s. 32(1)[below] of The Ontario Water Resources Commission Act, R.S.O. 1970, c. 332, which provides so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000

and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.

Note: Section 32(1) reads as follows:

32. (1) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable on forest conviction of a fine of not more than $5,000 and on each subsequent conviction to a fine of nor more than $10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment. ----------

Although the facts do nor rise above the routine, the proceedings have to date had the anxious consideration of five courts. The City was acquitted in Provincial Court (Criminal Division), but convicted following a trial de novo on a Crown appeal. A further appeal, by the City, to the Divisional Court was allowed and the conviction quashed. The Court of Appeal for Ontario on yet another appeal directed a new trial. Because of the importance of the legal issues, this Court granted leave to the Crown to appeal and leave to the City to Cross-appeal.

To relate briefly the facts, the City on November 18, 1970 entered into an agreement with Cherokee Disposal and Construction Co. Ltd., for the disposal of all refuse originating in the City. Under the terms of the agreement, Cherokee became obligated to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which, it would appear, runs into the Root River. The method of disposal adopted is known as the "area", or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel.

Prior to 1970, the site had been covered with a number of fresh-water springs that flowed into Cannon Creek. Cherokee dumped material to cover and submerge these springs and then placed garbage and wastes over such material. The garbage and wastes in due course formed a high mound sloping steeply toward, and within twenty feet of, the creek. Pollution resulted. Cherokee was convicted of a breach of s. 32(1) of The Ontario Water Resources Commission Act, the section under which the City has been charged. The question now before the Court is whether the City is also guilty of an offence under that section.

In dismissing the charge at first instance, the judge found that the City had had nothing to do with the actual disposal operations, that Cherokee was an independent contractor and its employees were not employees of the City. On the appeal de novo Judge Vannini found the offence to be one of strict liability and he convicted. The Divisional Court in setting aside the judgment found that the charge was duplicitous. As a secondary point, the Divisional Court also held that the charge

required mens rea with respect to causing or permitting a discharge. When the case reached the Court of Appeal that Court held that the conviction could not be quashed on the ground of duplicity, because there had been no challenge to the information at trial. The Court of Appeal agreed, however, that the charge was one requiring proof of mens rea. A majority of the Court (Brooke and Howland JJ.A.) held there was not sufficient evidence to establish mens rea and ordered a new trial. In the view of Mr. Justice Lacourcière, dissenting, the inescapable inference to be drawn from the findings of fact of Judge Vannini was that the City had known of the potential impairment of waters of Cannon Creek and Root River and had failed to exercise its clear powers of control.

The divers, and diverse, judicial opinions to date on the points under consideration reflect the dubiety in these branches of the law.

The Duplicity Point

Turning then to the question of duplicity, and whether the information charged the City with several offences, or merely one offence which might be committed in different modes. The argument is that s. 32(1) of The Ontario Water Resources Commission Act charges three offences: (i) discharging; (ii) causing to be discharged; (iii) permitting to be discharged, deleterious material. The applicable principle is well-established: if the information in one count charges more than on offence, it is bad for duplicity: Kipp v. Attorney General for Ontario [[1965] S.C.R. 57.].

The rule against multiplicity of charges in an information is contained in s. 724(1) of the Code which reads as follows:

> 724. (1) In proceedings to which this Part applies, the information ...
>
> (b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

Section 731(a) provides, however, that no information shall be deemed to charge two offences by reason only that it states that the alleged offence was committed in different modes.

Several tests have been suggested for determining whether an indictment or information is multiplicitous. Probably the best known test is that enunciated by Avory J. in R. v. Surrey Justices, ex parte Witherick [[1932] 1 K.B. 450.], at p. 452. The charge was that of driving without due care and attention and without reasonable consideration for other persons. Avory J. said that, if a person may do one without the other, it followed as a matter of law that an information which charged him in the alternative would be bad. In R. v. Madill [(1943), 79 C.C.C. 206.] (No. 1), at p. 210, Ford J.A. applied the test of "... whether evidence can be given of distinct acts, committed by the person charged, constituting two or more offences," and in R. v. International Nickel Co. of Canada

[(1972), 10 C.C.C. (2d) 44.], at p. 48, Arnup J.A. expressed the view that if a section containing two or more elements is to be construed as containing only one offence, one must be able to state with precision the essence of the single offence.

Each of these tests is helpful as far as it goes, but each is too general to provide a clear demarcation in concrete instances. This is shown by the variety of cases and the diversity of opinion in this case itself. To resolve the matter one must recall, I think, the policy basis of the rule against multiplicity and duplicity. The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

The duplicity rule has been justified on two grounds: to be fair to the accused in the preparation of his defence, and to enable him to plead autrefois convict in the future. As Avory J. said in R. v. Surrey Justices, ex parte Witherick, supra, at p. 452:

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion form pleading autrefois convict.

The problem of raising a defence of autrefois convict is illusory even when there is duplicity. It is difficult to see as a practical matter why the Crown would begin new proceedings after having just concluded as successful prosecution. Even if there were a prosecution, it could not succeed. Assume conviction of the City on a charge of (i) discharging; (ii) causing discharge of; (iii) permitting discharge of pollutant at a stated time and place. If another charge were laid at a later date in respect of (i) or (ii) or (iii), as related to the same pollutant and the same time and place, the new charge would be based on the same cause or matter which had already formed the basis of a conviction, and a further conviction would be barred: Kienapple v. The Queen [[1975] 1 S.C.R. 729.]. It is equally clear that no problem of autrefois acquit arises, even where there is duplicity, because an acquittal means acquittal on all the offences charged, and thus there is no difficulty in raising the defence of autrefois acquit to a later charge of one of the same offences alone.

In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The City knew the case it had to meet. Section 32(1) of The Ontario Water Resources Commission Act is concerned with only one

matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting," and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

I am satisfied that the Legislature did not intend to create different offences for polluting, dependent upon whether one deposited, or caused to be deposited, or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute.

In R. v. Matspeck Construction Co. Ltd. [[1965] 2 O.R. 730.], Hughes J. considered the very section now under study and, adopting the approach I favour, concluded that the charge was not duplicitous. The judge said, at p. 732:

> There can be no doubt in the mind of accused that he is charged with having in one mode or another, discharged or deposited material into water and that this material may have impaired its quality.

On the other hand, in the English case of Ross Hillman Limited v. Bond [[1974] 2 All E.R. 287.], where very similar language was used, May J. said, p. 291, that the Act (in that case s. 40 (5)(b) of the Road Traffic Act, 1972) created three distinct types of offence. I think that the authority of the English cases in this area of the law must be carefully considered and their aid discounted to the extent that the statutory provisions applicable differ from those contained in our Code.

I conclude that the charge in this case is not duplicitous. It is unnecessary, therefore, to consider whether a defendant can raise a duplicity objection for the first time on appeal.

The Mens Rea Point

The distinction between the true criminal offence and the public welfare offence is one of the prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in

every sense, yet be branded as a male factor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

Public welfare offences evolved in mid-nineteenth century Britain: (R. v. Woodrow [(1846), 15 M. & W. 404.] and R. v. Stephens [(1866), L.R. 1 Q.B. 702.]) as a means of doing away with the requirement of mens rea for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.

Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty case which daily come before the Court, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.

Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may

down-play it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of The Highway Traffic Act of Alberta, R.S.A. 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence, and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) of the Manitoba Highway Traffic Act, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the Legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interest of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.

Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. See Sayre, Public Welfare Offences (1933), 33 Colum. L. Rev. 55; Hall, Principles of Criminal Law, (1947), ch. 13; Perkins, The Civil Offence (1952), 100 U. of Pa. L. Rev. 832; Jobson, Far From Clear, 18 Crim. L. Q. 294. The unfortunate tendency in may past cases has been to see the choice as between two stark alternatives; (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see Hals. (4th ed.), Vol. II, Criminal Law, Evidence and Procedure, para. 18. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent.

Dr. Glanville Williams has written: "There is a half-way house between mens rea and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence," (Criminal Law (2d ed.): The General Part, p. 262). Morris and Howard, in Studies in Criminal Law, (1964), p. 200, suggest that strict responsibility might with advantage be replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. The defendant would be allowed to exculpate himself by proving affirmatively that he was not negligent. Professor Howard (Strict Responsibility in the High Court of Australia, 76 L.Q.R. 547) offers the comment that English law of strict responsibility in minor statutory offences is distinguished only by its irrationality, and then has this to say in support of the position taken by the Australian High Court, at p. 548:

> Over a period of nearly sixty years since its inception the High Court has

> adhered with consistency to the principle that there should be no criminal responsibility without fault, however minor the offence. It has done so by utilizing the very half-way house to which Dr. Williams refers, responsibility for negligence.

In his work, Public Welfare Offences, at p. 78, Professor Sayre suggests that if the penalty is really slight involving, for instance, a maximum fine of twenty-five dollars, particularly if adequate enforcement depends upon wholesale prosecution, or if the social danger arising from violation is serious, the doctrine of basing liability upon mere activity rather than fault, is sound. He continues, however, at p. 79:

> On the other hand, some public welfare offences involve a possible penalty of imprisonment of heavy fine. In such cases it would seem sounder policy to maintain the orthodox requirement of a guilty mind but to shift the burden of proof to the shoulders of the defendant to establish his lack of a guilty intent if he can. For public welfare offences defendants may be convicted by proof of the mere act of violation; but, if the offence involves a possible prison penalty, the defendant should not be denied the right of bringing forward affirmative evidence to prove that the violation was the result of no fault on his part.

and at p. 82:

> It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public dander is widespread and serious, the practical situation can be met by shifting to the shoulders of the defendant the burden of proving a lack of guilty intent.

The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

The case which gave the lead in this branch of the law is the Australian case of Proudman v. Dayman [(1941), 67 C.L.R. 536.] where Dixon J. said, at pp. 540-41:

> It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

...

This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in the principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

The principle which has found acceptance in Australia since Proudman v. Dayman has a place also in the jurisprudence of New Zealand: see The Queen v. Strawbridge [[1970] N.Z.L.R. 909.]; The King v. Ewart [[1906] N.Z.L.R. 709.].

In the House of Lords case of Sweet v. Parsley [[1970] A.C. 132.], Lord Reid noted the difficulty presented by the simplistic choice between mens rea in the full sense and an absolute offence. He looked approvingly at attempts to find a middle ground. Lord Pearce, in the same case, referred to the "sensible half-way house" which he thought the Courts should take in some so-called absolute offences. The difficulty, as Lord Pearce sat it, lay in the opinion of Viscount Sankey L.C. in Woolmington v. Director of Public Prosecutions [[1935] A.C. 462.] if the full width of the opinion were maintained. Lord Diplock, however, took a different and, in my opinion, a preferable view, at p. 164:

> ...Woolmington's case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. The jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.

In Woolmington's case the question was whether the trial judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey L.C. referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden of the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt, I do not understand the case as standing for anything more, than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. It is somewhat ironic that Woolmington's case, which

embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.

There have been several cases in Ontario which open the way to acceptance of a defence of due diligence. In R. v. McIver [[1965] 2 O.R. 475.], the Court of Appeal held that the offence charged, namely, careless driving, was one of strick liability, but that it was open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent. MacKay J.A., who wrote for the Court, relied upon Sherras v. De Rutzen, Proudman v. Dayman, Maher v. Musson [(1934), 52 C.L.R. 100.], and R. v. Patterson [[1962] 1 All E.R. 340.], in availing an accused the opportunity of explanation in the case of statutory offences that do not by their terms require proof of intent. The following two short passages from the judgment might be quoted (at p. 481):

> On a charge laid under s. 60 of the Highway Traffic Act, it is open to the accused as a defence, to show an absence of negligence on his part. For example, that his conduct was caused by the negligence of some other person, or by showing that the cause was a mechanical failure, or other circumstance, that he could not reasonably have foreseen.
>
> ...
>
> In the present case it was open to the accused to show, if he could, that the collision of his car with the car parked on the shoulder of the read, occurred without fault or negligence on his part. He having failed to do so was properly convicted.

An appeal to this Court was dismissed [1966] S.C.R. 254 on other grounds.

Later, in R. v. Custeau [[1972] 2 O.R. 250.], MacKay J.A., again speaking for the Court, returned to the same point, at p. 251:

> In the case of an offence of strict liability (sometimes referred to as absolute liability) it has been held to be a defence if it is found that the defendant honestly believed on reasonable grounds in a state of facts which, if true, would render his act an innocent one.

In the British Columbia Court of Appeal the concept of reasonable care was discussed in R. v. Larocque [(1958), 120 C.C.C. 246.] (selling liquor to an interdicted person contrary to a provincial statue) by Mr. Justice Sheppard, speaking for the Court, at p. 247:

> ... That test has been defined in Bank of New South Wales v. Piper, [1897] A.C. 383 at pp. 289-90 as follows: 'On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.'
>
> The onus would therefore be upon the accused to show not merely that he did not know that Pierre was an interdicted person but also that he, the accused, had used honest and reasonable efforts to become acquainted with the information supplied by the Department to comply therewith and that notwithstanding such efforts he had an honest and reasonable belief that Pierre was not an interdicted person.

In an early Saskatchewan Court of Appeal decision in R. v. Regina Cold Storage & Forwarding Co. [(1923), 41 C.C.C. 21.] (unlawful possession of liquor) it was held that mens rea was an essential element for conviction and that element was absent. Chief Justice Haultain appears to have conceptualized absence of mens rea, not as lack of knowledge or intent but rather in terms of reasonable care in an offence of strict liability. He said, at p. 23: "Absence of mens rea means an honest and reasonable belief by the accused in the existence of facts which, if true, would make the charge against him innocent."

In the New Brunswick case of R. v. A.O. Pope, Ltd. [(1972), 20 C.R.N.S. 159 aff'd 10 C.C.C. (2d) 430.] (failing to provide properly fitted goggles contrary to the Industrial Safety Act, 1964 (N.B.), c. 5) Kierstead Co. Ct. J. held that the offence was one of strict but not absolute liability, and a defence of reasonable care was open to the accused to prove that the act was done without negligence or fault on his part. An appeal to the New Brunswick Supreme Court, Appeal Division, was dismissed without, however, any discussion of this issue.

Two more recent cases, one being from the Province of Ontario and the other from the Province of Alberta, deserve attention. In R. v. Hickey [(1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416.] (speeding) the Divisional Court held that the offence was one of strict liability, but that the accused would have a valid defence if he proved on the balance of probabilities that he honestly believed on reasonable grounds in a mistaken set of facts which, if true, would have made his conduct innocent. The accused had testified that he honestly believed because of the speedometer reading that he was not exceeding the speed limit. A test conducted by a police officer at the scene showed that the speedometer was, in fact, not working properly. The majority of the Court, therefore, set aside the conviction. Mr. Justice Galligan made the following comment, at p. 36:

> Submissions were made to this Court about the difficulties involved in the prosecution of speeding cases and other strict liability offences if this defence is a valid one in law. in my opinion, the availability of the defence as a matter of law

> should make no unreasonable burden upon the prosecution or the Courts. It is clear from the Australian authorities that not only is the burden of proving such a defence upon the accused, he must prove in upon a balance of probabilities. It is not sufficient merely to raise a reasonable doubt. In this respect, the defence of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is raised in a case involving men rea as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt: see R. v. Morgan et al., [1975] 2 W.L.R. 913 (H.L.) and Beaver v. The Queen (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193.

The decision in Hickey was subsequently appealed to the Court of Appeal (1976), 30 C.C.C. (2d) 416. The Court allowed the appeal and restored the conviction. Mr. Justice Jessup, in giving judgment for the Court, said:

> Assuming, without deciding, that statutory offences can be classified into one of three groups mentioned by Estey, C.J.H.C., in his judgment given in the Divisional Court, we are of the opinion that the offence here in question, of speeding, under the Highway Traffic Act, R.S.O. 1970, c. 202, is a statutory offence within the third group mentioned by Estey, C.J.H.C.; that is one of absolute liability in the sense that reasonable mistake of fact is not a defence.

No reasons were given for the identification of the offence as one of absolute liability once the three groups of statutory offences were assumed to exist.

In the Appellate Division of the Alberta Supreme Court, the defence of reasonable care for an offence of strict liability was accepted after full consideration of the issues involved, in the recent case of R. v. Servico Limited [(1977), 2 Alta. L.R. (2d) 388.]. The offence in question was that an employer "shall not permit a person under the full age of eighteen years to work during the period of time prohibited by this section." Mr. Justice Morrow, writing for the majority of the Court, said (at pp. 397-8):

> While the language of the particular regulation under review does in my view come within the category of absolute or strict liability offences. I am also of the opinion that the general language used--particularly with the inclusion of the word "permit," which has a connotation suggesting some intent is to be considered-- brings this section into what probably can be described as the exception to the rule of absoluteness as suggested by Estey C.J.H.C., in his dissenting judgment in Regina v. Hickey (1976), 12 O.R. (2d) 578, 29 C.C.C.

> (2d) 63, 68 D.L.R. (3d) 88, reversed 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (C.A.), where at p. 580 he describes statutes which prohibit a specified act or omission but which are interpreted to permit the defence of an honest belief held on reasonable grounds in a mistaken set of facts which if true would render the act or omission innocent.
>
> The above exception or type of defence has long been recognized in Australia,...

It is interesting to note the recommendations made by the Law Reform Commission to the Minister of Justice (Our Criminal Law) in March, 1976. The Commission advises (p. 32) that (i) every offence outside the Criminal Code be recognized as admitting of a defence of due diligence; (ii) in the case of any such offence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence; (iii) the defendant would have to prove this on the preponderance or balance of probabilities. The recommendation endorsed a working paper (The Meaning of Guilt--Strict Liability) in which it was stated that negligence should be the minimum standard of liability in regulatory offences, that such offences were (p. 32), "to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the ... environment and [therefore] the ... offence is basically and typically an offence of negligence"; that an accused should never be convicted of a regulatory offence if he establishes that he acted with due diligence, that is, that he was not negligent. In the working paper, the Commission further stated (p. 33), "let us recognize the regulatory offence for what it is--an offence of negligence--and frame the law to ensure that guilt depends upon lack of reasonable care." The view is expressed that in regulatory law, to make the defendant disprove negligence--prove due diligence--would be both justifiable and desirable.

In an interesting article on the matter now under discussion, Far From Clear, supra, Professor Jobson refers to a series of recent cases, arising principally under s. 32(1) of The Ontario Water Resources Commission Act, the section at issue in the present proceedings, which "openly acknowledged a defence based on lack of fault or neglect; these cases require proof of the actus reus but then permit the accused to show that he was without fault or had no opportunity to prevent the harm." The paramount case in the series is R. v. Industrial Tankers Ltd. [[1968] 4 C.C.C. 81.] in which Judge Sprague, relying upon R. v. Hawinda Taverns Ltd. [(1955), 112 C.C.C. 361.] and R. v. Bruin Hotel Co. Ltd. [(1954), 109 C.C.C. 174.], held that the Crown did not prove that the accused had mens rea, but it did have to show that the accused had the power and authority to prevent the pollution, and could have prevented it, but did not do so. Liability rests upon control and the opportunity to prevent i.e. that the accused could have and should have prevented the pollution. In Industrial Tankers, the burden was placed on the Crown to prove lack of reasonable car. To that extent Industrial Tankers and s. 32(1) cases which followed it, such as R. v. Sheridan [(1972), 10 C.C.C. (2d) 545.], differ from other authorities on s. 32(1) which would place upon the accused the burden of showing as a defence that he did not have control or otherwise could not have prevented

the impairment: see R. v. Cherokee Disposals & Construction Limited [[1973] 3 O.R. 599.]; R. v. Liquid Cargo Lines Ltd. [(1974), 18 C.C.C. (2d) 428.] and R. v. North Canadian Enterprises Ltd. [(1974), 20 C.C.C. (2d) 242.]

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control" (Lord Evershed in Lim Chin Aik v. The Queen, [[1963] A.C. 160) at p. 174.]. The purpose, Dean Roscoe Pound has said (The Spirit of the Common Law (1906)), is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale." As Devlin J. noted in Reynolds v. Austin & Sons Limited [[1951] 2 K.B. 135.], at p. 139: "...a man may be responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark." Devlin J. added, however: "If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

The decision of this Court in The Queen v. Pierce Fisheries Ltd. [[1971] S.C.R. 5.] is not inconsistent with the concept of a "half-way house" between mens rea and absolute liability. In Pierce Fisheries the charge was that of having possession of undersized lobsters contrary to the regulations under the Fisheries Act, R.S.C. 1952, c. 119. Two points arise in connection with the judgment of Ritchie J., who wrote for the majority of the Court. First, the adoption of what had been said by the Ontario Court of Appeal in R. v. Pee-Kay Smallwares, Ltd. [(1947), 90 C.C.C. 129.]:

> If on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

Ritchie J. held that the offence was one in which the Crown, for the reason indicated in the Pee-Kay Smallwares case, did not have to prove mens rea in order to obtain a conviction. This, in my opinion, is the ratio decidendi of the case. Second, Ritchie J. did not, however, foreclose the possibility of a defence. The following passage from judgment (at p. 21) suggests that a defence of reasonable care might have been open to the accused, but that in that case care had not been taken to acquire the knowledge of the facts constituting the offence:

> As employees of the company working on the premises in the shed "where fish is weighted and packed" were taking lobsters from boxes "preparatory for packing" in crates, and as some of the undersized lobsters were found "in crates ready for

> shipment," it would not appear to have been a difficult matter for some "officer or responsible employee" to acquire knowledge of their presence on the premises.

