CITATION: Williams v. Toronto (City), 2016 ONSC 42
COURT FILE NO.: CV-10-398293CP
DATE: 20160104

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TERENCE WILLIAMS	)	*Brendan Van Niejenhuis* and *Justin Safayeni* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
THE CORPORATION OF THE CITY OF TORONTO	)	*Mark Siboni* and *Christopher J. Henderson* for the Defendant
Defendant	)	
	)	
	)	**HEARD**: December 9, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Between 2003 and 2008, the Plaintiff Terence Williams was a tenant in the Parkdale area of Toronto, Ontario. Under s. 131 (3) and (4) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 and under s. 136 (3) and (4) of the predecessor *Tenant Protection Act*, S.O. 1997, c. 24, the Defendant City of Toronto was obliged to notify Mr. Williams of any rent reduction brought about by a re-classification of his residence under the *Assessment Act*, R.S.O. 1990, c. A.31. Mr. Williams' residence was re-classified, but the City did not give the required statutory notice, and Mr. Williams did not know that he was entitled to a rent reduction, and he did not obtain any rent reduction from his landlords.

[2] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, Mr. Williams, who was a member of the Executive of the Parkdale Residents' Association, brought a class action against the City for its alleged negligence in failing to give the statutorily-prescribed notice.

[3] Mr. Williams did not sue the landlords who overcharged him for rent, because the limitation period for doing so was very likely already past. Mr. Williams' action was certified as a class action; see: *Williams v. Toronto (Corporation of the City of)*, 2011 ONSC 5933 (Div. Ct.), aff'd, 2012 ONCA 915, rev'g, 2011 ONSC 2832.

[4] As Representative Plaintiff, Mr. Williams now brings a summary judgment motion for declarations that the City owed him and the Class Members, who are comprised of approximately 200-500 tenants in the Parkdale area, a duty of care and that the City breached the

standard of care when it failed to give him and the Class Members notice that rent payments to landlords should be reduced.

[5] The City resists the summary judgment motion and submits that it had no duty of care to the Class Members, or alternatively, it submits that there is no evidence that it breached the standard of care in failing to give the notices required by the *Residential Tenancies Act, 2006* or the *Tenant Protection Act.* It asks that Mr. Williams' class action be dismissed.

[6] For the reasons that follow, I grant Mr. Williams' summary judgment motion. This class action should now move on to the individual issues phase, where after hearing from parties I will authorize an practical and efficient claims process pursuant to s. 25 of the *Class Proceedings Act, 1992.*

B. OVERVIEW CAVEAT

[7] My Reasons for Decision require a caveat or caution because my reasoning arises in the context of a reconsideration of my previous decision that was reversed on appeal.

[8] As the discussion later will reveal, my reason for not certifying Mr. Williams' action in the first instance was my opinion that the City had no duty of care to him or the Class Members for its alleged negligent failure to give the notice required by the *Residential Tenancies Act, 2006* and the predecessor *Tenant Protection Act.*

[9] Previously, i.e., at the time of the certification motion, I refused to certify Mr. Williams' action as a class action because it was plain and obvious to me that the City did not owe him and the Class Members a duty of care. However, I was reversed by the Divisional Court, which in the double negative fashion of the first criterion for certification, concluded that based on a discrete special relationship between the City and the Class Members that arose from their mutual participation in a project known as the Parkdale Pilot Project, it was not plain and obvious that a court would not find a duty of care owed to Class Members. The Divisional Court's decision was affirmed by the Court of Appeal.

[10] For present purposes, it is important to note that the Divisional Court did not conclude that the City had a duty of care to the Class Members. Rather, the outcome of the Divisional Court's decision, which was subsequently affirmed by the Court of Appeal, was just that Mr. Williams and the Class Members had satisfied the low threshold of the plain and obvious test that measures the viability of a cause of action for the purposes of the first criterion for certification as a class action. The Divisional Court also held that it was inappropriate in the circumstances of this case to decide any legal policy issues without the City having pleaded its defence and without a fulsome evidentiary record. However, the Divisional Court did not affirmatively decide the duty of care issue. The duty of care issue, both as an issue of law and as an issue of fact, required an adjudication by trial or summary judgment.

[11] On this summary judgment motion, having considered the evidentiary record and having reconsidered the duty of care issue on its merits, I affirmatively conclude that the City owed the Class Members a duty of care and that this duty of care has been breached.

[12] I have considered the discrete special relationship line of argument that persuaded the Divisional Court and the Court of Appeal that there might arguably be a duty of care arising from the circumstances of the Parkdale Pilot Project, and I am persuaded by that argument.

[13] In the unique context of this case, recognizing a duty of care is consistent with the statutory scheme, and in the unique circumstances of the Parkdale Pilot Project, which has not been replicated anywhere in the province, the City and Class Members were in a sufficiently proximate relationship to justify imposing a duty of care. Although there are policy considerations that might negate a *prima facie* duty of care, those policy considerations have themselves been negated by the unique circumstances of this case.

[14] I do not need any expert or other evidence to conclude that it was a breach of the standard of care for the City to not give any notice at all. I affirmatively conclude that the City was negligent and that Mr. Williams should be granted summary judgment. His class action should move on to the individual issues phase to quantify the City's liability to the Class Members.

C. FACTUAL AND PROCEDURAL BACKGROUND

1. The Statutory Background

[15] Under s. 131 (1) of the *Residential Tenancies Act, 2006*, (and under its virtually identical predecessor, the *Tenant Protection Act, 1997,*) and under the associated regulation, O. Reg. 516/06, where a property tax reduction exceeds 2.49%, a tenant is entitled to a rent reduction in accordance with a prescribed formula.

