IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(SMALL CLAIMS)

File No. 24838/92 Prince George, B.C.

BETWEEN:

BRUCE MacKAY and MARILYN MacKAY

Claimants

AND:

REGIONAL DISTRICT OF FRASER FORT GEORGE

Defendant

AND:

DIRK LOEDEL

Third Party

Mr. Noel Kearney, Esq., appearing for Bruce and Marilyn MacKay

Mr. Steven Lee, Esq., appearing for The Regional District of Fraser Fort George

Mr. Garth Wright, Esq., appearing for Mr. Dirk Loedel

R E A S O N S F O R J U D G M E N T

This case involves the alleged negligence of a municipal building inspector. Bruce and Marilyn MacKay are the owners of property located at 12800 Green Road, West Beaverly, near Prince George, B.C. This is in the Regional District of Fraser Fort George (hereinafter called the Regional District). They are suing the Regional District for the cost of repairing a defective chimney and surrounding trusses in their home. The Regional District has made a third party claim against Dirk Leodel. Damages are agreed at $8583.44.

There are three main issues:

1) Limitations Act
2) Liability of Regional District
3) Liability of Third Party

The essential history of the claim is as follows. In 1979, David and Muriel Kehl were the registered owners of this property. They applied for a building permit from the Regional District (exhibit 4, tab 2). The application was signed by Dirk Loedel as owner or authorized agent, and indicated the contractor was Denise Construction Ltd. The application for the building permit included plans (exhibit 4, tab 3) which showed that the proposed house would have a masonry chimney. A building permit was issued and on five occasions, the building inspector was called to inspect the construction (exhibit 4, tab 4):

a) July 4/79 - Inspect footings
b) July 11/79 - Inspect frames

c) July 16/79 - Inspect Damages - proof
d) Aug 3/79 - Plumbing Inspector (request Aug 2/79)
e) Aug 17/79 - Inspector regarding framing (requested Aug 15/79).

The records of the Regional District do not contain any records of further inspections or of an application for occupation permit. No occupation permit was issued.

Mr. and Mrs. MacKay purchased this house in February 1989. In July 1990, they purchased a used stove and notified the Regional District to inspect. The building inspector, John Lorath condemned the chimney orally - the MacKays never received a written notice of condemnation. The following facts were agreed:

- the chimney and fireplace were not built according to code.
- Mr. MacKay discovered this when the installer would not install a wood stove.
- Mr. Lorath attended at Mr. MacKay's request, and advised the chimney could not be used.
- Mr. MacKay sought estimates to repair the problem.
- David Lea told Mr. MacKay in September 1990 that the chimney should not have passed inspection.
- Mr. MacKay took reasonable steps in obtaining an estimate and all repairs undertaken were appropriate.
- the MacKays were aware in September 1990 of the cut truss and inadequate clearances in original construction.

- until proceedings commenced, the MacKays had no knowledge of what inspections were done or not done at the time of original construction.
- the MacKays retained a legal adviser in August 1991 and did not seek other advice regarding inspection procedures or code violations prior to that date.
- on September 3, 1991, the claimants gave notice to the Regional District pursuant to s.755 of the Municipal Act.

Dave Lea of Cranbrook Hill Masonry was called to the home in September 1990 to look at the chimney which had been condemned and gave an estimate to take it down and rebuilt it. At that time, he advised of the infractions he could see, relating to no clearances, and could only give a supposition as to what was behind the chimney. It was too late in the year to do the work. In August 1991, he was asked for a rebid. He has now taken down the chimney and rebuilt it. In the process he discovered various breaches of the building code, including cut trusses, truss cemented in, improper clearances. He described the violations of the building code as very bad and dangerous. He agreed anyone in the business could not build a chimney in that fashion without knowing it was a violation.

Dennis Sadorszney was involved in repairing trusses. He described a severed truss which he said destroyed the structural integrity of

that area of the roof. He agreed any competent builder would know not to cut an engineered truss.

The claimants say these problems and the resulting expense flow from the failure of the Regional District's building inspector to properly perform his duties in 1979.

Clifford John Turner was the building inspector for the Regional District in 1979 and this home was in his area. He testified that at that time it was the policy of the Regional District to inspect properties if asked to. Mr. Turner issued the permit in question here. He personally performed four of the five inspections of the property. On August 17, 1979 on the the last inspection, the trusses were not cut. He would not have approved work done in the manner illustrated in the claimant's photograph. Mr. Turner said he does recall this particular house because he knew the original owner. The records of the Regional District were an aid to his memory. He relies on both memory and documents to say that he never inspected a fireplace on this property.

