

## **TAB 13**

# **The *Building Code Act*, 1992 – Recent Changes and Cases**

**John Mascarin, C.S.**  
*Aird & Berlis LLP*

## **The Six-Minute Municipal Lawyer 2010**



The Law Society of  
Upper Canada

Barreau  
du Haut-Canada

**CONTINUING LEGAL EDUCATION**

# **THE *BUILDING CODE ACT*, 1992 – RECENT CHANGES & CASES**

**by John Mascarin**

Law Society of Upper Canada  
*The Six-Minute Municipal Lawyer 2010*

May 12, 2010

---

**AIRD & BERLIS LLP**

---

Barristers and Solicitors  
181 Bay Street, Suite 1800  
Toronto, Ontario  
M5J 2T9

Tel: 416.865.7721  
Fax: 416.863.1515  
Email: [jmascarin@airdberlis.com](mailto:jmascarin@airdberlis.com)

# **THE *BUILDING CODE ACT*, 1992 - RECENT CHANGES & CASES**

**John Mascarin**

**Aird & Berlis LLP**

## **INTRODUCTION**

Last year the *Building Code Act*, 1992, S.O. 1992, c. 23 ("BCA") was amended by the *Green Energy and Green Economy Act*, 2009 and the *Good Government Act*, 2009. Corresponding amendments were made to the *Building Code* (O. Reg. 350/06) ("OBC").

In addition, the Ontario Courts released a number of interesting judgments over the past year that have interpreted and applied the BCA and OBC.

## **LEGISLATION**

### **A. *BUILDING CODE ACT*, 1992**

#### **1. *Green Energy and Green Economy Act*, 2009**

##### **(a) General**

The *Green Energy and Green Economy Act*, 2009, S.O. 2009, c. 12, Sched. J, sections 1-3 (Bill 150) amended the BCA to promote the development of renewable energy generation facilities and the use of renewable energy. The amendments to the BCA are contained in Schedule J of the Bill which came into force on May 14, 2009.

**(b) Regulation-Making Authority**

Section 34 of the BCA grants regulation-making authority relating to standards governing the construction and demolition of buildings to the Lieutenant Governor in Council.

Subsection 34(5) of the BCA, which sets out the purposes of the regulations made under section 34, was amended to strike out the former purpose listed as “conservation and environmental integrity” and to substitute “conservation, including, without limitation, energy conservation, and environmental integrity” in its place.

**(c) Five-Year Review of OBC re Standards for Energy Conservation**

A new subsection 34(6) was added to the statute which mandates the Minister of Municipal Affairs and Housing to initiate a review of the OBC with reference to standards for energy conservation within 6 months of the *Green Energy and Green Economy Act, 2009* coming into force. The Minister is thereafter required to undertake a review every five years.

**(d) Building Code Energy Advisory Council**

Furthermore, a new body to be called the “Building Code Energy Advisory Council” has been established by the addition of the following provision:

**34.1** (1) The Minister shall establish a council to be known in English as the Building Code Energy Advisory Council and in French as Conseil consultatif des questions énergétiques liées au code du bâtiment.

(2) The Minister may appoint one or more persons to the Council and fix its terms of reference.

(3) The Council shall,

(a) advise the Minister on the building code with reference to standards for energy conservation; and

(b) perform such other functions as the Minister may specify.

The amendments to the BCA came into force on May 14, 2009 which is the day the *Green Energy and Green Economy Act, 2009* received Royal Assent.

## **2. Good Government Act, 2009**

### **(a) General**

The BCA was also amended by the *Good Government Act, 2009*, S.O. 2009, c. 33, Sched. 6, section 43 and Sched. 21, sections 2-3 (Bill 212) which received Royal Assent on December 21, 2009. Section 2 of the statute provided that the schedules to the Act come into force as provided in each schedule. Both Schedules 6 and 21 provide that they come into force on a day to be named by proclamation of the Lieutenant Governor.

O. Reg. 503/09 was filed on December 21, 2009 and made a broad range of technical amendments to the OBC as well as a number of housekeeping or editorial changes to clarify the regulation.

