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• EDITORIAL: NO SWIMMING ON AN EASEMENT — COURT OF APPEAL UPHOLDS TOWN'S EASEMENT RIGHTS •

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In the first decision released by the Ontario Court of Appeal in 2021, the Court upheld the disputed easement rights of the Town of Oakville.[1] The Town acquired broad above and underground easement rights over a strip of land 10 feet in width pursuant to a standard form easement document employed by the Town in 1972. The easement specifically prohibited the erection of buildings or structures on the easement, as well as trees. There was no dispute that the easement was granted for the purpose of an underground hydro cable servicing an adjoining lot. The easement was never utilized for any other purpose and the Town had no intention to use it for anything else. Moreover, in 2000, the Town sold the hydro infrastructure, including the easement rights, to a separate Hydro Electricity Distribution Company, but retained for itself an interest in the granted easement rights. The Town had previously granted permission for some encroachments on the easement for a carport and part of a dwelling. There was also evidence that several large mature trees were located within the easement, as well as a garden shed.

A new owner, without consultation with the Town, erected an above ground swim spa and deck ("pool amenities") on the easement. He incorrectly assumed the easement had been abandoned. He also did not apply for a building permit, as required. Both the Town and Hydro objected to the encroachment and brought an Application to have the pool amenities removed.

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In a hotly contested Application heard in Superior Court, Justice Conlan ordered the pool amenities removed.[2] The Owner argued successfully that the pool amenities did not "substantially interfere" with the easement rights granted. The hydro cable was located within a conduit and furthermore, with new technology such as directional drilling, it was not necessary to access the easement rights from the surface. Nevertheless, Conlan, J. held that the pool amenities contravened the express terms of the standard easement form used by the Town that prohibited the erection of any building or structure within the easement. He further stated that, but for the outright prohibition in the grant of easement, he would have found that the pool amenities did not constitute an actionable encroachment since there was no evidence of substantial interference.

On appeal to the Court of Appeal, the owner argued that regardless of the wording of the easement, in order to bring a case for an actionable encroachment, you must establish substantial interference. He also argued that the easement was abandoned or partially extinguished and that proprietary estoppel applied due to the fact that the Town had allowed the other encroachments to exist.

The Town argued that the easement contained a restrictive covenant in perpetuity, which effectively provides that any encroachment is a material derogation of the grant.[3] The Town also argued that examining the issue of substantial interference before considering the meaning and extent of the easement is an error in law.[4]

Furthermore, there was no need to examine the surrounding circumstances or previous conduct of the Town when determining the scope of the easement since the nature and extent of the rights conveyed were clear and unambiguous. Finally, the Town argued that contravention of the restrictive covenant by itself amounted to substantial interference.

The Court of Appeal accepted these submissions. It held:

> *[14] In evaluating whether there is an actionable encroachment on an easement created by express grant, the court first determines the nature and extent of the easement by interpreting "the wording of the*

> *instrument creating the easement, considered in the context of the circumstances that existed when the easement was created": Fallowfield v. Bourgault (2003), 68 O.R. (3d) 417 (C.A.), at para. 10; see also Raimondi v. Ontario Heritage Trust, 2018 ONCA 750, 96 R.P.R. (5th) 175, at para. 11 (emphasis added).*

NO ABANDONMENT OR PARTIAL EXTINGUISHMENT

The Court also rejected the owner's claims of abandonment or partial extinguishment. It referred to another Court of Appeal decision which clearly sets out the principles that apply.[5]

> *[27] In Remicorp, this court reviewed the general principles relating to abandonment of an easement by release (at paras. 47-51) and partial extinguishment of an easement (at paras. 63-73). In broad outline:*
>
> - *"Unless an easement is granted for a term of years, the rights conferred by an easement are perpetual and, accordingly, are actually or potentially valuable rights. Therefore it is not lightly to be inferred that the owner of such a right should give it up for no consideration": at para. 47, citing Gale on Easements, at para. 12-26.*
> - *Other than by an express release, an easement can be abandoned by release impliedly by non-use coupled with evidence of an intention to abandon the easement: at para. 49.*
> - *An easement can be extinguished either by statute or at common law: at paras. 70-71.*

The Owner's argument hinged on the fact that the easement had only been used for a buried hydro cable and there was no current intention to use it for anything else. This position completely ignored the fact that:

1. The easement was created by an express grant with express rights; and
2. The Town had never agreed to relinquish any of its rights under the easement.