[16] Under s. 131 (3) and (4) of the *Residential Tenancies Act, 2006* (and under s. 136 (3) and (4) of the predecessor *Tenant Protection Act*), the local municipality in which the residential premises is located is obliged to notify the affected tenants of the rent reduction.

[17] It is worth noting, because it may be relevant to the discussion later about whether the local municipality has a duty of care associated with the statutory obligation to give notice to the tenants, that the local municipality does not have an obligation to give notice to tenants residing in residential complexes with less than seven units.

[18] Section 131 of the *Residential Tenancies Act, 2006* states:

> *Municipal taxes*
>
> 131. (1) If the municipal property tax for a residential complex is reduced by more than the prescribed percentage, the lawful rent for each of the rental units in the complex is reduced in accordance with the prescribed rules.
>
> *Effective date*
>
> (2) The rent reduction shall take effect on the date determined by the prescribed rules, whether or not notice has been given under subsection (3).
>
> *Notice*
>
> (3) If, for a residential complex with at least the prescribed number of rental units, the rents that the tenants are required to pay are reduced under subsection (1), the local municipality in which the residential complex is located shall, within the prescribed period and by the prescribed method of service, notify the landlord and all of the tenants of the residential complex of that fact.

Same

(4) The notice shall be in writing in a form approved by the Board and shall,

(a) inform the tenants that their rent is reduced;

(b) set out the percentage by which their rent is reduced and the date the reduction takes effect;

(c) inform the tenants that if the rent is not reduced in accordance with the notice they may apply to the Board [Ontario Landlord and Tenant Board] under section 135 for the return of money illegally collected; and

(d) advise the landlord and the tenants of their right to apply for an order under section 132 [Application for variation].

Same

(5) A local municipality that gives a notice under this section shall, on request, give a copy to the Board or to the Ministry.

[19] The relevant provisions of O. Reg. 516/06 are as follows:

Reduction of municipal taxes

41. (1) For the purposes of subsection 131 (1) of the Act, the prescribed percentage is 2.49 per cent. ....

(2) [Definition of "municipal property tax"]

(3) If the lawful rent for the rental units in a residential complex is to be reduced under subsection 131 (1) of the Act, the reduction in rent shall be determined as follows: ....

(4) The prescribed date for the purpose of subsection 131 (2) of the Act is December 31 of any year in which the municipal property tax reduction takes effect.

(5) The prescribed number of rental units for the purposes of subsection 131 (3) of the Act is seven.

(6) The period within which notification of a rent reduction must be given for the purposes of subsection 131 (3) of the Act is,

(a) between June 1 and September 15 for landlords; and

(b) between October 1 and December 15 for tenants;

(7) When the notice under subsection 131 (3) of the Act is served on the landlord, it shall be addressed to the landlord or to the owner of the property for tax purposes and when it is served on the tenants, the notice for each tenant shall be addressed to the tenant or occupant of the tenant's rental unit.

(8) The notice under subsection 131 (3) of the Act shall be served,

(a) by handing it to the person; ....

(d) by leaving it in the mail box where mail is ordinarily delivered to the person; ...

(f) by sending it by mail, by courier or by facsimile to the last known address where the person resides or carries on business.

[20] Speaking generally, the effect of s. 131 and of O. Reg. 516/06 is that when municipal taxes are reduced by more than 2.49 percent, a tenant is entitled to a rent reduction beginning January 1 of the following year. For residential complexes with seven or more units, the local municipality gives the landlord advance notice of the rent reduction in the summer of the year and the local municipality gives the tenant advance notice of the rent reduction in the fall of the year.

[21] The rent reduction takes effect at the yearend whether or not notice is given by the local municipality. The notice, among other things, informs the tenant that if the rent is not reduced in accordance with the notice, the tenant may apply under s. 135 of the *Act* for the return of the money illegally collected.

[22] If a landlord does not reduce the rents as required by s. 131 of the *Residential Tenancies Act, 2006,* under s. 135 of the *Act*, the tenant has a right to apply to the Ontario Landlord and Tenant Board ("the Board") for an Order that the landlord pay to the tenant any monies collected or retained in contravention of the *Act*.

[23] There are, however, statutory bars to the claim for money collected illegally found in s. 135 and also in s. 136 of the *Act*. Sections 135 and 136 of the *Act* state:

> MONEY COLLECTED ILLEGALLY
>
> *Money collected illegally*
>
> 135. (1) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this Act or the *Tenant Protection Act, 1997.* ....
>
> *Time limitation*
>
> (4) No order shall be made under this section with respect to an application filed more than one year after the person collected or retained money in contravention of this Act or the *Tenant Protection Act, 1997.*
>
> *Rent deemed lawful*
>
> 136. (1) Rent charged one or more years earlier shall be deemed to be lawful rent unless an application has been made within one year after the date that amount was first charged and the lawfulness of the rent charged is in issue in the application.
>
> *Increase deemed lawful*
>
> (2) An increase in rent shall be deemed to be lawful unless an application has been made within one year after the date the increase was first charged and the lawfulness of the rent increase is in issue in the application. ...

2. Factual Background

(a) The Parkdale Pilot Project

[24] In the late 1990s, to deal with the high number of illegal rooming houses in the Parkdale area (Ward 14) of the City of Toronto, the City engaged in a series of community consultations for possible solutions to what was a serious and complex social problem. Rooming houses are an important source of housing for many persons who cannot otherwise afford accommodation in

Toronto, Ontario, but unlicensed rooming houses escaped the City's regulation of fire and safety standards. In 1998, Toronto Community Council endorsed the creation of a process to achieve consensus on the approach the City should take to the illegal rooming house situation in the Parkdale area. The City invited landlords, representatives of tenants' associations, and representatives of community agencies, to participate in a mediation process. Staff from various City departments provided input into the discussions. In 1998 and 1999, there were 15 meetings.

