CITATION: York Condominium Corporation No. 382 v. Jay-M Holdings Limited, 2007 ONCA 49
DATE: 20070129
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COURT OF APPEAL FOR ONTARIO

WEILER, LANG and ROULEAU JJ.A.

B E T W E E N :	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 382	)	**Warren H. O. Mueller, Q.C. for the appellant**
	)	
(Plaintiff/Appellant)	)	
	)	
- and -	)	
	)	
JAY-M HOLDINGS LIMITED and THE CITY OF TORONTO	)	**Susan Ungar and Christina Pangos for the respondent**
	)	
(Defendants/Respondent)	)	
	)	
	)	**Heard: October 17, 2006**

On appeal from the order of Justice John D. Ground of the Superior Court of Justice dated January 20, 2006.

WEILER J.A.:

A. Overview

[1] Is the claim of York Condominium Corporation #382 ("York") against the City of Toronto (the "City") for an alleged act of negligence that took place over 15 years ago, but which it pleads that it only discovered in May 2004, barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "Act")?

[2] Previously, time for bringing a claim for general negligence did not begin to run until the claimant knew or ought to have known that he or she had a claim. This was known as "the discoverability rule". See *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 (C.A.), aff'd [1997] 3 S.C.R. 549. The rule subjected a defendant to potential liability indefinitely. The current Act seeks to balance the right of claimants to sue with

the right of defendants to have some certainty and finality in managing their affairs. Subject to certain exceptions that are not relevant to this appeal, the Act provides for a fifteen-year ultimate limitation period dating from the act or omission giving rise to a claim. Regard for this provision in isolation would automatically bar York's claim. However, the transition provision in s. 24(5) Rule 1 states: "If the claim was not discovered before [January 1, 2004], the Act applies as if the act or omission had taken place on [January 1, 2004]." As I would interpret this transition provision, if a claim is not discovered until after January 1, 2004, but the act or omission took place before that date, the ultimate limitation period of fifteen years starts to run as if the act or omission had taken place on January 1, 2004 and York's claim is not barred.

B. The Facts and the Relevant Provisions of the *Limitations Act*

[3] In May 2004, York discovered that the condominium building's demising walls were not fire-rated in accordance with the Building Code. It brought an action in June 2005 against the condominium developer, Jay-M Holdings Limited, and the City, alleging the former was negligent in its construction of the building and the latter was negligent in its inspection of the building. The parties agree that the last act by the City with respect to its alleged negligence took place in February 1978.

[4] Pursuant to s. 4 of the Act, which came into force on January 1, 2004, the basic limitation period expires two years from the day on which the claim is discovered.[1] York brought its claim within this time limit. However, the Act also contains a 15-year ultimate limitation period. Section 15 of the Act provides:

> (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.

[5] Thus, pursuant to s. 15, if a negligent act or omission occurred on January 2, 2004, but remained undiscovered until January 6, 2019, no action could be brought although the basic limitation period of two years from the date of discovery had not expired.

[6] The City pleaded that on its face s. 15 barred York's action since the alleged negligent act took place over 27 years ago. The City then brought a motion under

[1] The basic limitation period in s. 4 is not at issue in this appeal.

Rule 21 to strike York's claim. The motions judge ruled in favour of the City and struck York's claim as being statute-barred.

[7] York appeals the dismissal of its action against the City on the basis that the ultimate limitation period in s. 15 must be read in light of the Act's transition provision in s. 24(5) Rule 1 and that the motions judge erred in his interpretation of this provision.

[8] Section 24(5) provides:

> If the former limitation[2] period did not expire before the effective date and if a limitation period under this Act would apply were 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, this Act applies as if the act or omission had taken place on the effective date.

The effective date of the Act is defined in s. 24(1) as January 1, 2004.

C. The Reasons of the Motions Judge

[9] The motions judge held:

- The wording of s. 24(5) is ambiguous. Able submissions on two conflicting interpretations of the transitional provisions was evidence of ambiguity when viewed with s. 15.

- Subsection 24(5) cannot be looked at in isolation. The structure and purpose of the legislation incorporates a balancing between the discovery principle and a cut-off date for bringing an action.

- All external sources cited to the court are consistent with an ultimate limitation period to counterbalance the codification of the discovery principle. No authorities on the interpretation of the ultimate limitation provision or the transitional provisions of the new Act were cited to the court.

- To interpret the transitional provisions as submitted by York could lead to an absurd result and absurd results are to be avoided whenever possible.