The intent to abandon may be express or implied. The onus is on the Respondent to prove abandonment. There was clearly no express abandonment.

To imply abandonment in the case of an express grant, it is not dependent on how it was used. *Remicorp*[6] makes it clear that the registration on title of an express grant is evidence of an absence of an intention to abandon. The Court further stated that "the intent to abandon means that the person entitled to the easement has knowingly, and with full appreciation of his rights, determined to abandon it".[7]

There was no evidence of any such intention. As in *Remicorp,* there was no request of any kind made by the Owner to determine the intent of the Town. It was just assumed (wrongly) that it was no longer being used and had been abandoned. This reckless behavior hardly supports a *bona fide* belief of abandonment and certainly is not evidence of abandonment. There was nothing in the record that would suggest that the Town at any time ever agreed to relinquish the substantial rights it had under the registered easement, even though it permitted the partial encroachments and failed to enforce other known or unknown encroachments.

PROPRIETARY ESTOPPEL

The estoppel argument also didn't gain any traction with the Court. The Court noted that in order to invoke this equitable doctrine, three elements must be established:[8]

> *(i) the owner of the land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property;*
> *(ii) in reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner; and*
> *(iii) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.*

The Court also adopted the reasons of the Application Judge that none of the conditions for proprietary estoppel had been established:[9]

> There is no evidence to suggest that Hydro had any knowledge of the other structures located within the easement that existed before the Pool Amenities were installed, and thus, it cannot be said that Hydro induced, encouraged or allowed [the appellants] to do what they did in early 2014.
>
> Second, we know for certain that the [appellants] did not enquire with the Town and/or Hydro about the scope of the Easement or a building permit before installing the Pool Amenities, and thus, there is no evidence to suggest that the [appellants] acted to their detriment to the knowledge of either the Town or Hydro.

> Third, though perhaps unforgiving to some degree, there is nothing "unconscionable" about the Town and Hydro enforcing the clear wording of the said Indenture.

SECTION 61 OF THE *CONVEYANCING AND LAW OF PROPERTY ACT*

Another consideration in this case was that even if the Court had not granted the relief sought by the municipality, that would not have removed the easement from title. The Owner would have to bring an application under s.61 of the *Conveyancing and Law of Property Act*[10] to remove the restrictive covenant.

There is very little case law on this section (and a similar section in the *Land Titles Act*). A restrictive covenant is defined as a covenant imposing a restriction in the nature of a negative obligation on the use of one person's land for the benefit of land belonging to the covenantee. It is immaterial if the covenant is in a positive form so long as it is negative in substance.[11]

Section 61 of the *Conveyancing and Law of Property Act*[12] provides that where "land or a specified part of it is not to be built on or is to be or not to be used in a particular manner… any such condition or covenant may be modified or discharged by order of the Superior Court of Justice". The order to modify or discharge the covenant should not be made unless the benefit to the Applicant greatly exceeds any possible detriment to the Respondent.[13]

The Ontario Court of Appeal in *Re Moody*[14] stated:

> *It has been more than once pointed out that under this statute there is no power to make compensation to a landowner who is prejudicially affected, and the jurisdiction is one to be exercised with the greatest caution, and an order should seldom, if ever, be made which will in truth operate to the prejudice of the adjacent landowner who has any real rights. The true function of the statute is to enable the Court to get rid of a condition or restriction which is spent or so unsuitable as to be of no value and under circumstances when its assertion would be clearly vexatious."*

It was argued by the Municipality that it could not be said by the Owner that the restrictive covenants were spent or of no value to the municipality when it was undisputed that the easement contained a buried hydro cable.

PRACTICAL CONSIDERATIONS

This case is an important victory for municipalities. There are numerous municipal easements that have been created for a specific purpose and are largely forgotten. The most common of such easements are rear and side yard drainage easements. Homeowners frequently make significant improvements to their yards interfering with the functionality of such easements by installing hard surfaces, sheds, retaining walls, and even pool amenities. In some cases, the municipality may not be aware of the contravention of the easement rights, but nevertheless grants a pool permit or a building permit without verifying whether the permit contravenes any easement rights.

In situations were the municipality is aware of the easement rights and acts to the detriment of the owner or an adjoining owner, it may well be held liable for damages for negligence. I have frequently litigated such cases where an adjoining homeowner sues the municipality as a result of a flooding claim caused by the unlawful interference of a drainage easement. The same consideration should apply to a private access or joint access easement. In one case, the municipality granted a building permit for a new dwelling on an access easement which completely denied access to an adjoining owner.

