SUBMISSION TO MINISTRY OF ATTORNEY-GENERAL REGARDING WHITE PAPER ON LIMITATION ACT REFORM

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Submission to Ministry of Attorney-General Regarding White Paper on Limitation Act Reform

A. Introduction

We are writing in response to the Ministry of Attorney-General's invitation to comment on the changes to the *Limitation Act* (the "Act") proposed in its September 2010 *White Paper*. While our comments on the ultimate limitation period focus on owners of defective buildings, our concerns regarding secondary claims are of general application.

In summary, it is our view that:

1. *A 10 or 15 year ultimate limitation period would not further the Ministry's goals of certainty and fairness, particularly if this deadline is tied to a defendant's act or omission.*

   We recommend that:

   (a) in the case of construction liability claims, the ultimate limitation period commence when the occupancy certificate is issued or the building is completed; and

   (b) the ultimate limitation period be 20 years.

2. *The procedure for adding secondary claims in section 24 is incomplete and would unduly complicate joinder applications.*

   We recommend that:

   (a) section 24(1) include a reference to adding or substituting a new party as plaintiff or defendant; and

   (b) section 24(3) be revised to state that any secondary claim commenced pursuant to section 24 is deemed to have been commenced on the date that the primary claim was commenced.

B. Ultimate Limitation Period

1. Commencement Date

The *White Paper* seeks to simplify the Act. We are of the view that its proposal for the commencement of the ultimate limitation period will not achieve this objective.

Large construction projects can span years from design to completion. Many parties can be involved, including developers, architects, engineers, contractors, suppliers, testing agencies and municipalities. It will be difficult to pinpoint in this factual matrix when a particular defendant committed an act or omission giving rise to a cause of action. Decisions are often made organically, as the result of deliberations that take place over weeks and months. Replacing an accrual-based approach with one triggered by the act or omission of a defendant will trade one uncertainty for another.

This uncertainty will be compounded by that fact that, in many construction liability cases, more than one defendant will share liability for a claim. As a result, the act or omission triggering the ultimate limitation period will be different for different defendants. On larger projects the range of commencement dates could extend over years.

Consider a building with unstable foundation caused by the errors of its geotechnical engineer, structural engineer and municipal building inspector. The act or omission of the geotechnical engineer would likely have taken place toward the beginning of the project, during the analysis of soil conditions and prior to excavating the foundation. The structural engineer's error may have occurred toward the middle of the project, when the foundation was poured. The act or omission of the building inspector may have occurred at the end of the project, when the project was approved for occupancy. The result is an action with three different ultimate limitation periods, and perhaps more if other parties are jointly and severally liable.

We propose that the ultimate limitation period be deemed to commence when a building is approved for occupancy. For buildings that do not receive an occupancy permit, the date of substantial completion under the *Builders Lien Act* could apply.

Relating the commencement of the ultimate limitation period to occupancy makes sense. Prior to completion or occupancy a building is a work-in-progress. Because defendants still have an opportunity to correct their errors, it is questionable whether they have breached their duty of care until the entire project is complete. Commencing the ultimate limitation period at the time of occupancy or completion would also avoid the complexity and unfairness of different ultimate limitation periods, some of which may begin years prior to the first owner taking possession.

2. Length

Fairness is another major objective of the proposed reforms. A 10 or 15 year ultimate limitation period would be particularly unfair to owners of defective homes and buildings.

Buildings are intended to last for decades, if not generations. Many construction defects are not immediately apparent and take many years to be discovered, sometimes with tragic consequences. A 10 or 15 year ultimate limitation period, particularly if triggered by the act or omission of the defendant, would inevitably deprive many owners of justice.

The example above of a building with a defective foundation illustrates this predicament. If the geotechnical engineer's error occurred three years before occupancy, owners would have only 7 or 12 years in which to sue. It is quite conceivable that the problem with the foundation may have appeared as nothing more than ordinary settlement and cracking throughout this time.

