

## Building Inspection Due Diligence

### What Is Your Duty?

Once a municipality makes a decision to conduct building inspections it is at law, held to owe a duty to the individual property owners, future property owners and the public at large to properly review plans, conduct inspections and issue building permits.

### Where does liability arise?

Liability for negligent building inspection arises at two major stages of a construction project: the plan approval stage and the on-site inspection stage.

### What is the standard imposed?

A building inspector will not be found negligent so long as he/she can demonstrate that they met the standard of an "ordinary, reasonable and prudent inspector in the same circumstances". The exact requirements of this standard will vary depending on: *The likelihood of harm occurring, the gravity or severity of that harm, the burden or expense that would be required to prevent the harm.* The result is that a building inspector's duty in any given situation is almost entirely fact specific.

### Plan Approval Stage

A municipality was held to be 100% liable for approving a permit based on plans that were not approved by an engineer. The municipality had accepted the developer's assurances that the plans complied with the building code and that an engineer's approval was not required.

### Site Inspection

In *Ingles v Tutkaluk*, 2000, the homeowner allowed a contractor to proceed to the later stages of construction work on a home without notifying the municipality or obtaining a building permit. By the time notice was given and an inspection conducted, the underpinnings of the house's foundation were covered by further construction. The inspector relied on the assurances of the contractor that they were properly installed. When the underpinnings turned out to be deficient, causing flooding problems in the basement, the municipality was held to be 14% liable for the homeowner's losses.

### Why do municipalities get sued for negligent building inspection?

**One more pocket:** Claims for negligent inspection usually arise once problems begin to manifest themselves for the building in question. When this happens, the owners will usually pursue several parties for damages, such as the contractor, engineer or the previous owners of the building. If the building is a large one, such as a condominium complex; or if the problem is one that will cost a large amount to repair, such as a structural problem, the plaintiff will normally have to include as many parties as possible to ensure the maximum possible recovery.

**The deepest pocket:** The liability insurance policies held by municipalities tend to have higher limits than policies that are held by individuals or corporations. It must also be noted that under Ontario law, defendants will usually be "jointly and severally" liable for a plaintiff's damages. This means that municipalities who are only found partially negligent can end up paying all of the Plaintiff's damages.

**The only pocket:** It is often the case that by the time a problem manifests itself, which can be years after the original construction and inspection, the municipality may be the only defendant left to sue.

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# Hill v. Hamilton-Wentworth Regional Police Service: SCC Grants Suspects the Right to Sue Police Officers for Negligent Investigation

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On October 4, 2007 a sharply divided Supreme Court of Canada released reasons recognizing the right of suspects who have been charged with a criminal offence to sue investigating officers for negligent investigation. Prior to this decision police officers in most of Canada could only be successfully sued for conduct arising during the course of an investigation if the suspect proved malice on the part of the investigating officer. In stripping away the malice requirement for successful pursuit of a claim against the police, the court has elected to expose Canadian police officers to a heightened level of liability exposure not recognized in most other common law jurisdictions. It has also created a fundamental distinction between the two central participants in the criminal justice system: Crown attorneys – who are still only subject to actions for malicious prosecution and, their partners, the police – who are now exposed to the lesser cause of action of negligent investigation.

The court's ruling arose out of an action by Jason Hill claiming negligent investigation on the part of the Hamilton-Wentworth Regional Police with respect to a series of robberies which occurred in late 1994 and early 1995. Mr. Hill was initially charged with ten counts of robbery following a police investigation. Nine charges were later withdrawn, however, the remaining charge proceeded to trial and Mr. Hill was convicted by a jury. Mr. Hill was imprisoned for in excess of twenty months, prior to his

acquittal at a second trial following a successful appeal. While Mr. Hill's action against the Hamilton Police was dismissed on the facts, the majority held that the police owe a duty of care to a suspect "to act in a reasonable manner during the course of any investigation of that individual". The majority justified its decision by suggesting that recognizing a cause of action for negligent investigation may assist society in responding to failures in the justice system such as wrongful convictions or institutional racism. The court defined the appropriate standard of care as being that of the "reasonable police officer in like circumstances" noting that "at the outset of an investigation the police may have little more than hearsay, suspicion or hunch".

Later, when laying charges the standard will be informed by the "legal requirement of reasonable and probable grounds to believe the suspect is guilty". The majority also noted that where an involved officer has special skills and experience, that officer will be held to a higher standard, similar to what occurs with regards to other professionals who have special expertise or training.

Finally in recognition of the significant level of intuition, discretion and professional judgment that police officers are required to exercise during the course of their duties, the court confirmed the availability of the defence of "reasonable error in judgment" for any claim against a police officer noting: "[c]ourts are not in the business of second guessing reasonable exercises of discretion by trained professionals". Accordingly, it will only be unreasonable exercises of an officer's discretion that will be actionable – mere "errors in judgment", which any reasonable police officer might have made, will not be actionable.