### **(b) Acting Director of Building and Development Branch & Delegation of Duties**

The Minister of Municipal Affairs and Housing is responsible for the administration of the BCA pursuant to section 2. Cabinet is required to appoint a Director of the Building and Development Branch of the Ministry of Municipal Affairs and Housing, who is the chief building official for the areas in which the Province has jurisdiction under the BCA (section 4) and who has various other responsibilities as outlined in the BCA.

The *Good Government Act, 2009* added two new subsections to section 2. Subsection 2(3) authorizes the Director of Building and Development Branch to designate a public servant employed under Part III of the *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Sched. A, who works in the Ministry of Municipal Affairs and Housing to exercise the powers and perform the duties of the Director in their absence. New subsection 2(4) authorizes the Director to delegate their powers or duties to one or more public servants employed under Part III of the *Public Service of Ontario Act, 2006* and who works for the Ministry.

### **(c) Time Frames for Permit Processing**

Subsections 8(2.2) and (2.3) were new provisions introduced by the *Building Code Statute Law Amendment Act, 2002*, S.O. 2002, c. 9. The *Good Government Act, 2009* repealed subsection 8(2.2) which instituted time frames within which the chief building official must decide whether to issue or to refuse a permit. New replacement subsection 8(2.2) clarifies the requirement for the time frames and provides that the chief building official's obligation arises if an application meets the prescribed requirements unless the prescribed circumstances apply.

Building officials can refuse to review applications within the timeframes if the requirements are not met. Where a permit is refused, subsection 8(2.3) requires that the permit applicant be informed of all reasons for the refusal within certain time frames. These time frames (which have not been revised) are set out in article 1.3.1.3. and Table 1.3.1.3. of Division C of the OBC, and apply to applications which meet the requirements of sentence 1.3.1.3.(5) of Division C of the OBC (which provisions were amended by section 222 of O. Reg. 503/09).

**(d) Disclosure of Prescribed Information to Tarion**

The *Good Government Act, 2009* added subsection 8(8.1) which requires a chief building official to provide certain information to a corporation designated under section 2 of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (currently Tarion Warranty Corporation). Prescribed information relates to permits that have been issued and the applications for permits for new residential construction. This amendment is for the purpose of consumer protection: to assist Tarion Warranty Corporation to take enforcement action against unregistered builders and unenrolled homes under the *Ontario New Home Warranties Plan Act*. The prescribed information that is to be given to Tarion Warranty Corporation is set out in article 1.3.1.6. of Division C of the OBC.

**(e) Repeal of Equivalency Provision**

The authority for chief building officials to accept equivalents was first introduced into the BCA in 1992. Former section 9 authorized chief building officials and registered code agencies to allow the use of materials, systems and building designs not authorized by the OBC provided they were of the opinion that the use of the proposed “equivalent” would achieve the level of performance required by the OBC.

The *Good Government Act, 2009* repealed section 9 and made several complementary amendments and repeals. The new objective based OBC rendered it no longer necessary to have recourse to “equivalents” under section 9 of the BCA to permit the use of alternative technical solutions to the prescriptive and performance-based technical requirements. This is because the objective-based format of the 2006 OBC contemplates the use of alternative technical solutions for *all* prescriptive and performance-based technical requirements (“acceptable solutions”). Section 9 had simply become redundant because of the new objective based OBC.

**(f) Amendments to Regulation-Making Authority**

The statute made several changes to the regulation-making authority under subsection 34(1) relating to the authority respecting timeframes for decisions of a chief building official (paras. 3.4, 3.4.1 and 4.1) and the repeal of the authority to establish conditions relating to the use of equivalent materials, systems and building designs under now-repealed section 9 (para. 6).

