SUPERIOR COURT OF JUSTICE
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The Honourable Madam Justice:	Kiteley
The Honourable Mr. Justice:	
Secretary's Name:	Yvonne C. Pawaroo
Matter:	**CITATION:** Quinte et al v. Eastwood Mall Inc. et al, 2014 ONSC 2044 **COURT FILE NO.:** 95/14 **DATE:** 20140403

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SUPERIOR COURT OF JUSTICE – ONTARIO

DIVISIONAL COURT

RE: Elaine Quinte, John Quinte and 1358896 Ontario Inc. (Carrying on Business as Hungry Jack's) Plaintiffs, Respondents in the Motion for Leave to Appeal

AND:

Eastwood Mall Inc., Bob Nazarian, The Corporation of the City of Elliot Lake, M.R. Wright & Associates Co. Ltd., R.G.H. Wood, G.J. Saunders, Her Majesty the Queen in Right of Ontario, Algoma Central Properties Inc., Coreslab Structures (Ont) Inc., John Kadlec, James Keywan, Non-Profit Retirement Residences of Elliot Lake Inc. (Carrying on Business as Retirement Living) and 1425164 Ontario Ltd. Inc. (Carrying on Business as Nordev), Defendants

Her Majesty the Queen in Right of Ontario, Applicant in Motion for leave to Appeal

BEFORE: Kiteley J.

COUNSEL: *Darrell Kloeze, Judie Im, Kristin Smith*, for the Applicant in Motion for leave to Appeal

David F. O'Connor and J. Adam Dewar, for the Respondents in the Motion for Leave to Appeal

HEARD: March 31, 2014

ENDORSEMENT

[1] In reasons for decision[1] dated February 13, 2014, Belobaba J. certified this as a Class Proceeding. Counsel for Ontario seeks leave to appeal from that decision. For the reasons that follow, the motion is dismissed.

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[1] 2014 ONSC 249

[2] The action arises from the collapse of the rooftop parking deck of the Algo Centre Mall in Elliot Lake on June 23, 2012. The statement of claim alleges that the defendants' negligence caused death and personal injury, psychological injury and mental distress, interruption of business, loss of personal property and loss of income.

[3] The class consists of all individuals or businesses who were occupants in the mall at the time of the collapse (or were parents, spouses, children and siblings of the occupants); tenants; and employees in the mall (even if they were not working on the day of the collapse). It is estimated that as many as 300 people may be included in the class.

[4] The common issues were found to be as follows:

Common Issue 1 Duties & Breach

(a) Did the Defendants (or any of them) owe a duty of care (whether at common law, statute or otherwise) to the Class Members regarding safety of the Mall?

(b) If the answer to Common Issue 1(a) is yes, did the Defendants (or any of them) breach the foregoing duty (or duties) of care? If so, how?

Common Issue 2 Causation and Damages

(a) If the answer to Common Issue 1(b) is yes, did the Defendants (or any of their) breaches of duty cause or contribute to the collapse?

(b) If the answer to Common Issue 2(a) is yes what types or heads of damages may Class Members be entitled to recover from the Defendants (or any of them), subject to any individual defence to the claim of individual class members?

Common Issue 3 Apportionment of Liability

(a) If the answer to Common Issue 1(b) is yes, what degree of fault should be assigned to the defendants under the common law, the Negligence Act or under any other statute?

[5] The statement of claim includes allegations of negligence as against all of the defendants and occupier's liability as against Eastwood and Nazarian, the current owners. The motions judge held that the claims had been properly pleaded and should proceed. The only defendant who took issue with the cause of action was Ontario.

[6] The plaintiffs allege that under the *Occupational Health and Safety Act*, (*OHSA*) Ontario is responsible for conducting inspections relating to the safety of workplaces. The provincial Ministry of Labour inspectors performed over 150 inspections of the mall between 1981 and the date of its collapse. The Ministry of Labour had received numerous complaints about the condition of the mall and the dangers the leakage problems posed to its occupants. The plaintiffs allege that the provincial inspectors should have followed up with reasonable investigations and in failing to do so, they were negligent.