In a later passage Ritchie J. added (at p. 22):

> In this case the respondent knew that it had upwards of 60,000 pounds of lobsters on its premises; it only lacked knowledge as to the small size of some of them, and I do not think that the failure of any of its responsible employees to acquire this knowledge affords any defence to a charge of violating the provisions of s. 3(1)(b) of the Lobster Fishery Regulations.

I do not read Pierce Fisheries as denying the accused all defences, in particular the defence that the company had done everything possible to acquire knowledge of the undersized lobsters. Ritchie J. concluded merely that the Crown did not have to prove knowledge.

The judgment of this Court in Hill v. The Queen [[1975] 2 S.C.R. 402.], has been interpreted (R. v. Gillis [(1974), 18 C.C.C. (2d) 190.]) as imposing absolute liability and denying the driver of a motor vehicle the right to plead in defence an honest and reasonable belief in a state of facts which, if true, would have made the act non-culpable. In Hill, the appellant was charged under the Highway Traffic Act with failing to remain at the scene of an accident. Her car had "touched" the rear of another vehicle. She did not stop, but drove off, believing no damage had been done. This Court affirmed the conviction, holding that the offence was not one requiring mens rea. In that case the essential fact was that an accident had occurred, to the knowledge of Mrs. Hill. Any belief that she might have held as to the extent of the damage could not obliterate that fact, or make it appear that she had reasonable grounds for believing in a state of facts which, if true, would have constituted a defence to the charge. The case does not stand in the way of a defence of reasonable care in a proper case.

We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) not requiring the Crown to prove mens rea, (ii) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The Courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.

It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the reaction of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of the courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory

pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

The Ontario Water Resources Commission Act, s. 32(1)

Turning to the subject matter of s. 32(1)--the prevention of pollution of lakes, rivers and streams--it is patent that this is of great public concern. Pollution has always been unlawful and, in itself, a nuisance: Groat v. City of Edmonton [[1928] S.C.R. 522.]. A riparian owner has an inherent right to have a stream of water "come to him in its natural state, in flow, quantity and quality": Chasemore v. Richards [(1859), 7 H.L.C. 349.], at p. 382. Natural streams which formerly afforded "pure and healthy" water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interest of the public health. There is thus no presumption of a full mens rea.

There is another reason, however, why this offence is not subject to a presumption of mens rea. The presumption applies only to offences which are "criminal in the true sense," as Ritchie J. said in the Queen v. Pierce Fisheries (supra), at p. 13. The Ontario Water Resources Commission Act is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possibly create an offence which is criminal in the true sense.

The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: "cause" and "permit." These two words are troublesome because neither denotes clearly either full mens rea nor absolute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over-simplification. There is authority both ways, indicating that the courts are uneasy with the traditional dichotomy. Some authorities favour the position that "permit", does not authorities favour the position that "permit", does not import mens rea: see Millar v. The Queen [[1954] 1 D.L.R. 148.]; R. v. Royal Canadian Legion [[1971] 3 O.R. 552.]; R. v. Teperman and Sons [[1968] 4 C.C.C. 67.]; R. v. Jack Crewe Ltd. [(1975), 23 C.C.C. (2d) 237.]; Browning v. J.H. Watson Ltd. [[1953] 1 W.L.R. 1172.]; Lyons v. May [[1948] 2 All E.R. 1062.]; Korten v. West Sussex C.C. [(1903), 72 L.J.K.B. 514.]. For a mens rea construction see James & Son Ltd. v. Smee [[1955] 1 Q.B. 78.]; Sommerset v. Hart [(1884), 12 Q.B.C. 360.], Grays Haulage Co. Ltd. v. Arnold [[1966] 1 All E.R. 896.]; Smith & Hogan, Criminal Law (3rd ed.) at p. 87; Edwards, Mens Rea and Statutory Offences (1955), at pp. 98-119. The same is true of "cause." For a non-mens rea construction, see R. v. Peconi [(1907), 1 C.C.C. (2d) 213.]; Alphacell Limited v. Woodward [[1972] A.C. 824.]; Sopp v. Long [[1969] 1 All E.R. 855.]; Laird v. Dobell [[1906] 1 K.B. 131.]; Dorten v. West Sussex C.C., (supra); Shave v. Rosner [[1954] 2 W.L.R. 1057.]. Others say that "cause" imports a requirement for a mens rea: see Lovelace v. D.P.P. [[1954] 3 All E.R. 481.]; Ross Hillman Ltd. v. Bond, supra; Smith and Hogan, Criminal Law (3rd ed.) at pp. 89-90.

The Divisional Court of Ontario relied on these latter authorities in concluding that s. 32(1) created a mens rea offence.

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit", fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which i have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care. I am strengthened in this view by the recent case of R. v. Servico Limited, supra, in which the Appellate Division of the Alberta Supreme Court held that an offence of "permitting" a person under eighteen years to work during prohibited hours was an offence of strict liability in the sense which I have described. It also will be recalled that the decisions of many lower courts which have considered s. 32(1) have rejected absolute liability as the basis for the offence of causing or permitting pollution, and have equally rejected full mens rea as an ingredient of the offence.

The Present Case

As I am of the view that a new trial is necessary, it would be inappropriate to discuss at this time the facts of the present case. It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the actus reus of discharging, causing, or permitting pollution within the terms of s. 32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that s. 32(1) deals with only one generic offence.

When the defendant is a municipality, it is of no avail to it in law that it had no duty to pick up the garbage, s. 354(1)(76) of The Municipal Act, R.S.O. 1970, c. 284, merely providing that it "may" do so. The law is replete with instances where a person has no duty to act, but where he is subject to certain duties if he does act. The duty here is imposed by s. 32(1) of The Ontario Water Resources Commission Act. The position in this respect is no different from that of private persons, corporate or individual, who have no duty to dispose of garbage, but who will incur liability under s. 32(1) if they do so and thereby discharge, cause, or permit pollution.

Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges," "causes," or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case. Whether an "independent contractor" rather than and "employee" is hired will not be decisive. A homeowner who pays a fee for the collection of his garbage by a business which services the area could probably not be said to have caused or permitted the pollution if the collector dumps the garbage in the river. His position would be analogous to a householder in Sault Ste. Marie, who could not be said to have caused or permitted the pollution here. A large corporation which arranges for the nearby disposal of industrial pollutants by a small local independent contractor with no experience in this matter would probably be in an entirely different position.

It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused the pollution. A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril.

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see Tesco Supermarkets v. Nattras [[1972] A.C. 153.].

The majority of the Ontario Court of Appeal directed a new trial as, in the opinion of that

court, the findings of the trial judge were not sufficient to establish actual knowledge on the part of the City. I share the view that there should be a new trial, but for a different reason. The City did not lead evidence directed to a defence of due diligence, nor did the trial judge address himself to the availability of such a defence. In these circumstances, it would not be fair for this Court to determine, upon findings of fact directed toward other ends, whether the City was without fault.

I would dismiss the appeal and direct a new trial. I would dismiss the cross-appeal. There should be no costs.

Appeal and cross-appeal dismissed, new trial directed.

Indexed as:

Kim v. Mississauga (City)

Between
Ik-Soo Kim, applicant, and
The Corporation of the City of Mississauga and Argis Robezneiks, Chief Building Official, respondents

[1996] O.J. No. 2534

8 O.T.C. 101

29 C.L.R. (2d) 98

33 M.P.L.R. (2d) 135

64 A.C.W.S. (3d) 221

Court File No. M13298/96

Ontario Court of Justice (General Division)
Milton, Ontario

Zelinski J.

July 3, 1996.

(35 pp.)

Land regulation -- Land use control, building or development permits -- Substantive requirements, change of, exemptions -- Land use control, zoning bylaws -- Interim control bylaws -- Whether retroactive.

Application by Kim for an **order** declaring that the respondent **municipality's** Interim Control by-law did not prevent the construction of a car wash building on the applicant's property. The applicant purchased a property in October 1995 with the intention of operating a car wash. He required site plan approval and a building permit. Representatives of condominium corporations requested the Committee of Adjustment to prohibit the car wash use. Meanwhile, the **City** Planning

and Building Department told the applicant that the site plan was substantially acceptable. It issued a limited use permit for drainage. The applicant had by this time invested a substantial amount of money. The bylaw was passed November 22, 1995 to prohibit car washes for one year in all residential districts which had zoning approval. The applicant claimed that he was told the car wash was a lawful use, that all Building Code requirements had been met, and that the sole purpose of the bylaw was to prevent the applicant's car wash. The respondent claimed that there were delays in making site plan applications, that many other properties were targeted by the bylaw, and that the applicant was always aware of the risk of not obtaining site plan approval.

HELD: Application allowed. The issuance of building permits for the car wash were ordered. The applicant consistently removed deficiencies referred to in the Application Status Report. The **municipality** accepted ongoing resolutions of problems, and accepted payment for each step. There was a prima facie lack of good faith on the part of the respondent. Substantive rights became vested when a temporary permit was issued for part of the construction. The drainage permit was issued before the bylaw was passed, and the respondent was therefore in error in refusing to issue the further building permit to complete the car wash. The bylaw could not prevent construction for which a limited use permit had already been issued.

Statutes, Regulations and Rules Cited:

Building Code Act, S.O. 1992, c. 23, ss. 1(1), 3(1), 7, 8, 25, 34(9), 38.
Municipal Act, R.S.O. 1990, c. M.45, ss. 136(1), 136(2).
Ontario Rules of Civil Procedure, Rule 14.05(3)(d).
Planning Act.

Counsel:

M. Virginia MacLean, Q.C. for the applicant.
Michal Minkowski for the respondents.

ZELINSKI J.:--

The Issues

1 The applicant seeks:

> ... an **order** declaring that the **City** of Mississauga Interim Control by-law 481-95 Interim Control By-law (the "ICB") does not prevent the construction or use of a car wash building on property owned by the applicant at 1455 Lakeshore Road East, Mississauga, (the "Property") because a building permit had been issued to

the applicant prior to the passage of the ICB.

In the alternative, the applicant seeks an **order** under s. 136 of the Municipal Act R.S.O. 1990, c. C.M.45, quashing the ICB for illegality by reason of bad faith and discrimination.

2 In addition to denying that there is merit in the application, the respondents take the position that it is out of time.

3 In simplest terms, the "bottom line" of this application is whether the ICB in question is enforceable against the applicant.

Statutes and By-laws

4 This application is brought pursuant to Rule 14.05(3)(d) which provides that a proceeding may be brought by application where the relief claimed is the determination of rights that depend upon the interpretation of a statute or municipal by-law.

5 Relevant statutory provisions are as follows:

The Building Code Act S.O. 1992, c. 23 ("BCA").

1.(1) Definitions. In this Act, "building" means ...

(c) plumbing not located in a structure, ...

"plumbing" means a drainage system, a venting system and a water system or parts thereof;

3.(1) Enforcement. The council of each **municipality** is responsible for the enforcement of this Act in the **municipality.**

(2) Chief Building Official, Inspectors. The council of each **municipality** shall appoint a chief building official and such inspectors as are necessary for the enforcement of this Act in the areas in which the **municipality** has jurisdiction.

7. By-laws, Regulations. The council of a **municipality** ... may make regulations ...

(a) prescribing classes of permits under this Act, including permits in respect

of any stage of construction ...

8.(1) Building Permits. No person shall construct ... a building or cause a building to be constructed ... unless a permit has been issued therefor by the chief building official.

(2) Issue of Permits. The chief building official shall issue a permit under subsection (1) unless,

a) the proposed building, [or] construction ... will contravene this Act or the building code of any other applicable law;

25.(1) Appeal. Any person who considers themself aggrieved by an **order** or decision made by an inspector or chief building official under this Act ... may, within 20 days after the **order** or decision is made, appeal the **order** or decision to a judge of the Ontario Court (General Division).

(2) Extension of Time. A judge to whom an appeal is made may, upon such conditions as the judge considers appropriate, extend the time for making the appeal before or after the time set out in subsection (1), if the judge is satisfied that there is reasonable grounds for the appeal and for applying for the extension.

(4) Powers of Judge. If an appeal is made under this section, the judge shall hold a hearing and may rescind or affirm the **order** or decision of the inspector or chief building official or take such action as the judge considers the inspector or chief building official ought to take in accordance with this Act and the regulations and, for such purpose, may substitute his or her opinion for that of the inspector or chief building official.

The Planning Act R.S.O. 1990, c. P.13, ("Planning Act")

34.(9) No by-law passed under this section applies,

(b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under section 8 of the Building Code Act, prior to the day of the passing of the by-law, ...

38.(1) Where the council of a local **municipality** has, by by-law ... directed that a review or study be undertaken in respect of land use planning policies in the **municipality** ... the council of the **municipality** may pass a by-law, (hereinafter referred to as an Interim Control By-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of passing thereof ...

(4) Any person ... may, within 60 days from the date of the passing of the by-law, appeal to the Municipal Board ...

(8) Subsection 34 (9) applies with necessary modification to a by-law passed under subsection (1) ...

The Municipal Act R.S.O. 1990 c. M.45 ("Municipal Act")

136.(1) Proceedings to **quash** by-law. The Ontario Court (General Division) upon application of a resident of the **municipality** or of a person interested in a by-law of its council may **quash** the by-law in whole or in part for illegality.

City of Mississauga By-law 428-93 The Building By-law issued under the BCA respecting permits and related matters) ("Building By-law")

2. Definitions

In this By-law;

(1)(g) "permit" means permission or authorization given in writing by the Chief Building Official to perform work regulated by the Act and Building Code, or to occupy a building or part thereof prior to its completion.

(h) "permit holder" means the person to whom the permit has been issued and who assumes the primary responsibility for complying with the Act and the Building Code.

3. Classes of Permits

Classes of permits for construction, demolition, change of use, or occupancy of a partially complete building are set forth in Schedule "A" appended to and forming part of this By-law.

SCHEDULE "A"

Permit Fees and Refunds

1. Fees

(1) Class of Permit

(a) Construct a building as defined by Section 1(b) of the Act, ... may be divided into the following classes of permits:

(i) Complete Building
(iv) Plumbing Component
(v) Drain Component

(b) For permits required in (a) when divided into part permits. [the permit fee is set out in Schedule "B" plus] $50.00 additional fee each for part permit ...

Agreed and/or Partially Admitted Facts

6 Facts relied upon by the applicant have been substantially admitted, or admitted with minor qualifications, as follows:

1. On October 2, 1995, the applicant, who had been looking to purchase real estate to be developed as a coin operated car wash, purchased the Property, a vacant parcel formerly used as an automobile service station and zoned AC (Automobile Commercial) which permitted the proposed development.
2. To develop the Property, the applicant required site plan approval and a building permit from the respondents.
3. A site plan application was submitted May 11, 1995 and revised on July 24, 1995; and, to make the proposed car wash building conform with setback and parking requirements of the zoning by-law, a variance application was made to the Committee of Adjustment on August 29, 1995.
4. A building permit application for a complete new building for a car wash was

made on August 17, 1995 and, a building permit application for site servicing for the construction of a private storm sewer, private sanitary sewer and water services on the Property (drain component class of permit) was made on September 27, 1995.

5. The September 28, 1995, Committee of Adjustment hearing on the variance application was adjourned to enable representatives of the nearby Peel Condominium Corporations 110, 170 and 415 (P.C.C. 110, 170 and 415) to meet with the applicant.

6. A Building Permit for drain component class of permit prescribed under the **City's** Building By-law, was issued to the applicant on October 12, 1995. Site servicing under the permit started October 15, 1995 and was completed October 17, 1995 at a construction cost of $55,175.00. [The respondents' admission is limited to the fact of the issuance of a permit for a drain component only.]

7. The applicant withdrew the variance application at the Committee of Adjustment meeting on October 20, 1995 because the site plan addressed the issues and to prevent delays to construction and, subsequently amended the site plan to comply with the zoning by-law. At the October 20, 1995 Committee of Adjustment meeting, representatives of P.C.C. 110, 170 and 415 requested the Committee to prohibit the car wash use on the Property which the Committee advised it could not do and suggested that the Condominium Corporations contact Councillor Corbasson, the Ward Councillor. [The respondents' admission is limited to the applicant's representative becoming informed of a proposed interim control by-law on November 15, 1995.]

8. On November 9, 1995, the said representative of the applicant Peter Chee, was advised by the respondent **City's** Planning and Building Department staff that the site plan was substantially acceptable and would be signed by a staff member authorized to do so, by by-law. Peter Chee re-attended on November 10, when he was advised that P.C.C. 110, 170 and 415 were opposed to the use and had contacted Councillor Corbasson and the site plan would be approved November 13, 1995. During the week of November 13, 1995, another representative of the applicant, Tony DiBella, was advised that the site plan would not be approved until the November 22, 1995 Council meeting and was advised by telephone that the application would be approved. On November 15, 1995, the applicant's representative Peter Chee, was advised that the respondent **City** intended to enact an interim control by-law to stop the applicant's car wash development and exempt some properties but not the applicant's. [The respondents' admission is limited to Chee's becoming informed of a proposed interim control by-law on November 15, 1995.]

9. The respondent **City,** at a meeting in Committee on November 13, 1995, of which the applicant had no notice, considered a planning report date October 30, 1995 that recommended that the Official Plan be amended to "allow car washes

in Residential Districts subject to certain conditions", heard representatives of P.C.C. 110 and P.C.C. 170 opposed to the applicant's use, were advised that **City** staff supported the applicant's car wash use as appropriate, and requested **City** staff to report to the next Council meeting "with respect to an Interim Control By-law on all Automobile Service Stations with Car Washes in Residential Districts". [The respondents' admission is limited to the fact of a planning committee meeting being held on November 13, 1995 at which a staff report was received and a direction being given to staff, by the committee, to report to the next council meeting with respect to an ICB.]

10. The respondents, at a meeting in Council on November 22, 1995, considered the requested staff report, passed a resolution that "a comprehensive planning study be undertaken to examine car washes within Residential Districts ... in terms of land use planning, zoning, locational attributes ..." and, passed an interim control by-law prohibiting for one year, car washes in all Residential Districts which had zoning to permit the use, while exempting four sites, two sites developed as gas bars [one of which was zoned AC-791], a vacant site in a Residential District not zoned to permit a car wash use, and a site for which a building permit for a car wash and gas bar was in process. Three of the four exempted sites were in response to a letter from Imperial Oil, and the latter was requested by the respondent **City's** staff.
11. The applicant appealed the ICB to the Ontario Municipal Board ("OMB") which has not scheduled a hearing.
12. The respondent **City's** Planning and Building Department prepared two Planning Reports in 1995 on the impact of car washes in Residential Districts. The first report was circulated for public input and reported to Council prior to the enactment of the ICB. The respondent **City** was made aware in the two Planning Reports that the Official Plan and the Zoning By-law were not consistent and, the February 13, 1995 Planning Report identified the impacts of car washes in residential zones. Neither report recommended the enactment of an ICB but recommended that the Official Plan be amended to permit the use which would not necessitate a zoning change. [The respondents' admission is limited to the fact of the consideration and circulation of planning reports prepared earlier in 1995 by the **City's** Planning and Building Department identifying inconsistencies in the **City's** hierarchy of official plan documents and between those documents the **City's** zoning by-law.]
13. The applicant paid $29,802.88 to the respondents for site plan approval and building permit issuance has posted securities and cash of $11,200.00 with the respondents to obtain the right to develop a car wash on the Property, and has paid $55,175.00 for site services which cannot be used for any use except a car wash. [The respondents' admission is limited to the fact of the payment of certain fees to the **City.**]

Additional Facts as Alleged by the applicant

7 The applicant also relies upon the following additional facts, which the respondents do not agree to:

1. On October 17, 1995 the applicant's representative met with representatives of P.C.C. 110, 170, and 415 and the respondent **City's** staff. The site plan was presented, it was explained that the car wash use was a lawful use and that the site plan incorporated the recommendations of noise expert and the **city** staff recommendations.
2. On November 21, 1995 the applicant's representative Tony DiBella, attempted to amend the building permit application to obtain a foundation to roof (superstructure) building permit, was advised not to amend the application by the respondents' staff because a building permit for the full building was close to issuance, and was advised that the applicant's file was marked "do not issue".
3. The applicant's representative requested an exemption from the ICB for the Property on January 4, 1996 and was refused by the respondents' Council on February 14, 1995 because the only exemptions to be permitted would be for sites specifically zoned for a car wash and not sites zoned for automobile service stations and public garages.
4. As of February 27, 1996 the applicant had satisfied all Building Code requirements for the issuance of a building permit and on March 4, 1996 the respondents, Chief Building Official, refused to issue a building permit because of the ICB and because site plan approval had not been granted.
5. The sole purpose of the ICB is to prevent the applicant's development of a coin operated car wash on the Property.