The problem is exacerbated in the case of phased condominiums. Phased condominiums are multi-building developments that comprise one strata corporation. They are common in larger projects as they reduce a developer's financing requirements by allowing buildings to be constructed sequentially. If our building with a defective foundation formed part of a phased development built over five years, homeowners in the last building to be completed may only have a couple of years after their purchase before a 10 year ultimate limitation period extinguishes their right to sue the geotechnical engineer. The ultimate limitation period for other defects would also be unacceptably shortened.

Our concern is that a shortened ultimate limitation period, in conjunction with the act or omission model, will inevitably lead to a sharp increase in cases that become time-barred before individuals are aware that they have a legal claim. This will have a negative effect on the public confidence in the justice system. Public perception will be that the Act prefers the construction industry over consumers, to whom a duty of care is unquestionably owed. In our opinion, a 20 year ultimate limitation period, commencing on the date of occupancy or completion, would strike a fair balance between the rights of owners and the certainty and finality sought by the construction and insurance industries.

Some "real world" examples further illustrate how a 10 or 15 year ultimate limitation period would fail to strike a fair balance between the rights of plaintiffs and defendants.

(a) *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*[1]

The facts of this case were sufficiently compelling to lead the Supreme Court of Canada to overturn the bar against recovery for pure economic loss in construction liability claims. The building was completed in December 1974. When cracks first appeared in exterior mortar in 1982, the owners hired the original architect and a firm of structural engineers to assess the cladding. This assessment and associated repairs were completed in 1982. In May 1989, 14 ½ years after substantial completion, a storey-high piece of cladding fell off the side of the building.

The architect and structural engineers retained in 1982 failed to detect the latent defects that caused the cladding to fall in 1989. The owners were therefore unable to discover the defects prior to collapse, despite their diligence.

The dangerous defect in this building was not discovered until many years after completion. This is not unusual for structural, electrical or fire code defects, which can remain undetected for years before a catastrophic failure. Had this building been completed in British Columbia under a 10 or 15 year ultimate limitation period triggered by a defendant's act or omission, its owners may have been left without any remedy, even if the collapse caused injury or death.

(b) *Board of School Trustees of School District No. 72 (Campbell River) v. IBI Group Consultants Ltd. et al.*[2]

This case concerned building envelope defects in Sayward Elementary School. Construction commenced in 1993 and was completed in March of 1994. On May 6, 2006 the school board discovered that some structural members had rotted to the point that they were in danger of collapsing. The school was closed for repairs.

In this case, dangerous structural defects were not discovered until more than 10 years after substantial completion. A 10 year ultimate limitation period would have deprived the school board of any remedy.

(c) *Perrault v. North Vancouver (District)*[3]

In 1979, severe rain caused a mudslide involving at least three properties close to the plaintiff's property in North Vancouver. As a result, residents petitioned the District to investigate the slope stability and perform any necessary remedial work. In April of 1980, the District sent a letter to residents advising that it had authorized a geotechnical

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1 [1995] 1 S.C.R. 85.

2 2007 BCSC 280.

3 2010 BCSC 182.

report, but that the report would not be commissioned, or at least not made public, unless the residents agreed not to use it against the District. The geotechnical report was prepared on November 30, 1980.

In August of 2003, the vendor signed a disclosure statement representing that she did not know of any structural problems. The plaintiffs therefore bought the property unaware of any geotechnical issues.

In the middle of the night on January 19, 2005, the plaintiffs awoke to find that a large portion of their backyard had slid down the slope upon which their house was built. The slide killed one resident of a house below and seriously injured another.

The plaintiffs brought a lawsuit against the District, the vendors and the realtors. The plaintiffs settled with the District, but their claim against the vendors was dismissed. A 10 or 15 year ultimate limitation period would have deprived the plaintiffs of any remedy against the District.

(d) *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*[4]

The condominium in this case was constructed in 1972 using a concrete block "back-up wall" behind a separate brick perimeter wall. Between 1973 and 1983, owners reported moisture problems and leaks and the external brick cladding showed signs of distress. Various studies were undertaken and extensive repairs to mortar joints and the exterior walls were undertaken in 1984.