**(g) Discoverability Rule for Offences**

Likely the most significant amendment implemented by the *Good Government Act, 2009* relates to the repeal and replacement of subsection 36(8). The provision had imposed a one-year limitation period for commencing the prosecution of an offence under section 36. New subsection 36(8) imports the concept of the discoverability to the commencement of the limitation period. Subsection 36(8) now specifies that a proceeding cannot be commenced more than one year after the facts on which the proceeding is based *first came to the knowledge* of an officer for enforcement of by-law enacted under section 15.1 or the chief building official in any other case. New subsection 36(8.1) provides that the limitation period is not extended where the subject-matter of the proceeding arose more than a year before December 15, 2009 (the date that the *Good Government Act, 2009* came into force). This amendment alleviates the harshness of the Ontario Court of Appeal's ruling in *R. v. Pickles* (2004), 5 M.P.L.R. (4th) 1 (C.A.), where it was held that the discoverability rule could not be implied into the limitation period for prosecuting offences under the BCA.

**(h) Public Inquiries**

Schedule 6 of the *Good Government Act, 2009* repealed the former *Public Inquiries Act*, and replaced it with the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6. A number of statutes, including the BCA, granted various persons and bodies certain powers and duties under the *Public Inquiries Act*. Subsection 30(1) of the BCA authorizes the Minister of Municipal Affairs and Housing to designate a person to conduct an inquiry into the failure in construction or demolition standards or in the enforcement of the BCA or OBC. Former subsection 30(2) specified that the person conducting the inquiry had the powers of a commission under Part II of the *Public Inquiries Act*. This provision has now been replaced by a direction that section 33 of the *Public Inquiries Act, 2009* applies to the inquiry. Section 33 of the new statute preserves the powers and duties under former Part II of the repealed Act for persons conducting inquiries, including the power to summons witnesses and evidence, to hold persons in contempt, to protect witnesses and employees and to deal with other matters relating to evidence and documentation.

## **B. BUILDING CODE**

### **1. Applicable Law List**

The enumerated list of “applicable law” in clause 1.4.1.3.(1)(a) of Division A of the OBC was amended by O. Reg. 365/09 (filed on September 23, 2009) by adding the following subclause:

(vi.1) section 47.3 of the *Environmental Protection Act*, with respect to the issuance of a renewable energy approval,

The list of applicable law was also amended by O. Reg. 503/09 to include by-laws made by the City of Toronto under section 108 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, respecting the construction of green roofs.

### **2. General Amendments**

O. Reg. 503/09 is a lengthy regulation which was filed on December 21, 2009 that has significantly amended the OBC. The regulation includes numerous administrative, technical and editorial amendments to the OBC.

#### **(a) Administrative Amendments**

O. Reg. 503/09 amended the OBC to require inspections to be made and permits to be issued prior to occupancy of certain new residential buildings (including detached, semi-detached and row houses). Criteria has now been specified for when occupancy permits are to be issued. The OBC now also authorizes municipalities to require notification of when construction of such dwelling units are complete.

#### **(b) Technical Amendments**

An extensive range of technical amendments to the OBC were also implemented by O. Reg. 503/09. The technical revisions arose from public consultation undertaken by the Ministry of Municipal Affairs and Housing in October 2009. The feedback was revised by the Ministry’s Technical Advisory Committee. These amendments include the following:

- Energy Efficiency in Houses
- Updated Reference Standards
- Outdoor Swimming Pools



- Liquid Manure Storage Tanks
- Water and Sewer Services
- Composite Piling
- Overlapping Service Piping
- Manholes
- Solar Domestic Hot Water Systems
- Low-Flow Toilets
- Septic Tank Depth
- Unprotected Openings in House Walls
- Home Ventilation Requirements
- Garage Foundation Construction

**(c) Editorial Amendments**

The regulation also made a significant number of editorial or housekeeping revisions intended to clarify and increase the ease of application and interpretation of the OBC.