Municipalities should maintain good records of the location of and rights granted under all municipal easements. Even in the case of private easements (which are not in favour of a municipality), the municipality could be held negligent if it fails to exercise a reasonable duty of care by ensuring that no private property rights are affected by municipal approvals.

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He regularly acts as counsel to public sector clients, in both insured and uninsured litigation. He has been frequently involved in high profile cases, including cases involving negligent Ontario Building Code inspections, contaminated fill and other environmental issues, abuse of public office and conspiracy, defamation, Judicial Review Applications, Municipal Conflict of Interest, Development Charges By-law appeals, planning and development litigation, expropriations and constitutional challenges. With many published papers to his credit, he frequently lectures at legal conferences. In addition to providing strategic direction at the firm, Chuck has numerous other interests and volunteers his time for a variety of non-profit causes. He also runs a working beef farm and enjoys golf and the Blue Jays.]

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1 *Oakville (Town) v. Sullivan*, [2021] O.J. No. 49, 2021 ONCA 1.

2 [2020] O.J. No. 1025, 2020 ONSC 1419.

3 *Devaney v. McNab*, [1921] O.J. No. 16, 51 O.L.R. 106 at paras. 24 and 25 (App. Div.).

4 *Fallowfield v. Bourgault*, [2003] O.J. No. 5206, 68 O.R. (3d) 417 (C.A.) at paras. 39 and 40.

5 *Remicorp Industries Inc. v. Metrolinx*, [2017] O.J. No. 2805, 2017 ONCA 443.

6 At para. 54.

7 At para. 56.

8 *Clarke v. Johnson*, [2014] O.J. No. 1481, 2014 ONCA 237, at para. 52.

9 Supra, at para. 34.

10 R.S.O. 1990, Chapter C.34.

11 Robert J. Sharpe, *Injunctions and Specific Performance*, Canada Law Book, loose-leaf edition at paras. 4.10–20.

12 1990 R.S.O., Chapter C.34.

13 *Re George* (1926) O.L.R.574 (S.C. App.Div.); *Re Crocker* (1931), 40 O.W.N. 294 (H.C.); *Wainfleet (Township) (Re)*, [2002] O.J. No. 183, [2002] O.T.C. 49 (S.C.J.).

14 [1941] O.J. No. 101, [1941] 3 D.L.R. 768 (C.A.).

• THE DELICATE DANCE OF PARTIAL SETTLEMENT AGREEMENTS: PIERRINGER AND MARY CARTER AGREEMENTS •

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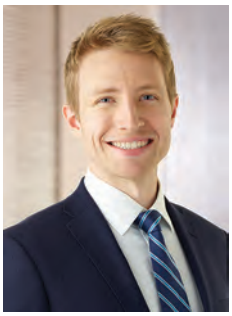

Ryan Wilson

In multi-party litigation, partial settlement agreements allow the plaintiff to settle some of their claims, while maintaining claims against the non-settling defendants. Generally, the plaintiff would achieve partial success and some certainty.

The purpose of this article is to review partial settlement agreements and outline the considerations and risks – take a wrong step and the consequences can be dire and stay the proceeding.

PARTIAL SETTLEMENT AGREEMENTS

The origin of formalized partial settlement agreements (the Mary Carter agreement and Pierringer agreement)

originated in the United States to address settlement in complex multiparty disputes and these agreements have since been adopted in Canada.

Partial settlement agreements that do not self-proclaim themselves as Pierringer agreements or Mary Carter agreements are still recognized by the Ontario Courts.[1] Reference to Pierringer agreements in Canadian case law has generally been used to describe proportionate share settlement agreements in which the settling defendant is removed from the action, in contrast to Mary Carter type agreements in which the settling defendant remains in the action and participates at the trial.[2]

Despite that these partial settlement agreements do not necessarily need to mirror the two established agreement types, they are still compared and evaluated by the Courts under the criteria established for Pierringer Agreements and Mary Carter Agreement.[3]

In evaluating any partial settlement agreement, the Courts should be involved in reviewing the fairness of the partial settlement and the consequences on all parties.[4] If a non-settling defendant impugns the fairness of the settlement agreement, then the Court must consider the fairness of the settlement.[5]

A party to a partial settlement agreement may choose to seek formal Court approval of the settlement, although this is not necessary.[6] It is always open for a settling party to move before the Court for directions as to whether the partial settlement agreement has the effect of changing the adversarial position of the contracting parties and the considerations for mandatory disclosure.[7] Moving before the Court for directions is a prudent course of action should the party wish to reduce the risk of adverse consequences.