Additional Facts Alleged By the Respondents

8 With respect to site plan approval issues, to the extent that approval is in issue, the respondents rely, in part, on applicant's delays in making the site plan applications. There were revisions presented and inconsistencies in approach. The respondents also cite changes in the applicant's representatives and similar as evidence of the applicant's responsibility for these delays. The respondents also rely upon the fact that the applicant was aware of the "risk of closing without site plan approval, having been informed of those risks".

9 The thrust of this approach by the respondents is that the applicant would have had the Building Permit for the entire building, had his application been pursued expeditiously and/or in a more sophisticated manner. This has nothing to do with merit. Indeed, such an approach is consistent with entitlement in law altered only by the circumstances of the enactment of the ICB. The applicant's acceptance of the risk in such circumstances is, in my view, as consistent with recognition of the fact of his entitlement as it is with the applicant having assumed any risk, the consequences of

which he must now bear.

10 With respect to the applicant's building permit application, the respondents also rely upon the following facts:

1. The applicant applied for a building permit on August 17, 1995 seeking the class of permit which would allow for "complete building" construction. The **city's** Building By-law specifically contemplates different classes of permits. Each class of permit is treated as an independent permit requiring a fresh application process.
2. While waiting for the "complete building" application to run its course, the applicant also applied on September 27, 1995 for a class of permit to allow for construction of the "drain component" only, the scope of work being defined as a "site servicing permit".
3. The applicant's agent who applied for the "site servicing permit", Peter Chee, admits he was told by **City** staff at the time of applying for this permit that its issuance was not a guarantee of the issuance of a building permit for construction of the car wash structure and that the issuance of the "site servicing permit" was at the applicant's own risk. Mr. Chee acknowledged that he also advised the applicant of this information.
4. The applicant further signed an acknowledgement in seeking the "site servicing permit" which expressly states:

> That the granting of this permission in no way obliges the Chief Building Official to issue the building permit for the project.

5. When the respondents' CBO was asked on November 23, 1995 by the applicant's solicitor to render a decision on the building permit application, the CBO determined that they could not issue the building permit due to the enactment of the ICB and due to the long list of outstanding items still required to be completed by the applicant as a condition precedent to building permit approval. The applicant satisfied most (but not all) of the outstanding concerns only in late February of 1996, some three months after the ICB was enacted.
6. The applicant's agent admitted on cross-examination that the CBO was unable as of November 23, 1995 to issue a building permit, irrespective of the ICB, due to the list of outstanding matters still requiring compliance as a condition precedent to the issuance of a building permit.
7. The applicant is, to this date, not fully in compliance with the conditions precedent of the **City** to issuance of a building permit, not having secured clearance regarding a lot grading certificate and lot grading approval as well as

site plan approval, the latter due to the applicant not having responded to requests for inter alia for an addendum to accompany a noise study and for the addendum to be certified by a professional engineer.

11 With respect to the ICB the respondents rely upon the following:

1. While zoning for the Property permits a car wash use, there was and is an inconsistency in the various primary and secondary official plan policies which govern development at this location. The [current] approved Official Plan does not permit car wash uses in highway commercial designations in residential districts, while the approved Secondary Official Plan (the Dixie Storefront Secondary Plan) does permit such uses, provided certain site development criteria can be satisfied. The **City's** new Official Plan, not as yet approved by the Minister, permits car washes, but the proposed new District Plan (the Lakeview District Plan) still awaiting Ministerial approval, does not permit such uses in the highway commercial policies for the District. [In oral submissions made, it was indicated that this ministerial approval has now been given.]
2. Council was and is also concerned with the absence of consistent development standards within the **City's** Zoning By-law for car wash uses within residential districts respecting matters such as issues of noise, ingress/egress, buffering and parking standards. These issues had not been studied in a comprehensive fashion in previous staff reports. The applicant's agent admitted on cross-examination that these matters constitute serious planning issues.
3. The only professional or expert planning evidence in this Application is that provided by the **City** through the affidavit of James Riddell. Mr. Riddell states that the ICB, under or in these circumstances, "is an approach in keeping with good planning principles."
4. The applicant through his agent Mr. Chee was aware approximately one week prior to November 22, 1995 that Council had requested **City** staff to prepare an ICB. The applicant, by admission of its agent on cross-examination, however, failed to take any substantive measures to track the progress of the ICB, or to take vigorous steps to represent the applicant's interests, failed to seek a meeting with the Mayor or members of Council, and failed to appear before Council at a public meeting to make submissions.
5. In any event, the ICB does not target the applicant's property. It applies to numerous properties throughout the entire **municipality** of the **City** of Mississauga. The applicant's witnesses admitted on cross-examination that the ICB has **City**-wide application.
6. The applicant and several entities have filed appeals from the ICB to the OMB, including an entity represented by counsel for the applicant herein and an entity represented by Vince Serratore.
7. The enactment of the ICB was accompanied by a resolution requiring that a

planning study be undertaken by staff to address Council's concerns, in accordance with the requirements of the Planning Act. This study with respect to car washes has now been completed and is to be presented to the Planning and Development Committee for direction.

8. While the applicant had the opportunity to submit an application for an exemption from the ICB, the applicant or his agents did not pursue this opportunity.
9. The applicant relies principally upon the affidavit of Vince Serratore to support the allegation that the ICB was targeted at 1459 Lakeshore Road East. Mr. Serratore swore his affidavit nearly four months after the November 13, 1995 Planning and Development Committee meeting.
10. Mr. Serratore admitted on cross-examination that:

a) he did not rely on any notes in preparing his affidavit;
b) the comments during the meeting of the Councillor for the Ward where the applicant's property is located were in the context of a concern over the inconsistency between the official plan policies and the zoning by-law applicable to the subject site;
c) the discussion among members of the Committee at the meeting mushroomed into a broader discussion on policy issues in general, without specific reference to any property, related to car wash uses in residential areas and closed automobile service station sites with respect to planning issues as identified above;
d) he conceded that it was simply his opinion that the ICB was targeted at 1459 Lakeshore Road East, but that he did not actually know if in fact is was so targeted; and
e) there is no reference anywhere in the Minutes from the Committee meeting of any Committee member specifically targeting or expressing an intent to target 1459 Lakeshore Road East to stop the construction of the car wash use at this site.

12 I find the respondent's concerns troubling. The position taken suggests that the applicant is not entitled to relief in these matters, in part, based upon his inattentiveness or lack of diligence.

13 It is the obligation of the **municipality** to assure that it uses its legislative powers in good faith in an objective, fair, impartial and unbiased manner.

14 The test is not whether the applicant was present, or represented, or even attentive, to assure that the **municipality** meets this standard. Even though the applicant does not take steps to assure that the **municipality** behaves responsibly, he is entitled to rely upon the fact that the **municipality** will do so.

15 Indeed the **municipality's** approach is not supported by the case authorities which suggest that, while the initial onus is upon the applicant to establish that the ICB has a potentially adverse impact upon him, once this burden is met, the onus shifts to the respondents to justify the **City's** course of conduct (Gilbert v. Oakville, (1986) 31 M.P.L.R. 157 at 160). The latter onus is not lightly discharged. As stated by M. Rosenberg in Re **City** of Scarborough Interim By-law 22169-81 (1988) 22 O.M.B.R. 129 at 131:

> ICBs are extraordinary remedies given to **cities** and their application must be done with extreme caution. In this case, there was no rationale behind the passing (sic) this by-law other than to appease angry ratepayers and delay development of the site. There are no planning principles involved here that would justify the **City** of Scarborough's action.

Jurisdiction of the Court

16 The respondents have framed two challenges to the Court's jurisdiction in these matters, as follows:

a) The application is not timely.
b) The OMB has complete jurisdiction to hear and determine the merits of appeals under the Planning Act as a consequence of the enactment of an ICB.

Timeliness

17 Section 25(1) of the BCA permits persons aggrieved by a decision made by a CBO to appeal the decision within 20 days after the decision is made.

18 On November 23rd, 1995, as a result of a telephone call from applicant's counsel, the CBO wrote to Ms. MacLean to advise of the enactment of the ICB the day previous. His "decision" in that letter was stated as follows:

> The by-law has the effect, as noted, of restricting the use of the property to those uses that existed on the date of passage of the by-law. As the property is not currently being used for the purpose of a car wash on November 22, 1995, the proposed use is not, at this time allowed. As a result, I am unable to issue the building permit applied for under the above noted application.
>
> Notwithstanding the ICB, I attach a copy of the current Application Status Report for the referenced application, detailing information outstanding and precedent to the issuance of a building permit or foundation to roof permit. (emphasis added)

19 The letter continued with an invitation to hold further discussions, including a discussion with

Councillor Corbasson, to whom a copy of the letter was sent.

20 Notice of the passage of the ICB was published on December 13th, 1995, with the result that on December 20, 1995, the applicant appealed the passage of the ICB to the OMB.

21 Under the heading "Zoning Requirements" of the Application Status Report which accompanied the November 23, 1995 letter of the CBO, there were certain deficiencies listed as outstanding, including "Site Plan Approval, Payment of Development Charges, Lot Grading Certificate and Lot Grading Approval". Also outstanding under separate headings were a number of Structural, Plumbing and HVAC requirements.

22 The applicant continued to resolve and remove the deficiencies referred to in that Application Status Report such that, on March 4, 1996, a further letter from the CBO was sent to applicant's counsel together with another Application Status Report. This latter letter, by the submissions of Ms. MacLean, constitutes the "decision" from which the 20 day appeal period referred to in s. 25(1) of the BCA begins to run. The March 4, 1996 letter stated:

> The above noted property is subject to an interim control by-law respecting the intended use of the property and Site Plan approval has not been granted for the proposed works.
>
> The Building Permit applied for under the noted code number can not be issued at this time.

23 In this letter the requirement of site plan approval was referred to. It had not been referred to in the earlier letter. Accompanying the March 4, 1996 letter was a more current Application Status Report which only noted, as outstanding deficiencies, certain zoning requirements. The previous requirement for "payment of development charges", was deleted. In the interim, payment had been made and accepted.

24 Counsel for the respondents, Mr. Minkowski, is of the view that time begins to run under s. 25(1) of the BCA when the decision was made, and reported, in the November 23, 1995 letter of the CBO to refuse the complete building permit. In that letter, he advances, it is clear that the decision was final, "as a result" of the ICB. This situation did not change.

25 In the March 4, 1996 letter, the ICB was still the bar which resulted in the denial of the building permit although the requirement of the site plan approval was also noted. The effect of the ICB continues to the be bottom line at this time.

26 Mr. Minkowski contends that the passage of the ICB crystallized events. That was stated November 23, 1995. That same decision was simply restated on March 4, 1996. The restatement, based upon the same grounds, is not, by his submission, the commencement date of the 20 days

within which to appeal notwithstanding that, in the interim, deficiencies had been resolved, and payments made.

27 This application was issued on March 14, 1996.

28 Counsel for the applicant disagrees. It is her position that, because of outstanding deficiencies which existed in November, the CBO could not have granted the building permit on November 23, 1995, even without the fact of the ICB. Those deficiencies, she states, have now all been resolved with the result that it is the March 4, 1996 letter which first addresses a decision which is based solely upon the enactment of the ICB.

29 Ms. MacLean distinguishes the still outstanding Zoning Requirements from other deficiencies on the basis that Site Plan, a Lot Grading Certificate and Lot Grading Approval are not proper requirements for the issue of a building permit. If they are, her position is lost because all requirements for the building permit are still not met, with the result that the court still cannot **order** the issue of the building permit.

30 It is not necessary to resolve the consequences of the presently outstanding Zoning Requirements as, in my view, the **municipality's** position is correct in that the decision not to issue the building permit was crystallized on November 23, 1995.

31 Despite this, s. 25(2) BCA provides the discretion to extend the time for the appeal. Ms. MacLean has asked that I exercise this discretion if I do not adopt her primary argument.

32 Mr. Minkowski has argued that my discretion to extend time for making this appeal should only be exercised in exceptional and compelling circumstances, which are absent in the present application. I reject this.

33 I am required by s. 25(3) BCA to satisfy myself, that there are reasonable grounds both for the appeal and for applying for the extension. The reasonableness of the grounds for the appeal necessitates an assessment of the merit of the positions of the parties. That has necessitated a lengthy review of the facts on the basis that the motion to **quash** is not time limited, as well as hearing the arguments of the parties.

34 These reasons confirm that I have found that reasonable grounds exist for the appeal.

35 As to the reasonableness of the grounds for applying for the extension, I am of the opinion it would be unreasonable not to exercise my discretion.

36 As stated, the CBO was continuing to accept ongoing resolutions of deficiencies set out in his first Application Status Report and even accepted payment between the two letters in which he set out his reasons for denying the building permit.

37 There can be no prejudice to the respondents if time is extended, whereas the prejudice to the

applicant, if relief is appropriate, is substantial. While not determining the issue at this stage, a plausible case has been made for **political interference,** inappropriate discriminatory treatment of the applicant and a lack of good faith by the **municipality** in its treatment of the applicant.

38 Similarly, while I recognize that I must assess the reasonableness of the grounds for the appeal separately from the grounds for applying for the extension, they are inextricably interwoven in this application in my view.

39 It would also be unreasonable that I determine that the grounds for appeal are reasonable and then go on to determine that the requisite extension is unreasonable, absent bad faith, misconduct or similar on the part of the applicant.

The OMB/Court Jurisdiction Issue

40 As I previously noted, it is the respondents' position that only the OMB has jurisdiction to determine questions of law on appeals under the Planning Act and from the enactment of an ICB. However, the appeal in question in this application is under s. 25(1) BCA, which specifically confers upon this Court the responsibility of determining appeals from orders or decisions of the CBO by persons who consider themselves aggrieved by those orders or decisions.

41 I am cognizant of the fact that the OMB is a specialized tribunal with particular knowledge and that the Court should exercise its discretion to intervene, when in competition with the OMB, sparingly and "only in the clearest of circumstances". Having regard to the fact that it is this Court which has the responsibility for appeals under s. 25 such considerations, have no relevance.

42 Pursuant to s. 25(4) BCA, I can:

(1) Rescind or affirm the decision of the CBO;
(2) Take such action as I consider the CBO ought to have taken;
(3) Substitute my decision for that of the CBO.

43 I am aware that I also have the authority, in appropriate circumstances, to grant equitable relief, including mandamus. (Re Woodglen & Co. Ltd. and **City** of North York (1984) 43 O.R. (2d) 289 at 300)

44 I repeat that the opinion of the CBO on November 23, 1995, confirmed on March 4, 1996, was that he was unable to issue the building permit in question because of the ICB, and other matters. His decision was unrelated to the validity of the ICB as it was necessarily based upon the presumption of the validity of that by-law. The CBO had no power to **quash** the ICB in question.

45 The issue, thus framed, is not whether the ICB is valid and enforceable but whether the CBO properly concluded that the ICB is enforceable against the applicant.

46 In my view, it is not so enforceable. This result is as a consequence of the interrelationship of

the Planning Act in conjunction with the BCA and the Building By-law of Mississauga.

Analysis

47 Under s. 8(1) of the BCA, no person shall construct a "building" without a "permit". A "building" by one definition, includes "plumbing not included in a structure". Plumbing is also defined. It includes a "drainage system".

48 Under s. 8(2) of the BCA, it is mandatory that the CBO issue a building permit unless the proposed building "will contravene this Act or the building code or other applicable law".

49 S. 7 of the BCA, permits **municipalities** to pass by-laws prescribing "classes" of permits including "permits in respect of any stage of construction". In its Building By-law, Mississauga has, in fact, prescribed classes of permits related to stages of construction. These are set out in Schedule "A", which provides for a "drain component" class of permit.

50 On October 12, 1995, a "drain component" class of building permit for "site servicing only" was issued to the applicant by the CBO.

51 The document which serves as the **City's** building permit is a composite document. It contains a heading "class of permit" under which are incorporated eight classes, including the "drain component" class. Boxes are available to be checked to distinguish the class of permit issued.

52 Also as noted, Mr. Chee, the applicant's agent in these matters, acknowledged that the issue of the "drain component" permit to the applicant did not guarantee that the applicant would be entitled to receive a different class of permit. The applicant was aware of this, and agreed. In the result, the **municipality** argues that the issue of the drain component permit was at the applicant's risk.

53 Under s. 8(2) BCA, the CBO is not entitled to withhold permits on such a basis. The permit in question is not, nor was it intended to be, a "conditional permit" pursuant to those provisions of the BCA which permit the issue of building permits in the discretion of the CBO when all of the requirements have not been met for its issue.

54 It is clear that the applicant was so anxious to obtain the permit in question that he accepted it on the limited basis on which the CBO purported to issue it. Mr. Minkowski believes that, as such, his acceptance, without further guarantees, constitutes an agreement that is binding upon him, even if not statutorily authorized. He argues that it is imperative that CBO's have an inherent jurisdiction to place restrictions on permits which are issued. This necessity arises so as to enable a CBO to administer the BCA on a basis consistent with the needs of applicant, and the interests of the community.

55 It is not necessary that I resolve the appropriateness or the limits of that discretion if it exists. The applicant did not, in pursuit of the permit that was issued, waive any further entitlement

consequent upon the fact of its issue. At the most he agreed that there was no guarantee, assuming the risk that he might not get the remaining permits for a complete building. He did not waive rights, statutory or otherwise, by this recognition of the lack of guarantee. His entitlement will therefore be determined in law, not on the basis of some notional contract that he was accepting the permit without further rights.

56 It is clear that the **municipality** considers a "class of permit" to be something less than a "building permit", on the basis that a "building permit" is the permit for a complete building. In the result, in Schedule "A" of its Building By-law, the basis of the fee it charges depends upon whether the permit is a "part permit".

57 S. 7 of the BCA does not authorize "part" permits. It authorizes "classes" of permits. It is axiomatic that a "part" of something is less than the whole of that thing, whereas a "class" of something is a category of that thing. "Classes" are distinguished by their differences, not by their completeness.

58 Funk and Wagnell's Standard Desk Dictionary includes, in the definition of "part", the following:

> N. (1) A portion of a whole; segment.

59 Included in its definition of "class" is the following:

> N. ... (3) A category of objects, persons, etc. based on quality or rank: of the first class
>
> (4) A number of things grouped together as having common properties; a category.

60 It is the submission of Mr. Minkowski that the legislative authority to identify different stages of construction contemplates that each class of permit will be treated as independent from other applications, each stage requiring its own application.

61 The issue of a class of permit will not, by this approach, be part of a continuum which binds the issuance of other classes of permit. It is irrelevant that the permit is in respect of something greater in the contemplation of the applicant (in this instance, a complete car wash building).

62 It is the position of the applicant that a class of permit having been issued in relation to part of the construction of the car wash, substantive rights become vested. Determinations based upon zoning have been favourably resolved and cannot thereafter be limited or encroached upon. It is only necessary for the applicant to meet the specific requirements which apply to each additional class of permit in **order** that the additional class of permit will issue.

63 Applicant's argument is that all necessary permits for the completion of the car wash must

follow, provided that the applicant conforms to the "applicable law" which, in terms of zoning, existed when the first permit was issued. An ICB cannot extinguish those vested rights. It is not only the fact that the drainage was properly designed, or similar, that was determined when the drain component class of permit was issued. The drainage component permit was related to a distinguishable building, a car wash. When issued there were no barriers to that facility, hence the vesting of the right to build that facility in its entirety.

64 S. 38 of the Planning Act authorizes the enactment of ICB's. S. 38(8) specifically provides that s. 34(9) of the Planning Act applies "with necessary modifications" to ICB's.

65 Section 34(9) provides that "no" such ICB "applies to prevent the erection ... of any building ... for which a permit has been issued" under s. 8 of the BCA, prior to the passage of the by-law "... so long as the building ... when erected is used for the purpose for which it was erected". (emphasis added)

66 Summarizing, the applicant's position is that a permit has been issued, albeit a permit for a limited purpose. Resolved in the issue of that permit is the entitlement of the applicant to operate a car wash on the site. Contrary to the position of the respondents (which is that only the Drain Component of the construction cannot be halted by the ICB), the ICB cannot prevent the erection of the building in respect of which the drain component is a part.

67 The real question then, is whether the car wash which was the greater building that was contemplated by the class of permit issued, can be prohibited by the ICB as a consequence of the fact of the issue of only a class of permit.

Statutory Interpretation

68 In 1121472 Ontario Inc. v. Corporation of the **City** of Toronto, (1995) 29 M.P.L.R. (2d) 221 at 228, Kiteley, J. conducted an "Analysis" of present practices applicable to the "plain and ordinary meaning" of words used in by-laws. Citing Wilson v. Jones, [1968] S.C.R. 554 (S.C.C.), she notes that the Supreme Court determined "any doubt as to the application of the by-law to prevent the erection of a specific building should be resolved in favour of such proposed use" whereas, without reference to that decision, in Bruce v. Toronto (1971) 19 D.L.R. (3d) 386 (O.C.A.) a liberal interpretation of a restrictive by-law was favoured with the result that, in matters related to the use of lands, "the rights of the community are paramount to the rights of the owner".