**C. PROPOSED AMENDMENTS**

The following bills from the current and immediately preceding legislative session also propose to amend the BCA:

- (i) Bill 14 - *Fire Protection Statute Law Amendment Act, 2010*
  - proposed additions to section 34 to add regulation-making authority with respect to smoke alarms and detectors and fire escapes in buildings
- (ii) Bill 63 - *Building Code Amendment Act (Storm Water Harvesting), 2008*
  - proposed amendment to section 8 to prohibit chief building officials from issuing permits to construct buildings if proposed buildings include or are served by a storage garage and no storm water harvesting system is included
  - addition to section 34 to add regulation-making authority to prescribe storm water harvesting systems for the purposes of section 8

(iii) Bill 72 - *Municipal Residential Sprinkler Act, 2008*

- proposed amendment to section 8 to prohibit chief building officials from issuing permits if municipality has enacted by-law to regulate fire sprinkler systems and proposed buildings do not comply with by-law
- addition to section 35 to provide that municipal by-laws prevail over any Act or regulation requiring the installation of fire sprinkler systems in residential buildings for which building permit applications are made on or after September 1, 2009

(iv) Bill 143 - *Hawkins Gignac Act (Carbon Monoxide Detectors), 2009*

- proposed amendment to add new section 15.8.1 to require carbon monoxide detectors to be installed in residential buildings
- new section 15.8.1:
  - sets out installation requirements
  - requires that detectors conform to standards prescribed by the regulations made under the BCA
  - that building owners maintain detectors in operating condition
  - prohibiting the disabling of a detector

(v) Bill 176 - *Municipal Residential and Commercial Surge Protector Act, 2009*

- proposed amendment to section 8 to prohibit a chief building official from issuing a building permit if a proposed building does not comply with a by-law passed by a municipality requiring the installation of surge protectors in new residential and commercial buildings
- add new section to provide that the by-laws, which may be passed with respect to residential and commercial buildings for which building permit applications are made on or after September 1, 2010, prevail over any Act or regulation

(vi) Bill 186 - *Condominium Owners Protection Act, 2009*

- proposed amendment to section 34 to deem regulations made under the BCA include the requirement that noise protection standards are to be reviewed and updated within 12 months after the day the *Condominium Owners Protection Act, 2009* comes into force

## CASE LAW

### A. BUILDING PLANS REVIEW – RELIANCE UPON ENGINEER'S STAMP & SEAL

The central issue in *Essex Condominium Corporation No. 43 v. LaSalle (Town)* (June 1, 2009), Doc. 05-CV-5733CM (Ont S.C.J.), concerned the municipality's policy to accept a professional engineer's seal and stamp on structural plans. In this case, the defendant municipality's chief building official had issued a building permit in 1990 to allow the construction of a 6-storey condominium complex. It was later discovered that the building was structurally deficient and that the concrete pillar blocks were bearing loads in excess of what was permitted under the OBC.

The condominium corporation sued the municipality for what it claimed was a breach of duty to ensure that construction is carried out in accordance with the OBC. It was agreed at trial that the structural defects were the result of negligence on the part of the engineer who constructed the building.

At the time the building was constructed, the Town of LaSalle's Building Department consisted of three persons. The departmental policy stipulated that the Building Department could rely upon the stamp and seal of an architect and a professional engineer on permit drawings to demonstrate compliance with the structural requirements of the OBC.

The condominium corporation contended that a municipality had a strict, non-delegable statutory duty to ensure that construction was carried out in compliance with the OBC and that it could not simply rely upon a professional engineer's stamp and seal on permit drawings.

The condominium corporation's position that the former *Building Code Act*, R.S.O. 1990, c. B.13, imposed a non-delegable statutory duty to enforce all aspects of the OBC was compelling. Subsections 3(1) and (2) of the then-*Building Code Act* (which are virtually identical to the current statute) provided:

3 (1) The council of each municipality is responsible for the enforcement of this Act in the municipality.

(2) The council of each municipality shall appoint a chief building official and such inspectors as are necessary for the purposes of the enforcement of this Act in the area in which the municipality has jurisdiction.

The condominium corporation's action was dismissed. Justice Pomerance noted that "it is clear the some statutory duties are non-delegable" but had sympathy for the municipality's submission that it did not delegate or abdicate the performance of its duty but instead performed it by confirming that the building drawings were approved by a professional engineer.

The justice noted that the courts have often distinguished between operational decisions and policy decisions made by municipalities in the exercise of their powers. As a general rule, municipalities will not be held liable for the consequences of *bona fide* policy decisions. The municipality's decision in this case to rely upon the stamp and seal of a professional engineer constituted a decision at the policy level.

