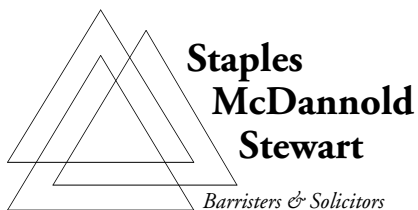


Case Law Review

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1. Delta Leaky Condo Case

See attached articles from Staples McDannold Stewart website at www.sms.bc.ca on the BC Supreme Court judgment in The Owners, Strata Plan 3341 v. Canlan Ice Sports Corp. and The Corporation of Delta:

[Leaky Condo Trial Decision Rendered](#)

[Delta Leaky Condo Case](#)

Update: this case is still on its way to the BC Court of Appeal, on the issues of contributory negligence and negligence generally, we believe.

2. Duty of Care

The landmark decision of the Supreme Court of Canada judgment in *Ingles v Tutkaluk Construction Ltd.*, 2000 SCC 12, 8 MPLR (3d) 1, is discussed in the [website article](#). According to the article: "This was a significant ruling for local governments in that it reviews the elements necessary to make a finding of negligence in respect of local government building inspection policies and actions. It goes some way toward clarifying what constitutes a reasonable building inspection and it examines the responsibility of the owner and establishes the circumstances under which an owner's actions may provide a complete defence to an action in negligence."

A subsequent BC case, *Cumiford V Powell River (District)* (2001) 21 MPLR (3d) 45, concerned similar issues of negligence. The District was sued by the purchaser of a single family house from a builder. The builder was a rank amateur with no drafting or building skills. The building inspector gave him a typical cross section of a house with crawl space and listed the information required before the permit could be issued. The sketch the would-be builder submitted contained very little information but a permit was issued anyway.

Although a few inspections were apparently carried out on the resulting building (which the court said bore little or no resemblance to the sketch), they were not noted on the permit. The builder himself never called for inspections required under the bylaw. Inspections at crucial points were not made. An occupancy certificate was issued after a final inspection was made upon the senior inspector discovering that the house was occupied.

The junior inspector had advised the senior inspector of poor workmanship and code violations and recommended stop work orders but none were placed on the property. The court found the senior inspector's evidence to be not credible, and that his illness during part of the construction time was no excuse for passing the blame to the junior inspector. The court found that the senior inspector did not take advantage of the enforcement tools at his disposal, such as revoking the building permit, posting a stop work order and refusing to issue the occupancy permit. The District could have ordered no occupancy of the building and applied to the court to enforce that order. The court noted that the senior inspector's reluctance to enforce the bylaw could have been the result of an attitude that filtered down from the

council but there was no evidence before the court of any such policy decisions of the council directing the inspectors to use limited means of enforcement.

The court found that the operational duties of the inspector clearly included the conduct of inspections, the issuing of stop work orders to ensure compliance and deciding whether a certificate of occupancy should be granted to demonstrate compliance. These duties were not met in this case, although they were within the scope of the duty of care owed by the District to subsequent purchasers of the house and breached in this case. The District escaped the added burden of punitive damages because there was no evidence that the inspector's employers, the council, were aware of or encouraged his negligent conduct.

Papadopoulos v Edmonton (2000) 11 MPLR 144, concerned actual knowledge by city officials of dangers related to the building site and of actions and omissions by the plaintiffs, which it failed to disclose or act upon. The city was found liable for 35% of the plaintiffs' loss and the plaintiffs for the remaining 65%. The plaintiffs applied for building and development permits for a house renovation but constructed a larger new home and garage on the foundations. The city's engineer and building inspectors became aware of this change as work on the building progressed.

A caveat was registered against the lands requiring a 40 feet setback from the ravine for all development, but much of the home was built within that setback. The front yard collapsed into the ravine leaving the house perched on top of a concrete palisade constructed after the collapse to support the house. One corner of the house must be jacked up each year to keep it level, but the house remains intact and occupied by the plaintiffs.

The city had some "unique" information about the site's vulnerability to landslides, which was not available to the plaintiffs. It had obtained slope stability recommendations from an engineering firm, which resulted in the registration of the 40 feet caveat. The city approved the subdivision of the property and rezoned the 4 lots for residential use.

The plaintiffs owned a successful irrigation and sprinkler business and were characterized as intelligent by the court. Their application to build within the 40 feet setback triggered a requirement for a detailed engineering study of the soil conditions and the plaintiffs hired an engineer who had recently worked for the firm that did the city's study of the area. This engineer was not informed of the full scope of the work and made recommendations based only on the replacement of the garage, as well as reiterating the restrictions his previous firm had recommended for sprinkler systems. The plaintiffs gave this report to the city engineer who knew the full scope of the work yet recommended the development permit be issued.

The court found the landslide would not have occurred were it not for the exceptional amounts of water added to the fragile top of the bank area by the plaintiffs' irrigation system. The issue was whether the plaintiffs took themselves outside the duty of care owed to them by the city in issuing the development permit. The court held that their contributory negligence did not amount to a waiver of the city's duty of care. In fact there was a special duty of care because of the city's specialized knowledge of the area.

Parsons v Finch (2002) 26 MPLR 224 is a case where the court was “asked to determine whether the City of Richmond’s failure to recognize alleged errors in a geotechnical soils report and accompanying foundation drawings resulted from an operational failure, and was thus an act of negligence, or from a policy decision to refrain from forming its own opinions on geotechnical issues”.

The plaintiffs built their own house with the plaintiff husband designing it and acting as general contractor, having “extensive experience in the construction industry”. The city’s plan checker reviewed the plans when the application for a building permit was made. He looked at the soils map and referred the application to the city’s code engineer, who required a geotechnical report on the soils and a foundation design, which were prepared and signed by the defendant Finch.