[7] Counsel had argued that the pleading does not disclose a reasonable cause of action in negligence against Ontario because it is plain and obvious that there is no private law duty of care owed by Ontario to the plaintiffs.

[8] At paragraph 18, Belobaba J. noted that the allegations of negligence were not just bald pleadings but were supported with material facts. He held that the allegations in the paragraphs listed pleaded a sufficient basis for the duty alleged vis-à-vis the class. He noted that the statement of claim clearly states that leaks through the parking deck or roof led to a lack of structural integrity and the collapse and that the leaks and poor condition of the roof and the unsafe working conditions had been brought to the attention of the provincial inspectors during their many inspections. He pointed out that the claim included an allegation that Ontario knew that leaks would corrode steel and could lead to a breakdown and structural failure of the parking deck and that the allegations clearly related to its duty to ensure workplace safety as referenced in s. 25(1)(e), s. 25(2)(h) and s. 54(1)(m) of the *OHSA* including structural integrity of a workplace.

[9] At paragraph 21, Belobaba J. held that the plaintiffs had pleaded material facts to establish that Ontario knew or ought to have known about the threat the leakage problems posed to the parking deck.

[10] His analysis of the cause of action requirement begins at paragraph 22:

> 22. I am also satisfied that there is an arguable cause of action. The plaintiffs submit that their claims against Ontario fall within two well-recognized categories of negligence: acts causing personal injury or property damage [*Cooper v. Hobart* 2001 SCC 79] and negligent inspection by a government authority. [*Just v. British Columbia* [1989] 2 S.C.R. 1228; *Rothfield v. Manolakos* [1989] 2 S.C.R. 1259; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12; *Fullowka v. Pinkertons of Canada Ltd.*, 2010 SCC 5; *Adams v. Borrel* 2008 NBCA 62] They also say, if needed, that the claims would satisfy a full-scale *Cooper-Anns* analysis. [FN omitted] For my part, it is sufficient to focus on the "negligent inspection" category.
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> 23. The "negligent inspection" cases have recognized that a public body statutorily empowered to conduct safety inspections may owe a private law duty of care to perform such inspections in a non-negligent manner. [*Cooper*, supra 12, at para. 36; *Fullowka*, supra note 13, at paras 46-51; *Adams*, supra, note 13, at paras 41-49]
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> 24. Unlike policy-based decisions of a government that may be immune from suit, the adequacy or quality of the Ministry of Labour's inspections of the Mall is an "operational" issue that can give rise to civil liability. [*Ingles*, supra note 13, at paras. 19-20] A government body such as the Ministry of Labour that exercises statutory power to conduct safety inspections **owes a duty of care to all who may be injured as a result of a negligent inspection.** Thus, for example, once the decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care. [*Just*, supra note 13, at 1243] As the Supreme Court noted in *Ingles*:

> Once it is determined that an inspection has occurred at the operational level, and thus that the public actor **owes a duty of care to all who might be injured by a negligent inspection,** a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. [*Ingles,* supra note 13, at para. 20; Also see *Rothfield,* supra note 13, at 1266-7; and, generally, *Kamloops (City of) v. Nielsen* [1984] 2 S.C.R. 2]

25. The actual identification of a serious and specific danger is not a condition precedent to holding the inspector liable. In *Fullowka*, the Supreme Court noted that inspectors are to detect problems before they translate into safety issues:

> As with the building inspectors, there is some discretion as to how they [the mining inspectors] carry out their duties, but also like building inspectors, once the mining inspectors embark on their inspections, it is reasonable to think they will exercise care in the way they carry them out . . . Similar to the role of building inspectors, the job of the mining inspectors includes protecting the miners from risk arising from other people's defaults. To paraphrase La Forest J. in *Rothfield*, the role of the mining inspector is to detect those defaults before they translate into dangers of health and safety" [*Fullowka,* supra note 13, at paras. 49-55

