

One of the uninformed criticisms levelled by some municipal authorities against the use of a Registered Code Agency (RCA) is that, in the event of an error by the RCA, the municipality becomes liable for the mistake. Even a cursory reading of the Building Code Act demonstrates that this criticism is unfounded because Subsections 31.(3) and 31.(4) of the Building Code Act absolve a municipality of liability for the errors of an RCA.

An on-going court case against the City of Barrie may become one of those “landmark” cases in the field of Building Codes, where a Judge of the Ontario Superior Court of Justice has explicitly examined and commented on the application of Subsections 31.(3) and 31.(4) of the Building Code Act. This particular case is known as: 1606533 Ontario Inc. v. The Corporation of the City of Barrie, 2015 ONSC 490. The latest court hearing in this case was held on January 13, 2015 by Judge Vallee and was released on January 22, 2015.

The case, so far, deals with the Plaintiff, 1606533 Ontario Inc., that is suing the City of Barrie and a number of other parties, including the contractors, the former property owner and an RCA. According to Judge Vallee, it stems from a fire that seriously damaged the Plaintiff’s building to the extent that it had to be demolished, except for the common wall shared with another building on the adjacent property. The Plaintiff applied for a building permit. Rather than reviewing the design in-house, the City of Barrie sent it to an RCA that was qualified under the Ontario Building Code. After reviewing the plans, the RCA issued a certificate which stated that the proposed building complied with the Ontario Building Code.

Based on the RCA’s certificate, the City of Barrie issued a conditional permit for the construction of footings. Furthermore, as a condition of issuing the permit, the City required the Plaintiff to assume all risks associated with the construction. The agreement relevant to the conditional permit stated that the Plaintiff was to indemnify the City for any claims with respect to the permit and was to pay the City’s costs to enforce the agreement.

When excavation work started for the new building, the common wall collapsed. It is alleged that the City of Barrie’s inspector did not inspect the building next door, on the other side of the common wall immediately after the fire.

The plaintiff’s allegations may be summarized as follows:

- The City of Barrie had a duty to inspect the building next door, including the party wall after a serious fire. It was damaged by a serious fire which was a contributing factor to its collapse.
- There may be some deficiency with respect to the review of the plans, in which case, the City of Barrie would be vicariously liable for the RCA’s plan review.

In her review of the City of Barrie's arguments, Judge Vallee wrote:

“[10] The City does not have any liability with respect to what [the RCA] did or did not do. Schedule B to the Building Code Act, 1992, S.O. 1992, c. 23, provides as follows:

15.15 The following are the functions that a registered code agency may be appointed to perform in respect of the construction of a building:

1. Review designs and other materials to determine whether the proposed construction of a building complies with the building code.
2. Issue plans review certificates.

15.16(1) A registered code agency may exercise the powers and perform the duties specified in the Act and the Building Code in respect only of the functions and of building specified in a particular appointment.

31(3) The Crown, a municipality ... is not liable for any harm or damage resulting from any act or omission by a registered code agency or by a person authorized by a registered code agency under subsection 15.17(1) in the performance or intended performance of any function set out in section 15.15.

31(4) The Crown, a municipality...is not liable for any harm or damage resulting from any act or omission in the execution or intended execution of any power or duty under this Act or the regulations by their respective chief building official or inspectors if the act was done or omitted in reasonable reliance on a certificate issued or other information given under this Act by a registered code agency or by a person authorized by a registered code agency under subsection 15.17(1).

[11] **This schedule to the Building Code Act is clear that the municipality is not liable for any harm or damage resulting from any act or omission of a registered code agency. Furthermore, the municipality is not liable if a building inspector relied on a certificate issued by a code agency. The [RCA] is not the City's agent and cannot be as a matter of law. If there was an issue with the plans, [the RCA] has the liability.”**
[my emphasis]

Judge Vallee's wise ruling has cleared up any misconceptions about municipal liability issues when an RCA is engaged on a project:

Municipal liability decreases when a registered code agency is hired for a project!

By the way, any time a judge makes a ruling that I like, it is a “wise” ruling.

About the author: Alek Antoniuk is best known for co-ordinating and managing the technical development of the 2006 and the 2012 editions of the Ontario Building Code. He also played a lead role in managing the code advisory services of the Ontario Ministry of Municipal Affairs and Housing since 1989. He is a building code consultant, a policy advisor, and the publisher of a web site for information about construction codes at: www.codenews.ca .