Maple Leaf Foods: An "Imminent Risk" to Construction Defect Claims?

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On November 6, 2020, the Supreme Court of Canada released the 5-4 decision of *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 ("*Maple Leaf Foods*"). The majority decision states that property owners who bring negligence claims for building defects must prove that the defects present an "imminent risk" of danger to persons or damage to property.

Some defence counsel have interpreted this case as a major development. However, we predict that it will have a limited impact on how courts determine future construction defect claims.

DUTY OF CARE AND CONSTRUCTION DEFECT CLAIMS

To succeed in negligence, a plaintiff must prove that the defendant owed a "duty of care". A duty of care will generally exist where it was reasonably foreseeable that the defendant's negligence would injure the plaintiff or damage its property.

In 1995, the Supreme Court of Canada released *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* - a landmark decision which carved out an exception to the general rule that a defendant does not owe a "duty of care" to avoid "economic losses" that affect a plaintiff's financial interests only, without injuring the plaintiff or damaging other property.

Winnipeg Condo held that that developers, consultants, contractors and others that are responsible for construction defects could be sued in negligence for the cost of repairing building defects that pose a real and substantial danger to persons or damage to property.

THE *MAPLE LEAF FOODS* DECISION

Maple Leaf recalled various meat products that were processed in a factory in which a listeria outbreak had occurred. The recall affected a group of Mr. Sub franchisees, which were required to purchase meats exclusively from Maple Leaf pursuant to their franchise agreements. Because of the tainted meat recall, the Mr. Sub franchisees experienced a shortage of meat products, loss of profits, and damage to goodwill.

A class action against Maple Leaf on behalf of the franchisees was certified. Since the Mr. Sub franchisees did not have a direct contract with Maple Leaf Foods, they sued Maple Leaf Foods in negligence, seeking compensation for lost profits and other economic losses.

The majority of the Supreme Court of Canada held that Maple Leaf did not owe a duty of care to the franchisees and dismissed the action.

WHAT DOES *MAPLE LEAF FOODS* HAVE TO DO WITH BUILDING DEFECT CLAIMS?

In *Maple Leaf Foods*, a slim majority of the Court made a statement in reference to *Winnipeg Condo*, indicating that property owners who sue in negligence for design or construction defects must prove that the defects pose an "imminent risk of physical harm to the plaintiffs or their chattels or property".[1]

In support of the "imminence" requirement, the SCC relies on a non-binding statement in *Blacklaws v. 470433 Alberta Ltd*., 2000 ABCA 175. The reasons fail to mention, however, that the imminence requirement in *Blacklaws* was subsequently rejected by the Alberta Court of Appeal in *Vargo v. Hughes*, 2013 ABCA 96. Appellate decisions in other jurisdictions have also considered (and rejected) whether *Winnipeg Condo* requires a plaintiff to prove imminence.

The SCC also held that professionals may be sued for negligent misrepresentation or performance of a service where (1) the professional undertook to protect the plaintiff's interests and (2) the plaintiff reasonably relied on this undertaking.

HOW MIGHT THE *MAPLE LEAF FOODS* DECISION IMPACT CONSTRUCTION DEFECT CLAIMS?

It is difficult to predict how courts will interpret and apply the "imminent risk" requirement in construction defect claims. However, we do not foresee a significant change in the law.

1. ***Whether a defendant owes a "duty of care" must be determined when the act or omission occurs, not when the damage is sustained or discovered***

According to *Winnipeg Condo*, the determination of whether a "duty of care" arises hinges on whether the defect poses danger to persons or damage to property. *Maple Leaf Foods* seems to have added a requirement that the plaintiff must demonstrate an "imminent risk" of danger or damage. However, the SCC has not provided guidance on when to assess whether a construction defect claim poses or will pose an "imminent risk".

Consider the following scenario:

- A builder constructs two identical homes for Homeowner A and Homeowner B.