26. The Supreme Court also made clear in *Ingles* that an inspector "will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied" [*Ingles*, supra note 13, at para 20]. *Ingles* involved a claim by a property owner against a municipality for negligent inspection of the lowering of a house basement. Lowering the basement required the contractor to install underpinnings under the existing foundations to keep the walls from cracking and the house from falling down. The municipal inspectors failed to identify that the underpinning construction was inadequate and the danger that this inadequacy posed. The Supreme Court held that the city owed the plaintiffs a duty of care to exercise reasonable care in its inspections of the renovations and that it could be found negligent for conducting an inspection without adequate care.

27. The statutory inspection provisions of the OHSA are similar to the safety inspection powers given to the government bodies found to owe a duty of care in the building code inspection cases of *Ingles* and *Rothfield* and the mining safety inspection case of *Fullowka.* Given the similarity of the statutory safety inspection powers, I agree with counsel for the plaintiffs that there is no principled basis for distinguishing the present case on a "plain and obvious" standard from the recognized category of negligent inspection cases. Moreover, section 65(2) of the OHSA expressly provides that the Ministry of Labour may be held liable for torts committed by "a Director, the Chief Prevention Officer, an *inspector* or an engineer of the Ministry". [emphasis added]

28. The claim of "negligent inspection" as against Ontario may or may not prevail on the merits. But for the purposes of s. 5(1)(a) of the CPA, the claim clears the low "cause of

> action" hurdle. In my view, it is not plain and obvious that the "negligent inspection" pleading has no chance of success and is doomed to fail. Indeed, Ontario has not presented a single analogous authority for the proposition that a negligent inspection by a government department cannot lead to liability **to those who suffered damage as a result of unsafe conditions which the inspection(s) failed to catch or remedy.**
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> 29. In sum, the statement of claim passes muster as a valid pleading of negligent inspection on the part of the Ontario authorities. The cause of action hurdle as against Ontario, indeed as against all of the defendants, is cleared. **Emphasis added**

[11] Having arrived at that conclusion, the motions judge did not conduct the *Cooper-Anns* analysis.

Position taken on Motion for Leave to Appeal

[12] Counsel for Ontario argues that the motions judge erred in law in (a) finding that the negligent inspection cases recognized that a public body statutorily empowered to conduct safety inspections may owe a private law duty of care to perform such inspections in a non-negligent manner; and (b) failing to conduct the two stage *Anns* test. Counsel relies on both rule 62.02(4(a) and (b).

[13] Counsel for the plaintiffs argues that there are no conflicting decisions, nor is it desirable that leave to appeal be granted; and that there is no good reason to doubt the correctness of the order, nor does the appeal involve matters of such importance that leave should be given.

Rule 62.02(4)(a)

[14] Counsel for Ontario asserts that the decision conflicts with established jurisprudence in finding that there is a recognized category of "negligent inspection" cases. At paragraph 23 of his factum, there is a list of 11 decisions that he argues are examples of how the Supreme Court and the Ontario Court of Appeal have "regularly struck negligence claims on a Rule 21 motion on the basis that there was no private law duty of care owed by a government regulator to the plaintiff". Accepting that characterization of those cases, it does not demonstrate that there are decisions in conflict with that of the motions judge. Indeed, as the motions judge observed in paragraph 28 above, Ontario had not cited a single analogous authority for the proposition that a negligent inspection by a government department cannot lead to liability.

[15] Counsel for Ontario resists the notion that there is a settled category of "negligent inspection" cases and argues that the motions judge relied on cases involving allegations of negligent inspection by public authorities in circumstances that are significantly different than the alleged actions of the Ministry of Labour health and safety inspectors as pleaded here.