69 In Milton v. Smith, 32 M.P.L.R. 107 at 117, Clarke, J. states:

> I accept as a general principle that in the construction of a by-law words must be given their ordinary natural grammatical meaning unless there is an indication in the context to show that the particular words are being used in a special sense.

70 I adopt that statement as being equally applicable to the interpretation of statutes with the

result that it has application both to the Building By-law of the respondent **City** and to the Planning Act.

71 Concluding, in the BCA and under the Building By-law, by definition, a building can be something considerably less than a complete building. Thus, by definition, "building" is "used in a special sense". Similarly "permit" can have different meanings.

72 Those special definitions or meanings are not set out, referred to, subsumed in or otherwise incorporated into the Planning Act.

73 It is therefore possible to give the language of s. 34(9)(b) of the Planning Act an ordinary, natural grammatical meaning without reference to those special definitions contained in the BCA and Building By-law.

74 Indeed, it would offend ordinary grammar and natural meaning to import the special meaning of those words into the Planning Act.

75 A "building" which consists of "plumbing not located in a structure" (s. 1(1)(c) BCA) demonstrates the fact of that definition as "being used in a special sense".

76 Pursuant to s. 34(9) of the Planning Act, "no by-law", (which includes an ICB by virtue of s. 38(8)) can prevent the erection of "any building" for which "a permit has been issued under s. 8 of the Building Code Act", prior to the passage of the ICB.

77 The plain meaning and only reasonable conclusion is that the building which cannot be prevented by the ICB is the car wash, not some lesser "building" as used in a special sense in another statute or by-law.

78 Concluding:

a) a permit was issued; albeit one of a class of permits;
b) it was issued under s. 8 of the BCA;
c) it was issued prior to the passage of the ICB.

79 In the result, the CBO was in error in refusing to issue the further building permit to complete the car wash which the applicant seeks to built at 1459 Lakeshore Road East, Mississauga, Ontario. That was the only building, using the ordinary natural grammatical meaning of a building, in respect of which "a" permit was issued. The declaration will therefore go that the ICB cannot be used to prevent the erection of that car wash building.

80 S. 8(2) BCA mandates that permits shall be issued provided that they do not contravene applicable law. By these reasons, the ICB does not constitute applicable law which prohibits such issue. Without determining the validity of the ICB, the applicant's lands are, by these reasons, exempt from the ICB.

81 Subject to payment of appropriate fees and the resolution of any outstanding Zoning Requirements or other deficiencies set out in the applicant's Application Status Report, I **order** the issue of those building permits, which, but for the ICB, the applicant requires for the construction and use of the car wash.

Section 136 of The Municipal Act

82 In view of the foregoing reasons, the question whether the ICB should be quashed by me, for illegality by reason of bad faith, becomes moot.

83 There is an appeal of the ICB to the OMB outstanding. That body has broad jurisdiction and is best able to deal with the validity of the ICB if the applicant wishes to proceed to resolve that issue.

84 I may be spoken to as to costs.

ZELINSKI J.

qp/d/mmr/DRS/DRS/DRS

Indexed as:

Ingles v. Tutkaluk Construction Ltd.

James Ingles, appellant;
v.
The Corporation of the City of Toronto, respondent.

[2000] 1 S.C.R. 298

[2000] S.C.J. No. 13

2000 SCC 12

File No.: 26634.

Supreme Court of Canada

1999: October 8 / 2000: March 2.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (62 paras.)

Negligence -- Duty of care -- Municipalities -- Building inspection -- Homeowner engaging contractor to renovate house -- Owner aware that building permit required in order to obtain inspection of work -- Owner accepting contractor's advice to commence construction prior to obtaining building permit -- Construction partially completed when permit obtained -- Building inspectors unable to inspect critical aspect of construction and relying on contractor's assurances that it conformed to building code -- Work proving defective -- Owner paying for extensive repairs and suing municipality for negligent inspection -- Whether municipality owed duty of care to owner in conducting inspection -- Whether owner's conduct absolved municipality of all or part of its liability.

Municipal law -- Building inspection -- Negligence -- Municipal liability -- Duty of care -- Homeowner engaging contractor to renovate house -- Owner aware that building permit required in order to obtain inspection of work -- Owner accepting contractor's advice to commence construction prior to obtaining building permit -- Construction partially completed when permit

obtained -- Building inspectors unable to inspect critical aspect of construction and relying on contractor's assurances that it conformed to building code -- Work [page299] proving defective -- Owner paying for extensive repairs and suing municipality for negligent inspection -- Whether municipality owed duty of care to owner in conducting inspection -- Whether owner's conduct absolved municipality of all or part of its liability.

The appellant hired a contractor to renovate his basement. This project required the installation of underpinnings under the existing foundation to prevent the walls from cracking and the home from collapsing. Although the contract specified that the contractor would obtain a building permit prior to commencing construction, and the appellant wanted the permit obtained and inspection made, the contractor convinced him 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. It was impossible to determine with a visual inspection whether the underpinnings conformed to the building code. Because it was 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, without verifying this information, except for an examination of the concrete. The appellant began to experience flooding in the basement shortly after the construction had been completed. He hired another contractor, who determined that the underpinnings were completely inadequate and failed to meet the standard prescribed in the Building Code Act, and who made the repairs. The appellant sued the first contractor in contract and the respondent city for negligence. The trial judge allowed the action and, after deducting an amount to reflect the appellant's contributory negligence, held the contractor and the city jointly and severally liable, and apportioned damages of $49,368.80 between them. The Court of Appeal set aside the decision, holding that by allowing the construction to proceed without a permit, the appellant had removed himself from the class of persons to whom the city owed a duty of care.

Held: The appeal should be allowed.

[page300]

The Anns/Kamloops test should be applied to determine whether a public body owes a duty of care toward individuals. Under the first branch of the test, a prima facie duty of care will be established if it can be shown that a relationship of proximity existed between the parties such that it was reasonably foreseeable that carelessness on the part of the public actor would result in injury to the individual. Under the second branch of the test, the court must examine the legislation which governs the public authority to determine whether a private law duty should be imposed in the circumstances. Such legislation includes statutes which confer a 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. Inspection schemes fall within this category of legislation, and in order to subject the local authority to a private law duty of care, it must be determined whether the inspection scheme represents a policy decision reached by the local authority which is exempt from civil liability, or whether that policy has been implemented at the operational level. 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. 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 be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the circumstances.

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 appellant and the city, such that it was foreseeable that a deficient inspection [page301] of the construction could result in damage to the property or injury to the owners. Under the second arm 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 implement this decision, and exercised its power to enter upon the premises to inspect the renovations at the appellant's home, it owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of that power.

The Court of Appeal erred in concluding that the appellant, through his own negligence, removed himself from the class of persons to whom a duty of care was owed. The negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care in exercising its power of inspection. A municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of reasonable care in rare circumstances, when the conduct of the owner-builder is such as to make it impossible for the inspector to do anything to avoid the danger.

To avoid liability, a municipality 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. Municipalities will not be held to the standard of insurers for the work; nor are they required to discover every latent defect. A reasonable inspection in light of the circumstances is required. The Building Code Act delineates that a city can only be held liable for those defects which the municipal inspector could reasonably be expected to have detected and had the power to have remedied. Whether an inspection has met the standard of

care is a question of fact, and once it is determined that a trial judge has applied the correct standard, an appeal court can only reverse the finding of whether the standard has been met if it can be established that a palpable or overriding error was made which affected the assessment of the facts. Here, the [page302] trial judge concluded that in light of the contractor's failure to apply for the permit until after the underpinnings were put in, his failure to post the permit as required, and his failure to notify the inspector that the underpinnings were being installed, it would have been reasonable to conduct a more thorough inspection. The legislation authorized a more vigilant inspection as was required in the circumstances. By failing to exercise those powers to ensure that the underpinnings were compliant 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.

While it is clear that the appellant was negligent in relying on the contractor's advice that it was appropriate to proceed with construction before the permit was obtained, in order to avail itself of the defence set out in Rothfield, the city must show that the appellant's conduct was such as to make him the sole source of his loss. His conduct must amount to a flouting of the inspection scheme. Here, the Court of Appeal erred in concluding that the appellant had flouted the inspection regulations, and in absolving the city of all liability. The concept of "flouting" denotes conduct which extends far beyond mere negligence on the part of the owner-builder.

The apportionment of liability is primarily a matter within the province of the trial judge and appellate courts should not interfere with a trial judge's apportionment unless there is demonstrable error in his appreciation of the facts or applicable legal principles. No such demonstrable error was shown in this case and the trial judge's apportionment of fault should be restored. Further, prejudgment interest at the rate prescribed by the trial judge is also restored, there being no reason to interfere with his discretion under the Courts of Justice Act.

Cases Cited

Applied: Anns v. Merton London Borough Council, [1977] 2 All E.R. 492; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; Ryan v. Victoria (City), [1999] 1 S.C.R. 201; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; [page303] Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210; considered: Rothfield v. Manolakos, [1989] 2 S.C.R. 1259; distinguished: McCrea v. White Rock, [1975] 2 W.W.R. 593; Leischner v. West Kootenay Power & Light Co. (1986), 24 D.L.R. (4th) 641; Hospitality Investments Ltd. v. Everett Lord Building Construction Ltd., [1996] 3 S.C.R. 605; referred to: Just v. British Columbia, [1989] 2 S.C.R. 1228; Acrecrest Ltd. v. Hattrell & Partners, [1983] 1 All E.R. 17; Hall v. Hebert, [1993] 2 S.C.R. 159; Fitzgerald v. Lane, [1988] 2 All E.R. 961; Colonial Coach Lines Ltd. v. Bennett, [1968] 1 O.R. 333; Menow v. Honsberger Ltd., [1970] 1 O.R. 54, aff'd [1971] 1 O.R. 129, aff'd [1974] S.C.R. 239 (sub nom. Jordan House Ltd. v. Menow); Hospitality Investments Ltd. v. Lord (Everett) Building Construction Ltd. (1993), 143 N.B.R. (2d) 258.

Statutes and Regulations Cited

Building Code Act, R.S.O. 1980, c. 51.
Building Code Act, R.S.O. 1990, c. B.13, ss. 3, 5(1), 6, 8, 9, 10, 11.
Building Code Act, 1992, S.O. 1992, c. 23, s. 13(6).
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 130.
Negligence Act, R.S.B.C. 1979, c. 298, s. 2(c).
Negligence Act, R.S.O. 1990, c. N.1, ss. 1, 3.
Rules of the Supreme Court of Canada, SOR/83-74, Rule 29 [rep. & sub. SOR/93-488; am. SOR/95-325].

APPEAL from a judgment of the Ontario Court of Appeal (1998), 38 O.R. (3d) 384, 158 D.L.R. (4th) 147, 107 O.A.C. 310, 37 C.L.R. (2d) 192, 46 M.P.L.R. (2d) 1, [1998] O.J. No. 1126 (QL), setting aside a judgment of the Ontario Court, General Division (1994), 18 C.L.R. (2d) 67 and 82, 24 M.P.L.R. (2d) 293 and 308, [1994] O.J. No. 1714 (QL) and [1995] O.J. No. 231 (QL), allowing in part the plaintiff's claim for damages for negligence. Appeal allowed.

Philip Anisman and Barbara J. Murchie, for the appellant. Diana W. Dimmer and Naomi Brown, for the respondent.

Solicitor for the appellant: Philip Anisman, Toronto. Solicitor for the respondent: City Solicitor, Toronto.

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The judgment of the Court was delivered by

BASTARACHE J.:--

I. Introduction

1 The issue to be resolved in this appeal is the liability of a public authority for breach of its duty of care in the exercise of a function that it has undertaken pursuant to a policy decision to that effect.

II. Factual Background

2 The appellant Mr. Ingles and his wife own an 80-year-old home in Toronto. In 1990, they decided to renovate the basement of the home, lowering it by18 inches, and to build a patio at the rear of the house. Lowering the basement would necessitate installing underpinnings under the existing foundations of the house to keep the walls from cracking and the house from falling down. They hired a contractor, Tutkaluk Construction Limited ("Tutkaluk") to do the work. The contract specified that the contractor would apply for and obtain a building permit and offered him an extra $500 for doing so. Mr. Ingles knew that a building permit was required to ensure that an inspection of the renovations would take place. He wanted such an inspection to ensure that the construction was being done properly.

3 Tutkaluk informed Mr. Ingles and his wife that the work would be delayed if it had to obtain a building permit before starting the renovations. Mr. Ingles reluctantly agreed that the work should begin as soon as possible, without the permit. Both Mr. Ingles and his wife asked the contractor several times in the following weeks to apply for the permit. The respondent, City of Toronto, received and approved the application for the permit two weeks after construction had begun. At this point, the underpinning work had already been completed, [page305] but the concrete for the new basement floor had not yet been poured.

4 The respondent added the following conditions to the permit before approving the application: first, that the underpinning be carried out to the satisfaction of the building inspector; second, that the building inspector be notified before proceeding with the underpinning and pouring of the concrete; and third, that the underpinning be at least as wide as the existing footings.

5 The morning after the permit was issued, Mr. Tecson, a building inspector with the city, noticed that there was construction under way at the Ingles' residence, and that the permit was not posted. After asking to see the permit, Mr. Tecson began to inspect the construction. He conducted a 30-minute inspection of the visible portions of the work. Because the underpinning had already been installed, it was not possible to determine visually whether the underpinning continued for the full width of the footing as required by the building permit. It was also not possible to determine visually the depth of the underpinning. Therefore, the inspector looked at the colour of the concrete and struck it with a hammer to see if it had set. It was raining the day of the inspection, and hence it was not possible to dig a hole next to the underpinning to determine its depth. With respect to the width of the underpinning, Mr. Tecson relied on Tutkaluk's assurances that everything was done in accordance with the drawings attached to the building plan. Mr. Tecson noted on his building card that the underpinning had been done prior to his inspection. This was contrary to the specifications on the permit, which required that an inspector be notified before starting the underpinning work.

6 Approximately two weeks later, Mr. Grimaldi, the regular building inspector for the area, also visited the site. By this time, the basement floor had been laid and visual inspection of the underpinning as a whole was even less possible than it had been at the time of Mr. Tecson's inspection. Mr. Grimaldi carried out the same inspection as [page306] had Mr. Tecson. In addition he noticed that the concrete was smooth and without voids, an indication that it had been packed

down adequately. On the job card he wrote that the underpinning appeared to be complete.

7 Within weeks of the completion of the project, the appellant began to experience flooding in his basement. He hired another contracting company to remedy the drainage problems. In the course of their work, the contractors discovered that the initial underpinning construction was completely inadequate. The underpinning was only 6 inches wide, instead of the 24 inches specified in the permit. In several places, the underpinning had not been installed to the depth stated in the plans. In fact, neither the width, nor the depth of the underpinning was in accordance with the specifications, and neither met the requirements of the Building Code Act, R.S.O. 1980, c. 51.

III. Judicial History

8 Conant J. of the Ontario Court (General Division) examined the basic duties and responsibilities for the regulation and inspection of construction in Ontario as set out in the Building Code Act ((1994), 24 M.P.L.R. (2d) 293). He found that it was clear from the statutory provisions that municipalities have a duty to appoint inspectors as are necessary to enforce the Act. The purpose of conducting inspections before issuing building permits was to ensure that permits were issued only for those plans that would conform with the building code. The purpose of conducting inspections after the permits were issued was to ensure that all construction was carried out in conformity with the plans. Conant J. concluded that the province had made a policy decision that cities inspect building plans and construction, and, as a result, that cities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers.

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9 Having found that the city owed a duty of care to Mr. Ingles, Conant J. proceeded to determine the appropriate standard of care for a municipal inspector. Following the decision of La Forest J. in Rothfield v. Manolakos, [1989] 2 S.C.R. 1259, he found that the city must show reasonable care in the exercise of its powers of inspection. The standard would not hold the city to the standard of an insurer, bound to discover every latent defect in the project and every derogation from the building code requirements. Instead, the city would be liable for those defects which it could reasonably be expected to have detected and to have ordered remedied.

10 Conant J. found that the city failed to meet the standard of care in its inspection of the construction at Mr. Ingles' home for two reasons. First, he found that it was not reasonable for Mr. Tecson to rely on Tutkaluk's assurance that the construction met the specifications. Mr. Tecson should have been wary of the contractor's assurances for the following reasons: the contractor did not apply for the permit until after the underpinning had been put in; the contractor did not give notice as to the status of the project, despite the requirements on the building permit; the permit was not posted outside the home; and Mr. Tecson did not know the contractor or his work. Second, he found that a more thorough inspection was reasonable because the underpinning was a major

structural element. A defect in that element could lead to a collapse of the entire house. Conant J. concluded that the inspector could have used his investigatory powers to determine the width and depth of the underpinnings and was negligent in failing to do so.

11 As for the appellant's negligence, Conant J. found that he knew, or should have known, what he was doing in agreeing to a delay in obtaining a building permit. As such, he was required to bear some of the responsibility for the damage. However, [page308] Conant J. also found that the appellant and his wife did not participate in a conscious effort to prevent the building inspector from examining the underpinnings. They were not disentitled from recovering against the city, which failed to discharge its obligations. Tutkaluk was found 80 percent liable for the damage and the city was found to be 20 percent liable. The city's liability was reduced by a further 30 percent to account for the appellant's contributory negligence.

12 In a subsequent addendum to the original judgment ((1995), 24 M.P.L.R. (2d) 308), Conant J. clarified the apportionment of liability as between the co-defendants, and the effect of the reduction on the award against the respondent city. He found that the respondent and the contractor were jointly and severally liable for the damages. The net effect of this finding was that the $52,520 in damages was apportioned 6 percent to the appellant, 14 percent to the city and 80 percent to Tutkaluk, with a judgment against both the city and Tutkaluk for $49,368.80 representing 94 percent of the damages. In a second addendum, he also awarded prejudgment interest fixed at the statutory rate of 12.9 percent.

13 Sharpe J. (ad hoc), writing for the Ontario Court of Appeal, allowed the appeal, solely on the ground that the trial judge erred in failing to address whether the appellant had removed himself from the scope of the city's duty of care: (1998), 38 O.R. (3d) 384.

14 Sharpe J. applied the test set out in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, and agreed with the trial judge that the city had made a policy decision to inspect building plans and construction, and thus that it owed a duty of care to any person reasonably within its contemplation as someone to be injured by a breach of its duty. Sharpe J. then proceeded to apply the two-step analysis of the duty of care as set out in Kamloops v. Nielsen. [page309] Namely, he asked whether the city was in a relationship of proximity with the appellant such that it could contemplate that carelessness in its inspection would harm the appellant. Second, he asked whether there were any policy considerations which would negate the duty in these circumstances.

15 Sharpe J. answered both questions in the affirmative. Although there was a relationship of proximity between the city and the appellant, the Court of Appeal also found that there were considerations that removed the appellant from the class of persons to whom the city owed a duty of care. Sharpe J. based this finding on the remarks of La Forest J. in Rothfield v. Manolakos, supra, followed in Hospitality Investments Ltd. v. Lord (Everett) Building Construction Ltd. (1993), 143 N.B.R. (2d) 258 (Q.B.), to the effect that an owner-builder could exclude himself from the municipality's duty of care when he knowingly flouted the applicable building regulations. In his

view, the appellant "[went] along with Tutkaluk's scheme" to proceed with the underpinning work without a permit. The appellant knew that this would preclude inspections while the underpinning work was being done and that it would make the inspection much more difficult afterwards. In the opinion of the Court of Appeal, this course of action was simply incompatible with the appellant attempting to recover from the city.

IV. Analysis

A. Duty of Care

16 This Court recently affirmed in Ryan v. Victoria (City), [1999] 1 S.C.R. 201, that the test set in Anns v. Merton London Borough Council, [1977] 2 All E.R. 492 (H.L.), [page310] adopted by this Court in Kamloops v. Nielsen (the "Anns/Kamloops" test) is the appropriate test for determining whether a private or public actor owes a duty of care. These cases provide the basis for determining whether the law can impose on a public authority a private law duty towards individuals, enabling individuals to sue the authority in a civil suit, and for determining whether a duty of care is owed by a public authority in particular circumstances. To determine whether a private law duty of care exists, two questions must be asked. These questions are set out by Wilson J. at pp. 10-11 of the decision in Kamloops v. Nielsen as follows:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

17 The first step of the Anns/Kamloops test presents a relatively low threshold. A prima facie duty of care will be established if it can be shown that a relationship of proximity existed between the parties such that it was reasonably foreseeable that carelessness on the part of the public actor would result in injury to the other party; see, for example, Ryan v. Victoria, supra, at para. 22. However, as Lord Wilberforce recognized in Anns, only in certain circumstances will a public authority owe a private law duty of care towards individuals. Thus, under the second step of the test, the court must examine the legislation which governs the public authority to determine whether a private law duty should be imposed in the circumstances. Wilson J. summarized the types of legislation identified by Lord Wilberforce, at p. 11 of Kamloops v. Nielsen, supra, as follows:

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> (1) statutes conferring powers to interfere with the rights of individuals in

which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;

(2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

18 Inspection schemes fall within the second type of legislation identified by Lord Wilberforce. To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, the court must determine whether the scheme represents a policy decision on the part of the authority, or whether it represents the implementation of a policy decision, at the operational level. True policy decisions are exempt from civil liability to ensure that governments are not restricted in making decisions based upon political or economic factors. It is clear, however, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy; see, for example, Just v. British Columbia, [1989] 2 S.C.R. 1228, at p. 1243, per Cory J.; Rothfield v. Manolakos, supra, at p. 1266, per La Forest J.