[25] These consultation efforts culminated in a report authored by City staff, and in February 2000, City Council adopted 18 recommendations, including the creation of the Parkdale Pilot Project. The Project's primary purpose was to address the problem of illegal housing by ensuring tenants would be provided with safe, quality housing through regular municipal inspections and the enforcement of appropriate standards. The Project was designed to bring eligible properties in Ward 14 within the City's existing licensing regime, so they would be inspected and their state of repair and safety would be monitored.

[26] The major features of the Project were that: (a) landlords of rooming houses and bachelorette buildings in Ward 14 that did not meet the requirements of City by-laws were invited to participate in the Project; (b) designated City staff, including a building inspector, housing standards inspector, and various administrative staff, were assigned to the Project to facilitate the inspection of participating properties and to work with the landlords to bring the premises into compliance with building, fire, and safety standards; and (c) after a property was brought into compliance, the City would, if necessary, pass a site-specific zoning by-law for the property to permit the lawful operation of the rental units.

[27] Another recommendation of the Parkdale Pilot Project required the City to advocate with the Province of Ontario to lower applicable tax rates on municipally-licensed rooming houses, so that a share of those savings could be passed on to tenants by way of the rent reduction provisions in the *Tenant Protection Act,* and its successor, the *Residential Tenancies Act, 2006.* Recommendation #16 of the Report provided:

> The conflict resolution process supports the City's efforts to have rooming house units qualify for a reduced tax rate. The City will vigorously advocate this position with the Province to resolve this issue. When the tax rate is adjusted, a portion of the savings will be passed on to tenants.

[28] In explaining the rationale for Recommendation #16 , the Report states as follows:

> The City should advocate to the Province a reassessment to reduce the level of taxation. A lower tax rate would provide a further incentive for property owners to come forward and retain these buildings as a form of affordable housing. ... The issue of whether bachelorettes should have a separate tax class requires further discussion with the Province. The creation of a new property class for rooming houses and bachelorettes is possible under current legislation, but does require the Minister to specify the new class in a Provincial regulation. Even if a separate class is supported, the tax rate applied is not within the City's jurisdiction to determine, but must fall within provincially defined "ranges of fairness" that were introduced when CVA was implemented in 1998. Further review is required not only with respect to the applicable tax rates, but also to the financial impact that the creation of a new class would have on the City. We therefore recommend that Council pursue the lower tax rate. ... We have recommended approaching the Province to secure a reduced tax rate for bachelorette buildings which will further assist affordability.

[29] While the Parkdale Pilot Project was ongoing, on August 28, 2003, the Province amended O. Reg. 282/98, a regulation under the *Assessment Act*, to classify municipally-licensed rooming houses from the "multi-residential" class to the "residential" tax class. The classification would

lower the municipal taxes for rooming house properties.

[30] On this summary judgment motion, the City, which participated in the study that led to the Province's action, disavowed having expressly advocated the amendment to the Regulations of the *Assessment Act*. In other words, the City denied complying with Recommendation #16 of the Parkdale Pilot Project. In my view the evidence was equivocal about whether the City complied or not but, in any event, although the City may not have actively lobbied the Province for a change to the *Assessment Act,* the City did not oppose what seems to have been a proposal strongly supported by others.

[31] In any event, as a result of the re-classification, 33 rooming houses in the Parkdale area became assessable under the residential class. Twenty-one properties experienced a change in 2004; four properties in 2005; four in 2006; three in 2007; and one property in 2008.

[32] The result of the re-classification in the Parkdale area was that the landlords enjoyed a municipal tax reduction, ranging up to 69.3%, with all but three properties enjoying at least a 25% reduction. Thus, 33 properties in the Parkdale area experienced a tax reduction of greater than 2.49% and the tenants of those properties had a statutory entitlement to a reduction in their rent payments.

[33] As noted above, the *Residential Tenancies Act, 2006* and the predecessor *Tenant Protection Act* required the City to provide the tenants with notice, alerting them that their rent has been reduced. Through admitted inadvertence, the City failed to give the statutorily required notice to the tenants of the Parkdale area.

[34] The landlords, however, did receive notice that their properties' tax assessments had been reduced. The City delivered interim tax bills and final tax bills to each of the individuals or companies that owned the properties in Ward 14. Each landlord in receipt of these tax bills would have had access to the information necessary to determine whether their tax obligation had been reduced from the previous year.

(b) Mr. Williams' and the Class Members' Circumstances

[35] Between April 2004 and November 30, 2005, Mr. Williams, who was an Executive Member of the Parkdale Residents' Association, was a tenant of a rooming house on Beaty Avenue in Parkdale. Unknown to Mr. Williams, this property enjoyed a tax reduction, which reduction should have, in turn, led to a reduction in Mr. Williams' rent effective January 1, 2005. Mr. Williams did not receive any rent reduction and overpaid his landlord in 2005.

[36] After December 2005, Mr. Williams resided at a rooming house at Laxton Avenue in Parkdale. Unknown to Mr. Williams, this property also enjoyed a tax reduction, which reduction should have, in turn, led to a reduction in Mr. Williams' rent. Mr. Williams did not receive any rent reduction and overpaid his landlord.