In a sharply worded dissent, three judges rejected the creation of a cause of action for negligent investigation stating:

*"the imposition on the police of a legal duty to take reasonable care not to harm the individual inevitably pulls the police away from targeting that individual as a suspect. In such circumstances, it is neither just nor fair to the individual police officers, nor in the interest of society generally, to impose on police officers a duty that brings in its wake a set of conflicting duties."*



# Hill v. Hamilton-Wentworth Regional Police Service: SCC Grants Suspects the Right to Sue Police Officers for Negligent Investigation

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The minority also predicted that the creation of conflicting duties between a police officer's public duty to act in the best interests of society as a whole and a legal duty to take reasonable care not to harm an individual could, ultimately, lead to an erosion of the "reasonable and probable grounds standard" with police officers becoming reluctant to lay charges unless the evidence against a suspect was overwhelming.

### The Implications for Police

1. There are going to be a significant number of new law suits started for negligent investigation across the country. Prior to this decision claims for negligent investigation had only been recognized in Ontario and Quebec. Many of these actions will be harassing law suits brought by individuals who are acquitted for a variety of reasons that do not relate to their factual innocence.
2. The amount of time officers spend responding to law suits will increase with extensive time being spent justifying investigative decisions.
3. The potential erosion of the reasonable and probable grounds standard. As noted by the minority, police officers may become reluctant to apply the reasonable and probable grounds standard to the investigation and charging process, subconsciously or consciously requiring evidence beyond a reasonable doubt before they lay charges.
4. There will be increased potential for conflict between the police and the Crown when law suits for negligent investigation/malicious prosecution are commenced against the police and crown attorneys. With the Crown only being liable if malice is proven, situations may occur where joint decisions result in liability only for the police. This potentially unfair result could lead to resentment and mistrust on the part of police officers which impairs the co-operative administration of justice.
5. The recognition of this tort creates the need for new, specialized, standard of care experts to review and defend the merits of individual police investigations. Experts will need to be identified and retained who have similar expertise to that of the investigating officer.

### What The Police Can Do To Assist in Successfully Defending These Law Suits:

1. Review and update your standard operating procedures on a regular basis. Procedures and guidelines should be updated on a regular (at least twice yearly) basis to take into account recent court decisions, training procedures and other investigative developments so that the police force cannot be accused of being "out of date or behind the times".
2. Make sure your police officers receive regular updates in their training with respect to developments regarding investigative procedures and guidelines. Simply disseminating the updated guidelines is likely not enough. Appropriate review seminars conducted by senior officers with records of attendance are likely the preferred procedure.
3. Senior officers need to make sure that complex investigations are conducted in a carefully organized, documented manner. Appropriate reports at all sensitive stages should be provided to all senior officers involved in the investigation.
4. Detailed and accurate contemporaneous notes of all aspects of the investigation, without any potentially derogatory references to the suspect, must be maintained.
5. Unless absolutely impossible, all interviews with suspects or witnesses should be fully videotaped to avoid any suggestion of coercion or trickery. Where videotaping is available but absolutely refused by the suspect or witness, a clearly signed form to that effect should be mandatory and the interview take place with two police officers, one of whom is responsible for taking detailed, accurate notes of the interview.
6. The police force must keep a complete copy of all documentation relating to an investigation even after the charges are dealt with so that all factors that went into the charging process are available for consideration at a later date.

# ABC's of Avoiding Building Inspection Errors & Omissions Claims

**A**void acting as a consultant.

**B**e aware of changes to construction which may require revised plans.

**C**ommunicate to potential new buyers any outstanding orders or open permits.

**D**uring inspection, document deficiencies, issue orders when necessary and follow-up to ensure compliance.

**E**nsure drawings are sealed by an architect or professional engineer where appropriate.

**F**iles and records should be kept in accordance with the Statute of Limitations.

**G**et to know your builders. Which ones will follow the building code and which ones will take short-cuts?

**H**ave procedures for consistent plan reviews.

**I**nspections completed today will need to stand the test of time. Remember the subsequent owner.

**J**udges rely on documentation to formulate a decision. What will your documentation reveal about the inspection?

**K**eep your documentation consistent and objective. Checklists will allow you to do this. It is also an excellent tool to ensure a complete inspection.

**L**iability for negligent building inspection arises at the plan approval stage and the on-site inspection stage.

**M**unicipalities that make a decision to conduct building inspections are at law, held to owe a duty to the individual property owners, future property owners and the public at large to properly review plans, issue building permits and conduct inspections.

**N**ever admit liability.

**O**wner acting as the Builder is a potential red flag.

**P**lans submitted should be detailed enough to carry out a proper review. Do not expect less.

**Q**ualified persons are required to prepare plans for building permits.

**R**emember to follow up on deficiencies found during previous inspections.

**S**afety of the present owner, future owner and potential visitors to a property must be considered, particularly associated with an occupancy inspection.

**T**he building code is your bible. Refer to it when in doubt.

**U**nderstand that by the time a claim is made, the municipality may be the only defendant left to sue. Other parties may have gone bankrupt, may not exist or may not have liability policies that will respond.

**V**erify that all required documentation has been received before issuing a permit.

**W**hat length of time do you allow inactive permits to remain open? Why do you allow them to remain open?

**X**pect a red flag when the contractor is working outside of his usual expertise or is a new builder.

**Y**ou have the power to order work to be uncovered when it is covered before you've inspected.

**Z**ero in on the aspects of construction within within the Building Code that are related to health, safety and structural stability.



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