There are two competing principles the Court must balance in assessing partial settlement agreements. First, parties to a civil lawsuit have broad discretion in deciding whether to settle some or all claims and on what terms.[8] Settlement has also been recognized as being critical to the administration of justice, considering the limited judicial resources.[9] The second principle is of public interest. Partial settlement agreements in multi-party disputes can lead to serious procedural and substantive effects on the non-settling defendants.[10] Consequently, Courts must prevent a partial settlement from causing unfairness or prejudice to non-settling defendants and must ensure the integrity of the Court's process.[11]

Generally, a plaintiff to a partial settlement agreement will limit their claims in the action so as to proceed only against the non-settling defendants; in other words, limit their claim to the several liability of the non-settling defendants. Limiting the claim this way also serves to exclude any crossclaims or third-party claims that the non-settling defendants may make against the settling defendants arising from the issues in the action. The plaintiff will also waive any claims against the settling defendants.[12]

DISCLOSURE REQUIREMENTS

Parties are required to disclose partial settlement agreements. This disclosure requirement is an exception to the settlement privilege that is typically provided to settlement agreements.

The timing for disclosure is strict. Any partial settlement agreement must immediately be disclosed to all non-settling parties and the Court if the agreement has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one.[13]

Both the existence of the agreement and its terms must be disclosed immediately.[14] The settling parties may withhold terms of the agreement that do not affect the litigation landscape.[15] For instance, the amount upon which the parties settled may not need to be disclosed.[16] Though, it would be in a risk-averse party's best interest to consider disclosing the amount as jurisprudence has supported judicial discretion as to whether the financial details must be disclosed.[17]

PIERRINGER AGREEMENTS

Pierringer agreements permit some defendants to withdraw from litigation, while leaving the remaining defendants in the action.[18] Pierringer agreements have been characterized as "proportionate share settlement agreements" as the remaining, non-settling defendants are responsible only for their proportionate share of any loss.[19]

Under the terms of a Pierringer agreement, a plaintiff may only seek recovery from the non-settling defendants on a several liability basis instead of a joint and several liability basis.[20] The settling defendants are assured that they cannot be subject to a contribution and indemnity claim from the non-settling defendants (typically the plaintiff will indemnify the settling defendant against any cross claims or third-party claims by the non-settling defendants arising out joint liability).[21] The practical result is that settling defendants are no longer involved in the litigation and the remaining non-settling defendants are responsible only for the loss they actually caused.[22]

Put succinctly, the features of a Pierringer agreement are:

1. the settling defendants settle with the plaintiff;
2. the plaintiff discontinues its claim action the settling defendants;
3. the plaintiff continues its action against the non-settling defendants but limits its claim to the non-settling defendants' several liability (a "bar order"[23]);
4. the settling defendants agree to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendants;
5. the settling defendants agree not to seek contribution and indemnity from the non-settling defendants; and,
6. the plaintiff agrees to indemnify the settling defendants against any claims over by the non-settling defendants.[24]

By their nature, Pierringer Agreements have the potential to prejudice the procedural rights of non-settling defendants.[25] This prejudice includes depriving the non-settling defendants of the benefits of a full discovery and evidence of the non-settling defendants.[26]

Accordingly, Pierringer Agreements must be immediately disclosed to the non-settling parties and the Court if the agreement has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one.[27] Both the existence of the agreement and its terms must be disclosed.[28]

Pierringer Agreements routinely include requirements that the non-settling defendants will be given access to the settling defendants' evidence.[29] This can include the settling defendants providing an affidavit of documents, attending examinations for discovery and providing access to retained experts.[30]

One of the fundamental differences between Pierringer agreements and Mary Carter agreements is that in Pierringer agreements the settling parties are removed from the proceeding.[31]

MARY CARTER AGREEMENTS

In a Mary Carter agreement, the settling defendants settle with the plaintiff but remain in the lawsuit.[32]

The settling defendants guarantee a minimum payment to the plaintiff, and the settling defendants' liability is capped at the guaranteed sum. Should the plaintiff recover more than the guaranteed amount, the settling defendants' liability is reduced on a dollar-for-dollar basis for the amount the plaintiff recovers in excess of the guarantee.[33]

In this way, a Mary Carter agreement provides an incentive for the plaintiff and the settling defendants to cooperate to maximize the quantum of the plaintiff's recovery.[34]