19 While I have stated above that a government agency will not be liable for those decisions made at the policy level, I must emphasize that, where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect. The decisions in Anns v. Merton London Borough [page312] Council, supra, and Kamloops v. Nielsen, supra, establish that in reaching a policy decision pertaining to inspection, the government agency must act in a reasonable manner which constitutes a bona fide exercise of discretion. In the context of a municipal inspection scheme, we must bear in mind that municipalities are creatures of statute which have clear responsibilities for health and safety in their area. A policy decision as to whether or not to inspect must accord with this statutory purpose; see, for example, Kamloops v. Nielsen, at p. 10.

20 Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. Recently, in Ryan v. Victoria, supra, at para. 28, Major J. reaffirmed that the measure of what is reasonable in the circumstances will depend on a variety of factors, 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. The same standard of care applies to a municipality which conducts an inspection of a construction project. While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the

building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied; see, for example, Rothfield v. Manolakos, supra, at pp. 1268-69.

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(1) Did the City Owe the Appellant a Duty of Care?

21 Both the trial judge and the Court of Appeal found that the city owed the appellant a prima facie duty of care in these circumstances. I agree with their finding in this respect. It is certainly foreseeable that a deficient inspection of the underpinnings of a home could result in damage to the property of the homeowners, or injury to the homeowners or others. As a result, I agree that there was a sufficient relationship of proximity between the appellant and the city such that the city owed the appellant a prima facie duty to conduct an inspection of the renovations of the appellant's home and to do so with reasonable care. The first stage of the Anns/Kamloops test has been met.

22 Having found that the city owed the appellant a prima facie duty of care, I now turn to the legislative scheme which governs municipal inspections in Ontario to determine whether there is any policy reason to limit the prima facie duty of care. The relevant provisions of the Building Code Act, R.S.O. 1990, c. B.13, are as follows:

> 3.--(1) The council of each municipality is responsible for the enforcement of this Act in the municipality.
>
> (2) The council of each municipality shall appoint a chief building official and such inspectors as are necessary for the purposes of the enforcement of this Act in the areas in which the municipality has jurisdiction.
>
> 5.--(1) No person shall construct or demolish or cause to be constructed or demolished a building in a municipality unless a permit has been issued therefor by the chief official.
>
> 6.--(1) The chief official shall issue a permit except where,

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(a) the proposed building or the proposed construction or demolition will not comply with this Act or the building code or will contravene any other applicable law;

...

(3) No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying the chief official and filing details of such change with him or her for the purpose of obtaining his or her authorization.

...

(5) No person shall construct or cause to be constructed a building in a municipality except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes thereto authorized by the chief official.

8.--(1) Subject to section 11, an inspector may, for the purpose of inspecting a building or site in respect of which a permit is issued or an application for a permit is made, enter in or upon any land or premises at any time without a warrant.

(2) Where an inspector finds that any provision of this Act or the building code is being contravened, the inspector may give to the person whom he or she believes to be the contravener an order in writing directing compliance with such provision and may require the order to be carried out forthwith or within such time as he or she specifies.

(3) Where an inspector gives an order under this section, the order shall contain sufficient information to specify the nature of the contravention and its location.

...

(5) Where an order of an inspector made under this section is not complied with within the time specified therein, or where no time is specified, within a reasonable time in the circumstances, the chief official may order that all or any

part of the construction or demolition respecting the building cease and such order shall be served on such persons affected thereby as the chief official specifies and a copy thereof shall be posted on the site of the construction or demolition and no person [page315] except an inspector or the chief official shall remove such copy unless authorized by an inspector or the chief official.

(6) Where an order to cease construction or demolition is made under subsection (5), no person shall perform any act in the construction or demolition of the building in respect of which the order is made other than such work as is necessary to carry out the order of the inspector made under subsection (2).

9.--(1) An inspector or chief official may issue an order prohibiting the covering or enclosing of any part of a building pending inspection and where such an order is issued, an inspection shall be made within a reasonable time after notice is given by the person to whom the order is issued that the person is ready for the inspection.

(2) Where a chief official has reason to believe that any part of a building has not been constructed in compliance with this Act and such part has been covered or enclosed, contrary to an order made by an inspector or chief official under subsection (1), the chief official may order any person responsible for the construction to uncover the part at the person's own expense for the purpose of an inspection.

10.--(1) Subject to section 11, an inspector may enter in or upon any land or premises at any time without a warrant for the purpose of inspecting any building to determine whether such building is unsafe.

(2) Where an inspector finds that a building is unsafe, he or she may serve upon the assessed owner and each person apparently in possession of the building an order in writing setting out the reasons why the building is unsafe and the remedial steps that the inspector requires to be taken to render the building safe and may require the order to be carried out within such time as the inspector specifies in the order.

(3) Where an order of an inspector under subsection (2) is not complied with within the time specified therein, or where no time is specified, within a

reasonable time in the circumstances, the chief official may by order prohibit the use or occupancy of the building and such order shall be served on the assessed owner and each person apparently in possession and such other persons affected thereby as the chief official specifies and a copy thereof shall be posted on the building, and no person except an inspector or the chief official shall remove such copy unless authorized by an inspector or the chief official.

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(4) Where the chief official has made an order under subsection (2) and considers it necessary for the safety of the public, the chief official may cause the building to be renovated, repaired or demolished for the purpose of removing the unsafe condition or take such other action as he or she considers necessary for the protection of the public and, where the building is in a municipality, the cost of the renovation, repair, demolition or other action may be added by the clerk to the collector's roll and collected in like manner as municipal taxes.

11.--(1) For the purposes of an inspection under section 8 or 10, the inspector may,

(a) require the production of the drawings and specifications of a building or any part thereof, including any drawings prescribed by the regulations, for his or her inspection and may require information from any person concerning any matter related to a building or part thereof;
(b) be accompanied by any person who has special or expert knowledge of any matter in relation to a building or part thereof;
(c) alone or in conjunction with such other person or persons possessing special or expert knowledge, make such examinations, tests, inquiries, or, subject to subsections (2) and (3), take such samples or photographs as are necessary for the purposes of the inspection;
(d) order any person responsible for the construction to take and supply at the person's own expense such tests and samples as are specified in the order.

23 The legislative scheme is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities. Sections 5 and 6 of the Act require that building plans

and specifications be inspected before a permit is issued to ensure that they conform with the building code. Sections 8 to 11 set out the powers of the inspector to ensure that all work that is being completed conforms with the permit and, as a result, with the building code. Inspectors are given a broad range of powers to enforce the safety standards set out in the code, from ordering tests at the owners' expense, to ordering that all work cease in general. Section 9 grants inspectors the power to order builders not to cover work pending inspection, or to uncover work when there is reason to believe that any part of the building has not been [page317] 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.

24 It would appear from the use of the word "may" in ss. 8 to 11 that municipalities have the discretion under the Act to decide whether to inspect and enforce the safety standards after construction has begun. Therefore, it may be open to the municipalities to make policy decisions as to whether to inspect in certain circumstances. Of course, all such policy decisions must be made in good faith and in a way that is consistent with the overall purpose of ensuring the health and safety of the public. Such decisions can only be immune from civil action when they accord with the overall purpose of the statutory scheme. Here, the evidence is that the city had made a policy decision to inspect construction, even if the permit was issued after the construction had begun. At trial, Fred Breeze, the city's Director of Inspections, testified as follows:

> Q. Well, if the inspector is not in the position to do proper inspection because of the lateness of the building permit, can you tell me why the city doesn't simply refuse to do such inspections and insist that the owner get an inspection from an independent engineer, for instance?

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> A. Well, that's not our policy. Our policy is to inspect once a permit has been issued, and we will inspect to the best the inspector can do at the time on what they can see while they are there. [Emphasis added.]

This policy has since been codified in the Building Code Act, 1992, S.O. 1992, c. 23, s. 13(6), which grants powers to the chief building official to order work to be uncovered when notice to inspect is not given in a timely fashion. While the Act gave the city the discretion to decide when to inspect, the city made a policy decision to inspect even when a permit was received late. Once the

city chose to implement this decision, and exercised its power to enter upon the premises to inspect the renovations at Mr. Ingles' home, it owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of that power.

25 Following the Anns/Kamloops test, the city owed Mr. Ingles a duty of care to conduct an inspection of the renovations on their home and to exercise reasonable care in doing so, despite the fact that the building permit was obtained late. Therefore, the city could be found negligent if it ignored its own scheme and chose not to inspect the renovations. It could also be found negligent for conducting an inspection of the renovations without adequate care.

(2) The Negligent Owner-Builder

26 The Ontario Court of Appeal found that, despite the fact that the inspection scheme was operational, there were considerations that removed the appellant from the class of persons to whom the city owed a duty of care. Relying on the decision of La Forest J. in Rothfield v. Manolakos, supra, the court found that owner-builders could be excluded from the ambit of a municipality's duty of care regarding building inspections if they are [page319] seen as the sole source of their loss. After reviewing the appellant's negligence, the Ontario Court of Appeal concluded that the appellant had knowingly flouted the building code by agreeing with Tutkaluk's scheme to apply for the permit late. In doing so, the court found, the appellant removed himself from the ordinary inspection scheme and from the scope of the city's duty of care.

27 With respect, the Ontario Court of Appeal erred in its interpretation of the meaning of the decision in Rothfield v. Manolakos. While there may be some ambiguity in the language of that decision, Rothfield v. Manolakos stands for the proposition that an owner's negligence may, in very rare circumstances, be considered as a complete defence to a finding of negligence on the part of municipal inspectors. The decision does not stand for the proposition that an owner's negligence can remove him or her from the scope of a municipality's duty of care.

28 The facts of the case of Rothfield v. Manolakos were quite similar to the facts of the case at bar. The plaintiffs were owners of a home who hired contractors to build a retaining wall in their backyard. The contractors applied for a building permit and presented the building inspector with a rough sketch of the project. The inspector exercised his discretion and granted a permit despite the fact that the plans had not been certified by an engineer. Neither the owners, nor the contractors, advised the city, as required by the by-law, that the project had come to a stage where inspection was required. When the inspector did come to inspect the construction, most of the wall had been put in place and it was not possible to conduct a standard inspection.

29 La Forest J., for the majority of the Court, began his analysis of facts by applying the Anns/Kamloops test. After examining the legislative [page320] scheme, he found that once the city had made a policy decision to inspect building plans and construction, it owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. He then proceeded to consider whether owner-builders, as a class, should be excluded from the scope of a

municipality's duty of care under the second portion of the Anns/Kamloops test. He could see no reason why an owner-builder would not fall within the scope of the duty of care owed by a municipality. Owner-builders are no better versed in the technical aspects of building construction than other members of the public, and cannot see to it that their contractors comply with the building codes. Owner-builders thus rely on the disinterested expertise of building inspectors to ensure that construction work is safe. In addition, La Forest J. found that owner-builders are also ratepayers in the municipality, members of the public for whose benefit the by-law was passed. Therefore, it is clear that La Forest J. decided that owner-builders are a class of persons to whom a duty is owed by municipal inspectors.

30 Having decided that municipal inspectors owe a duty of care to owner-builders, La Forest J. proceeded to discuss the implications of the owner-builder's negligence. He considered the dictum of Lord Wilberforce in Anns v. Merton London Borough Council, supra, that no duty is owed "to a negligent building owner, the source of his own loss"; see Rothfield v. Manolakos, supra, at p. 1271. La Forest J. found that this principle was applicable only in the narrowest of circumstances. At p. 1271, he states:

> It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building by-laws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangers to [page321] 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 relieved the municipality of its duty to show reasonable care in approving building plans and inspecting construction.

Negligent owners would be viewed as the sole source of their own loss where they, for example, knowingly flouted the applicable building regulations or the directives of the municipality, or totally failed to acquit themselves of the responsibilities that properly rested on them, none of which apply in this appeal. La Forest J. concluded that the conduct of the plaintiffs in Rothfield v. Manolakos, supra, was not such as to make them the sole source of their own loss.

31 There is some ambiguity in the decision in Rothfield v. Manolakos as to where in the traditional tort law analysis the consideration of an owner-builder's negligence should take place, namely whether the analysis should take place in the determination of whether a municipality owes a duty of care to the negligent owner-builder, or whether the negligence of an owner-builder can serve as a defence to a finding of negligence on the part of a municipal inspector. This ambiguity stems from the fact that La Forest J. began his analysis of the consequences of the negligence of an owner-builder by quoting the dictum of Lord Wilberforce in Anns v. Merton London Borough Council, supra. At p. 504, Lord Wilberforce states:

> To whom the duty is owed. There is, in my opinion, no difficulty about

> this. A reasonable man in the position of the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them, not of course to a negligent building owner, the source of his own loss.

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Lord Wilberforce's dictum does imply that an examination of the negligence of an owner-builder will take place within the two-step analysis of whether a duty of care is owed by a municipality in conducting an inspection. As a result, the analysis of the consequences of the negligence of an owner-builder in Rothfield v. Manolakos, supra, also uses language which implies that the inquiry into whether a municipality is liable for its negligent inspection will end at the duty stage of the analysis if the plaintiff's conduct is found to be such as to make him or her the sole source of his or her own loss. Upon further examination, however, it is my view that the true intention of the decision in Rothfield v. Manolakos was to create a defence available to municipalities in a very limited set of circumstances.

32 There are several passages in the reasons of La Forest J. in Rothfield v. Manolakos which make it clear that the negligent conduct of an owner-builder should not absolve a municipality of its duty to take reasonable care in its inspection. For example, at p. 1273, he states:

> It cannot be disputed that the owners were negligent in failing to give timely notice for the pre-pour inspection. The by-law places this obligation squarely on every property owner. But the fact remains that when the inspector did attend at the site he was confronted with a situation in which it must have been at once clear to him that the retaining wall was potentially substandard. As I have just pointed out, there is no mystery to the fact that uninspected foundations may give rise to hidden defects.

Again, at p. 1274, he states:

> ... when he attended at the site, [the inspector] was confronted with a situation which, if left unremedied, manifestly stood to pose a threat to the health and safety of the public, including the neighbours and the owner builder. Of course, the cause of the problem would have been evident if the inspector had been asked to come at the proper time. But this does not absolve the inspector of his duties. It must be remembered that the inspector [page323] was, at the time, armed with all the powers necessary to remedy the situation. As I see the matter, it was incumbent on the building inspector, in view of the responsibility that rested on him, to order the cessation of the work, and the taking of whatever corrective

> measures were necessary to enable him to ensure that the structure was up to standard.

In light of these two passages, it is apparent that an inspector who attends at a site owes a duty of care to the public, to third-party neighbours, and to owner-builders to ensure that all renovation and construction projects meet the standards set out in the by-laws. This duty arises regardless of the conduct or negligence of the owner-builder.

33 Having found that a municipality whose inspector conducts a site inspection owes a duty to conduct a reasonable inspection, despite the negligence of the owner-builder, La Forest J. proceeds to set out a defence that may be available to municipalities in limited circumstances. He underlines that it may be open to a municipality to argue in its defence that an owner-builder's conduct was such that it was impossible to fulfill the duty to take reasonable care in its inspection. He sets out the test as follows, at pp. 1273-74:

> The key question, it seems to me, is whether it is reasonable to conclude that despite the negligence of the owners, the inspector was still in a position to acquit himself of the responsibility that the by-law placed on him, i.e., to take reasonable care to ensure that all building was done in accordance with the applicable standards of the by-law. In other words, is it reasonable, in the circumstances, to conclude that a due exercise by the inspector of his powers, even though he was summoned late, could have avoided the danger?

The test assumes that inspectors owe a duty to take reasonable care to ensure that all construction is done in accordance with the standards. A municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of reasonable care when the conduct of the owner-builder is such as to make it [page324] impossible for the inspector to do anything to avoid the danger. In such circumstances, for example when an owner-builder determines to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him or her, that owner-builder cannot reasonably allege that any damage suffered is the result of the failure of the building inspector to take reasonable care in conducting an inspection.

34 La Forest J.'s interpretation of Lord Wilberforce's dictum in Anns v. Merton London Borough Council, supra, is consistent with the interpretation provided by the English Court of Appeal. In Acrecrest Ltd. v. Hattrell & Partners, [1983] 1 All E.R. 17, Donaldson L.J. found that the principle does not exclude negligent builder-owners from the ambit of a municipality's duty of care, but rather that it serves as a defence. He interprets the Lord Wilberforce's dictum as follows, at p. 31:

> ... the local authority's duty of care extends to the building owner and the builder-owner to the same extent as to future owners and present and future occupiers. The difference in the position of the building owner or builder-owner is not in the ambit of the duty, but in the fact that they may have more difficulty

> in proving a causal connection between the damage and the building inspector's negligence and may also be faced with allegations of contributory negligence which may partially or even wholly defeat their claim. This, I think, is what Lord Wilberforce meant when in the Anns case ... he said:
>
> > "The duty is owed to them [the owners or occupiers of the house], not of course to the negligent building owner, the source of his own loss."
>
> If the building owner's negligence was the effective source of his loss, he would fail on the ground that there was a break in the chain of causation or on the ground that it was just and equitable that the damages recoverable should be reduced to nothing, having regard to the building owner's share in the responsibility for the damage... .

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Clearly, the English Court of Appeal interpreted Lord Wilberforce's dictum as a defence to a claim of negligence on the part of an owner-builder who was the sole source of his or her own loss. Such a defence could be invoked, either to show that the negligence of an inspector could not in any way be the cause of the owner-builder's loss, or as a complete bar to recovery for the owner-builder's contributory negligence.

35 La Forest J.'s interpretation of Lord Wilberforce's dictum as a defence to a finding of negligence against a municipality, rather than as a principle which excludes a class of negligent builder-owners from the scope of a municipality's duty of care, is also consistent with this Court's approach to other defences in tort law which focus on the plaintiff's conduct. In the context of the defence of ex turpi causa non oritur actio, this Court has ruled that it is inappropriate to consider the effect of the conduct of a plaintiff within the duty of care analysis. In Hall v. Hebert, [1993] 2 S.C.R. 159, McLachlin J., for the majority of the Court, found that it is inconsistent with the conceptual role of the duty of care within the traditional tort law analysis to consider the plaintiff's conduct as a consideration which can remove him or her from the scope of a duty which would otherwise be owed to him or her. She found that a duty of care should be grounded in considerations of proximity and foreseeability. The legality or morality of the plaintiff's conduct is an extrinsic consideration. As such, she found, in those cases where the conduct of the plaintiff does become an issue to be considered, it should be done by way of a defence, rather than by distorting the notion of the duty of care owed by the defendant to the plaintiff; see Hall v. Hebert, supra, at p. 182. It would be inconsistent with this Court's jurisprudence to develop an area of negligence law where the conduct of the plaintiff is determinative of whether he or she is owed a duty of care when this Court

has specifically pronounced that a plaintiff's conduct may not be considered in determining whether a duty of care is [page326] owed to him or her in other areas of negligence law.

36 The respondent city argues that to interpret the decision of La Forest J. in Rothfield v. Manolakos, supra, as setting out the parameters for a defence to a claim of negligence by a negligent owner-builder against a municipality would necessitate overruling this Court's decision in Hospitality Investments Ltd. v. Everett Lord Building Construction Ltd., [1996] 3 S.C.R. 605. This decision consists of one paragraph which restores the judgment of the New Brunswick Court of Queen's Bench at (1993), 143 N.B.R. (2d) 258, and is set out, at p. 606, as follows:

> We agree with the trial judge that no duty of care was owed to the respondent in the circumstances of this case. Accordingly, the appeal is allowed, the judgment of the Court of Appeal (1995), 166 N.B.R. (2d) 241, is reversed, and the trial judgment (1993), 143 N.B.R. (2d) 258, is restored, the whole with costs throughout.

This decision does appear to contradict the decision in Rothfield v. Manolakos, supra, as it seems to exempt the municipality from liability at the first stage of the negligence analysis. However, the Court did not adopt the reasons of the trial judge in the case and wrote only one sentence in disposing of the appeal. To the extent that the decision can be read as departing from the analysis of Rothfield v. Manolakos, it should not be followed.

