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City takes hit for shoddy Reno

The Annex is a trendy area of older Toronto homes in the Bloor-Bathurst-Spadina corridor. Back in 1990, James Ingles and his wife Valerie Webb owned an 80-year-old Annex house at 123 MacPherson Ave. They decided to improve it by lowering the basement 18 inches and building a patio and deck in the backyard.

Lowering a basement is no small task. It requires digging under the foundations section by section around the perimeter of the house, then underpinning the basement walls with new, deeper foundation walls. By following this procedure, the walls above are prevented from cracking and the house will not fall into the basement. After the deeper walls are installed, the basement floor can be safely dug out to provide more ceiling height.

Based on researching the required work and on some personal recommendations, Ingles hired Tutkaluk Construction Ltd. The total contract price was $46,000 and required Tutkaluk to lower the basement floor and install new underpinnings 20 to 24 inches wide below the existing foundation.

According to the contract, Tutkaluk was to apply for, and obtain, a building permit. Ingles knew that a permit was required to ensure city inspections would take place and that the work was being done properly. Tutkaluk told Ingles the work would be delayed if he had to obtain the permit first, so Ingles agreed the work could begin without a permit as soon as possible.

Construction began June 14, 1990. A permit application was submitted by Tutkaluk June 27, and a permit issued the next day two weeks after the work had started. By this time, the underpinning work had been completed, but the new floor had not yet been poured.

In issuing the permit, the City of Toronto attached three conditions: first, the underpinning had to be carried out to the satisfaction of the building inspector; second, the inspector had to be notified before the contractor proceeded with the underpinning and pouring the concrete; and third, the underpinning had to be at least as wide as the existing footings.

On the morning after the permit was issued, an inspector arrived to inspect the construction. During his half-hour visit, it was impossible for him to visually verify whether the underpinning was as wide as the existing footings, as required by the permit, since the foundations were already in place. Neither was it possible for him to measure the depth of the new foundations without digging a hole. That was not possible because it was raining the day of the inspection.

Tutkaluk assured the inspector that everything was done according to the drawings submitted with the permit, and that the underpinnings were as wide as the existing footings.

Two weeks later, another inspector visited the site. By this time, the basement floor was poured and finished. He noted the underpinning appeared to be complete at that stage.

Within weeks of completion of the job, the basement of the MacPherson Ave. house began to flood. Ingles hired another contractor to remedy the drainage problems. It turned out the whole house was resting on underpinning that was only six inches wide, instead of the 24 inches required by the permit. As well, the new foundations were not dug to the depth required by the plans. Both deficiencies were violations of the province's Building Code Act.

Total cost of the repairs was $56,925, and Ingles took the city and the first contractor to court to recover the damages. Only one defendant, the City of Toronto, appeared at the trial, and all of the arguments at court concerned whether or not the city was liable in negligence.

After a four-day trial, the court ruled that the city owed a duty of care to all those who might be injured if the city was negligent in exercising its inspection rights.

Justice Roger Conant decided that the city's inspections did not meet the standard of reasonableness. It should have been alerted, he said, because the contractor only applied for a permit after the work had been done. Conant wrote that the city should not have accepted the contractor's verbal assurance that the work was up to Code, but should have ordered the contractor to conduct a more thorough inspection by an engineer at its own expense.

Of great importance to the court was the public safety issue. Under the Building Code Act, the city is responsible to ensure the safety of buildings. If the work was not done properly, the entire house could have collapsed.

Does the city insure all sloppy construction? Even though the city is required to perform reasonable inspections of important structural elements, it cannot, said Conant, guarantee all work done by contractors. The city cannot be the unpaid insurer for negligent construction work. It merely has to perform reasonable inspections.

Justice Conant found the contractor liable for 80 per cent of the damages, and the city for 20 per cent. Of the 20 per cent, the owner was responsible for 30 per cent for contributory negligence in allowing the contractor to start work before getting the permit. This resulted in the late inspection and the city's failure to discover the shoddy work.

Judgment was recorded against the contractor for $42,016, and the city for $7,352, but under the Negligence Act, the city had to pick up the contractor's share as well.

Four years later, the city took the case to the Court of Appeal and succeeded in having the claim tossed out. Three appeal justices said the owner's actions in letting the contractor proceed without a permit barred him from any recovery.

In March 2000, almost 10 years after the original work, the Supreme Court of Canada handed down the final word in Ingles v. Tutkaluk. A seven-judge panel reversed the Court of Appeal, restored the trial decision, and ordered the city and contractor to pay Ingles $49,368 plus 10 years' interest at 12.9 per cent. Ingles and his lawyers Philip Anisman and Barbara J. Murchie were awarded costs of all the hearings at trial and the appeals.

The Supreme Court of Canada has now clearly stated that a municipality owes a duty of care to all who might be injured by negligently carrying out its statutory duties. To avoid liability, the city must exercise the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances.

The Supreme Court agreed with the trial judge that a municipality cannot be an insurer of shoddy work, and cannot be expected to discover every hidden defect. A homeowner will be denied recovery, however, only if his or her conduct is the sole source of the loss.

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