SUBMISSION TO THE BARRETT COMMISSION REGARDING REFORM OF LIMITATION PERIOD LEGISLATION

by

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Submission to the Barrett Commission
Regarding Reform of Limitation Period Legislation

I. Introduction

We are writing in respect of Recommendation 68 in the Commission's July 1998 Report, which proposed:

> That the time limitations under various legislation be reviewed and amended, as appropriate, to accommodate the reasonable needs of residential property owners, including the *Municipal Act* and the *Real Estate Act* be amended to reflect the circumstances of the failure to perform by the municipality and the developer. Limitations under the *Insurance Act* should also be reviewed.

We are writing to propose reform of the legislation governing limitation periods. Our comments address the limitation period for suing those parties potentially responsible for poor condominium construction (i.e. the developer, general contractor, subcontractor, suppliers, consultants and municipalities). We will refer to such proceedings as "defective condominium" litigation.

II. The Limitation Act

The limitation periods governing defective condominium litigation are found in the *Limitation Act*.[1] This enactment gives rise to two issues:

a. Which limitation period applies to defective condominium claims? The choice is between a two year limitation period applicable to claims for "injury to property", and a six year limitation period generally applicable to other claims.

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[1] Section 285 of the *Municipal Act* prescribes the following six month limitation period:

> All actions against a municipality for the unlawful doing of anything that
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> (a) is purported to have been done by the municipality under the powers conferred by an Act, and
> (b) might have been lawfully done by the municipality if acting in the manner established by law,
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> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.

There are no decisions which have considered whether this section applies to defective condominium actions.

b. When does time under the applicable limitation period begin to run?

Defective condominium actions are likely subject to the six year limitation period in s. 3(5) of the *Limitation Act*[2]. In *Workers' Compensation Board v. Genstar Corp.*[3] our Court of Appeal concluded that an action for damages caused by structurally defective beams in a parkade was governed by this six year limitation period, as were other claims for "damage occasioned by defects in the property itself." The British Columbia decisions which considered the application of the *Limitation Act* to defective condominium claims have assumed the six year period applies.[4]

The more difficult question is when this six year period begins to run. In cases of damage which is latent at first and progresses until it comes to the plaintiff's attention, it is unfair for the limitation period to begin before the plaintiff could have become aware of his or her loss. Section 6(3) of the *Limitation Act* attempts to address this unfairness by permitting limitation periods to be "postponed". Essentially, the commencement of a limitation period is postponed until two conditions are met:

1. The identity of the defendant is known to the plaintiff.

2. A reasonable person in the plaintiff's position would have sued. This will occur when the facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and taking appropriate advice, would regard the facts as showing that

   (a) an action has a reasonable prospect of success, and

   (b) is in the person's interest.

The focus of most cases, including the decisions which have applied this section to defective condominium litigation, has been whether the facts within the plaintiff's "means of knowledge" should have inclined him or her to sue.

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[2] A shorter two year limitation period in section 3(2) is likely applicable to two types of related claims:

1. Claims for "personal injury" caused by fungal contamination;
2. Claims for "property damage" to building contents.

[3] (1986), 24 B.C.L.R. (2d) 157 (C.A.).

[4] *Strata Plan VR 1720 v. Bart Developments Ltd.*, [1998] B.C.J. No. 224, para. 4 (S.C.), affirmed [1999] BCJ No. 2399 (C.A.); *Strata Plan VR 2000 v. Shaw*, [1998] B.C.J. No. 1190, para. 7 (S.C.).

III. The Case Law

To date, there have been two cases which have addressed the application of the *Limitation Act* to construction deficiency claims: the *Bart Developments* and *Shaw* decisions. *Bart Developments* has been upheld by the Court of Appeal and will likely set the course for future judicial interpretation of this section.

A. The *Bart Developments* Decision

The *Bart Developments* decision arose out of a pre-trial application by the defendants to dismiss the owners' claim on the basis that it was brought after the expiration of the six year limitation period. The Supreme Court judgment was pronounced on February 3, 1998. The Court of Appeal dismissed an appeal and cross appeal from this decision on October 28, 1999.

Bart Developments involved a 77 unit, low-rise, wood frame condominium built in Vancouver's Fairview Slopes in 1986. The writ of summons, filed on November 7, 1995, required the strata corporation to establish postponement until *November 7, 1989*.