37 The respondent city also relies on the decision of the British Columbia Court of Appeal in McCrea v. White Rock, [1975] 2 W.W.R. 593, to [page327] support its contention that a duty of care is not owed to the appellant in the case at bar. That case is also distinguishable from the case at bar. In that case, the plaintiffs had hired a contractor to renovate their grocery store. The contractor applied for and received a building permit on the basis of a plan which he submitted to the inspector. He did not, however, follow the plan when installing a beam into the renovations and eventually the building collapsed. The by-law which governed inspections in the City of White Rock provided for a scheme of inspections to occur at various stages of the construction. A duty was placed on the owners of the building to notify the inspector at various stages of the construction to receive inspections. The city had made a policy decision not to inspect until notified of the need for an inspection. The contractor called the inspector on behalf of the owners, and received three inspections pursuant to the by-law. There was evidence that the practice in White Rock was for the contractor to call for inspections on behalf of the owner. No further calls for inspection were made and as a result the inspector did not inspect the beam and did not conduct any further inspections of the site.

38 While three separate and concurring sets of reasons were delivered in that case, all three of the judges of the British Columbia Court of Appeal agreed that the by-law imposed a duty to inspect the construction only when the inspector was notified by the owners that the construction had reached one of the stages where inspection was required by by-law. A municipal inspector could not be

expected to attend at a site continuously to ensure that the construction met the specifications in the permit. Since the owners had failed to notify the inspector of the need to inspect the work, the inspector owed no duty to them. Two of the sets of reasons were careful to distinguish the case from those cases where inspectors had attended at construction cites and been negligent in conducting their inspections. This case is distinguishable from the case at bar, where the owners did notify the inspector of a need to inspect, and the inspector did attend at the site to conduct the inspection.

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39 To summarize, despite some ambiguity in the language used in his decision, it is clear that La Forest J. created a complete defence for municipalities that could be used to militate against a finding of negligence only in the rarest of circumstances, namely, when the owner-builder's conduct was such that a court could only conclude that he or she was the sole source of his or her own loss. This complete defence may encompass those situations where an owner-builder never applies for a building permit, or never notifies the inspector of the need for an inspection, or those situations where the inspector receives notification so late that it would be impossible, upon full exercise of the powers granted under the governing legislation, to discover any hidden defects. In other cases, such as Rothfield v. Manolakos, supra, itself, it will still be open to municipalities to show that a plaintiff was contributorily negligent, and to seek an apportionment of the damages accordingly. It is also clear that once a municipality chooses to implement a policy decision to inspect, it owes a duty to all who might be injured by the negligent exercise of those powers, including builder-owners, to take reasonable care in conducting that inspection. As a result, I must disagree with the findings of the Ontario Court of Appeal in this case. The city owed a duty to the appellant to conduct a reasonable inspection of the renovations to his home.

B. Standard of Care

40 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 [page329] 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.

41 The inspection scheme set out in the 1990 Building Code Act delineates the powers that are available to municipal inspectors to discover defects in a construction project. The city can only be held liable for those defects which the municipal inspector could reasonably be expected to have detected and had the power to have remedied.

42 I turn now to the inspection that took place at the appellant's home. In examining whether the inspection was reasonable in the circumstances, we must bear in mind that the determination of whether a defendant has met the standard of care required in the circumstances is a question of fact. While it is open to an appeal court to find that a trial judge applied the wrong standard of care, once it is determined that he or she applied the correct standard, an appeal court can reverse a trial judge's findings with respect to whether that standard was met by the defendant only if it can be established that he or she made some palpable and overriding error which affected the assessment of the facts; see, for example, Ryan v. Victoria, supra, at para. 57; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at p. 808.

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43 After conducting a thorough examination of the facts in this case, Conant J. concluded that the city's inspection fell short of meeting a reasonable standard in the circumstances. He accepted the appellant's submission that the behaviour of the contractor should have made the inspector wary. The contractor did not apply for the building permit until after the underpinning had been put in. The contractor had ignored the instructions in the permit, which specified that the inspector was to be notified before proceeding with the underpinning. The contractor had also failed to post the permit outside the appellant's home. Mr. Tecson testified that he did not know the contractor and had no basis for relying on him. The trial judge concluded that, given these circumstances, it would have been reasonable to inspect further. It was simply insufficient for the inspector to rely on the contractor's assurances that the work, which was not readily visible, had been completed according to the specifications. Indeed, it has been recognized by this Court that it is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building by-laws. It is for this reason that municipalities employ building inspectors; see, for example, Rothfield v. Manolakos, supra, at p. 1271. It is, therefore, unreasonable for an inspector to conclude that a project has met the standards in the building code simply because the contractor has said so. Such a conclusion is especially unreasonable when the inspector has been put on notice of the contractor's willingness to contravene the instructions in the building permit.

44 Conant J. also found that a more thorough inspection was reasonable in this case because of the nature of the work that was being carried out. He found that the risk of harm was great, requiring a higher standard of care. The construction work consisted of the installation of

underpinning, which was to bear the weight of the entire house. It was a major structural element, and a serious defect in its construction could have led to the [page331] collapse of the entire house. While the tests conducted by the inspector could help to ascertain the quality of the materials used, they could not help to ascertain whether the dimensions of the underpinning were in accordance with the plan. Given the importance of the underpinning to the safety of the entire house, verification that its construction met the specifications of the plan was necessary.

45 The city argued that the inspector lacked the power to do anything further than the inspection that he conducted. The underpinning had been laid before his arrival and it was impossible to determine visually whether it continued for the full width of the footing. The basement was dug up for the laying of the drains, and only a few inches of the depth of the underpinning were visible because of the piles of dirt from the excavation. The city argued that the powers of the building inspector to uncover work were limited. Section 9(2) restricted those powers to situations where there was a reason to believe that a part of the building had not been constructed in compliance with the Act and there was a pre-existing order not to cover. At trial, Conant J. accepted that the preconditions to satisfy granting an order pursuant to s. 9(2) of the Act were absent in this case. However, he rejected the argument that this was the only power available to the municipality to remedy the defect.

46 The trial judge found that, pursuant to s. 11(1)(d) of the 1990 Act, the inspector had the power to order the appellant to call in an engineer to saw through the underpinning to determine its width. Furthermore, pursuant to s. 9(1) of the Act, the inspector could have ordered that the basement floor not be laid. He could then have returned after the drains had been installed, when it was not raining, and dug down to determine the depth of the underpinning. The city argues that this places too high a standard on the inspector. He had no reason to believe that the underpinning did not meet the specifications in the plan. His inspection indicated that the work had been done properly. I find no [page332] error in the findings of the trial judge in this respect. The inspector reached his conclusion that the depth and the width of the underpinning met the specifications in the plan on the assurance of a contractor who had already shown disregard for the requirements of the building permit, and tests which concluded that the other aspects of the underpinning had met the standard. Given the nature of the work, it was unreasonable to conclude that the width and the depth of the underpinning met the requirements of the building code without actually inspecting that aspect of the work.

47 The trial judge applied the correct principles in determining that the inspector failed to conduct a reasonable inspection in the circumstances. He recognized that in the circumstances, especially in light of the importance of the underpinning to the structural safety of the home, a more vigilant inspection was required. The Act granted the power to the inspector to conduct such an inspection. By failing to exercise those powers to ensure that the underpinning met the specifications in the plan, the inspector failed to meet the standard of care that would have been expected of an ordinary, reasonable and prudent inspector in the circumstances. I therefore agree with Conant J. that the municipality was negligent in conducting the inspection of the renovations

on the appellant's home.

C. The Negligent Owner-Builder

48 Having found that the city owed a duty to the appellant to conduct a reasonable inspection, and that its inspector failed to conduct a reasonable inspection in the circumstances, I must now examine whether the conduct of the appellant in this case was negligent, absolving the city of some of its liability for its insufficient inspection. The appellant's conduct may even have been such as to justify absolving the city of all liability for its negligence.

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49 Mr. Ingles had specified in his contract that Tutkaluk was to apply for a building permit. Tutkaluk told him that the work would be delayed if it had to obtain a building permit before it began. The trial judge found that the appellant knew or should have known what he was doing in agreeing to a delay in obtaining a building permit, and found that he was negligent in allowing the construction to begin without a permit. On the other hand, the trial judge also found that it was impossible to conclude that the appellant and his wife participated in a conscious effort to prevent the building inspector from examining the underpinnings of their home. The Court of Appeal found that the appellant and his wife were "sadly mistaken" in relying on Tutkaluk's advice that it was appropriate to proceed with the underpinning without a permit. It is clear that the appellant was negligent. That negligence may reduce, in part, the city's liability. However, for the city to avail itself of the complete defence described in Rothfield v. Manolakos, supra, it must show that the appellant's conduct was such as to make him the sole source of his own loss.

50 As I have discussed above, the defence described in Rothfield v. Manolakos applies only in the narrowest circumstances. To avail itself of the defence, the municipality must show that the owner-builders knowingly flouted the applicable building regulations or the directives of the building inspector, or that the owner-builders totally failed to acquit themselves of the responsibilities that rested on them, such that the inspector was no longer in a position to take reasonable measures to ensure that the construction was done in accordance with the applicable standards. In delineating the type of conduct which might be considered "flouting" of the building regulations, or a total failure to meet the requirements of the legislative scheme on the part of the owner, it is important to consider the fact that the defence absolves municipalities of all liability. As a result it serves as a complete bar to recovery for certain plaintiffs. The scope of the defence must be consistent with the [page334] purposes of a system of tort law, and with tort law principles themselves.

51 The contributory negligence bar, where a plaintiff was denied any means of recovery once he or she was seen to have contributed to his or her own loss, is no longer a part of our system of tort law. It has been replaced by statutory schemes which apportion liability between negligent

defendants and contributorily negligent plaintiffs. This Court recently reaffirmed its disapproval of the bar in Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210. In the course of determining whether the contributory negligence bar could still apply in maritime law, McLachlin J. states (at para. 94):

> The considerations on which the contributory negligence bar was based no longer comport with the modern view of fairness and justice. Tort law no longer accepts the traditional theory underpinning the contributory negligence bar -- that the injured party cannot prove that the tortfeasor "caused" the damage. The contributory negligence bar results in manifest unfairness, particularly where the negligence of the injured party is slight in comparison with the negligence of others. Nor does the contributory negligence bar further the goal of modern tort law of encouraging care and vigilance. So long as an injured party can be shown to be marginally at fault, a tortfeasor's conduct, no matter how egregious, goes unpunished.

In light of this Court's approach to the contributory negligence bar, a municipality cannot avail itself of the defence set out in Rothfield v. Manolakos, supra, simply because a plaintiff acted negligently. To allow the municipality to do so would amount to a reintroduction of the contributory negligence bar into the sphere of municipal inspection. It would be inconsistent with the modern goal of tort law of encouraging care and vigilance to absolve a municipality of all liability for a negligent inspection simply because its inspectors were contacted late. Municipalities, having made a [page335] policy decision to inspect even when a permit is obtained late, would be able to conduct unreasonable inspections, while being assured that there would be no financial sanction for doing so. As I have stated above, the contributory negligence of a plaintiff may still be relevant to the apportionment of liability. In Bow Valley v. Saint John Shipbuilding, supra, McLachlin J. reduced the plaintiff's recovery by 60 percent due to its negligence. In the case at bar, the liability will also be apportioned in accordance with the appellant's negligence. In the rarest of circumstances, such as those described in Rothfield v. Manolakos, a defendant may be absolved of all liability because it is shown that the owner-builder is entirely responsible for the damage and did not rely on the inspection.

52 The concept of "flouting", therefore, must denote conduct which extends far beyond mere negligence on the part of an owner-builder. The word suggests that the owner-builder in fact mocks the inspection scheme. Certainly, an owner-builder who submitted false plans and documents to receive a permit would be mocking the scheme. Similarly, an owner-builder who never contacted an inspector to conduct an inspection would show a lack of respect for the inspection scheme and certainly no reliance on it. However, in this case the appellant did not act in these ways. He certainly acted negligently. The trial judge, however, found that he did not participate in a conscious effort to undermine the building code regime. In my view, such conduct does not amount to a "flouting" of the building code. As a result, I find that the Court [page336] of Appeal erred in absolving the city of all liability.

D. Damages

53 The appellant contends that this Court does not have the jurisdiction to review the trial judge's award of damages in this case because the respondent city did not apply for leave to cross-appeal pursuant to Rule 29 of the Rules of the Supreme Court of Canada, SOR/83-74. The relevant provisions of Rule 29 provide as follows:

> 29. (1) A respondent who seeks to set aside or vary the whole or any part of the disposition of the judgment appealed from shall apply for leave to cross-appeal within 30 clear days after the service of the application for leave.
>
> ...
>
> (3) A respondent who seeks to uphold the judgment on a ground or grounds not raised in the reasons for the judgment appealed from may do so in the respondent's factum without applying for leave to cross-appeal, and the appellant may serve and file a factum in reply in accordance with Rule 41.

The appellant argues that since the city's arguments with respect to apportionment, damages, and joint and several liability do not seek to uphold the Court of Appeal judgment on a ground not raised in the reasons for judgment, the city must apply for leave to cross-appeal pursuant to Rule 29(1).

54 The Court of Appeal did not find that the city was negligent in this case, and as such, did not comment upon the apportionment of the damages by the trial judge. In asking this Court to review the trial judge's apportionment of fault in this case, the city is not seeking to set aside or vary any part of the Court of Appeal judgment. In addition, the city is not seeking to uphold the judgment on a ground or grounds not raised in the reasons for [page337] judgment. The city is merely responding to the appellant's position that the appellant's negligence is properly considered in the apportionment of fault, and not in the determination of whether a duty of care was owed by the municipality. Therefore, I find that the city's arguments do not fall within Rule 29 and that this Court has the jurisdiction to review the apportionment of fault by the trial judge.

55 The trial judge found that Tutkaluk was 80 percent liable for the damage suffered by the appellant. The city was 20 percent liable for its negligent inspection. He then turned to the appellant's negligence. Having found that the appellant should bear some of the responsibility for his loss, the trial judge reduced the city's liability by 30 percent to account for the appellant's negligence. It appears that the trial judge took this approach to ensure that Tutkaluk would not benefit from the finding of negligence against the appellant, by having his damages reduced in proportion to the appellant's fault. With respect, this initial apportionment is not consistent with the Negligence Act, R.S.O. 1990, c. N.1. Sections 1 and 3 of that Act read as follows:

> 1. Where damages have been caused or contributed to by the fault or

> neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

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When there are two or more tortfeasors, and a plaintiff has also been found negligent, the proper approach to apportionment is to first reduce the extent of the recoverable damages in proportion with the plaintiff's negligence, and then to apportion the remaining damages between the defendants, in accordance with their fault; see, for example, Fitzgerald v. Lane, [1988] 2 All E.R. 961 (H.L.); Bow Valley v. Saint John Shipbuilding, supra; Colonial Coach Lines Ltd. v. Bennett, [1968] 1 O.R. 333.

56 In his subsequent addendum, however, the trial judge clarified that his intention was to apportion fault so that the appellant would be 6 percent liable, the city would be 14 percent liable and Tutkaluk would be 80 percent liable. In assessing the damages, he corrected his previous error, and subtracted the portion of the damages that could be attributed to the plaintiff in accordance with his findings of fault.

57 The city has asked this Court to overturn the trial judge's apportionment of fault in this case. It argues that his apportionment is inconsistent with other apportionments in similar situations; see, for example, Rothfield v. Manolakos, supra, at p. 1278. The apportionment of liability is primarily a matter within the province of the trial judge. Appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles; see Bow Valley v. Saint John Shipbuilding, supra, at para. 78. While the trial judge applied an unorthodox method of apportionment in his original judgment, his subsequent addendum clearly shows his intention to apportion fault between the plaintiff and the defendants as follows: 6 percent to the appellant; 14 percent to the city; and 80 percent to the contractor. The trial judge was well apprised of all of the facts in the case, and based his final apportionment on these facts. In my view, there is no demonstrable error in the trial judge's

appreciation [page339] of the facts in this case to justify interfering with his apportionment.

58 The city also argues that it should not be held to be jointly and severally liable with the contractor and that it should be liable only for its portion of the fault. To support this contention, the city relies on authorities from British Columbia that have held that where the plaintiff is contributorily negligent, multiple tortfeasors will only be liable to the extent of their fault; see, for example, Leischner v. West Kootenay Power & Light Co. (1986), 24 D.L.R. (4th) 641 (B.C.C.A.). I do not find these authorities to be applicable in this case. The legislation in British Columbia differs significantly from the legislation in Ontario. Section 2(c) of the Negligence Act, R.S.B.C. 1979, c. 298, reads as follows:

> ... as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person. [Emphasis added.]

Therefore, it is possible to read the British Columbia legislation as allowing contributorily negligent plaintiffs to recover only the percentage of the damage sustained that corresponds to the degree of fault of each of the individual tortfeasors.

59 The Ontario legislation has been interpreted differently, and joint and several judgments have been awarded to contributorily negligent plaintiffs; see Menow v. Honsberger Ltd., [1970] 1 O.R. 54 (H.C.), aff'd [1971] 1 O.R. 129 (C.A.), aff'd on other grounds, [1974] S.C.R. 239 (sub nom. Jordan House Ltd. v. Menow). Similarly, in Bow Valley v. Saint John Shipbuilding, supra, this Court ruled that defendants would be jointly and severally liable for a negligent plaintiff's damages in the context of the Canada Shipping Act, R.S.C., 1985, c. S-9. The purpose of a regime which imposes joint [page340] and several liability on multiple defendants is to ensure that plaintiffs receive actual compensation for their loss. Given the wording of the Ontario Negligence Act, I can see no reason to deny this benefit to a plaintiff who contributes to his or her loss. His or her responsibility for the loss is accounted for in the apportionment of fault. There is no reason to account for it again by denying him or her the benefit of a scheme of joint and several liability when the wording of the legislation does not intend it to be so.

60 In light of the foregoing analysis, I would allow the appeal and restore the apportionment of fault by the trial judge. As a result, the damages of $52,520 will be reduced by $3,151.20, representing 6 percent of the damages, to account for the appellant's negligence. I would thus restore the judgment of $49,368.80 against both the city and the contractor. The city is entitled to have judgment for indemnity against the contractor for $42,016.

61 I turn now to the prejudgment interest that was awarded by the trial judge. The trial judge awarded prejudgment interest at the rate of 12.9 percent. The city has asked this Court to review that award to account for the fluctuations in the market interest rates that occurred between the date

that the action was commenced and the date of judgment. The Courts of Justice Act, R.S.O. 1990, c. C.43, s. 130, grants trial judges the discretion to award prejudgment interest at a different rate than the prescribed interest rate to account for changes in market interest rates. The trial judge did not find that this was an appropriate case to lower the prejudgment interest rate from the one prescribed. He did not find that he was prevented from adjusting the interest rate, but simply chose not to do so. I find no reason to interfere with the trial judge's exercise of his discretion on this matter.

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62 I would accordingly allow the appeal, set aside the judgment of the Court of Appeal and restore the decision of the trial judge, with costs throughout.

cp/d/qlhbb

Case Name:

Sapone v. Clarington (Municipality)

Between
Umberto Sapone and Joan Sapone, plaintiffs, and
The Corporation of the Municipality of Clarington, Eridanus Industries Inc. and Wayne Earnest Conrad, defendants

[**2001] O.J. No. 4991**

14 C.L.R. (3d) 254

27 M.P.L.R. (3d) 167

110 A.C.W.S. (3d) 551

Court File No. 6746/01

Ontario Superior Court of Justice

Lane J.

Heard: September 20, 2001.
Judgment: December 18, 2001.

(16 paras.)

Municipal law -- Actions against municipality -- Cause of action -- Breach of own bylaw -- Negligence -- Enforcement of bylaw -- Negligent issue of permits -- Practice -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action.

Motion by one of the defendants, The Municipality of Clarington, to strike out the plaintiffs' statement of claim as it applied to it. The plaintiffs owned property adjacent to the other defendants. The property was located in Clarington. The plaintiffs claimed that the other defendants had carried out construction and were making use of the land adjacent to the plaintiffs' lands contrary to Clarington's by-laws and thereby causing a nuisance. The plaintiffs claimed damages against Clarington for negligently failing to enforce its own by-laws and for ignoring the plaintiffs' concerns regarding the illegal use of the adjacent property. They further alleged that Clarington

made the nuisance possible by granting building permits knowing that they did not comply with by-laws.

HELD: Motion allowed in part. If the allegation regarding granting building permits knowing that they did not comply with by-laws could be proven, there was a possible cause of action that would have to be resolved at trial. There was no legal duty on Clarington, however, to enforce zoning by-laws against the other defendants. It followed that there was likewise no legal duty to respond to the plaintiffs' complaints by investigating and reporting to the plaintiffs on the activity at the premises of the other defendants. Because of the substantial success of Clarington, the plaintiffs' statement of claim was struck in its entirety with leave to amend it to include only its claim regarding Clarington's granting of the building permits.