[16] Neither counsel has identified a case where a government regulator was held liable in negligence as a result of inspections done by Ministry of Labour inspectors. It is for that reason that counsel for the plaintiffs relied on existing cases by analogy and the motions judge accepted that submission: *Ingles* involved negligent inspection of house foundations by a building inspector; *Rothfield* involved negligent inspection of a retaining wall by a building inspector; *Fullowka* involved negligent inspection by a mining safety inspector. The fact that the

circumstances are different does not mean that, for purposes of identifying analogous cases, they are inappropriate. As indicated in paragraph 7 of the factum filed on behalf of the respondents, those three cases and others confirm that there clearly is a settled category of "negligent inspection" cases.

[17] Counsel for Ontario also asserts that the decision conflicts with established jurisprudence when it is alleged that a private law duty of care is owed by the Ministry of Labour occupational health and safety inspectors to members of the general public, when no such duty has previously been found to exist.

[18] As indicated in the bolded passages in paragraphs 24 and 28 of the motions judge's reasons, he described those to whom the duty would be owed as "all who may be injured as a result of a negligent inspection" and he defined the class as occupants (and their families), tenants and employees in the mall. Bearing in mind that the decision of the motions judge is that it is not plain and obvious that such a duty is not obviously doomed to fail, there are no conflicting decisions which warrant the granting of leave.

[19] Counsel for Ontario made no submission as to the desirability that leave be granted. Since the test is rule 62.02(4)(a) is conjunctive, if I had been persuaded that the decision conflicted with others, I would have dismissed the motion for leave on that ground.

Rule 62.02(4)(b)

[20] Counsel for Ontario asserts that there is good reason to doubt the correctness of the decision because the motions judge made a finding that Ontario owes a private law duty of care to the plaintiffs without conducting an *Anns* analysis.

[21] I agree with counsel for the responding parties that some of the submissions on behalf of the moving party were based on the assumption that the motions judge had found that Ontario owes a private law duty of care. That is not the case. Not only did the motions judge not make such a finding on the certification motion, at paragraph 28 of his reasons he acknowledged that in due course the claim might not prevail.

[22] As for the necessity of conducting the *Anns* analysis, I refer to *Mustapha v. Culligan of Canada Ltd.*[2] where the Supreme Court made it clear that a "full-fledged" *Anns* analysis is not required where the relationship between the plaintiff and defendant falls within, or is analogous to, a category of relationship already recognized as giving rise to a duty of care. That is what the motions judge found. Counsel for Ontario has not established that there is good reason to doubt the correctness of the decision.

[23] Counsel for Ontario took the position that it is a matter of importance within rule 62.02(4)(b) whether the issue deals with a statutory scheme of wide application, with the

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[2] [2008] SCJ No. 27

administration of justice or with the development of the law in a specific area and that that includes determining if a public authority owes a private law duty of care. Counsel further characterized the decision as establishing "a broad category of 'negligent inspection' where none previously existed and significantly broadens the liability of government activity in any domain where inspections take place".

[24] I repeat, the motions judge did not find that a public authority owes a private law duty of care to the members of the class. He found that the claim that Ontario owed class members a private law duty of care is not plainly and obviously doomed to fail. There is no aspect of that decision in relation to s. 5 of the *Class Proceedings Act* that falls within the category of importance. In fact, the contrary is the case: it is important that the matter advance beyond the procedural stages and not be held up in unnecessary challenges to the pleadings.

[25] Counsel for the responding parties submitted that if an *Anns* analysis was required, that the allegations in the statement of claim would meet the threshold. Given my conclusions above, I need not embark on that analysis.

[26] Counsel for Ontario raised other issues such as whether paragraph 158 alleges that there is a duty to prosecute Ministry officials. As the communications between counsel make clear, that is not the allegation. Having arrived at my conclusions with respect to rule 62.02(4)(a) and (b), I need not deal with any other issues.

ORDER TO GO AS FOLLOWS:

[27] Motion for leave to appeal is dismissed.

[28] If by April 14, 2014, counsel have not agreed as to costs of this motion, then counsel will make written submissions not exceeding 3 pages plus costs outline as follows: plaintiffs by April 21; Ontario by April 28.

Kiteley J.

Date: APR 03 2014