(c) The Discovery of the City's Failure to Give the Statutory Notices

[37] In late April 2008, Warren Sheffer, who was then the Treasurer of the Parkdale Residents' Association, asked City officials about whether tenants in the Parkdale area had been entitled to a rent reduction because of the amendment to the *Assessment Act* in 2003.

[38] The City provided Mr. Sheffer with information about 33 rooming houses in Ward 14 that had been reclassified under the *Assessment Act*. The information included: (a) municipal address; (b) assessment roll number; (c) number of units; (d) year of re-classification; (e) the amount the taxes decreased as a result of the change in property tax classification; and (f) the amount of the rent reduction.

[39] In response to a specific question posed in a Freedom of Information Request that was submitted in May 2008, the City undertook a review of its records, and it discovered that it had not provided notices to the landlords and tenants of certain residential rental properties in the Parkdale area that experienced a decrease in property tax greater than 2.49% between 2003 and 2004, between 2004 and 2005, and between 2005 and 2006.

[40] The City admitted that delivering the statutory notices to tenants was a very important task and acknowledged that the statutory notices were the most likely means of a property tax reduction coming to the attention of Class Members. Indeed, in a report reviewed by City Council that considered the situation of tenants across the City, it was shown that automatic rent reductions were obtained by 64% of tenants who received the statutory notices and only 11% of tenants who did not receive a notice obtained a rent reduction. The City did not dispute that its failure to give notice to tenants was a mistake.

[41] Beginning in the summer of 2008, the Parkdale Residents' Association attempted to have the City issue notices. These efforts were not successful, and in May 2009, the Parkdale Residents' Association brought a Judicial Review Application for an order in the nature of *mandamus* to compel the City to issue the notices and for a declaration that the City had breached its statutory duties.

[42] In September 2009, during the *mandamus* Application, the City disseminated information to the landlords and tenants of all the properties that the Parkdale Residents' Association had identified as being affected. The notices provided the current landlords and tenants with information about the property tax changes that took place in 2004, 2005, and 2006, which affected the buildings in which they lived. The notices also advised tenants that they could explore the issue of an entitlement to a rent reduction with their landlords and ask the Board any questions they may have about the subject.

[43] Meanwhile, the City successfully resisted the *mandamus* application; see *Parkdale Residents Assn. v. Toronto (City)*, [2009] O.J. No. 5121 (Div. Ct.). On the judicial review application, the City argued that because of the passage of time, it would be misleading to release the statutory notice because the limitation period for applying for rent reductions may have intervened to preclude claims.

[44] The Divisional Court agreed with the City's submission, and it dismissed the *mandamus* application. Justice R.J. Smith who wrote the Reasons for the Court (Associate Chief Justice Cunningham and Justice Swinton concurring) reasoned that the one year limitation period, as set out in both s. 136 and s. 135 (4), may have already passed for rent reductions which occurred in 2005, 2006 and 2007 and as a result, it was not clear that the current tenants would be able to obtain a rent reduction. Therefore, giving the notice strictly in accordance with s. 131 (4) of the *Residential Tenancies Act* could be misleading and a *mandamus* would be inappropriate.

[45] Justice R.J. Smith noted that the tenants were not without other potential remedies, including making a claim for damages for any excess rent paid and making a possible application

to the Board for relief.

(d) Mr. Williams' Class Action and the Decision of the Divisional Court on the Duty of Care Issue

[46] Perhaps because of the suggestion to take other legal measures contained in the Divisional Court's Reasons for Decision, Mr. Williams commenced this class action on March 3, 2010.

[47] In the class action, it is estimated that the class comprises between 200 and 500 tenants. The estimate is rough because some tenants are transient, and there are also occasional vacancies in the rooming houses. Many of the Class Members are of very modest financial means, including a significant number who have disabilities or who rely on social assistance.

[48] The typical amount of the individual Class Members' claim is small. It is estimated that the average claim would be approximately $3,000. In the class action, Mr. Williams claims on behalf of the Class Members $500,000 for damages for negligence and $500,000 for punitive damages.

[49] On April 29, 2011, Mr. Williams' motion to have his proceeding certified as a class action was argued, and on May 13, 2011, I released my Reasons for Decision. I concluded that save for the cause of action criterion, Mr. Williams' action satisfied all the criteria for certification as a class action. I, however, refused to certify the action because of its failure to satisfy the cause of action criterion, s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[50] Mr. Williams appealed, and the only issue on the appeal was whether I had erred in law in finding that it was plain and obvious that there was no cause of action because of the absence of a duty of care. Justice Swinton (Justice Mackinnon concurring; Justice Pardu dissenting) allowed the appeal and concluded that it was not plain and obvious that the City owed no duty of care to Mr. Williams and the Class Members.

[51] The heart of Justice Swinton's Reasons for the majority are set out in paras. 31 to 50 of her Reasons for Decision. I shall comment about these Reasons for Decision below, but for the moment, I shall simply set them out and let them speak for themselves.