- Within the first year, Homeowner A discovers that the roof was not installed correctly and that the deficiencies will, over time, result in leaks, mould growth, rotting of structural framing components, and water damage to personal contents. However, when Homeowner A discovers the defect, the damage has been minimal and does not yet pose an immediate risk to persons or property.

[1] Para. 45; emphasis added

- Homeowner B discovers the roof defects several years later. By that time, the damage and mould growth is extensive and poses an immediate health risk to the occupants, and the home is uninhabitable.

In both cases, it was reasonably foreseeable to the defendants at the time of construction that failure to install the roof properly would result in unintended water penetration into the building envelope, which may cause injury or damage during the anticipated service life of the building. However, it would be irrational to conclude that the builder owed a duty of care to Homeowner B, but not Homeowner A.

In our view, whether a builder owes a duty of care to a property owner must be assessed when the builder carries out the work. Whether a defendant owes a duty of care should not hinge on the imminence of danger when the damage is discovered or at trial, as this would result in a duty of care being imposed retroactively.

2. Maple Leaf Foods may have expanded the duty of care owed by architects, engineers and other building professionals

The Supreme Court did not address whether claims against architects and engineers should be governed by:

- the "imminent risk" of a "real and substantial danger" principle that applies to defective building claims, or
- the "undertaking and reliance" principle that applies to claims for negligent performance of professional services / negligent misrepresentation.

If the latter, the *Maple Leaf Foods* decision may have expanded the liability of architects and engineers for construction defect claims. After all, many negligence claims against professionals and negligent misrepresentation claims involve economic losses only. If so, owners may be able to pursue claims against engineers, architects and other construction professionals for building defects, even if the defects are not dangerous at all.

3. Claims based in contract law do not require proof of dangerous conditions

The overall impact of *Maple Leaf Foods* on building defect claims will be limited because certain construction defect claims do not require a plaintiff to prove that the defect poses a substantial danger to persons or property. These types of claims include:

1. Breach of contract claims.
2. Breach of warranty claims, such as 2-5-10 home warranty claims.
3. Claims made by original owners for breach of an implied warranty of habitability.

In addition, a claim for failing to warn the owners (and other defendants) of construction defects likely does not require proof of an *imminent risk* of a real and substantial danger.

CONCLUSION

Maple Leaf Foods did not overturn *Winnipeg Condo*, which remains the leading case on construction defect tort claims.

Justice Russell Brown, who co-authored the majority decision in *Maple Leaf Foods*, also authored the leading text Pure Economic Loss in Canadian Negligence Law. Professor Brown (as he then was) concluded that *Winnipeg Condo* does not imply or suggest an "imminence" requirement:

> … the reasons of La Forest J. in *Winnipeg Condominium*, to the extent they furnish some elaboration of what was meant by a "real and substantial danger", **do not seem to imply a requirement of *imminence***. The defendant's duty of care, we are told, is founded upon "*the reasonable likelihood* that a defect in a building will cause injury to its inhabitants." **A threshold of "reasonable likelihood" is not suggestive of imminence**, but rather of possibility or, at best, probability.[2] [emphasis added]

Courts in BC and other provinces have confirmed that *Winnipeg Condo* does not import a requirement that a plaintiff prove an "imminent" risk of danger.

As Justice Brown opined: the "real and substantial" danger requirement in *Winnipeg Condo* "ought to be characterized by some degree of imminence **or inevitability**".[3]

We expect that courts will continue to find a duty of care in building defect negligence claims, provided the harm is inevitable or reasonably likely to occur within the useful life of the building, particularly when it is impossible to predict when the risk will manifest itself.

Lesperance Mendes represents owners in construction defect claims. Please visit us at www.lmlaw.ca for more information and contact Naomi R. Rozenberg to schedule a consultation.

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[2] Russell Brown, Pure Economic Loss in Canadian Negligence Law, (Markham, Ontario: Lexis Nexis) Canada, 2011 at 176.

[3] Russell Brown, Pure Economic Loss in Canadian Negligence Law, (Markham, Ontario: Lexis Nexis) Canada, 2011 at 176.