The history of this complex is typical of many "leaky condos". By November 1987 "serious water leaks" had been noted in two suites. In January 1988 the property manager notified the developer of "serious leakage" problems and cautioned that the strata corporation would seek legal advice if an immediate response was not received. This prompted the developer to undertake some repairs, but the project kept on leaking. Problems with water in the walkways were discussed at an EGM in April 1988. In November 1988 the property manager advised the developer that the cause of the leaking appeared to be defective stucco. In the same month, the strata corporation made a claim under its New Home Warranty coverage. By January 1989 the Owners were aware the developer would not repair at least some of the leaks. This prompted the strata council to discuss the possibility of legal action in April 1989, and assign one member to find experienced counsel.

The most significant event was strata council's decision in the spring of 1989 to obtain a building envelope assessment. A consultant delivered a report in July 1989 which concluded that the roof, balconies and stucco were seriously defective and required repairs estimated at approximately $130,000 (several other defects were also noted, with an estimated repair cost of $77,600). The consultant made a presentation at a council meeting in August 1989, at which he advised that apart from the roof, the condominium's workmanship and materials were above average. A council member testified the consultant told her personally that, apart from the problems noted in the report, the building was "as solid as the rock of Gibraltar." In September 1989 the strata corporation obtained an opinion from another engineer, who supported the first consultant's report.

The strata corporation first consulted a lawyer in February or March 1990. This resulted in a demand letter to the architects in September 1990.

Work to repair the stucco was completed in the summer of 1990. The roof and deck system was replaced in 1992. In the mid nineties $800,000 was spent to replace the walkways. These repairs proved unsuccessful. At the time of the court application the strata corporation was in possession of a report disclosing defects requiring work estimated at $2.1 to $2.7 million.

The Court concluded the six year limitation period for the defects noted in the consultant's 1989 report began to run in August 1989, when that report was presented to the Owners. Claims based on defects not mentioned in the 1989 report were not dismissed, although the defendants were given permission to present further evidence at trial to establish that these claims should also be dismissed.

In reaching this conclusion, the Court rejected the owners' argument that the limitation period should not begin to run until 1995 because it was in that year that the Supreme Court of Canada decided *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*[5] That decision involved a 15 storey apartment built in 1972 and converted into a condominium in 1978. In 1982 the condominium's directors became concerned with the exterior stone cladding, which had begun to crack. Acting on the advice of the original architects and a firm of structural engineers, the strata corporation carried out minor repairs in 1982 at a cost of $8,100. On May 8, 1989, a 20 foot panel of cladding fell from the ninth storey. The strata corporation hired new engineers who recommended that the entire cladding be replaced. This work was completed at a cost of over $1.5 million. The owners sued the contractor, its masonry subcontractor and the architects, claiming they were liable under the law of negligence for the cost of replacing the cladding.

The central issue was whether the owners could sue these parties in negligence for the “pure economic loss” of repairing their building. In England, after some vacillation, the House of Lords concluded that such loss could not be recovered in negligence. The position in Canada was less clear. A 1973 decision of the Supreme Court of Canada was considered by some to prohibit claims of this kind.[6] Since that time, some lower courts had questioned whether this principle should continue to be recognised in light of other developments in the law.

The Supreme Court of Canada resolved this debate in *Winnipeg Condominium*:[7]

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5 [1995] 3 W.W.R. 85.

6 *Rivtow Marine Ltd. v. Washington Iron Works and others* (1973), 40 D.L.R. (3d) 530.

7 At p. 97.

> Where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a *real and substantial danger* to the occupants of the building, the reasonable costs of repairing the defects and putting the building back in a non-dangerous state are recoverable in tort by the occupants. (emphasis added)

Strata corporations can therefore sue in negligence to recover the cost of repairing defects which pose a real and substantial danger to its members.