> 31. The motions judge set out the applicable legal principles to determine whether there is a duty of care in tort, as explained by the Supreme Court of Canada in a number of cases. Of greatest assistance is the recent case of *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, a case that found provincial mining inspectors owed a duty of care to individuals killed by an explosion deliberately set during a strike. That determination was made after a trial.
>
> 32. To find a duty of care, a court must examine the relationship between the plaintiff and defendant and determine if there is sufficient foreseeability and proximity to establish a *prima facie* duty of care. If such a duty is established, the court must determine whether there are policy considerations which negate or limit the duty of care (*Fullowka* at para. 18).
>
> 33. The City did not take issue with the motions judge's finding that the foreseeability of harm criterion was met here. Therefore, I shall focus on the issues of proximity and policy considerations in the discussion that follows.
>
> 34. The analysis of proximity focuses on the relationships in issue. In determining whether there is sufficient proximity when the plaintiff alleges a duty of care on the part of a government defendant, the Supreme Court has stated that the statute is the foundation of the proximity analysis

and policy considerations. The court must consider whether the alleged duty of care conflicts with other overarching statutory or public duties, or if there is a statutory immunity provision in the legislation (*Fullowka* at para. 39). However, the analysis goes beyond the statute and also requires a consideration of whether there is a sufficient relationship between the plaintiff and defendant, with the focus on "whether the alleged actions of the alleged wrongdoer have a close and direct effect on the victim". The Supreme Court listed other considerations as including "expectations, representations, reliance and the nature of the interests engaged by the relationship" (*Fullowka* at para. 40). Ultimately, the Court must decide whether "it is just to impose a duty of care in the circumstances" (*Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at para. 9).

35. In the present case, the motions judge focused only on the statute in determining whether there was a sufficient relationship between the plaintiff and the City to found a duty of care. While that was the correct starting point, in my view, the motions judge erred in failing to also consider the facts pleaded, when determining whether there was a sufficient relationship between the City and the appellant and other residents of the 32 rooming houses in Parkdale to found a *prima facie* duty of care. As the Supreme Court of Canada noted in *Syl Apps Secure Treatment Centre v. B. D.*, 2007 SCC 38, where a relationship occurs in the context of a statutory scheme, the analysis begins with the statute to determine if there is sufficient proximity between the parties (at para. 38). However, the Court also stated (at para. 30):

> Depending on the circumstances of the case, the factors to be considered in the proximity analysis include the parties' expectations, representations and reliance. There is no definitive list.

36. In *Fullowka*, above, the Supreme Court considered both the statutory context and the factual relationship between the mining inspectors and the striking mine workers. Similarly, in *Heaslip Estate v. Ontario*, 2009 ONCA 594, the Ontario Court of Appeal emphasized that even if sufficient proximity does not arise from the relationship created by a statute, the interactions of the plaintiff and the government defendant can result in a finding of proximity (at paras. 15-22).

37. When one turns to the provisions of the RTA, it is evident that the City has a clear statutory obligation to provide a notice of a decrease in rent to both landlords and tenants, if the municipal taxes are decreased by more than 2.49% and the residential complex has seven or more units. That is an obligation owed directly to both tenants and landlords.

38. As a result, this is not a case like *Cooper v. Hobart*, [2001] 3 S.C.R. 537 or *Edwards v. Law Society of Upper Canada*, above. In each of those cases, the Supreme Court refused to find a private law duty of care to the plaintiffs on the part of the regulator. In *Cooper*, the Court held that the Registrar of Mortgage Brokers did not have a private law duty of care to investors; rather, its duty was to regulate so as to protect the interests of the public as a whole. In *Edwards*, the Law Society did not have a private law duty of care to persons who deposit funds in lawyers' trust accounts. There, the Supreme Court of Canada stated (at para. 14):

> Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

39. In contrast to those cases, the City exercises no discretion nor any regulatory function under the RTA that would be inconsistent with a private law duty of care. Rather, the law imposes a clear duty on the City to provide the notice in the prescribed circumstances to landlords and tenants.

40. It is true, as the City argues, that landlords have a positive obligation to reduce rent for tenants in the situation of the appellant, but this does not prevent a finding of a private law duty of care. So, too, in *Fullowka*, above, the legislation required the owners and managers of workplaces to act to protect the safety of workers, but that did not prevent the Supreme Court from finding a duty of care owed by the government inspectors, given the facts of the case.

41. The motions judge was influenced by the fact that the City owes no obligation to give notice to tenants in buildings with less than seven units or where the tax reduction is less than 2.5%. I fail to see why this would obviate a duty to those who are included in the group to which notice must be given under the statute. The fact that the Legislature chose to distinguish among different groups of tenants does not change the fact that a certain group of tenants, including the appellant, was entitled to receive the statutory notice.

42. More importantly, the statute is only the beginning of the analysis to determine whether there is sufficient proximity to found a *prima facie* duty of care. It is necessary, as well, to consider whether the relationship between the City and the appellant, a Parkdale rooming house tenant, would be sufficient to find proximity. In the context of s. 5(1)(a) of the CPA, the question is whether it is plain and obvious that there is insufficient proximity to found a *prima facie* duty of care to the appellant and the other Parkdale rooming house tenants.

43. The appellant does not argue that there is a private law duty of care on the City owed to all tenants entitled to a notice, although the motions judge appears to have approached his analysis on this basis. Rather, the appellant has pleaded facts to show a specific and special relationship between the City and himself and other class members. The motions judge failed to consider that the appellant had pleaded that he and the class members fell within a specific group of tenants targeted by the City in the Parkdale Pilot Project.

44. As pleaded, one of the express objects of the Project was to create property tax incentives for landlords by way of reclassification under the *Assessment Act*. It follows that this reclassification would provide a mechanism for rent reductions for a vulnerable group of tenants.

45. In *Fullowka*, the Court stated that the proper focus is on the effect of the actions of the wrongdoer on the victim and, in particular, whether there is a close and direct effect. The City argues that its inaction does not have a close and direct effect, because landlords are expected to implement rent reductions. That argument assumes landlords know their obligations and are willing to comply, and that tenants know their rights with respect to remedies. However, the notice obligation in the legislation is obviously designed to alert tenants to their right to a rent reduction if the landlord is not compliant and to inform them of a way to obtain redress from the Board. On the facts pleaded, read generously as one is required to do in a case such as this, the appellant and the class members are particularly vulnerable and would not know of their rights without the information in the notices. Indeed, the City had already taken action to protect them with the Parkdale Pilot Project.