His understanding of s.8(e) of the Bylaw was that it did not require five inspections, but inspections at five stages. There could be many inspections at any one stage of construction.

On August 17, the chimney was not there and he okayed the framing. The drywall was not in place on that date.

It was the practice of the Regional District to inspect only on request. There was no policy to track applications to ensure there was an inspection for a final permit. No final permit or occupancy permit was issued for this building.

Robert John Lorath is the current building inspector for the Regional District. He testified that he inspected the chimney at Mr. MacKay's request. On seeing infractions in the basement and seeing improper and cut trusses in the attic, he condemned the chimney. Mr. MacKay asked how something like this could get past inspection and Mr. Lorath replied that if an inspection was done, it would not have passed.

Mr. Lorath had reviewed the records and found no request to inspect the chimney. The chimney was not built in the location indicated on the plans. It was his opinion that the fireplace had been built after the drywalling and taping were completed.

The By-Law

The relevant sections of Bylaw 143 of the Regional District are as follows:

"s.2 In this by-law,
"authority having jurisdiction" means the regional district board and the agent thereof that have authority over the subject that is regulated."

s.5 The authority having jurisdiction:
(a) (i) may enter any building or premises at any reasonable time for the

purpose of administering or enforcing this bylaw;

(ii) where any dwelling, apartment or guest room is occupied, shall obtain the consent of the occupant or provide written notice twenty-four hours in advance of inspection;

(iii) shall ensure that employees or persons charged with administration and enforcement of this by-law carry proper credentials.

(b) may revoke or refuse to issue a permit where the results of tests or materials, devices, construction methods, structural assemblies or foundation conditions are not satisfactory, in its opinion;

(c) may order the correction of any work which is being or has been improperly done under the permit;

(d) may order the cessation of work that is proceeding in contravention of this by-law.

s.8 Every owner of a property or his agent shall:

.....

(e) give at least 48 hours notice to the authority having jurisdiction and obtain his inspection and approval of the work;

(i) after the forms for footings and foundations are complete, but prior to placing of any concrete therein;

(ii) after removal of formwork from a concrete foundation and installation of perimeter drain tiles and damp-proofing, but prior to backfilling against foundation;

(iii) when framing and sheathing of the building are complete, including fire-stoping, bracing, chimney, duct work, plumbing, gas venting, wiring, but before any insulation, lath or other interior or exterior finish is applied which would conceal such work;

(iv) before a building drain, sanitary or storm sewer is covered, and if any part of a plumbing system is covered before it is inspected and approved it shall be uncovered if the authority having jurisdiction so directs, and when considered necessary, underground building drains, branches, storm drains, and sewers shall be retested after the completion of all backfilling and grading by heavy equipment;

(v) after the building or portion thereof is complete and ready for occupancy, but before occupancy takes place of the whole or a portion of the building."

Limitations Issue

S.755 of the Municipal Act is as follows:

> "The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. In case of the death of a person injured the failure to give notice required by this section is not a bar to the maintenance of the action. Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence."

The Regional District says that the claimants had sufficient knowledge in August 1990 to notify the Regional District of their claim. Their notice was dated September 3, 1991.

The claimants rely on Grewal v. Saanich (Dist.) (1989) 38 B.C.L.R. (2d) 250, and Teller v. Sunshine Coast Regional District (1990) 43 B.C.L.R. (2d) 376, both decisions of our Court of Appeal.

I do not intend to review those cases in this decision, although I have relied upon them in reaching my conclusions on this issue. In this case, I am satisfied that there was reasonable excuse for the delay on the part of the claimants. Although the claimant knew in August 1990 that the chimney was condemned and unsafe, they did not know the true extent of the problem until August 1991. On the evidence, I find as a fact that the claimants did not have

sufficient knowledge of the role of the Regional District in the construction and inspection process prior to consulting a legal advisor, to be able to provide particulars of the time, place and manner of damages. The Regional District has not claimed any prejudice as a result of delay. I am satisfied that the saving provisions of s.755 apply and the claimants are not barred from maintaining their claim.