[2] The former limitation period is defined in s. 24(1) as "the limitation period that applied in respect of the claim before the coming into force of this Act."

- Regard for the analogous limitations provisions of British Columbia and Alberta and the need to have regard for the policy considerations behind a statute of limitations leads to the conclusion that York's position must be rejected.

As a result of his interpretation of the Act, the motions judge dismissed the action as against the City.

D. Standard of Review

[10] The interpretation of section 24(5) of the *Act* is a question of law and thus review of the motions judge's decision is on a standard of correctness. See: *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at para. 8.

E. The Modern Approach to Statutory Interpretation

[11] The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. This approach has been widely endorsed by the Supreme Court. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26. The interpretive factors set out by Driedger, need not be canvassed separately in every case: *Bell ExpressVu, supra,* at para. 31.

[12] The different interpretations of a provision by counsel engaged in litigation are not an appropriate starting point from which to conclude that legislation is ambiguous. *Bell ExpressVu, supra,* at paras. 29- 30.

[13] The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada, 2002) at 21, where Sullivan quotes Gonthier J. from *Canadian Pacific Airlines v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at 735. Having determined the ordinary meaning, the court must go on to consider the context of the provision, the purpose and scheme of the legislation as well as the consequences of adopting the ordinary meaning and any other relevant indicators of legislative meaning. If, after undertaking this analysis, the words of the provision are reasonably capable of more than one meaning, a real ambiguity exists. *Bell ExpressVu, supra*, at paras 29- 30.

[14] The court must adopt an interpretation that best fulfills the objects of the legislation. Having regard to this broader context, the court may modify or reject the application of the presumption that favours an interpretation in accordance with the

ordinary meaning. However, the interpretation adopted must be plausible in the sense that it is one that the words are reasonably capable of bearing.

[15] A statute, should, if possible, be construed so as to avoid any inconsistency between its different provisions. One way of reconciling an inconsistency is through the "implied exception" rule of statutory interpretation, which holds that a special provision prevails over a more general provision. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 273.

F. Application to this Case

[16] The motions judge erred in concluding that simply because counsel had put forward two conflicting interpretations respecting the interpretation of the transitional provisions, s. 24(5) was ambiguous when viewed alongside the provisions of s. 15: *Bell Expressvu*, *supra*.

[17] To determine whether the legislation should be given its ordinary meaning, a contextual and purposive approach is required. The same approach is used to resolve a true ambiguity in legislation. While the motions judge undertook a contextual and purposive analysis, I conclude that his analysis was not correct. Rather, the adoption of a contextual and purposive approach leads me to conclude that the transition provisions postpone the starting date for the running of the ultimate limitation period to January 1, 2004.

[18] For the purposes of this appeal, I have grouped the discussion under two broad headings: a) Grammatical and Ordinary Sense, and b) Legislative and Broader Context.

a) Grammatical and Ordinary Sense

[19] For ease of reference I will repeat s. 24(5) Rule 1:

> If the former limitation[3] period did not expire before the effective date[4] and if a limitation period under this Act would apply were 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, this Act applies as if the act or omission had taken place on the effective date.

[3] See note 2, *supra*.
[4] See paragraph 8, *supra*.

[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 fifteen-year ultimate limitation period will commence from January 1, 2004.

[21] Under the now-repealed *Limitations Act*, York had six years from the time of discovery of the omission to bring its claim. The limitation period had not expired under the former *Limitations Act* before the effective date of the current Act on January 1, 2004 because York had not discovered the alleged negligence by that date. If the act or omission had taken place after January 1, 2004, York would be subject to a limitation period under the current Act. That limitation period is "the second anniversary of the day on which the claim was discovered." For the purposes of this motion, it is accepted that York did not discover its claim until after the effective date of the Act or until May 2004, and that it brought its claim within the two-year limitation period. Insofar as the ultimate limitation period is concerned, York submits that under Rule 1, the Act applies as if the negligent act or omission took place on January 1, 2004. Thus, the ultimate fifteen-year limitation period begins to run from January 1, 2004, not from the actual date of the negligent Act or omission as prescribed in s. 15.

[22] Rule 1 provides that, "If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date." The City submits that Rule 1 ought to mean that, if the claim was not discovered before the effective date, the Act applies. This interpretation gives no meaning to the concluding words of Rule 1, "as if the act or omission had taken place on the effective date."