This structure is why Mary Carter agreements in particular have been challenged as champertous and why a Mary Carter agreement may be challenged as an abuse of process if it is not disclosed.[35] The undisclosed settlement agreement distorts the adversarial orientation of the litigation.[36] If not disclosed, then the trier of fact will have a misleading basis for understanding the evidence since apparent adversaries are in truth allies.[37]

As with the Pierringer agreement, the Mary Carter agreement must be disclosed to the Court and to the other parties to the lawsuit as soon as the agreement is made.[38] Both the existence of the agreement and its terms must be disclosed.[39]

COMPARISON CHART OF PIERRINGER AND MARY CARTER AGREEMENTS

The chart below briefly sets out the hallmark features both unique to and shared between both agreements.

	Hallmarks of a Mary Carter Agreement	**Hallmarks of a Pierringer Agreement**
Impact on settling defendants	The settling defendants remain in the lawsuit and aid plaintiff	The settling defendants are removed from the litigation. This requires consent of all parties or a Court order to discontinue the claim(s) against the settling defendants.
Settlement amount	Capped to a maximum, guaranteed amount. The amount paid by the settling defendants will be reduced in direct proportion to the amount the plaintiff recovers from the non-settling defendants in excess of the capped amount.	Fixed amount.
Limit to liability	The plaintiff agrees not to pursue the non-settling defendants for any amount beyond their several liability (as opposed to joint and several) in order to protect the settling defendants from any potential crossclaims or third-party claims for contribution and indemnity from the non-settling defendants.	
Indemnification	The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants. The plaintiff should only offer protection from contribution and indemnity based upon joint and several liability. Where the non-settling defendants have independent claims against the settling defendants for contribution and indemnity, e.g. by contract, the plaintiff is not in a position to protect the settling defendants.	
Disclosure	The agreement must be disclosed to non-settling defendants and the Court immediately after being executed. Not every term of the agreement must be disclosed. As long as the terms in the agreement that affect the litigation landscape are disclosed, other terms may be withheld.	
Procedural considerations	There must be sufficient procedural safeguards to prevent an abuse of process. The procedural entitlements often sought by the non-settling defendants include documentary discovery, oral discovery, and the ability to serve notices to admit on the settling defendants.	
Court approval of settlement agreement	Not required in every instance, but to reduce risk it is advisable to move before a Court for directions on the agreement and disclosure obligations.	

CONSEQUENCE OF FAILING TO DISCLOSE PARTIAL SETTLEMENT AGREEMENTS

The Court of Appeal has stayed actions where the settling parties failed to immediately disclose the partial settlement agreement, which in effect had shifted the settling parties' adversarial relationship into a co-operative one.[40] In the case of *Aecon Buildings v Brampton*, a delay of several months was sufficient to stay the plaintiff's action against the non-settling parties.[41]

Settling parties in multi-party disputes are obligated to immediately inform all other parties to the litigation as well as the Court of the settlement agreement.[42] The non-settling parties are not required to make inquiries to seek out whether any partial settlement agreements have been entered into.

This obligation is required because the agreement significantly alters the relationship among the parties, strategy, and the steps the non-settling party may decide to take from that point forward.[43]

The Court must be informed immediately so that it can properly fulfil its role in controlling its process in the interest of fairness and justice to all parties.[44] To maintain the fairness of the litigation process, the Court needs to know the reality of the adversity between the parties and whether an agreement changes the dynamics of the litigation or the adversarial orientation.[45]

The Court of Appeal has concluded that any failure of compliance to immediately disclose the partial settlement agreement amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party.[46] This is the case even where there is no prejudice to the non-settling party.[47] Where the failure amounts to abuse of process, the only remedy to redress the wrong is to stay the proceeding.[48]

PREVENTING UNFAIRNESS AND STEPS TO REDUCE RISKS STEMMING FROM PARTIAL SETTLEMENT AGREEMENTS

A party may move before the Court for directions on the implications of a partial settlement agreement, and specifically, whether the agreement has the effect of changing the adversarial position of the contracting parties and attracting the mandatory disclosure obligation.[49]

Many of the procedural issues relating to partial settlement agreements relate to the production of documents and examinations for discovery of the settling defendants. These concerns can be addressed in the agreement or by the Court. Notably, Ontario courts have not always imposed a term requiring the settling party to produce documents or submit for discovery but have left it open for the non-settling defendants to obtain that relief under the ordinary *Rules of Civil Procedure*.[50]

Procedural safeguards may include the imposition of limits on the conduct of examinations of witnesses by parties who were formerly adversaries but who have become allies as a result of the Mary Carter agreement.[51]

The Court may also consider preservation orders to be justifiable so that the settling defendants are obliged to retain all relevant documents.[52]

Further, the Courts may allow parties to cross-examine settling parties, and allowing all parties remaining in the action to cross-examine a settled defendant at trial.[53]

CONCLUSION

Partial settlement agreements can be an effective tool, but care should be taken to ensure procedural fairness is maintained and that the agreement is immediately disclosed to all parties and the Court. Failure to disclose the agreement can result in the serious consequence of having the action stayed.