Counsel:

Irving Marks and David Taub, for the defendant Clarington, moving party.
Umberto Sapone, for the plaintiffs, responding party.

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1 **LANE J.** (endorsement):-- The defendant Clarington moves to strike out the Statement of Claim and dismiss the action against it on the ground that it does not disclose a cause of action against Clarington. The other defendants take no position. The plaintiffs seek damages and punitive damages against Clarington by reason of the construction and use of certain buildings on a property adjacent to their own by the other defendants. The plaintiffs say that the municipality, Clarington, has negligently failed to enforce its own by-laws, ignored the plaintiffs' concerns and "turned a blind eye" to illegal use of the adjacent lands, thereby causing a nuisance.

2 The plaintiffs reside in a home located one house north of property owned by the defendant Mr. Conrad and adjacent to other property owned by the defendant Eridanus, a corporation owned by him. I will refer to all of these lands as the Conrad property. The area is zoned as a rural hamlet for single family dwellings only. The Conrad property was originally a 2800 s.f. home like those around it. In the early 1990's, the defendant Conrad applied for and was granted building permits by Clarington for a substantial extension doubling, if not tripling the size of the house. There is also a 2 metre high concrete wall around the property built at the same time.

3 The plaintiffs say, in paragraph 17, that this property does not comply with the zoning because it is being used for business with numerous people working there day and night, and not as a single family dwelling. They further say, in paragraph 19, that Clarington has failed to comply with their request to investigate and report on the nature of the use of the Conrad property. In paragraph 21, the plaintiffs say that the Conrad building is an eyesore out of character with the vicinity, and is a nuisance because it blocks their view, emits noise, light and fumes and discharges unknown

substances onto the plaintiffs' property, damaging their cedar trees. In paragraph 22. the plaintiffs say that the wall contravenes the zoning by-law and that the building is being used for business. In paragraph 23, the plaintiffs say that the numerous cars entering and exiting at all hours, helicopters hovering, brilliant security lights and constant patrolling by security guards have all given rise to apprehension and loss of a sense of security. In paragraph 24, the plaintiffs say that all of this has been caused by the negligence of Clarington in that it failed to enforce the zoning by-laws, ignored the plaintiffs' concerns and turned a blind eye to the business use of the Conrad property.

4 In paragraph 26, the plaintiffs plead that Clarington: issued building permits for the Conrad property "knowing that the said permits did not comply with the letter and spirit" of the zoning by-law; has known since the early 1990s of the use of the property and has failed to enforce the by-law; knew or should have known that Conrad would use the property for business; has totally disregarded the plaintiffs' concerns as to the eyesore and the nuisance to the plaintiffs; and, in spite of the plaintiffs' concerns, issued further building permits to Conrad. In paragraph 27, the plaintiffs allege that in doing these things, Clarington failed to exercise the standard of care to be expected and thereby facilitated the illegal use of the Conrad property. Finally, in paragraph 28, the plaintiffs say that Clarington acted in a high handed manner and in bad faith by allowing Conrad to circumvent the rezoning process required to establish a business use in this residential area and by abusing its discretionary power and abdicating its duty to the plaintiffs to enforce the by-law.

5 On a motion such as this, the court must accept the facts as alleged in the Statement of Claim, unless clearly ridiculous or incapable of proof, and read that document generously: Toronto-Dominion Bank v. Deloitte, Haskins & Sells (1991), 5 O.R. (3d) 417 at 419, (O.C.G.D.). The court should not dispose at this stage of matters of law not fully settled: R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 at 782 (C.A.). It must appear plain and obvious to the motions judge that even if the facts pleaded are proved, there is no reasonable cause of action: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 980.

6 It is apparent that much of this pleading is in the language of the law of nuisance. In his oral submissions, Mr. Sapone said that his case was that the municipality had issued a building permit when it ought not to have; the building itself was a nuisance. Since 1990 Clarington had known of the business use and went ahead and issued more building permits in 1999 despite the plaintiffs' objections.

7 Counsel for Clarington submitted that a municipality cannot be liable in nuisance to a landowner where it does not occupy the land from which the nuisance emanates. It is certainly true that nuisance is normally an action brought against a neighbouring landowner based upon some use being made of that land. The municipality here is not the occupier of the offending lands. It is possible, in some circumstances, for a non-occupier to become liable. In Jackson v. Drury Construction Co. Ltd. (1975), 4 O.R. (2d) 735 (C.A.) the court held that a road contractor whose blasting operation broke open fissures in rock which enabled pig farm effluent to pollute the plaintiff's well, was liable in nuisance even though he was not the occupier of the pig farm from

which the effluent came. His non-natural use of the nearby county road had directly caused the problem. Dubin J.A. said that in an action for nuisance, liability attaches to anyone who either creates or causes a nuisance, and the cause of action is not dependent on that person being in occupation of the lands from which the nuisance emanates.

8 In the present case, while the majority of their pleading revolves around the use of the premises, the plaintiffs have pleaded that the building itself causes a nuisance by obstructing their view, and that certain pipes discharge effluent onto the plaintiffs' lands. They further submit that Clarington made this nuisance possible by granting building permits "knowing that the said permits did not comply with ... the by-law." (paragraph 26(i)). If that last sentence were proved, it is not plain and obvious to me that a municipality could not be liable for the results of such an act. The principle in Drury may not be broad enough to encompass a municipality issuing a permit, because in Drury there is reference to the defendant's non-natural use of the road, so that there was an occupation of land in the vicinity involved. But this stage of the action is not the place to resolve such issues of law. I think therefore, that paragraph 26(i) should stand.

9 Much of the plaintiffs' complaint is that Clarington knows of the illegal use and will not enforce the by-law and put an end to it. Counsel for Clarington submitted that there was no legal duty on a municipality to a ratepayer to enforce a by-law. He referred me to Toronto (City) v. Polai [1970] 1 O.R. 483 (C.A.), aff'd [1973] S.C.R. 38. In that case the City, as a result of wartime housing shortages, had adopted the practice of not enforcing zoning by-law restrictions on multiple family use of single family dwellings. In the postwar period, some such properties were placed on a deferred' list and were not prosecuted for violating the by-law. Other property owners in the same area were prosecuted for the same offence and one of them defended an action by the City for an injunction on the basis that the City was discriminating against her. The action was dismissed and the City appealed. The appeal was allowed. All three Judges wrote reasons and all referred in one fashion or another to the discretion possessed by the City as to whether to prosecute or not.

10 Schroeder J.A., at pages 490-1, likened it to the discretion possessed by the Attorney-General when acting as parens patriae, where the decision to prosecute or not could not be challenged in Court. He also observed that "the mere passing of a by-law by a municipal corporation does not cast any legal duty on the municipality to see to its enforcement." He referred to Brown v. Corporation of the City of Hamilton (1902), 4 O.L.R. 249, where the plaintiff was injured by exploding fireworks which were discharged contrary to a by-law prohibiting setting off fireworks in the streets. The plaintiff argued that he had a cause of action against the City because the City had long disregarded the by-law, to the knowledge of its officers and took no steps to enforce it. Chancellor Boyd said that this was a novel proposition, contrary to all authority except in Maryland, and that: "Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement."

11 Jessup J.A. said at page 497, that, in the absence of evidence of impropriety in the administration of the deferred list, the City must be assumed to have: "... exercised bona fides the discretion they undoubtedly have in the enforcement of the City's zoning enactments." He also

referred to Brown, supra.

12 Brooke J.A. said, at page 501:

> "Municipal Council has a discretion as to when it will prosecute for a breach of or sue to enforce the provisions of the zoning by-law. To deny the discretion in Municipal Council would be to place the most technical breach of the by-law beside the most blatant and to remove from consideration the harm done to the offender and the value to the community of the proposed proceedings when considering when they ought to be taken." Later, at page 502, he said that the Court cannot interfere with that discretion.

13 The plaintiffs relied on a number of cases demonstrating the existence of a duty of care in municipal inspection of buildings under construction, such as Kamloops (City) v. Neilsen [1984] 2 S.C.R. 2 and Ingles v. Tutkaluk Construction Ltd. [2000] S.C.J. No. 13. They may or may not assist the plaintiffs in their case against the municipality for issuing a building permit knowing that the application did not conform to the zoning by-law, but they do not support the view that merely passing a by-law casts a legal duty upon a municipality to enforce it. They are cases where the municipality has undertaken to inspect for compliance and thereby has come under a duty of care in the conduct of such inspection.

14 In my opinion Polai is decisive authority against the plaintiffs' reliance upon Clarington having a legal duty to them to enforce the zoning by-law against the other defendants. If there is no legal duty to enforce, it would follow that there is likewise no legal duty to respond to the plaintiffs' complaints by investigating and reporting to the plaintiffs on the activity at the premises of the other defendants.

15 The Statement of Claim is replete with references to Clarington's failure to respond to the plaintiffs' complaints, or to enforce the by-law. It is likely better that a new document be prepared without these passages than to strike out bits here and there. In the result, the plaintiffs' Statement of Claim against Clarington is struck out, with leave to amend to plead the cause of action referred to in paragraph 26(i).

16 The defendant Clarington has been substantially successful and will have its costs on a party and party basis, but they will be to it in the cause of the action against it.

LANE J.

cp/s/qlrme/qlkjg

Case Name:

Oshawa (City) v. Carter

Between
The City of Oshawa, and
George Carter, Patricia Carter

[2009] O.J. No. 4078

File Nos. 2860 999 08 1175, 2860 999 08 1176

Ontario Court of Justice
Whitby, Ontario

S. Lancaster J.P.

Oral judgment: January 9, 2009.

(133 paras.)

Charges: s. 36(1)(b) Building Code Act, 1992, S.O. 1992 c. 23

Counsel:

R. Vanderlinde, Prosecutor for the City of Oshawa.

G. Carter, In Person.

REASONS FOR JUDGMENT

1 **S. LANCASTER J.P.** (orally):-- The matter before this Court is that of George and Patricia Carter, who were charged on February the 20th, 2008 pursuant to the **Building Code Act,** s. 15.2(2), owner fail to comply with Property Standards By-law 1-2002, a **strict liability** offence.

2 The trial was heard on November the 3rd, 2008, and adjourned to today's date for Judgment.

The Court has heard from Christine Rutherford, a Municipal Law Enforcement Officer with the City of Oshawa. Officer Rutherford is a certified property standards officer with 17 years law enforcement experience. Her duties include investigating complaints regarding property repairs, maintenance and by-law enforcement. She investigated 676 Dnipro Boulevard in Oshawa, a nine unit apartment building owned by George and Patricia Carter, the subject of numerous complaints of overflowing garbage and debris that is unsightly and unsafe.

3 By-law 1-2002, article 4.5.9 stipulates that a property with external garbage and recycling storage areas including areas located within the building shall be enclosed by a refuse enclosure approved by the City of Oshawa Department of Development Services. By-law article 4.5.7. stipulates that every receptacle, if located outside the building, shall be located in the rear yard, when space can accommodate it or otherwise in the side yard, but shall not be located in the front yard or exterior side yard.

4 Officer Rutherford attended 676 Dnipro Boulevard on January the 4th, 2007 and issued an Order on January the 9th, 2007. After re-attending the property on October the 26th, 2007, and noting non-compliance, she reissued the Order on November the 5th, 2007, due to an administrative error, mistaking the six month time limitation with the one year time limitation required by the Building Code Act. The November 5th, 2007 Order noted that, "There are numerous garbage, recycling and compost receptacles stored in the open in the front yard of the property, contrary to By-law 1-2002, Articles 4.5.7 and 4.5.9". Compliance was required by November the 30th, 2007, with an Appeal deadline of November the 26th, 2007.

5 The Court heard that the previous Order issued on March the 2nd, 2005, contained, ten contraventions, nine of which were substantially corrected. The one outstanding item related to the unenclosed garbage enclosure, the same matter before this Court. While the compliance date was March the 23rd, 2005, no enforcement resulted.

6 Officer Rutherford told the Court that she spoke with the defendant about the Appeal option although no Appeal was filed. The property was re-inspected with a second officer on January the 4th, 2008, February 20th, 2008, and October 29th, 2008, confirming non-compliance, and took photographs on each occasion. These photos were tendered to the Court as exhibits. Several garbage bins, recycling bins and various household items, including a microwave oven, furniture and garbage bags with exposed food wastes were observed.

7 Officer Rutherford further advised that garbage bags are required to be stored in garbage containers, unless awaiting curbside collection, to protect against animal damage and the resulting health hazards. The Information was laid on February the 20th, 2008, stipulating the charge before the Court.

8 The Court has heard from the defendant, George Carter, who is also representing Patricia Carter, his wife. He told the Court that the apartment building located at 676 Dnipro Boulevard in Oshawa was built in 1969 and pre-dates the Building Code Act, and as such, he questions the

applicability of the Act to his building, as well as the City's Property Standards By-law, as it does not refer specifically to pre-existing buildings. He noted that not all properties can be upgraded.

9 Mr. Carter confirmed receiving the March 2nd, 2005 and the November 5th, 2007 Orders, and is aware of the contravention. He indicated that he corresponded with the City's Operation Services Committee on August the 3rd, 2004, regarding the garbage situation, and also applied for curbside refuse collection, a process that apparently required a by-law change to permit apartment buildings with nine units to receive curbside collection. He was successful and has been receiving curbside collection for some four years. Previously he had to arrange private collection to empty a garbage dumpster, that incidentally, was the subject of complaints of overflowing garbage. He also spoke with the Fire Department regarding refuse placement in the driveway, which was disallowed. He advised that he had applied to the City for a Building Permit to construct the refuse enclosure but the permit was not granted given the proposed plan or location of the unit.

10 Mr. Carter contends that he has no legal place to situate the required enclosure and no way to comply with the Order. Mr. Carter also questioned the City's lack of enforcement of Orders, the authority to issue and re-issue Orders, and to lay charges as well as the time period limitation outlining the Building Code Act.

11 Mr. Carter tendered R. v. Pickles, [2004] O.J. No. 662, City of Thunder Bay v. Bodnar, [2007] O.J. No. 5426, and R. v. Rexlington Heights Ltd., [2005] O.J. No. 4223, for the Court's consideration. Section 15.1(3) of the Building Code Act, authorizes the passing of Municipal By-laws for prescribing standards for maintenance and occupancy of property, if the Official Plan includes provisions regarding property conditions. The City of Oshawa's Official Plan includes property condition provisions. Paragraph 12 of R. v. Rexlington Heights Ltd. notes that, "It is undisputed that the City can legislate so that the new property standards apply to preexisting buildings". By-law number 1-2002 specifies in section 1.2.1, "That it applies to all properties in the City of Oshawa unless otherwise indicated".

12 Section 15.2,2 of the Building Code Act, and section 1.4 of the By-law 1-2002 speaks to compliance and the City's Property Standards Officer may make Orders regarding alleged contraventions. Based on the Building Code Act and the By-law provisions, Oshawa's property standards do apply to 676 Dnipro Boulevard.

13 The Court heard that a number of Orders have been issued against this property, noting four in total, although only the November 5th, 2007 and March 2nd, 2005 Orders were tendered to this Court and spoken to.

14 The January 9th, 2007 Order was re-issued on November the 5th, 2007 due to administrative error. The March 5th, 2007 Order did not result in enforcement as nine of the ten items were substantially corrected. Officer Rutherford noted that Property Standard Enforcement Officers have the discretion to issue Orders, re-issue Orders within the limitation periods, and provide limited time extensions to comply, as well as lay charges. The officer cannot vary or rescind Orders.

15 According to section 15.3.2 of the Building Code Act, an Order that is not appealed within the required time shall be deemed to be confirmed and can proceed to enforcement. The City and Mr. Carter confirmed that the November 5th, 2007 Order, nor any previous Orders regarding this property have been appealed.

16 Section 36.1 of the Building Code Act states, "A person is guilty of an offence if the person fails to comply with an Order, direction or other requirement made under this Act". R. v. Pickles and Thunder Bay v. Bodnar address the one year time period limitation and the doctrine of discoverability as they relate to the construction of a cottage dock and a garage relocation respectively, without obtaining a Building Permit. In both cases, the discoverability rule relates to a specific time when the dock construction and the garage relocation were completed and that the one year time period limitation would begin and run from that day, and not when the contravention was discovered.

17 Section 36.8 of the Building Code Act stipulates that, "No proceeding under this section shall be commenced more than one year after the time when the subject matter of the proceeding arose". The case at bar, the charge date of February 20th, 2008, is the date the proceeding arose with the Summons to Court confirmed within the one year limitation period.

18 The case at bar is a strict liability offence, and as such a due diligence defence is available as is the defence of officially induced error. While Mr. Carter did not specifically advance a due diligence defence, nor a reference to a defence of officially induced error, his testimony touched on both. He noted that he had corresponded with City officials, the Planning Department, and the Fire Department regarding the garbage situation, and his application for curbside collection. He successfully received curbside collection in 2004, but was denied the Building Permit to construct the refuse enclosure. A defence of due diligence requires the defendant to establish, on a balance of probabilities, that he took all reasonable steps to avoid committing, and in this case correcting the statutorily barred offence. The defendant is to call evidence to positively make out due diligence. George and Patricia Carter were made aware of their non-compliant status as a result of the March 5th, and the November 5th, 2007 Orders. Mr. Carter confirmed this in fact, to the Court. Despite these Orders, and apparently Orders issued earlier and meetings with the officer, they failed to take the required corrective action. The November 5th, 2007 Order had a compliance date of November the 30th, 2007, and re-inspection dates of January the 4th, 2008, February 20th, 2008 and October 29th, 2008, continued to confirm non-compliance. The Carters had the opportunity to Appeal this Order by November 26th, 2007 to the Property Standards Committee, although no Appeal was filed.

19 The Court heard that the Carters applied for, and were not granted, a Building Permit to construct a refuse enclosure in 2004. The Carters had the opportunity to apply to the City's Committee of Adjustment for an exemption or variance under the Zoning By-law to reduce the number of parking spaces, or otherwise alter his property to permit the legal placement of the refuse enclosure. The Carters made no such application. Mr. Carter noted that because he secured curbside pick up, he believed that 'everything was fine', and despite the Orders and the four years that

followed, the Carters remained non-compliant.

20 With respect to due diligence, the Court finds that the Carters have not taken all reasonable steps to address the non-compliant situation.

21 With respect to the defence of officially induced error, Mr. Carter noted that in his dealings with the City regarding the curbside collection, he was led to believe that he was in compliance, and then received the subsequent order. While asked by this Court several times if he had any evidence to substantiate his belief that the City Official led him to believe erroneously that he was in compliance, no evidence was tendered and the elements of officially induced error have not been made out.

22 As this Court has heard, the charge before the Court is rather simple. George and Patricia Carter are either in compliance, or they are not, or they have a valid defence. While the Carters may have assumed the curbside collection alleviated the refuse problem, it did not. Oshawa Property Standards are in place to address unsightly and unsafe storage of garbage. Curbside collection only removes the garbage when taken to the curb, it clearly doesn't address the tenant's storage needs, nor does it provide a neighbourhood environment that residents can enjoy and be proud of.

23 Considering the evidence before the Court, I am satisfied that the prosecution has proven its case on the balance of probabilities; that the defendants are guilty as charged. The defence has not provided convincing evidence that would lead me to find otherwise and the conviction is registered.

24 Submissions on penalty, please?

25 MS. VANDERLINDE: Thank you, Your Worship. With regards to penalty, as set out in s. 36(3) of the Building Code Act, the maximum penalty for a first offence is $25,000.00 for an individual. I'm requesting a $3,000.00 fine in total. I'll leave it to Your Worship to have that fine divided equally between both defendants, Patricia Carter and George Carter, or however this Court deems fit; a suspended sentence against one and the $3,000.00 fine imposed against the other. I do have some case law in which I'd like to refer to, Huntsville (Town) v. Jagosky. I have a copy for the Court as well as for ...

26 MR. CARTER: Thank you.

27 MS. VANDERLINDE: ... Mr. Carter. In this case, this is a case that was heard - Judgment June 2nd, 2005. Mr. Jagosky pled guilty for failing to comply with a Property Standards Order. He was fined $1,125.00. I'd just like to state, on the third page, that he did appeal to the Ontario Court of Justice and it was heard before Judge Beattie and Judge Beattie found that - he considered Mr. Jagosky's financial circumstances and that the fine that was imposed was lower end range and that the Judge felt that there was no error made on that - on behalf of the Justice of the Peace, and dismissed the Appeal. I'm requesting the amount of $3,000.00 fines, as this Court has heard that this is an apartment building which has nine dwelling units in it. The defendants before the Court

receive a rental income from these nine units and it's my understanding as well, that Mr. Carter at least, has a full time position with Chrysler Canada. Those are my submissions.

28 THE COURT: Thank you. Mr. Carter, do you wish to make submissions with respect to penalty?

29 MR. CARTER: Yes, I'm looking at the actual Memorandum from the City of Oshawa regarding what their consideration of the amount of the penalty should be, and their summation is that if you find the evidence sufficient for prosecution purposes, please have the necessary documents drawn up and proceed with the laying of the charge in this matter, apply for a Prohibition Order or a Probation Order, that may be appropriate in the circumstances, should a conviction be obtained.