Reliability of Regional District

The claimants say that the building inspector knew that there was to be a chimney in the building. This knowledge imposed on the inspector a duty to inspect the chimney. The by-law called for five inspections and five were done; the owner/developer had no further duty to call for inspections. The building inspector did not carry out his statutory duties and therefore the Regional District is liable.

The claimant has provided a comprehensive brief of cases including:

Kamloops v. Nielsen [1984] 5 W.W.R. 1 (S.C.C.)

Just v. B.C. [1990] 1 W.W.R. 385 (S.C.C.)

Rothfield v. Manolakos [1990] 1 W.W.R. 408 (S.C.C.)

Faucher v. Friesen (1985) 17 C.L.R. 82 (B.C.S.C.)

Petrie v. Groome [1991] B.C.J. 776 (B.C.S.C.)

Dha v. Ozdoba [1990] B.C.D. Civ. 1336-02 (B.C.S.C.)

Wilson v. Robertson [1991] B.C.J. 351 (B.C.S.C.)

The defendant, Regional District relies upon the following case:

McCrea v. White Rock [1975] 2 W.W.R. 593 (B.C.C.A.) and says the inspector was required to inspect upon request of the owner/developer, but was not required to inspect without such a request.

The defendant agrees that pure economic loss is now recoverable.

In my view, the key to each of the cases cited by the claimant is knowledge. In each case, the court found that the inspector or municipality knew or ought to have known of a situation which required greater care.

In Kamloops v. Nielsen, the building inspector inspected the foundations, was not satisfied, and required remedial work which was not done. After further inspections where further deficiencies were noted, the city imposed a stop work order. Work continued and further inspections revealed further violations. In spite of the stop work order, a plumbing permit was issued. No occupancy permit was ever issued. After a subsequent purchaser took possession, they learned the foundations had subsided. The alleged negligence of the city was the failure to enforce the stop work order. The Supreme Court of Canada found the city liable. The Regional

District points out that the Kamloops by-law imposed a positive duty to enforce whereas the Regional District by-law provides a power to enforce but not a positive duty.

In Rothfield v. Manolakos, the building inspector allowed a project to proceed although he was aware of design flaws. The owner did not request an inspection at the appropriate times. When an inspection was requested, concrete was poured and backfilling done; this prevented a proper inspection of construction. The court found the city partially responsible on the basis that inadequate plans were approved, and the inspector could have and should have required that work stop and deficiencies be corrected.

In Faucher v. Friesen, the inspector permitted breaches of the requirements of the building code and did not inspect adequately. The inspector ordered the builder to rectify certain defects and did not follow up on this; the inspector was aware that the builder moved in without an occupancy permit. The court found both the builder and the inspector liable. In relation to the inspector, the court found that he had identified a risk and did nothing to deal with it or correct it.

Similarly in Petrie v. Groome, the court found that the inspector should have been concerned about the adequacy of the subsoil and footings and did not take proper care.

The claimants say the by-law required five inspections and five inspections were done and that the by-law required framing and chimney to be inspected at the same time.

In my view, the by-law does not limit the number of inspections to five but requires inspections at five specific stages. There may be more than one inspection at each stage. Indeed, in Faucher v. Friesen, it is clear from Mr. Justice Perry's reasons for judgment that at least ten inspections were made in that case.

The Regional District says the onus is on the owner/developer to request an inspection and that the inspector attended whenever requested. Inspections revealed no flaws to be rectified. This is not a situation analagous to those cited by the claimants because there was no defect or fault which the inspector knew of or should have known of. The inspector had no knowledge whatsoever of the improper construction.

I feel very sorry for the claimants. It was obvious from Mr. MacKay's demeanour on the stand that he is quite distressed by this situation.

Unfortunately for the claimants, in my view, they have no claim in law against the Regional District. I find that the inspector properly performed his duties. He carried out inspections as requested. This was not a situation where he was aware of, or

should have been aware of, faults which he did not address. The onus was on the owner/developer to request further inspections and finally to request an occupancy permit. This was never done. There is no requirement in law that the municipality inspect without either a request or knowledge of some deficiency or risk.

The claim against the Regional District is dismissed.

Liability of Third Party

Because of any decision that the Regional District is not liable, there is no need to address this issue. The claim against the third party is dismissed.

I note that the builder, Denise Construction Ltd., was struck from the Register of Companies on June 24, 1988.

Dated on the 18th of September, 1992, at the City of Prince George in the Province of British Columbia.

B.L. Dollis
Provincial Court Judge