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1 *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906.

2 *Noonan v. Alpha-Vico*, [2010] O.J. No. 2807, 2010 ONSC 2720, at para. 28.

3 *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906, at paras. 10–12; *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324, at para. 41.

4 *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906 at para. 13.

5 *Ibid.*, at para. 14

6 *Ibid.*, at para. 15.

7 *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324 at para. 47.

8 *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906 at para. 16.

[9] *Amoco Canada Petroleum Co. v. Propak Systems Ltd*., [2001] A.J. No. 600, 2001 ABCA 110 at para. 27.

[10] *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906 at para. 17.

[11] *Ibid.*, at para. 17.

[12] *Rains v. Molea*, [2012] O.J. No. 4073, 2012 ONSC 4906.

[13] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324, at para. 39; *Moore v. Bertuzzi*, [2012] O.J. No. 2485, 2012 ONSC 3248, at paras. 76–77.

[14] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 14.

[15] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 19; [for a list of terms for inclusion see: *Noonan v. Alpha-Vico*, [2010] O.J. No. 2807, 2010 ONSC 2720, at paras. 50–52.]

[16] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 18; *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] S.C.J. No. 37, 2013 SCC 37, at paras. 20 and 27.

[17] *Moore v. Bertuzzi*, [2012] O.J. No. 2485, 2012 ONSC 3248, at para. 71; *Noonan v. Alpha-Vico*, [2010] O.J. No. 2807, 2010 ONSC 2720, at paras. 48–50.

[18] *Hollinger Inc., Re*, [2012] O.J. No. 4346, 2012 ONSC 5107, at para. 54.

[19] *Ibid*.

[20] *Gendron v. Doug C. Thompson Ltd*. (Thompson Fuels), [2019] O.J. No. 1865, 2019 ONCA 293, at para. 97; *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] S.C.J. No. 37, 2013 SCC 37, at paras. 23 and 26.

[21] *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] 2 S.C.R. 623, 2013 SCC 37, at paras. 23 and 26; *Noonan v. Alpha*, [2010] O.J. No. 2807, 2010 ONSC 2720, at para. 29.

[22] *Gendron v. Doug C. Thompson Ltd*. (Thompson Fuels), [2019] O.J. No. 1865, 2019 ONCA 293, at para. 97; *Hollinger Inc., Re*, [2012] O.J. No. 4346, 2012 ONSC 5107, at para. 54; *Moore v. Bertuzzi*, [2012] O.J. No. 2485,, 2012 ONSC 3248, at para. 85.

[23] *Hollinger Inc., Re*, [2012] O.J. No. 4346, 2012 ONSC 5107, at paras. 70 and 71.

[24] *Moore v. Bertuzzi*, [2012] O.J. No. 2485, 2012 ONSC 3248, at para. 84.

[25] *Hollinger Inc., Re*, [2012] O.J. No. 4346, 2012 ONSC 5107, at para. 67; *Fram Elgin Mills 90 Inc. v. Kerbel*, 2016 CarswellOnt 7792, at para. 63.

[26] *Hollinger Inc., Re*, [2012] O.J. No. 4346, 2012 ONSC 5107, at para. 67.

[27] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324, at para. 39; *Moore v Bertuzzi*, [2012] O.J. No. 2485, 2012 ONSC 3248, at para. 90.

[28] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 14.

[29] *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] 2 S.C.R. 623, 2013 SCC 37, at para. 24.

[30] *Ibid*.

[31] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 17.

[32] *Elder v. Rizzardo Bros. Holdings Inc*., [2016] O.J. No. 5992, 2016 ONSC 7235, at para. 10 footnote 1; *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at para. 17.

[33] *Elder v. Rizzardo Bros. Holdings Inc*., [2016] O.J. No. 5992, 2016 ONSC 7235, at para. 10 footnote 1.