The Court determined that the Building Department's policy:

- (i) was reasonable,
- (ii) reflected a *bona fide* exercise of discretion, and
- (iii) was consistent with the legislative purpose of ensuring the health and safety of the public.

The Court also determined that the decision in *Hilton Canada Inc. v. Magil Construction Ltd.* (1998), 47 M.P.L.R. (2d) 182 (Ont. Gen. Div.), was directly applicable. This case had held that the City of Mississauga's long-standing policy for building department staff to conduct only a cursory review of structural design matters was a true policy decision that had been exercised on a *bona fide* basis. As such, the City's reliance on its policy was immune from the application of private law standards of tort liability.

Justice Pomerance held that to rule that the Town of LaSalle could not adopt such policy, based on political and economic considerations, would be to hold the municipality to an impossible standard. Municipalities have been consistently held not to be insurers for the public.

## **B. PROPERTY STANDARDS COMMITTEE – APPEALS**

The judgment in *Anderson v. Hamilton (City)* (December 31, 2009), Doc. 09-10727 (Ont. S.C.J.), is notable because it is problematic in both its two principle rulings which appear to be directly contrary to two other recent judgments.

In this case, a property standards officer from the City of Hamilton conducted an on-site inspection and determined that two retaining walls were in need of repair and that there was a breach of the City's Property Standards By-law requiring the retaining walls be kept in good repair. The officer issued identical orders requiring repair of the upper retaining wall to the appellant and to his neighbour. A third order in the same form was issued to the appellant for repair of the lower wall. The appellant appealed both orders to the Property Standards Committee. The appellant contended that the orders ought to have been issued only to his neighbour as the owner of the structures as opposed to him as the owner of the property upon which the structures were located. The Property Standards Committee rejected his appeal. The appellant appealed to the Superior Court of Justice pursuant to subsection 15.3(4) of the BCA.

Subsections 15.3(4), (6) and (7) of the BCA provide:

### **Appeal to court**

(4) The municipality in which the property is situate or any owner or occupant or person affected by a decision under subsection (3.1) may appeal to the Superior Court of Justice by notifying the clerk of the municipality in writing and by applying to the court within 14 days after a copy of the decision is sent.

...

### **Judge's powers**

(6) On the appeal, the judge has the same powers and functions as the committee.

### **Effect of decisions**

(7) An order that is deemed to be confirmed under subsection (2) or that is confirmed or modified by the committee under subsection (3) or a judge under subsection (6), as the case may be, shall be final and binding upon the owner and occupant who shall carry out the repair or demolition within the time and in the manner specified in the order.

The appellant contended that his appeal should proceed as a trial *de novo* such that he could "proceed as though from the beginning, with regard to the evidence before the Committee." Justice Crane dismissed the appeals and confirmed the orders of the Property Standards Committee.

Justice Crane found the standard of review under subsection 15.3(4) to be highly conflicting in the jurisprudence. He noted that an assessment as directed in *Dunsmuir v. New Brunswick* was to be undertaken. After reviewing the four factors: (a) the presence or absence of a privative clause; (b) the purpose of the tribunal as determined by the enabling legislation; (c) the nature of the question at issue; and (d) the expertise of the tribunal, he concluded that the City's by-law supported minimal enforceable property standards and that lawyers and judges had no particular expertise in this subject matter. Accordingly, deference should be given to the property standards officer and the property standards committee (who could go and conduct inspections of properties). Therefore, he ruled that the standard of review was reasonableness, not correctness.

This determination is contrary to *Hamilton (City) v. Perry* (February 1, 2010) (Ont. S.C.J.) which determined that the standard of review under subsection 15.3(4) of the BCA is correctness. In this case, Justice Ramsey held that a property standards committee has no particular expertise on legal questions such as onus and location of a boundary wall.