The code engineer noted that the report was signed and sealed by a registered BC engineer; described soil conditions at 3 test holes; recommended excavation of certain surface materials and specified replacement with a certain type of fill; and the foundation had been designed by Finch to a specified soil bearing capacity. Since the report addressed the issues that had to be addressed, the code engineer concluded the BP application was in order and agreed it should be issued.

In determining whether Richmond owed the plaintiffs any duty of care, the court examined the city’s procedures for dealing with applications in areas with poor soils. The code engineer is not a geotechnical engineer and thus does not have the expertise to determine the correctness of the geotechnical report, nor does the city employ such a specialist engineer. The code engineer examines the report only in the limited sense of ensuring that it appears to address the poor soil conditions. The court found that Richmond consistently refrains from conducting its own soil investigations for reasons of public economy. This may be a lesson learned from the Dha case.

This case turned on whether the city’s procedural scheme negates, limits or reduces its duty of care in carrying out building inspections. If the scheme is a true policy decision, it will be sufficient. If it is an operational decision, it will attract liability. The court was “satisfied that the practice and procedure ... pertaining to soil investigation reports is the product of a true policy decision made by the City of Richmond for economic and political reasons”. Therefore, although there was a duty of care owed to the plaintiffs, it was limited by the policy.

3. Failure to Enforce Regulations

This is an element of negligence and is discussed in the following cases, as well as in the Delta and Powell River cases discussed under item 2 above.

Bakhtiari v Axes Investments Ltd (2020 24 MPLR (3d) 248, is a very lengthy judgment of the Ontario Superior Court of Justice, where the City of North York (now part of the mega-city of Toronto) was found 20% liable for injuries sustained in a high rise apartment fire, as a result of its failure to enforce fire safety requirements for self-closing devices (SCDs) on doors. The court found that the city’s building bylaw, in force when the apartment building was constructed, required SCDs on all

interior fire separation doors, a category in which the court placed the individual suite doors, and that the city was negligent in failing to require them in this case.

Furthermore, the building's owner had been granted an extension of time to meet the city's bylaw requirements as part of a compulsory program of upgrading older apartment buildings authorized by legislation enacted by the province of Ontario in 1992. There was a two year period of compliance and a possible extension for two more years. The legislation contained no criteria for granting the extensions, but the statement they "must be based on sound financial or logistical reasons and be accompanied by a schedule for completion of the required work" was set out in a Commentary on Changes to the Fire Code. The application had to be dealt with in 10 days. The extension requested included the required SCDs and financial hardship was the reason given. The court found that while the official in charge of extension applications was not specially trained in analyzing financial statements, his decision was reasonable and could have been reached by someone who was experienced in such matters.

The alleged failures of the city in actually fighting the fire were found not to have contributed to the plaintiffs' injuries, unlike the failure to require the SCDs.

In a 2002 BC case, *Cambridge Plumbing Systems v. City of Vancouver et al* (2002) 29 MPLR 304, the plaintiff, a plumbing contractor, sued Vancouver and 9 other Lower mainland municipalities for economic loss resulting from failing to enforce their bylaws, specifically the way in which other contractors performed epoxy pipe coating. The claim alleged that the defendants failed to require epoxy applicators to obtain permits, to insure that they were properly trained, to inspect plans and to inspect the work done. Vancouver applied successfully to strike out the claim on the ground that it disclosed no reasonable claim.

The city pointed out that the plaintiff is "neither the owner nor prospective purchaser of property where epoxy pipe coating is used", nor "a contractor working on such property". The plaintiff is a competitor of other such contractors. The court agreed "the duty of a municipality to inspect without negligence is owed only to the property owner and to prospective purchasers".

4. Permit Conditions

We are often asked what should be done to satisfy the duty to inspect when an owner has built without a permit or completed construction without the required inspections. A Quebec case, *Alfred/Plantagenet (Canton) v Peladeau* (2001) 17 MPLR 237, may provide some insight into the legal effects of the standard answer: require the owner to obtain an engineer's certificate that the building conforms to the bylaw and codes. The judgment is in French, so the following is from the English version of the headnote.

The building inspector refused the engineer's certificate submitted by the owner for the structures built without permits and required the owner to provide "as built" plans. On the owner's refusal, the municipality then applied to the court for an order requiring the owners to comply with the provincial building code and with the BI's

order to demolish the unpermitted structures or authorize the municipality to demolish them.

The court held that the municipality was required to accept the engineer's certificate stating that the structures complied with the requirements of the building code, on condition that the engineer was ready to commit in writing to the municipality to be directly responsible for all defects and complaints that could arise against the issued certificate. The owners were to pay the costs incurred to obtain the necessary documentation. The court found that the BI's distrust of the owner contributed to the imposition of conditions that the owners could not meet, although there was no evidence that as built drawings was an onerous condition.

5. Limitation Periods

[When does the Cause of Action Arise?](#)

The statutory limitation period under the Limitations Act for negligence claims is 30 years after the right to bring an action arose. In *Armstrong v West Vancouver* (2002) 26 MPLR 129, a house was built in 1963 on organic matter. The house settled and the foundation cracked. Plaintiffs purchased in 1987 and had the damage inspected by an engineer in 1999 and then sued the municipality. The court held that the damage occurred and the action arose in 1963 and the action had to be brought within 30 years. The cracking of the basement walls was only a manifestation of the damage that occurred in 1963. The transfer of the title in 1987 did not create a new cause of action.

[Extension of Time for Bringing Action](#)

Gringmuth v North Vancouver (2002) 26 MPLR 54 illustrates that delays on the part of the municipality in settling a claim will not bar a claimant from bringing an action, despite the limitation period of 6 months under the Local Government Act for commencing an action.

6. MIA Model Building Bylaw

[Cautionary Notes](#)

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