[34] *Moore v. Bertuzzi*, [2012] O.J. No. 2485,, 2012 ONSC 3248 at para. 68; *Laudon v Roberts*, [2009] O.J. No. 1824, 2009 ONCA 383, at para. 2 footnote 1; [for exemplar terms of what may be contained in a Mary Carter agreement, see *Evans v. Jenkins*, 2003 CarswellOnt 463, at paras. 6 and 7]

[35] *Moore v. Bertuzzi*, [2012] O.J. No. 2485,, 2012 ONSC 3248, at para. 68.

[36] *Ibid*.

[37] *Ibid*.

[38] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324 at para. 35; *Laudon v. Roberts*, [2009] O.J. No. 1824, 2009 ONCA 383 at para. 39; *Moore v. Bertuzzi*, [2012] O.J. No. 2485, 2012 ONSC 3248, at para. 90.

[39] *Stamatopoulos v. Harris*, [2014] O.J. No. 5139, 2014 ONSC 6313, at paras. 14 and 20.

[40] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324.

[41] *Aecon Buildings v. Brampton (City)*, [2010] O.J. No. 5630, 2010 ONCA 898.

[42] *Ibid.*, at para. 13.

[43] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324, at para. 36.

[44] *Ibid.*, at para. 36.

[45] *Ibid.*, at para. 39.

[46] *Aecon Buildings v. Brampton (City)*, [2010] O.J. No. 5630, 2010 ONCA 898, at para. 16.

[47] *Ibid.*, at para. 12.

[48] *Ibid.*, at para. 16.

[49] *Handley Estate v. DTE Industries Limited*, [2018] O.J. No. 1763, 2018 ONCA 324, at para. 47.

[50] *Noonan v. Alpha-Vico*, [2010] O.J. No. 2807, 2010 ONSC 2720, at para. 42.

[51] *Evans v. Jenkins*, 2003 CarswellOnt 463, at para. 24.

[52] *Noonan v. Alpha-Vico*, [2010] O.J. No. 2807, 2010 ONSC 2720, at para. 43.

[53] *Cheesman et al v. Credit Valley Hospital et al*, [2019] O.J. No. 4510, 2019 ONSC 4996, at para. 14.

• BUILDING CODE LIABILITY: MUNICIPALITY LIABLE FOR FAILURE TO INSPECT •

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James Cook

Owners of a cottage in Muskoka obtained judgment against the Township of the Lake of Bays in the amount of $361,875, resulting from the Township's failure to properly inspect construction after a building permit had been issued: *Breen v. The Corporation of the Township of Lake of Bays.*[1]

In March, 1999, the plaintiffs purchased a cottage for $710,000 in Lake of Bays, Ontario. In 2011-2012, during renovations, the plaintiffs' architect discovered several structural issues, leading to an inspection by an engineer. The engineer determined that the entire cottage was structurally unsafe and that there were serious violations of the *Building Code Act* (the "*Act*") and the applicable *Ontario Building Code* regulations.

The plaintiffs' engineer concluded that constructing of an addition to the cottage would not be permitted until the outstanding structural deficiencies were addressed. Given the extent and severity of the structural deficiencies, the engineer believed that the repair costs could exceed the re-construction costs of the cottage. The plaintiffs stopped occupying the cottage in 2013, and thereafter removed the contents, turned off the heat, and drained the plumbing.

In 2014, the plaintiffs commenced an action in the Ontario Superior Court of Justice against the Township seeking damages for negligent building inspections and breaches of its legal duty to enforce the provisions of the *Act* and *Building Code*.

In January 2021, following a multi-day trial, the Honourable Mr. Justice Sutherland found that the Township breached a duty of care owed to the plaintiffs. The Township owed a duty of care to the plaintiffs as owners of a property that was constructed pursuant to a building permit which it had issued. The Township conceded that it was reasonably foreseeable that carelessness on the Township's part relating to approval of the building permit might cause damages.

The more difficult question was whether there were any policy reasons limiting the duty of care owed to the plaintiffs. Following the Supreme Court of Canada's decision in *Ingles v. Tutkaluk Construction Ltd.*[2], the court reasoned that the purpose of the building inspection scheme is to protect the health and safety of the public by enforcing safety standards for all construction projects. Municipalities in Ontario are required to appoint inspectors who will inspect construction projects and enforce the provisions of the *Act* and *Building Code*.