When condensation problems, leaks and cracking bricks were again noted in 1989, further investigation became necessary. In 1993, consultants examined the block back-up wall and raised concerns about its structural integrity. Eventually, the outer brick wall had to be removed entirely, and more expensive repairs became necessary to ensure the structural integrity of the building.

The Court found that the dangerous structural problems involving the concrete inner wall were not reasonably discoverable until 1993, more than 20 years after construction of the condominium. The trial judge found the builder liable for breach of warranty and negligence.[5] Had this building been constructed in British Columbia, a 10 or 15 year ultimate limitation period would have deprived its owners of any remedy.

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4 (2001), 15 C.L.R. (3d) 23 (Ont. S.C.J.), aff'd (2004), 15 R.P.R. (4th) 161 (Ont. C.A.).

5 *Carleton Condo Corp. No 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 (Ont. S.C.J.), 15 C.L.R. (3d) 23; supp reasons [2002] O.J. No. 2185; aff'd [2004] O.J. No. 597 (C.A.).

C. Joinder of Secondary Claims

We have two concerns with section 24 of the Act, which addresses joinder of secondary claims

1. Adding and Substituting Parties

Section 24(1) does not refer to "adding or substituting a new party as plaintiff or defendant", as permitted by section 4(1)(d) of the current Act. Section 4 is most often enlisted in applications to add defendants, so we assume this omission is an oversight.

2. Whether Primary Claim is Statute-Barred

Section 24(3) of the Act prevents the commencement of secondary claims where the limitation period for the primary claim has expired. By putting into issue the validity of the primary claim this section will create two serious difficulties.

The first is that in cases where the impact of the Act on the primary claim is in issue, all parties, including those already in the lawsuit, have an interest in whether the primary claim is statute-barred. All defendants will therefore be motivated to participate in the joinder application, which could decide a pivotal issue in the lawsuit. The result will be complex and costly joinder applications, in which existing and proposed parties try to have the limitation issue determined in a summary manner.

The second difficulty is that joinder applications are not an ideal forum in which to resolve whether the primary claim is statute-barred. This issue will often turn on discoverability, which will in many cases be a fact-intensive inquiry. Many cases have held that inquiries into postponement should be avoided in joinder applications, where opposing parties are often not entitled to oral or documentary discovery:[6]

> The cases are replete with observations of chambers judges that the determination of whether a limitation period has been postponed is difficult, and may be unjust, in the absence of a factual matrix that in many cases may only become evident following at least examinations for discovery and perhaps a trial....

This caution is equally applicable to discoverability.

The intent of section 24(3) may be realized in a way that avoids both of these problems. We submit that this section should be revised to state that any secondary claim commenced pursuant to section 24 is deemed to have been commenced on the same date as the primary claim. This would prevent secondary claims from overcoming a

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6 *The Owners, Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, para. 22.

limitation defence to the primary claim. It would also defer consideration of limitation defences to the trial, after all parties have been entitled to discovery. Such an approach has been endorsed by our Court of Appeal, which has approved of a lower Court decision adding a new claim while giving the defendant liberty to argue any limitation defence that had accrued when the writ was filed.[7]

Our proposed section 24(3) would apply to all secondary claims, including those added by an amendment to pleadings under section 24(5). Section 24(3) does not currently apply to section 24(5). Our Court of Appeal has held that the joinder of parties and claims under section 4 of the current Act are governed by the same principles.[8]

D. Conclusion

Thank you for giving us an opportunity to comment on the proposed changes to the *Limitation Act*. Please do not hesitate to contact us if you would like to discuss any of our concerns.

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per

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Naomi R. Rozemberg

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7 *Stone Venepal (Celgar) Pulp Inc. (Trustee of) v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 para. 48, citing *Strata Plan VR2000 v. Shaw* (1998), 39 C.L.R. (2d) 87, para. 31 (B.C.S.C.).

8 *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, [1996] B.C.J. No. 234 (B.C.C.A.), paras. 65 and 74.