In *Bart Developments* the strata corporation argued that *Winnipeg Condominium* represented an evolution in the law, and should mark the commencement of the six year limitation period. The Court of Appeal dismissed this argument (at para. 6):

> Accepting that the claim is one for pure economic loss, I do not accept that a reasonably prudent legal advisor in 1989 would have advised against joining the architect and engineer. The argument based on *Winnipeg Condominium* is essentially based on the contention that the law was settled in 1973 in *Rivtow Marine Ltd. v. Washington Iron Works et al* (1973), 40 D.L.R. (3d) 530 (S.C.C.) and that a prudent lawyer would not have considered it to have been changed until the decision of the Supreme Court in *Winnipeg Condominium* was known. That argument essentially ignores the general thrust of Canadian tort law in the years since *Rivtow* was decided. I need only refer to *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 (S.C.C.) as an example of the case authorities and writings which any prudent advisor would have had in mind in 1989. As a matter of interest, I note that the *Winnipeg Condominium* case itself was begun in 1989 considerably earlier in the year than the relevant date in this case. I do not suggest that is an important circumstance, but is part of the picture.

The Court of Appeal upheld the Supreme Court's finding that the limitation period had expired for the defects noted in the 1989 consultant's report.

B. The *Shaw* Decision

The *Shaw* decision involved a condominium built in 1987 in Vancouver's West End. The decision was pronounced on May 19, 1998. It arose out of an application by the strata corporation for a ruling on two questions of law:

1. Do the postponement provisions in the *Limitation Act* apply to a defective condominium claim?

2. Is the commencement of the limitation period determined in relation to the strata corporation or the individual owners of the strata units?

The Court answered the first question in the affirmative, holding that such claims could be postponed.

The issue raised by the second question was whether the Court should examine the "means of knowledge" of the strata corporation as a corporate entity, or the knowledge of individual owners. The Court preferred the latter approach (at para. 47):

> ... the knowledge relevant to determining when the limitation period starts to run for the purposes of the postponement provisions of the *Limitation Act* is that of the individual owners and not that of the strata corporation.

The architect argued that an owner-by-owner approach to postponement would result in the perpetual renewal of the limitation period as new owners buy into the condominium. The Court addressed this concern through section 6(5)(c) of the *Limitation Act* which deems certain plaintiffs, for the purposes of postponement, to know the facts within the means of knowledge of prior owners (paras. 49):

> Although it is the knowledge of the individual owners which is relevant to determining the start of the limitation period under [the postponement section], that is not to say that the limitation period starts to run each time a new owner purchases a unit and at the time of purchase or subsequently becomes aware of the defects in the unit. Under s. 6(5)(c) of the *Limitation Act*, each owner of a strata unit must be taken to have the knowledge or the means of knowledge of the previous owner and of the strata corporation, at the time the previous owner or the strata corporation had the requisite knowledge.

As a result, if the original owner of a unit should have known in 1990 that she had a right to sue, a purchaser who bought from that owner in 1995 would likely have only one year within which to sue.

The Court recognised an exception, to lessen unfairness to subsequent purchasers. Prior knowledge should not be attributed to a purchaser where it would "do violence" to the facts. This might occur, for example, if the original owner deliberately withheld information from the purchaser.

IV. The Need for Reform

It is difficult to fault the conclusions reached in *Bart Developments* and *Shaw*. Both decisions coped with the difficulty of applying a law of general application to the special circumstances of a complex and evolving area of the law.

Bart Developments indicates the limitation period will start to run against a strata corporation which has some knowledge of the defective condition of its building, even though this knowledge was acquired prior to public understanding of the problems giving rise to the "leaky condo crisis".

Many of the buildings which gave rise to this crisis were built in the eighties and early nineties. Most of them leaked shortly after they were built. The owners of many of these

buildings sought the assistance of contractors or consultants. Prior to the mid-nineties, most of these owners were advised that the leaking could be repaired through limited and relatively affordable measures (usually involving re-caulking, elastomeric coating, or reconstruction of specific areas such as flashings, membranes etc.) In the writer's experience, most envelope repairs throughout this time cost less than a few thousand dollars per owner.

The relatively small magnitude of most of these losses made defective condominium litigation uneconomical. Such litigation is usually costly because the limited or non-existent resources of many developers requires legal counsel to pursue more complex recourse against other parties. Since the strata corporation sues on behalf of its owners (who sometimes number in the hundreds) a defective condominium action is effectively a class proceeding brought against multiple defendants. An American author has described such litigation as follows:[8]

> Construction litigation - particularly where there are numerous defects - is extremely complex. Essentially, each defect is a separate case. Thus a construction case with twenty defects is basically twenty products liability cases.

It is not surprising that few strata corporations availed themselves of legal remedies in the eighties and early nineties, when the maximum return per owner was usually no more than a few thousand dollars.