With respect to the second issue, there were several judicial decisions that appeared to suggest that an appeal under section 15.3 would proceed as a trial *de novo* (including *Re Jimeil Holdings Inc.* (2000), 16 M.P.L.R. (3d) 96 (S.C.J.); *R. v. MacDonald*, [2007] O.J. No. 3551; and *R.K. Radbourne Building Ltd. v. Owen Sound (City)* (2005), 7 M.P.L.R. (4th) 27 (S.C.J.)). Justice Crane interpreted "section 15.3 to provide for a summary, inexpensive review process of generally, minor decisions of a municipal officer as to minimally accepted community standards of property maintenance. Property owners who allow their picket fence to fall down are not likely wanting to retain counsel and call expert witnesses to a formal hearing before the Superior Court." He viewed the Property Standards Committee as one that was entitled to a great degree of deference. He concluded that an appeal from a property standards committee under subsection 15.3(4) to the court is not a trial *de novo* but is an appeal on the record

The decision was not only contrary to the established case law but is directly opposite the determination in *Swanson v. Whitchurch-Stouffville (Town)* (September 29, 2009) Docs. Newmarket CV-08-089707-00, CV-08-089550-00 (Ont. S.C.J.). Justice Lauwers concluded that, based on the four factors, a Property Standards Committee did not necessarily have any specific expertise and was not entitled to deference. The appeal was to proceed as a hearing *de novo*. Lauwers J. held that the standard of review on an appeal from a decision of a Property Standards Committee was correctness.

### **C. BUILDING PERMIT FEES – SURCHARGE**

The City of Hamilton's Building By-law contained a not-unusual provision which required the payment of an additional or increased permit fee if a person had already commenced construction or demolition or had already changed the use of a building prior to the issuance of the requisite permit under either sections 8 or 10 of the BCA.

The City's specific clause provided as follows:

6(6) Every person applying for a permit when construction, demolition, or a change in the use of the building has commenced prior to the issuance of the required permit shall pay the additional fee required in Schedule "C" as well as the permit fee as set out in Schedule "A", attached hereto and forming part of this by-law.

The provision was challenged as being void for illegality on a motion for a determination of an issue before trial in *2072581 Ontario Inc. v. Hamilton (City)* (October 14, 2009), No. 09-9332 (Ont. S.C.J.)

Justice Festeryga determined that the city had neither express nor implied authority under the BCA to provide for such a payment. Festeryga J. contended that the BCA "clearly and unequivocally provides that a person cannot commence building until a permit has been issued." He held that the provision conflicted with or contravened the scheme of the BCA and was clearly beyond the powers of the municipality to enact.

The City of Hamilton appealed the decision. The Ontario Court of Appeal allowed the appeal [2010 ONCA 272] on the basis that clause 7(1)(c) of the BCA provided clear authority for a municipality to require the payment of fees on an application for and on the issuance of a permit and that this included a permit issued after construction, demolition or a change of use has occurred. The authority to levy fees included permits issued after construction has commenced which was contemplated in clause 7(1)(a) (i.e. "permits in respect of any stage of construction or demolition"). While subsection 7(2) placed a limit on the amount of fees that could be charged, there was nothing to suggest that the additional fee or surcharge required by the City's building by-law contravened the statutory limitation.

#### **D. BUILDING DEPARTMENT INTERPRETATION POLICIES**

In *Straka v. Toronto (City)* (2009), 65 M.P.L.R. (4th) 309 (Ont. S.C.J.), a property owner appealed the issuance a building permit to a neighbour which allowed the construction of a house on the grounds that the proposed construction did not comply with the zoning by-law in respect of the building's height. The City of Toronto's chief building official had formulated a policy to administer a specific provision of the municipality's zoning by-law (related to roofs) through a quantitative measure in order to have consistency of decisions and to help to resolve issues relating to the interpretation of the zoning by-law for the City's building officials. In this case, the policy misinterpreted the zoning by-law which expressly restricted building height and not the *use* of a building. The building permit was rescinded. It was acknowledged, however, that the courts have recognized this process and have generally approved it, as provided in clause 1.1(6)(a) of the BCA, which provides that it is the role of a chief building official to establish operational policies for the enforcement of the BCA and OBC.

6578981.1