46. In my view, it is arguable that there is sufficient proximity to found a *prima facie* duty of care when the statutory duty to give notice is considered in light of the facts as pleaded showing the relationship between the City and the Parkdale tenants arising as a result of the Parkdale Pilot Project. This is not a case like *Cooper* or *Edwards*. If anything, it is closer to *Heaslip*, and therefore, the issue of the City's duty should be determined on the basis of a full factual record, as it was in *Fullowka*. It is not plain and obvious that the appellant would fail on this issue.

47. The motions judge went on to find that even if there was a *prima facie* duty of care, policy considerations would negate that duty. In my view, he erred in law in doing so. It has often been stated that the defendant has the "evidentiary burden" to show countervailing policy considerations, and a court should be reluctant to dismiss a claim for policy reasons without a full record (see, for example, *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.) at para. 52). Nevertheless, there are some cases where courts have considered policy considerations at the stage of the equivalent of a Rule 21 motion - for example, *Syl Apps*, above.

48. However, in the present case, there are no conflicting duties on the City that would negate a duty to the appellant and the class members, as in *Cooper, Edwards* and *Syl Apps*. Moreover, this is not a case where the City is exercising discretion or making a policy decision which could create conflicts for it if a private law duty of care were found.

> 49. The motions judge focused on two main considerations: the danger of indeterminate liability for the City and the inappropriateness of shifting the landlords' financial obligation to taxpayers. There are a number of problems with his conclusion. First, he had no evidence to support his conclusions; second, the City did not make these policy arguments before him; and third, this is not a case where the recognition of a duty to the Parkdale group of tenants would create indeterminate liability to tenants in general. As in *Heaslip*, above (at para. 33), the motions judge failed to consider the particular claim before him made on behalf of the appellant and a specific group of Parkdale tenants. This is not a case where the appellant was arguing there was a duty of care owed by municipalities to all tenants who should receive a notice.
>
> 50. This is a case where the policy considerations should be determined after a Statement of Defence is filed and on the basis of an evidentiary record. The case raises a novel issue of law respecting the duty of care. It is not plain and obvious, when the pleadings are read generously, that the appellant's claim will fail. On that basis, I conclude that the motions judge erred in finding s. 5(1)(a) of the CPA was not met.

[52] Justice Pardu dissented, and the heart of her Reasons are set out in paras. 71 to 74 of her Reasons for Decision, which are set out below. Once again, I shall simply set out the Reasons for Decision and let them speak for themselves.

> 71. This is a claim for pure economic loss, and does not raise policy issues related to safety, or dangerous conditions imperilling bodily integrity or property. This case is also different from *Heaslip Estate v. Mansfield Ski Club Inc.* (2009), 96 OR (3d) 401 (C.A.) where there was a direct relationship between the injured person and the provincial air ambulance service. Here the claim against the City relies on a failure of the City to reduce the risk of harm caused by landlords charging excessive rents. This case is also different from *Fullowka v. Pinkertons of Canada Ltd.* 2010 SCC 5 where the entire focus of the mine inspectors' job was the employees' safety.
>
> 72. The fact that the plaintiffs might be entitled to rent reductions because the landlord's municipal taxes have been reduced does not cast them into a relationship of proximity with the City. The *Residential Tenancies Act* provides generally that if property owners receive a tax reduction greater than a specified amount, the rent charged to tenants must be reduced by a regulated amount. Where the property contains more than 7 units, the City is obligated to send a notice to the landlord and the tenant, but the rent reduction is automatic and takes place whether or not a municipality gives notice.
>
> 73. It was foreseeable that some landlords might fail to pass on the benefit of reduced taxes to their tenants, and that some tenants might fail to assert their right to a reduced rent when they might have done so had they received a notice from the City, however this alone is not sufficient to create a relationship of proximity.
>
> 74. In my view it is plain and obvious that tenants of buildings where the property taxes have been reduced by more than the specified amount do not stand in a proximate relationship with the City, and agree with the decision of the motion judge that there is no cause of action against the City for breach of statutory duty or negligence.

[53] The City appealed the decision of the Divisional Court. The Court of Appeal (Justices Cronk, Juriansz and Pepall) dismissed the appeal. See: *Williams v. Toronto (City of)*, 2012 ONCA 915. At paras. 14 to 20 of its decision, the Court of Appeal stated:

> 14. We are not satisfied that the high 'plain and obvious' threshold is met in this case.
>
> 15. The City acknowledges that it was obliged to deliver the statutory rent reduction notices in question and that it failed to do so. It further accepts the motion judge's finding that the alleged harm occasioned by its failure to deliver the rent reduction notices was foreseeable.
>
> 16. Importantly, in addition to these admitted facts, Mr. Williams pleaded that he and similarly-

