CONDOMINIUM PROJECTS AND LIMITATION PERIODS: YORK CONDOMINIUM CORPORATION NO. 382 V. JAY-M HOLDINGS LIMITED

by Richard Macklin

Introduction

Condominium developers and builders face unique issues regarding when they will be protected from a lawsuit following a lengthy passage of time. Latent construction defects may not be discovered until 20 or more years have passed. Is the developer or builder potentially liable for an indefinite period?

The 2004 amendments to the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24 Sched. B, seek to place some limits on the period of time a developer or builder can be liable for construction defects. Section 15 of the new *Limitations Act, 2002* places an "ultimate" 15-year limitation period on all claims. There is uncertainty, however, regarding the ultimate limitation period. Does the ultimate limitation period have a retrospective effect or will it only "kick in" 15 years from the 2004 amendments?

Analysis

Recently, the 15-year limitation period and the issue of when it "kicks in" were before the Court of Appeal for Ontario in the case of *York Condominium Corporation No. 382 v. Jay-M Holdings Limited* (2007), 30 M.P.L.R. (4th) 161 (Ont. C.A.).

In this case, the construction had occurred in 1978. In May 2004 it was discovered that the building's demising walls were not fire-rated in accordance with the *Building Code*. The condominium corporation sued the developer and the City of Toronto in June 2005. The City brought a motion to strike the claim for its being out-of-time in respect of the "ultimate" 15-year limitation period.

The motions judge allowed the motion and dismissed the claim against the City. The Ontario Court of Appeal reversed that finding and re-instituted the claim against the City. The Court of Appeal's ruling appears to stand for the following propositions:

> (i) if the "negligent" acts that form the basis of the lawsuit occurred and were discovered before the new limitations act came into being (January 2004), the former limitation rules (generally six years to sue from date of discovery of negligence) apply. There is no "ultimate" limitation period;
>
> (ii) if the "negligent" acts occurred before the new limitations act came into being but were discovered after January 2004, the new limitation period applies (generally two years to sue from the date of discovery of negligence). There is a 15-year ultimate limitation period but the counting of the 15 years starts on January 1, 2004;
>
> (iii) If the "negligent" acts occurred and were discovered after January 1, 2004, the new limitation act applies (two years to sue from date of discovery of negligence). No matter when after January 1, 2004 the "negligence" was discovered, no lawsuit can be brought 15 years after the "negligent" acts occurred.

Applying these principles to the City's motion, the Court of Appeal affirmed that the negligent acts occurred in 1978 and were discovered in May 2004. The lawsuit was commenced in June 2005. Based on principle (ii) above, the Court of Appeal held that the lawsuit was instituted within two years of discovery and the ultimate limitation period would not toll until 2019. Accordingly, the action against the City was reinstated.

Of the three principles set out above, only principal (ii) appears controversial and, indeed, was the only point of con-

tention on the appeal. Specifically, the City sought to interpret s. 15 as having retrospective effect. That is, upon the passing of the new *Limitations Act, 2002*, no claim could be commenced 15 years after the acts that form the basis of the lawsuit occurred — irrespective of which *Limitations Act* was in force at the time of the occurrence. The plaintiff, York Condominium Corporation No. 382, asserted that the plain and ordinary meaning of the transition provisions in the new *Limitations Act, 2002* was such that a retrospective effect could not be applied. According to the plaintiff, the 15-year ultimate limitation period only began to toll on January 1, 2004 and, thus, would not "kick in" until 2019. The relevant sections of the *Limitations Act, 2002* that were before the Court of Appeal were subsections 15(1) and (2) and subsection 24(5) which provide as follows:

> 15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.
>
> (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.
>
> 24. (5) If the former limitation period did not expire before the effective date [January 1, 2004] and if a limitation period under this Act would apply where the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date [January 1, 2004], this Act applies as *if the act or omission had taken place on the effective date. [emphasis added]*

The Court of Appeal, per Weiler, J.A., held that based on a reading of subsections 15(1)-(2) and 24(5), that occurrences prior to January 1, 2004 that were discovered after January 1, 2004 were subject to a 15-year ultimate limitation period, which calculation commences from January 1, 2004. Specifically, as noted by Weiler, J.A. at paragraph 20:

> The ordinary grammatical meaning of s. 24 (5) Rule 1, is that where an act or omission occurred prior to the current Act coming into force, if the limitation period under the former Act had not expired and the claim was discovered after the current Act came into force, the calculation of the 15-year ultimate limitation period will commence from January 1, 2004.