30 THE COURT: Now just - which document are you referring to?

31 MR. CARTER: It's a Memorandum.

32 THE COURT: Okay, because I haven't - I haven't seen it. Do you wish to ... ?

33 MR. CARTER: That would have been from - according to the By-law violation that the prosecution would have - be used to start the charges here.

34 MS. VANDERLINDE: Yes, Your Worship. I can advise Your Worship that how it works in the - within the City of Oshawa, the Legal Services Department receives a Memo from the Building By-law Office, and I believe this one is - Court's indulgence, please?

35 THE COURT: Certainly. What did you call it, a - a what?

36 MS. VANDERLINDE: It's a Memorandum.

37 THE COURT: Memorandum - of understanding.

38 MS. VANDERLINDE: Yes, well ...

39 THE COURT: Yes.

40 MS. VANDERLINDE: ... it's just a Memorandum.

41 THE COURT: Okay.

42 MS. VANDERLINDE: It's a simple Memo to the Legal Service Department, from Peter Nelson, who is the Municipal Law Enforcement Office Supervisor, telling the Legal Service Department that they want charges laid in dealing with a specific property. So the Memorandum just simply states, 'please proceed with charges under the Building Code Act, and if appropriate, to

request a Prohibition Order, or a Probation Order. This Court doesn't - isn't able to issue a Probation Order under these circumstances, however this Court, if deemed fit, can issue a Prohibition Order, which would stop the repetition, or continuance of the offence, and that is also set out in the Building Code Act, I believe, under s. 36(7). However, just to let the Court know, I do not ordinarily ask for a Prohibition Order when there is a first offence involved. Ordinarily a fine is requested from the Court, and in the event that there is a continuing offence, and a second charge is laid, I will ask for a Prohibition Order, and at that time if compliance isn't achieved, then we'd make an application to Superior Court to compel the defendant to come into compliance and it also serves possible jail time.

43 THE COURT: Okay, with respect to the Prohibition Order, can you give me a little bit more on the Prohibition Order?

44 MS. VANDERLINDE: With regards to s. 36 in the Building Code Act, just - Court's indulgence, please?

45 THE COURT: Certainly.

46 MS. VANDERLINDE: With regards to s. 36(3) in the Building Code Act, it states that - Penalties which may be imposed; "If a person who is convicted of an offence is liable to a fine of not more than $25,000.00 for a first offence, and not more than $50,000.00 for a subsequent offences", and that is what the prosecution is seeking, is a fine amount as opposed to a Prohibition Order. Under - Court's indulgence, please - under subsection 7, section 36, the 'Power to restrain' if the prosecution feels that it is necessary, it states, "If this Act or the Regulations are contravened, and a conviction is entered, in addition to any other remedy, and to any penalty imposed", so in addition to the fine amount that the prosecution is seeking, or any other penalty that has - is imposed, the Court in which the conviction is entered, and any Court of competent jurisdiction thereafter, may make an Order prohibiting the continuation or repetition of the offence by the person convicted. So the Memorandum which Mr. Carter is referring to is a simple Memorandum from the Supervisor from the Municipal Law Enforcement Office, asking us to proceed with charges, and if the prosecution deems it necessary to ask for a Prohibition Order, or a Probation Order. And that is above and beyond the regular fine amounts that the prosecution can ask for, as set out in section 7. I do have the Building Code Act, if Your Worship wanted to refer to subsection 7 there.

47 THE COURT: Certainly.

48 MS. VANDERLINDE: The Prohibition Order is in addition to any fine imposed, and I'm not seeking a Prohibition Order.

49 THE COURT: Okay, now that I have a better understanding of - of this, thank you, Mr. Carter, can you ...

50 MR. CARTER: I was speaking ...

51 THE COURT: ... carry on?

52 MR. CARTER: ... well, I was speaking to that. If the City of - City of Oshawa was requiring a fine, I'm sure would have put it in their request to the prosecution department. They've specifically requested Order of Prohibition Order, or - a Prohibition Order or a Probation Order, as may be appropriate in the circumstances. At no time did they - have they stated, up and above, a fine of any kind. This matter - had a maximum of $25,000.00 penalty to be associated with this fine. I was under the assumption, coming in today, or into the - into the original trial that all the City was asking for was a Probation or Prohibition. My thought process, and my ability maybe to possibly hire a lawyer if I was going to be penalized $25,000.00, would have been - made it a different scenario at that point. I'm going by what the City was asking for. Prohibition Order is not going to affect me by up to $25,000.00. I may have changed the way I proceeded in this matter. What's to me unfair at this time, to all of a sudden state that no, now the City wants something different? If I had already gone ahead with - with the trial, it would be very similar to going into a Highway Traffic Act, and you're dealing with a maximum $1,000.00 fine, and realized well the Court's going to change me to $5,000.00. The act that you did - the amount of fine may have changed the way you handled the particular case.

53 THE COURT: Okay, so what you're saying is because you - you have a copy of that Memo ...

54 MR. CARTER: Yes.

55 THE COURT: ... presumably under a freedom of information, I think you've made a request ...

56 MR. CARTER: Yes.

57 THE COURT: ... is that how you ... ?

58 MR. CARTER: Yes, I did.

59 THE COURT: You don't - you didn't understand that there - that the prosecution would be asking for a fine?

60 MR. CARTER: Not at all. They were asking for a Prohibition or Probation ...

61 THE COURT: Right.

62 MR. CARTER: ... as far as I understood.

63 THE COURT: Mmhmm.

64 MR. CARTER: Now if they were going to be going to a fine of $25,000.00, my whole process

might of - might have changed at that point.

65 THE COURT: Mmhmm.

66 MR. CARTER: Because $25,000.00 would have been worth hiring a lawyer at that particular moment in time.

67 THE COURT: Okay.

68 MR. CARTER: Yep.

69 THE COURT: With - now, with respect to the fine ...

70 MR. CARTER: Mmhmm.

71 THE COURT: ... because I need to make a decision here ...

72 MR. CARTER: Yes.

73 THE COURT: ... and submissions with respect to a fine? To the value of the fine which I think was ...

74 MR. CARTER: Well yeah, I would ...

75 THE COURT: ... $3,000.00.

76 MR. CARTER: ... I would say there should be no fine at all just for the fact that I've been working with the City on this particular matter for four years now. Your summation, where the timing may have been correct, some of the - the actual relevant matters may have just been a little off. It was the City that approached me ... .

77 THE COURT: Okay, well I just ...

78 MR. CARTER: Yeah.

79 THE COURT: ... in terms of the penalty, please?

80 MR. CARTER: To the penalty, well that would be the point. The - I have dealt with the City the best I could. I dealt with Ms. Rutherford. I dealt with the By-law Department, Planning Department, the Operations Department, all departments. The matter for the garbage pick-up actually went to City Council meeting. I put ...

81 THE COURT: Okay, again ...

82 MR. CARTER: ... a letter in.

83 THE COURT: ... I don't want to get into ...

84 MR. CARTER: Yeah, I understand okay ...

85 THE COURT: ... revisiting that.

86 MR. CARTER: ... so I've done everything that I was supposed to do, that I possibly could at that time. Everything was turned down. There was no possibility of - of doing anything different ...

87 THE COURT: Okay, again you're giving ...

88 MR. CARTER: ... so there should be no fine attached.

89 THE COURT: ... you're launching into - okay, Mr. Carter, you're launching again ...

90 MR. CARTER: Yes.

91 THE COURT: ... into ...

92 MR. CARTER: Appeal grounds, yeah.

93 THE COURT: ... the evidence, if you - you wish to Appeal my decision ...

94 MR. CARTER: Yeah.

95 THE COURT: ... you're certainly welcome to ...

96 MR. CARTER: Yeah.

97 THE COURT: ... do that. I've made my ruling and now ...

98 MR. CARTER: Yeah.

99 THE COURT: ... I'm just deciding on penalty ...

100 MR. CARTER: So, yeah ... .

101 THE COURT: ... so if you wish to make submissions with respect to the quantum of the fine ...

102 MR. CARTER: Yeah.

103 THE COURT: ... I'm - you know, I'm listening ... .

104 MR. CARTER: I'd be looking at zero - zero dollar fine on this - on this matter, just for the fact - I've done everything possible that I could do, and going by what the - the City of Oshawa was

requesting and the prosecution itself.

105 THE COURT: Okay, in terms of ...

106 MR. CARTER: I'm relying on that.

107 THE COURT: ... what do you do for a living?

108 MR. CARTER: I work for Chrysler. I'm unemployed - well, I'm laid off at the moment.

109 MR. CARTER: Okay, but you - so you work with - for Chrysler ...

110 MR. CARTER: Chrysler.

111 THE COURT: ... that was full time? The layoff is ... ?

112 MR. CARTER: Part time.

113 THE COURT: Is a temporary lay off? What's - what's the situation?

114 MR. CARTER: I was given notice of permanent lay off last year. I was safe for a little bit. I have no idea what's going to happen this year.

115 THE COURT: Okay and you have this - this particular apartment building ...

116 MR. CARTER: Yes.

117 THE COURT: ... for which you receive rent?

118 MR. CARTER: Yes.

119 THE COURT: Do you have some other apartment buildings?

120 MR. CARTER: I have some other houses in Oshawa, yes.

121 THE COURT: How many other houses?

122 MR. CARTER: Three other houses.

123 THE COURT: Okay. Okay. All right, is there anything else you wish to add?

124 MR. CARTER: No, that would be all.

125 THE COURT: All right, Madam Prosecutor?

126 MS. VANDERLINDE: Just briefly, Your Worship, and I'm sure this Court is aware of s. 81

of the Provincial Offences Act, which states that ignorance of the law - 'ignorance of the law by a person who commits an offence is not an excuse for committing the offence', and I would respectfully submit that this also applies to any penalty amounts that are imposed. Mr. Carter and Mrs. Carter chose to represent themselves, or Ms. Carter chose to have Mr. Carter represent her, and not seek legal advice. Mr. Carter, as this Court may be aware, is well versed and able to read the legislation, that being the Building Code Act, and the penalty amounts that could possibly be imposed on Mr. and Mrs. Carter. Also, I'd like to state to the Court, with regards to the memo that was received by Mr. Peter Nelson, it is not up to Mr. Nelson, or any other individual within the City of Oshawa, to have influence on the prosecutor with regards to any penalty amounts that are imposed. It is simply a suggestion, and those are my submissions.

127 THE COURT: Thank you. Okay, having heard the submissions with respect to penalty, it is the view of this Court that individuals who appear before this Court are expected to understand the laws, and from my appreciation of having heard Mr. Carter, he appeared before me, he appears to be well versed with a number of aspects of the Building Code, and the Property Standards. I would certainly expect that he would be familiar with the penalty section as the - as a possibility, or as a maximum penalty. He's indicated that he has had a number of year's interaction with the City. I've dealt with all of those issues in my Judgment. So, with respect to the penalty, the Court is going to impose a fine of $3,000.00 total, and that will be divided $1,500.00 each; $1,500.00 for Mr. Carter and $1,500.00 for Mrs. Carter. With respect to time to pay, sir?

128 COURTROOM CLERK: Please stand, sir.

129 MR. CARTER: Forty-five days?

130 THE COURT: Forty-five days?

131 MR. CARTER: Yes.

132 THE COURT: All right, 45 days to pay.

133 MS. VANDERLINDE: Thank you, Madam Clerk, the payment slips - reminder slips have been given to Mr. Carter. I thank you, Your Worship.

qp/s/qllxr/qljxr/qlbdp/qlsxs

Case Name:

Peel Condominium Corp. No. 108 v. Young

Between
Peel Condominium Corporation No. 108, Applicant, and
Donna Young, Respondent

[2011] O.J. No. 1203

2011 ONSC 1786

4 R.P.R. (5th) 162

2011 CarswellOnt 1849

Court File No. CV-10-1305-00

Ontario Superior Court of Justice

D.K. Gray J.

March 21, 2011.

(31 paras.)

Counsel:

Bora Nam, for the Applicant.

Evan Moore, for the Respondent.

REASONS FOR JUDGMENT

1 D.K. GRAY J.:-- In this application, the applicant seeks to enforce its Declaration as against the respondent, one of the unit owners. Specifically, it is alleged that the respondent, in installing a tankless gas water heater in her unit, constructed a vent through the outside wall of the unit. It is not

in dispute that the outside wall is a common element. The applicant seeks an order requiring the respondent to remove the vent, and an order requiring her to pay the applicant for the cost of restoring the wall to its original condition.

2 The primary argument of the respondent is that the applicant has been selectively enforcing the Declaration, and it would be unfair to enforce it against her.

3 For the brief reasons that follow, the application is granted.

Background

4 In April, 2009, the applicant became aware that the respondent had installed a tankless water heater, which vents through the exterior wall. The exterior wall is a common element. The respondent did not seek prior approval from the Board of Directors.

5 Discussions ensued, including demands that the respondent remedy the problem. Ultimately, this application was commenced.

6 I am satisfied that there have been other contraventions of the Declaration which have not resulted in enforcement proceedings by the applicant. Some of those contraventions are less serious than others. For example, one unit owner has completely torn up his or her lawn and converted it to a garden that is quite inconsistent with the appearance of other yards. The yard is a common element. The applicant appears to have done nothing about this.

7 Another unit owner has constructed a furnace vent through the rear wall of the unit, below the fence line. The applicant acknowledges the violation of the Declaration, but apparently takes the position that if approval was retroactively requested, it would be granted.

8 At least three kitchen exhaust vents have been installed through exterior walls of units. One has been removed, although it is unclear as to whether a hole remains in the wall. Two other vents remain, but the applicant's counsel advises me that the applicant intends to take enforcement proceedings depending on the result of this case.

9 In at least one other instance, the applicant made adjustments to her own yard, and was retroactively granted approval.

Submissions

10 The applicant submits that it is entitled, indeed required, to enforce the Declaration for the benefit of all unit holders. Any contravention of the Declaration can only be permitted if it is authorized by the Board of Directors, and in this case, the Board of Directors has not done so.

11 The applicant submits that there has been no selective enforcement of the Declaration. Any contraventions that have not been approved by the Board are minor. The more serious violations are

those that either fall within the Board's policy regarding approved venting through exterior walls, or will await enforcement depending on the result of this case.

12 Counsel for the applicant also relies on a provision in the Declaration that stipulates, in substance, that violations of the Declaration permitted by the Board of Directors shall not prevent the enforcement of similar violations if they occur.

13 Counsel for the respondent argues that the doctrine of promissory estoppel prohibits the applicant from enforcing the Declaration in these circumstances. The respondent argues that she was led to believe, through the inaction of the Board, that she would be permitted to breach the outside wall as she has done, and it would now be inequitable to allow the applicant to succeed.

14 In the alternative, the respondent submits that the applicant has selectively enforced the Declaration, and it would be unfair to permit the applicant to enforce the Declaration in these circumstances.

15 Both parties rely on caselaw to support their respective positions.

Analysis

16 I did not call on the applicant to respond to the respondent's position regarding promissory estoppel. In my view, the evidence falls far short of demonstrating that the applicant made a representation on which the respondent relied to her detriment.

17 Of more significant concern, in my view, is the issue of selective enforcement. There have been a number of instances where breaches of the Declaration, including some similar to the one at issue here, have gone unaddressed by the applicant and its Board of Directors.

18 Certain provisions of the *Condominium Act, 1998*, are germane:

> **Objects**
>
> **17.** (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> **Duties**
>
> (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

Ensuring compliance

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

...

Changes made by owners

98. (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,

(a) the board, by resolution, has approved the proposed addition, alteration or improvement;
(b) the owner and the corporation have entered into an agreement that,

(i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
(ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
(iii) sets out the other matters that the regulations made under this Act require;

(c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and
(d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.

...

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a

declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

...

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Contents of order

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and
(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

19 Certain provisions of the Declaration are relevant:

(a) Article IV(1)(d):

> No owner shall make any structural change or alteration in or to his unit or make any change to an installation upon the common elements or maintain, decorate, alter or repair any part of the common elements except for maintenance of those parts of the common elements which he has the duty to maintain, without the consent of the board.

(b) Article X:

> Each owner shall indemnify and save harmless the corporation from and against any loss, costs, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, any other resident of his unit or any guests, invitees or licensees of such owner or

> resident to or with respect to the common elements and/or all other units, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the corporation.

(c) Article XII(2):

> All present and future owners, tenants and residents of units, their families, guests, invitees or licensee, shall be subject to and shall comply with the provisions of this declaration, the by-laws and any other rules and regulations of the corporation.
>
> The acceptance of a deed or transfer, or the entering into a lease, or the entering into occupancy of any unit, shall constitute an agreement that the provisions of this declaration, the by-laws and any other rules and regulations, as they may be amended from time to time, are accepted and ratified by such owner, tenant or resident, and all of such provisions shall be deemed and taken to be covenants running with the unit and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such deed or transfer or lease or occupancy agreement.

20 The argument regarding selective enforcement raises issues of fairness on both sides. On the one hand, unit owners as a group, and their representatives, the Board of Directors, have an interest, and indeed a duty, to enforce the Declaration. On the other hand, the individual unit holder who violates the Declaration has a legitimate cause for complaint where the Board of Directors have permitted other violations to occur without consequence. The task of the Court is to balance these competing interests in a specific case.

21 In my view, there has been a degree of selective enforcement by the applicant sufficient to give rise to a concern. However, it does not approach the sort of rampant non-enforcement that has arisen in some cases, particularly those involving the keeping of pets.

22 In some ways, this case is analogous to a situation that arises where a municipality attempts to enforce one of its by-laws, and it is alleged that there has been selective enforcement.

23 The leading case in this respect is *City of Toronto v. Polai*, [1970] 1 O.R. 483 (C.A.); affirmed [1973] S.C.R. 38. In that case, the City of Toronto applied for an order under the *Municipal Act* to prohibit the defendant from using her building as a multi-family dwelling house in an area not zoned to permit such use. Since 1949, the City had maintained a "deferred list" of known offenders,

against whom no prosecution or other enforcement proceedings would be brought. The judge of first instance refused to grant the requested order, relying on the "clean hands" doctrine applied by courts of equity. The Court of Appeal reversed the court below, [1968] O.J. No. 1343, holding that the City was entitled to the order sought. The Supreme Court of Canada upheld the Court of Appeal.

24 All three judges of the panel that heard the case in the Court of Appeal delivered separate reasons. Both Jessup J.A. and Brooke J.A. held that the circumstances disclosed discriminatory enforcement of the by-law on the part of the municipality, but held that the public interest in the enforcement of the by-law should prevail, notwithstanding the discrimination.

25 At page 497, Jessup J.A. stated as follows:

> I have no doubt, however, that the result is discriminatory and therefore inequitable vis-à-vis the respondent and but for one consideration I would deny the appellant the remedy it seeks on the ground that to obtain equitable relief against the respondent it must have done equity to her. That consideration is that the public has a direct and substantial interest in the enforcement of the by-law and such public interest must prevail over the private interest of an admitted flagrant transgressor.

26 At page 502, Brooke J.A. stated as follows:

> I therefore agree with the learned trial Judge that the practice, as it is carried out today, is discriminatory as against the respondent. However, in my view, that is not sufficient grounds in this case to deny the relief sought by the appellant. The public has a direct and a substantial interest in the enforcement of this by-law and in the circumstances here public interest must prevail over the private interest of one who has admittedly flouted this law for so long. It is in this respect that I hold that the learned trial Judge erred in denying the appellant the order which it sought.

27 In my view, similar reasoning applies here. Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the Declaration enforced must prevail over the private interest of the respondent. The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets.

28 For these reasons, the application is granted.

Disposition

29 For the foregoing reasons, the application will be granted in terms of paragraph 1(b) and (c) of the Notice of Application.

30 The applicant has sought costs on a substantial indemnity basis. I will entertain the parties' submissions on costs. I incline to the view that while the applicant's selective enforcement of the Declaration does not bar it, in these circumstances, from seeking the order I have granted, I think selective enforcement is relevant to the issue of costs.

31 I will entertain written submissions with respect to costs, not exceeding 3 pages, together with a costs outline. Counsel for the applicant shall have 10 days to file submissions at my chambers in Milton, and counsel for the respondent shall have 10 days to respond. Counsel for the applicant shall have 5 days to reply.

D.K. GRAY J.

cp/e/qlafr/qlvxw/qlhcs/qlcas

IN THE MATTER OF the *Public Inquiries Act, 2009,* S.O. 2009, c. 33, Sched. 6
AND IN THE MATTER OF The Elliot Lake Commission of Inquiry, established by Order in Council 1097/2012 dated July 19, 2012
AND IN THE MATTER OF The Corporation of the City of Elliot Lake

ELLIOT LAKE COMMISSION OF INQUIRY

PHASE I BOOK OF AUTHORITIES OF THE CORPORATION OF THE CITY OF ELLIOT LAKE

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An Interested Person

RCP-E 4C (July 1, 2007)