> situated tenants were part of a specific City project in the Parkdale area of Toronto - the Parkdale Pilot Project - that was intended to regularize illegal and/or unlicensed rooming house apartment buildings to bring them into conformity with the City's land use by-laws.
>
> 17. As pleaded, one of the significant components of the Parkdale Pilot Project involved statutory amendments to facilitate property tax savings for Parkdale landlords and corresponding rental savings for affected Parkdale rooming house tenants, including Mr. Williams and other proposed class members. Mr. Williams also pleaded that his ability and that of other class members to learn of their entitlement to rent reductions hinged on receipt of the relevant rent reduction notices from the City.
>
> 18. We agree with the majority of the Divisional Court that it is not plain and obvious that these pleaded facts, if proven, are insufficient to establish that the City owed Mr. Williams and other class members a private law duty of care as a result of a specific and special relationship between the parties arising from the Parkdale Pilot Project. As the majority of the Divisional Court put it, at paras. 43 and 46, on the facts pleaded: "[Mr. Williams] and the class members fell within a specific group of tenants targeted by the City in the Parkdale Pilot Project" and, "[I]t is arguable that there is sufficient proximity to found a *prima facie* duty of care when the statutory duty to give notice is considered in light of the facts as pleaded showing the relationship between the City and the Parkdale tenants arising as a result of the Parkdale Pilot Project."
>
> 19. We are also not persuaded, at this early stage, that it is plain and obvious that policy considerations would inevitably operate to negate any private law duty of care otherwise found to attach to the City.
>
> 20. On the facts as pleaded by Mr. Williams, there is no suggestion that a private law duty of care attaches generally to the City in respect of all tenants in the City who are entitled to rent reduction notices. The case put against the City is confined to a duty allegedly owed to a discrete subgroup of Toronto tenants - those like Mr. Williams, who were targeted by the City in the Parkdale Pilot Project. Further, in our view, in the absence of a complete exchange of pleadings and a full evidentiary record, it cannot be said that the policy considerations identified by the motion judge (the suggested danger of indeterminate liability for the City and the inappropriateness of allegedly shifting landlords' financial obligations for rent reductions to the City) would necessarily operate to negate any private law duty of care on the City's part, arising from the alleged special relationship between the parties.

[54] After the decision of the Court of Appeal, the now certified action moved forward. By way of a certification order dated April 30, 2013, "Class Members" were defined as follows:

> All those persons residing in Ward 14 in the City of Toronto who, being tenants in rental apartments having seven or more units in respect of which the municipal property tax was reduced by more than 2.49% at any time between January 1, 2003, and December 31, 2008, as a result of the participation of such apartment buildings' owners in the Parkdale Pilot Project, did not receive the notices of tax reduction referred to in section 136 of the *Residential Tenancies Act, 2006* and/or section 131 of the *Tenant Protection Act*.

[55] The certification order certified two common issues; namely:

> 1. Did the City owe a duty of care to Class Members to send the notices required by s. 136 of the *Tenant Protection Act* and s. 131 of the *Residential Tenancies Act, 2006*?
>
> 2. Did the City, by failing to send the notices required by s. 136 of the *Tenant Protection Act* and s. 131 of the *Residential Tenancies Act, 2006*, fall below the requisite standard of care?

[56] On March 31, 2015, Mr. Williams brought this motion for summary judgment, seeking a declaration that the City owed a duty of care to Class Members to send the statutory notices, and that the City's failure to do so fell below the requisite standard of care.

[57] On the summary judgment motion, the only evidence filed by the City about policy considerations is found in the affidavit of Casey Brendon, Director of the City's Revenue Services Division. Mr. Brendon's affidavit describes the "relevant policy considerations" in this case as follows:

> If the City of Toronto could be held responsible for rental monies that tenants paid to their landlords, and that their landlords charged, collected, and retained, contrary to the provisions of the governing landlord and tenant legislation, the City would be exposed to a liability which is uncertain and one which is directly the landlord's responsibility.

D. DISCUSSION AND ANALYSIS

[58] The contemporary Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions adapting and explaining the House of Lord's decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). See: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263; *Childs v. Desormeux*, [2006] 1 S.C.R. 643; *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83; *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5.

[59] The contemporary analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties: *Childs v. Desormeux*, *supra* at para. 14.

[60] The case at bar does not fall within a recognized relationship that includes a duty of care.

[61] As developed by the case law, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity.

[62] Under this formulation not all reasonably foreseeable harm is subject to a duty of care: *Cooper v. Hobart*, *supra* at para. 21. Whether a relationship entails a duty of care depends on foreseeability of a harm, moderated by policy concerns: *Anns v. Merton London Borough Council*, *supra*; *Mustapha v. Culligan of Canada Ltd.*, *supra* at para. 4.

[63] Proximity focuses on the relationship between the parties and asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests: *Odhavji Estate v. Woodhouse*, *supra* at para. 49; *Hercules Managements Ltd. v. Ernst & Young*, *supra* at para. 24.

[64] The proximity aspect asks whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between them: *Syl Apps Secure Treatment Centre v. B.D., supra* at para. 26. The plaintiff must show not just foreseeability of harm but that the defendant was in a close and direct relationship to them making it just to impose a duty of care upon the defendant: *Cooper v. Hobart, supra* at paras. 34, 42.

[65] The proximity analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved: *Cooper v. Hobart, supra* at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board, supra* at para. 23; *Odhavji Estate v. Woodhouse, supra* at para. 50. Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed: *Hill v. Hamilton-Wentworth Regional Police Services Board, supra* at para. 29.

[66] Moving on to the second stage of the duty of care analysis, if the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it: *Childs v. Desormeux, supra* at para. 13. This second stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper v. Hobart, supra* at para. 37; *Odhavji Estate v. Woodhouse, supra* at para. 51. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair: *Cooper v. Hobart, supra* at para. 37; *Odhavji Estate v. Woodhouse, supra* at para. 51.

[67] Turning now to the case at bar, in the circumstances of this case, the City ought to have contemplated that its failure to send out a notice could affect the Class Members because the Class Members might not otherwise know that the taxes had been reduced on their premises with an attendant reduction in rent payments. As it happens, as a factual matter, the City admits it knew that its notices would inform the Class Members of their rights and that the Class Members would likely be adversely affected by the lack of notice.