Accordingly, Justice Sutherland found that the Township had a duty to ensure all construction of "new buildings" as prescribed by the *Act* and *Building Code* complied with the standards of construction as described therein. The Township therefore owed a duty of care to the plaintiffs to not negligently exercise its power to grant a building permit and in the

inspection of the construction of a building permitted under the *Building Code*.

As to whether the Township breached the duty of care, the court noted that the standard of care was not perfection, and the Township was not elevated to the level of an insurer for each and every deficiency or negligent action in the construction of a building. However, Justice Sutherland concluded that the standard of care required the Township to take proactive steps to inspect a building during construction:

> *I am of the view that once a building permit is granted, the municipality has an obligation to inspect the building to comply with the Act and the requisite Building Code. Anything less would make the whole building permit and inspection process meaningless.*

A municipality's obligation to ensure that a building complied with the *Act* and *Building Code*, has two stages: (1) the building permit application stage, which involves assessing the proposed scope and plans of construction; and (2) the inspection of construction. With the information contained in the building permit, a building inspector is required to inspect the construction at various phases of construction.

Justice Sutherland found that the Township fell well below the standard of care in the first stage by failing to take reasonable and prudent steps to review the building permit application to enforce the *Act, Building Code* and associated health and safety by-laws. The Township could not produce any evidence that a set of plans and specifications for the cottage were ever filed or were utilized by the building department during inspections.

As to the second stage, the evidence was that the municipality had conducted only three inspections during the initial construction phase of the cottage and no inspections of the structural framing. Following the initial inspections, the municipal building inspectors never returned to the property. Instead, as time went by, the municipality simply wrote to the permit holder to confirm that if they did not hear from him they would assume that the project was complete and that they close their file.

Accordingly, the court was satisfied that the Township's inspection of the structural issues fell below the standard of care. An inspector should have concluded that various issues with the structural framing of the cottage did not comply with the *Building Code*. The Township could have ordered construction to cease until plans and/or specifications were provided to certify that the cottage beams and joists met the required load capacities. The Township could have terminated the building permit until proper plans and/or specifications were provided to show compliance with the *Building Code* or the *Act*. The Township did neither and was therefore negligent.

The plaintiffs sought damages, firstly, for costs to rectify *Building Code* violations that the Township should have observed during inspections while construction was going on, and secondly for damages flowing from *Building Code* violations, such as damages due to water penetration (the second group). The court noted that in law, a defendant should not be responsible to compensate a plaintiff for damages that they would have suffered notwithstanding the defendant's alleged negligence: *Blackwater v. Plint*[3]; *Bowman v. Martineau*[4].

The court concluded that the plaintiffs had established damages relating to areas that the Township was required to have inspected pursuant to the *Building Code*. The Township failed to identify violations to the *Building Code* and ordering rectification to stairs, beams, and other structural features as part of the permit inspection process. The costs to remedy such deficiencies were therefore caused by the Township's breaches.

However, with regard to the second group (relating to decaying flooring joists, floor beams and flooring due to water penetration), the court was not persuaded that the plaintiffs had established that the breaches of the Township caused the damages claimed. There was ample evidence that water penetration was due to water flowing into the cottage from the poor construction of the wooden decks and skylight. The plaintiffs took no steps to remedy the issue of the poor construction of

the exterior decks. There was no compelling evidence that water penetration from the crawl space, lack of flashing or from the chimney caused the damage to the decay of the floor, joist, door and wall in the living room and kitchen area.

In the result, the court awarded damages to the plaintiffs in the amount of $346,875.33 for the repair costs relating to the first grouping of structural deficiencies. The court awarded an additional $7,500 to each plaintiff for mental and emotional distress.

The decision represents the culmination of an eight-year ordeal for the plaintiffs. One cannot fault them for not seeking to review the original building department file at the time of purchasing the cottage to confirm that the work authorized by the building permit was properly inspected by the municipality during the construction process. The plaintiffs had a home inspection before closing which evidently did not detect the serious structural deficiencies at issue. It is unlikely that any buyer would seek to review a municipal building department file at the time of purchase unless there were some obvious issues indicating that they should do so. There was no argument made at trial by the Township that the plaintiffs had failed to mitigate their losses. The case demonstrates that a municipality will be held to account for negligence relating to the issuing of a building permit and failure to conduct proper inspections during the course of construction.

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1 2021 ONSC 533

2 [2000] S.C.J. No. 13, 2000 SCC 12

3 [2005] S.C.J. No. 59, 2005 SCC 58, at para. 78

4 [2020] O.J. No. 2372, 2020 ONCA 330, at paras. 11–14