



PUBLICATIONS

0006

EXPANDING THE DUTY TO INSPECT

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COWAN NEWS*

This Supreme Court of Canada decision will greatly affect the duties of Building Inspectors.

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The recent Supreme Court of Canada decision in *Ingles v. Tutkaluk Construction Ltd. (March 2, 2000)*, will greatly affect the duties of building inspectors, in certain circumstances. The failure of an inspector to use the powers available to him to discover defects may attract liability to the municipality which is liable for damages caused by his negligence.

The Facts

In *Ingles* the plaintiff was a homeowner who had hired a contractor to lower his basement and to build a patio at the rear of the

house. To lower the basement, the contractor was required to install underpinnings under the foundations to keep the walls from cracking and the house from falling down.

The plaintiff agreed to having the work commence before the permit was obtained, although the plaintiff knew that a building permit was required. Two weeks after the construction had begun and after the underpinnings had been installed, the contractor applied for the building permit.

The building permit was issued with the following conditions:

- The underpinning be carried out to the satisfaction of the building inspector
- The building inspector be notified before proceeding with the underpinning and the pouring of the concrete

- The underpinning be at least as wide as the existing footings

The first inspection took place by coincidence, the day after the building permit was issued. As the underpinning had been installed prior to the inspection, contrary to the conditions on the building permit, it was not possible to examine the width of the underpinning. In addition, it was raining and therefore it was not possible to examine the depth of the underpinning. The inspector examined the colour of the concrete and struck it with a hammer to determine if it had set. The building inspector relied on the contractor's assurances that all construction had been carried out in accordance with the drawings attached to the building plan. The

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inspector noted that the underpinnings had been installed prior to his inspection.

A second inspection was conducted two weeks later and after the floor had been laid. The second inspector carried out the same inspection as the first. In addition, he noted that the concrete was smooth and without voids, which indicated that it had been packed down adequately.

It was later discovered that the underpinning was only 6 inches wide instead of the required 24 inches. In several places, the underpinning had not been installed to the depth stated in the plans. The plaintiff sued the Contractor and the City.

Judicial History

At trial, Conant J. held that the City failed to meet the standard of care in the

circumstances. Conant J. found that it was not reasonable for the inspector to rely on the assurances of the contractor in the circumstances, as the contractor:

- Did not apply for a permit until after the underpinning had been installed
- Did not give notice as to the status of the project
- Did not post the permit outside the home
- Was unknown to the inspector

Conant J. also found that a more thorough inspection was called for as the underpinning was an important structural component. Conant J. held the contractor 80% liable and the City 20% liable. The City's liability was reduced by 30% to account for the Plaintiff's contributory negligence in agreeing to delay in obtaining the building

permit. The total liability of the City was therefore 14%.

The Court of Appeal allowed the appeal on the ground that by agreeing to delay obtaining the building permit, the plaintiff had removed himself from the scope of the duty of care. In the eyes of the Court of Appeal this amounted to a flouting of the building inspection scheme.

The Supreme Court reversed the decision of the Court of Appeal and affirmed the decision of the trial judge. 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

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a reasonable inspection will vary depending on the facts of each case, including the likelihood of a known and foreseeable harm, the gravity of that harm and the burden of cost which would be incurred to prevent injury.

Summary

In *Ingles* the trial judge found that it was unreasonable for the inspector to conclude that the work was properly completed based on the

statements of the contractor, in particular, as the inspector had been put on notice of the contractor's willingness to contravene the instructions in the building permit. The non-compliance of the owner with the building inspection scheme did not acquit the building inspector of his responsibility, and in fact, it may have augmented it. As well, the court found that there was a higher standard of care as the underpinning was a major structural element.

Conclusions

As a practical reality, building inspectors are routinely called upon to inspect major structural elements. Thus, in almost every case, where a contractor commences work before there is an opportunity to inspect, this may amount to a suspicious circumstance requiring the inspector to conduct a more thorough inspection using all powers necessary. ↻

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