The Court of Appeal in *York Condominium Corporation No. 382 v. Jay-M Holdings Limited* was faced with a question of statutory interpretation. Could subsections 15(1) and (2) be interpreted as stand alone rules or did they have to be read in conjunction with the transition rules in subsection 24(5)? In the former case, the ultimate limitation period would have retrospective effect and bar the plaintiff's claim. In the latter case, the limitation period would not toll until 2019 and the plaintiff's case would be reinstated. Ultimately, the resolution of these issues of statutory interpretation came down to policy considerations. The underlying policy informing the Court of Appeal's decision in the *York Condominium Corporation No. 382 v. Jay-M Holdings Limited* was access to justice. Limitation periods are to be strictly construed against the party seeking to curtail the right to sue. Weiler, J.A. held as follows at paragraph 26:

> Driedger articulates the common-sense proposition that effect should be given to the ordinary meaning of a legislative provision unless there is a good reason not to do so. The court is therefore required to consider the purpose and scheme of the legislation, the consequences of adopting the ordinary meaning and all other relevant indicators of legislative meaning. In light of these additional considerations, the court may adopt an interpretation that modifies or rejects the ordinary meaning provided that the words can bear the proposed alternative meaning. The interpretation of the motions judge can be viewed as a marked departure from previous limitations act jurisprudence that when the provisions of a statute of limitations are in issue, "[they] should be liberally construed in favour of the individual whose right to sue for compensation is in question."
>
> *Papamonolopoulos v. Toronto (Board of Education)* (1986), 56 O.R. (2d) 1 at 7 (C.A.), aff'd, [1987] 1 S.C.R. v, 58 O.R. (2d) 528n. While an evolution respecting statutory construction has occurred in the past two decades, the broader principle, that access to justice should not be frustrated except in clear cases, has not changed and informs the legislative and broader context discussed below.

Access to justice, however, was not the only policy consideration. Indeed, the new *Limitations Act, 2002*, was seen by the Court of Appeal as legislation that strikes a compromise between the right of access to justice and the right to certainty and finality in the organizing of one's affairs. A review of the legislative history of the new *Limitations Act, 2002* indicated that ultimate limitation periods of as long as 30 years and as short as 10 years were considered. The ultimate limitation period of 15 years represented a compromise between 10 and 20-year ultimate limitation periods that exist in other jurisdictions (see paragraphs 27 to 33 of the Court of Appeal's judgment). This balancing of interests is reflected in paragraph 32 of the judgment:

> The purpose of the Act as a whole is to balance the right to access to justice by bringing a lawsuit with the right to certainty and finality in the organization of one's affairs. The purpose of the ultimate limitation period is to balance the concern for plaintiffs with undiscovered causes of action with the need to prevent the indefinite postponement of a limitation period and the associated costs relating to record-keeping and insurance resulting from continuous exposure to liability. While the motions judge considered the purpose of the Act and of the ultimate limitation period, he did not consider the purpose of the transitions provisions. The purpose of transitional provisions in general is to provide when a new Act applies and when it does not apply, or to provide for how it applies to situations that arose before the coming into force of the Act that are affected by its passage.

The Court of Appeal also considered whether it was reasonable that an ultimate limitation period, passed in 2004, would have no practical benefit to potential defendants until 2019. The City argued that such an interpretation was unreasonable given that the legislature had instituted an ultimate limitation period where none existed before and, accordingly, it had signalled an intention to favour finality of claims. However, the Court noted that ultimate limitation periods of as long as 30 years were considered in Ontario and exist in British Columbia. Thus, the Court was not concerned with an interpretation of s. 15 and subs. 24(5) that delayed the impact of the

ultimate 15-year limitation period to 2019. Specifically, as noted by Weiler, J.A. at paragraph 39 of the judgment:

> In this case, the effect of my proposed interpretation is to allow a twenty-seven-year-old claim that was not discovered until shortly after the new Act had come into force to go forward. This time frame is within thirty years from the date of the act or omission, the ultimate time recommended in the Ontario consultation paper for most claims, as well as that contained in the earlier Bill, and the same time as provided in the B.C. legislation for all claims. It cannot be said to be an absurd result particularly when one recalls that, prior to the passage of the new Act, there was unlimited liability for as-yet-undiscovered claims (i.e., there was no ultimate limitation period). In moving to a new regime with an ultimate limitation period, s. 24 (5) Rule 1 effectively creates a 15-year transition period for undiscovered claims. Although such a transition provision may be regarded as generous, it is part of the Act's attempt to ensure that, with respect to pre-existing situations, access to justice be preserved while limiting liability on a go-forward basis

Conclusion

In conclusion, the Court of Appeal's judgment in *York Condominium Corporation No. 382 v. Jay-M Holdings Limited* pitted access to justice arguments against finality. Access to justice won out. The long-standing rule that limitation provisions are to be read strictly against the parties seeking their benefit remains the defining rule for interpretation of limitation period provisions. In that sense, in a Province where we have existed without an ultimate limitation period for hundreds of years, waiting until 2019 does not appear too unreasonable.

Richard Macklin is a litigation lawyer practising in the areas of commercial, civil and administrative litigation with Stevensons LLP. He is a frequent writer and presenter on legal issues and has acted on several landmark cases at the Supreme Court of Canada and the Court of Appeal for Ontario.

MUNICIPAL LAW

229. Attacks on by-laws and resolutions — Grounds — Bad faith —— City enacted new licensing by-law respecting adult entertainment parlours — By-law prohibited touching between dancers and customers, and required that all live entertainment or services be performed in open designated entertainment areas — Application by owners, operators and performers associated with adult entertainment parlours to quash by-law was dismissed — Application judge stated that while evidence of health risk was not conclusively established, concerns underlying "no touch" and "designated entertainment area" provisions were reasonable and genuine as were safety concerns in relation to dancers — Applications judge held that city acted reasonably within its legislative competence, for valid municipal purposes — Applicants appealed — Appeal dismissed — City's reasons for licensing adult entertainment owners and operators was to promote health and safety and consumer protection in order to provide safe environment for patrons and employees — Link between these purposes and permissible purposes set out in s. 150(2) of Municipal Act, 2001 was obvious — Application judge's finding that city did not act in bad faith or for ulterior purpose could not be interfered with — By-law with essentially same provisions was determined to be valid exercise of municipal regulatory authority in earlier case law — By-law did not seek to prohibit applicants' businesses rather than to regulate them — There was no basis for interfering with application judge's finding that city acted reasonably in enacting by-law.

Adult Entertainment Assn. of Canada v. Ottawa (City) (2007), 2007 CarswellOnt 3190, 2007 ONCA 389, 33 M.P.L.R. (4th) 1, H.S. LaForme J.A., R.A. Blair J.A., S.T. Goudge J.A. (Ont. C.A.); affirming (2005), 14 M.P.L.R. (4th) 17, 2005 CarswellOnt 3973, Hackland J. (Ont. S.C.J.); additional reasons at (2005), 2005 CarswellOnt 5237, 14 M.P.L.R. (4th) 30, Hackland J. (Ont. S.C.J.).

230. Attacks on by-laws and resolutions — Grounds — Bad faith —— Owner was proprietor of large number of rickshaws being operated in downtown core of city — Rickshaw industry attracted customer complaints relating to excessive fares, traffic obstruction and aggressive solicitation — City council passed new by-laws relating to operation of rickshaws in city — By-laws placed restrictions on solicitation, imposed maximum fare schedule and restricted traffic of rickshaws on certain streets during specific times — Owner alleged that city council member had pushed new by-laws in bad faith due to owner's refusal to remove certain advertisements from back of rickshaws — Owner brought application to quash by-laws — Application granted in part — By-law imposing maximum fare schedule was quashed — When price controls were legislated and maximum fares imposed on particular business, basic fairness required proper notice to affected stakeholders and reasonable opportunity for input from industry members — Council's imposition of maximum fare was made without notice to or input from rickshaw industry — No substantive discussion or analysis took place regarding what constituted appropriate maximum fare — Except for maximum fare issue, restrictions imposed within by-laws were reasonably implemented and directly related to specific concerns — No evidence was introduced illustrating that any council member had acted in name of personal grudge in passing by-laws — No evidence was presented that owner's business was failing because of by-laws.