Time has proven the limited measures taken prior to the mid nineties to be ineffective. The past decade witnessed a growing awareness that the problem with multi-family residential construction was widespread and intractable. Consultants began to recommend complete replacement of “face seal” building envelopes with “rain screen” cladding. These comprehensive repairs are expensive.[9] As this Commission is well aware, they have caused many British Columbians to endure financial hardship and even bankruptcy.

We submit that it was not until the construction industry and condominium owners reached a proper understanding of the repairs required to abate the “leaky condo crisis” that defective condominium litigation became practical for most strata corporations. While it is difficult to pinpoint this date, it is unlikely to have occurred prior to 1995.

The pronouncement of the *Winnipeg Condominium* decision in 1995 also had an impact on a reasonable owner's view of litigation. As noted by the Court of Appeal in *Bart Developments*, a prudent lawyer could have advised a strata corporation prior to 1995 that it was possible to sue consultants and others responsible for faulty condominium construction in negligence. However, the uncertainty in this area of law prior to 1995 is

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[8] Robert J. Manne, “Condominium Construction Litigation: Representing the Community Association”, 29 *American Jurisprudence Trials* 157, p. 170.

[9] In the writer’s experience, repair costs average $25,000 - $40,000 per owner.

something a prudent strata corporation would consider when deciding whether to sue. This uncertainty created a risk that such litigation would not succeed and that the strata corporation might have to reimburse several defendants for court costs. Since many owners believed prior to 1995 that the cost of repairing their building was relatively modest, the risk of failure would be a further disincentive to litigation.[10]

The *Shaw* decision has introduced different difficulties. It requires strata corporations, defendants and the courts to become involved in what is likely to be a time-consuming and expensive owner-by-owner analysis of the knowledge of virtually every owner. When prior owners are taken into account, postponement issues may require the examination of the knowledge of over 100 individuals in many cases. This may require:

1. all past and present owners to disclose documentation in their possession (minutes, correspondence, notes etc.) relating to their knowledge of their building's defects;

2. the pre-trial examination of such owners, by perhaps more than one defendant;

3. the examination of these owners at trial.

Such an inquiry has the potential to deplete the limited resources of some strata corporations and defendants, and overwhelm limited judicial resources.

V. Recommendation for Reform

We recommend that the *Limitation Act* or the unproclaimed *Strata Property Act* be amended to recognise that it was impractical for most strata corporations to sue before the construction industry and the public understood the true cost of repairing faulty condominium construction.

This may be done by an amendment which deems defective condominium actions to comply with the *Limitation Act* if they are commenced prior to a certain date in the future. This date should be six years from when the public became generally aware of the true cost of condominium repairs, and litigation became a more practical alternative. In our opinion,

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[10] Future cases may provide an answer to this problem. Section 6(4)(b) allows a limitation period to be postponed until, essentially, a reasonable person would conclude that it was in the plaintiff's interest to sue. A future court may permit postponement of a limitation period until the *Winnipeg Condominium* decision on the basis that it was not in the strata corporation's interest to sue before that time. This argument was not addressed by the Court of Appeal in *Bart Developments*, and future defendants will undoubtedly argue that this was because the Court considered it to be unpersuasive.

this would not be until 2001 at the earliest.

An amendment of this nature would also avoid the owner-by-owner inquiry into postponement that may be required in many cases currently before the courts. This would permit parties to dedicate more resources to repairs or compensation, and allow the Courts to concentrate on substantive issues.

A precedent exists for such an amendment. In 1982 the *Limitation Act* was amended to establish a specific limitation date for actions seeking damages for urea formaldehyde contamination:

> 16. No action for damages caused by urea formaldehyde foam used as insulation that is brought on or before December 22, 1986 shall be barred on the ground that the bringing of the action is otherwise barred by this Act.

We have appended extracts from Hansard relating to this amendment. The Legislature's intent appears to have been to give owners sufficient time to consider whether to commence claims for UFFI contamination.

The amendment could be tailored to strike a balance between the interests of plaintiffs and defendants. For example, it may be appropriate for the commencement of the limitation period to be determined under the general postponement provisions if the owners had early knowledge of the true cost of their repairs. This balance could be achieved by providing that the limitation period begins to run once the cost of repairs is known to exceed a certain amount per owner, or a certain global amount for a building.

We hope you will find the foregoing to be of assistance.

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