[68] Thus, in the case at bar, there is foreseeable injury and some proximity; however, the issue is whether that proximate relationship was sufficiently close to give rise to a duty of care. Standing alone, foreseeable harm is insufficient to establish a duty of care, and it is necessary to probe further.

[69] In the case at bar, the City's liability is based on its responsibilities under the *Residential Tenancies Act, 2006* and its predecessor legislation, and in these circumstances, the relationship of sufficient proximity between the Class Members and the City must be found in the governing statute: *Cooper v. Hobart, supra* at para. 43; *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.) at para. 54.

[70] The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered: *Syl Apps Secure Treatment Centre v. B.D., supra* at paras. 26-30; *Fullowka v. Pinkerton's of Canada*

Ltd., *supra* at para. 39. In the case at bar, this legislation does establish a relationship between the City and tenants in the City and imposes responsibilities on the City to give the required statutory notice to the Class Members and other tenants in Toronto who come within the prerequisites for notice; i.e. a rent reduction of 2.49 percent in a rooming house with seven or more units. However, just having a proximate relationship, once again, is not enough to establish the special relationship; i.e. a relationship of such proximity that it is just and fair to impose a duty of care. Is the relationship one where the imposition of a duty of care is appropriate?

[71] At the time of the certification motion, it was my view that while there was forseeability of harm and a proximate relationship between the City and the Class Members, it was not a sufficient or adequate proximate relationship to give rise to a duty of care. However, it was the view of the majority of the Divisional Court and of the unanimous Court of Appeal that I was wrong in my assessment of the pleaded circumstances, because given the distinctive or added feature of the Parkdale Pilot Project, it was not plain and obvious that the relationship between the City and the Class Members did not give rise to a duty of care. In other words, it was the view of the appellate courts that I erred by not paying sufficient attention and giving legal significance to the distinctive circumstances of the Parkdale Pilot Project that placed the Class Members in a closer relationship than other tenants in Toronto who were also entitled to receive notices from the City.

[72] With the education of the appellate courts and the new arguments of the parties on this summary judgment motion, I have reconsidered the duty of care issue, and I adopt Justice Swinton's reasoning, and I conclude that the City did have a duty of care to the Class Members.

[73] Further, I now view the case at bar as analogous to the factual and legal issues addressed by the courts in a line of cases following *Hercules Managements Ltd. v. Ernst & Young*, *supra*, which addressed the negligence law associated with accountants' and auditors' liability. I analyzed this law recently in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2015 ONSC 7695.

[74] This law is analogous to the circumstances of the case at bar because the *Hercules Managements Ltd.* line of cases reveals how fact specific circumstances can establish an exception to a general rule that there is no duty of care.

[75] As I explained in some detail in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, *supra* the law for economic negligence claims against accountants and auditors is that: (1) accountants have a duty of care to the corporation and to the corporation's shareholders for the purposes of supervising the affairs and management of the corporation; (2) accountants have a *prima facie* duty of care to shareholders, lenders, and others that reasonably rely on the information provided by the accountant, but that duty of care is negated by policy considerations based on indeterminate liability; (3) where the spectre of indeterminate liability is removed, accountants have a duty of care to shareholders and others that reasonably rely on the information provided by the accountants; and (4) the spectre of indeterminate liability can be removed when: (a) the accountant knows the identity of the persons or group of persons who are reasonably relying on the information provided by the accountant; and (b) the information was used for the purpose for which the accountant prepared it.

[76] In the immediate case, as noted above, at the time of the certification motion, my duty of care analysis led me to the conclusion that a local municipality's statutory obligation to issue notice under the *Residential Tenancies Act, 2006* and the predecessor *Tenant Protection Act* did

not give rise to a sufficiently proximate relationship under the first stage of an *Anns v. Merton* analysis and if, contrary to this view, there was a *prima facie* duty of care, the duty of care was negated by policy factors of indeterminate liability and also the possible unfairness of imposing a liability to provide a rent reduction that rightfully should have been assumed by the landlords. My current analysis by way of analogy to *Hercules Managements Ltd.* is that the general rule is that local municipalities do not have a duty of care to tenants to give the notices required by the *Residential Tenancies Act, 2006* and the predecessor *Tenant Protection Act*, largely because the policy issues that can be applied at both the first stage and the second stage of an *Anns v. Merton* analysis stand against a duty of care. However, fact specific circumstances can respond to the policy issues and make it fair and just to impose a duty of care and attendant liability on the local municipality including a liability for a harm caused by others failing to act lawfully. In my opinion, the Parkdale Pilot Project is a fact specific circumstance that justifies the imposition of a duty of care on the City.

[77] Having found in the circumstances of the immediate case that the City had a duty of care to the Class Members, it requires no evidence about the standard of care to conclude that the City breached its duty of care.

[78] The City admitted it made a mistake in not sending out the notices. It cannot be said that the standard of care of the reasonably competent local municipality in the giving of notices would be set so low that a municipality can be absolved from sending out a statutorily required notice without any excuse for its failure to comply with the statute. I conclude that the City breached its duty of care.

E. CONCLUSION

[79] For the above reasons, I grant Mr. Williams' summary judgment motion.

[80] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Williams' submissions within 20 days of the release of these Reasons for Decision followed by the City's submissions within a further 20 days.

Perell, J.

Released: January 4, 2016

CITATION: Williams v. Toronto (City), 2016 ONSC 42
COURT FILE NO.: CV-10-398293CP
DATE: 20160104

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TERENCE WILLIAMS

Plaintiff

– and –

THE CORPORATION OF THE CITY OF TORONTO

Defendant

REASONS FOR DECISION

PERELL J.

Released: January 4, 2016