[23] It is certainly arguable that s. 15(1) is not in harmony with the transitional provision of s. 24(5) Rule 1. Again, section 15(1) states:

> 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.

However, in keeping with the rule that, if possible, disharmony should be avoided, I would hold that disharmony can be avoided by treating s. 24(5) as a special provision that applies to the limited number of transitional situations and by treating s. 15(1) as a general provision.

[24] The City argues that because s. 24(5) does not specifically say that it applies despite s. 15, it cannot be read in the manner York submits. In support of its position, the City points to other sections of the Act where s. 15 is specifically made subject to another

section. For example, s. 16(4) states that ss. 16 and 17 prevail over anything in s. 15. However, neither of those sections deals with a transitional context. Section 16 deals with general situations where there is no limitation period and s. 17 deals with environmental claims. These sections apply indefinitely for the foreseeable future until the Act is amended. Section 24(5) is transitory and the situations to which it applies will run their course. There would be little point in enacting this transition provision if it were not intended to apply to s. 15.

[25] Although the motions judge and this Court were not provided with any scholarly writing or educational material concerning the new Act, it does exist and supports the position I have taken. For example, John Lee, counsel for the Ministry of the Attorney General for Ontario, wrote an article entitled, "Developing a New Uniform Limitations Act: A survey of Canada's Emerging Limitations Regimes" in Melissa Krishna, executive ed., and Jacob Ziegel *et al*., co-ordinating eds., *The New Ontario Limitations Regime: Exposition and Analysis* (Toronto: Ontario Bar Association, 2005)at 165 and an article entitled "An Overview of the Ontario *Limitations Act, 2002*" (2004) 28 *Advocates' Q.* 29. In his articles (at 189 and 34, respectively) Lee discussed the meaning of s. 24(5) Rule 1. Lee's interpretation of s. 24(5) Rule 1 is that if a claim is not discovered until after the Act's effective date, but the act or omission took place before the effective date, "for purposes of calculating the ultimate limitations period, the period will commence from January 1, 2004." This is precisely York's position. In addition, an application of the facts of this case as answers to the questions derived from the flowchart of Rosemary Bocksa yields the same interpretation.[5] See *Ontario Limitations Manual*, 3d ed., looseleaf (Markham, Ont.: LexisNexis Canada, 2006) at Appendix-2.

[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.),

[5] The flowchart asks the following questions: 1) Is the claim based on an assault or sexual assault? (No.) 2) Did the act or omission take place before January 1, 2004? (Yes.) 3) Was the proceeding commenced before January 1, 2004? (No.) 4) Was there a former limitation period that applied? (Yes.) 5) Did the former limitation period expire before January 1, 2004? (No.) 6) If the claim were to be based on an act or omission that took place after January 1, 2004, would a *Limitations Act, 2002* limitation period apply? (Yes.) 7) Was the claim discovered before January 1, 2004? (No.) Result: The *Limitations Act, 2002* applies as if the act or omission took place on January 1, 2004.

aff'd, [1987] 1 S.C.R. v, 58 O.R. (2d) 528*n*. 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.

b) Legislative and Broader Context

[27] The Act is the culmination of several earlier attempts since the late 1960s to reform the law of limitations. In 1969, the Ontario Law Reform Commission (OLRC) called for a simplification of the law of limitations in its *Report of the Ontario Law Reform Commission on Limitation of Actions* (Toronto: Department of the Attorney General, 1969). The Attorney General released a discussion paper in 1977, comprising a draft bill, which largely borrowed from the OLRC report. See Ontario Ministry of the Attorney General, *Discussion Paper on Proposed* Limitations Act (Toronto: Ministry of the Attorney General, 1977). Much of the draft bill from 1977 was reflected in Bill 160 (*An Act to revise the* Limitations Act, 3rd Sess., 32nd Leg., Ontario), introduced in 1983, which did not proceed beyond first reading. Bill 160 would have introduced a knowledge requirement into the law of limitations. For certain actions, s. 10 of the Bill provided that the limitation period would not start to run until the plaintiff had knowledge of the identity of the defendant and knowledge of sufficient facts to indicate that he had a cause of action.

[28] In 1991, a consultation group produced a paper for the Attorney General on the proposed *Limitations Act*. See Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991). The consultation group recommended an ultimate limitation period of thirty years and, in exceptional cases, ten years. With respect to when to enact the shorter ultimate limitation period, at page 5 the consultation group asked the government to weigh, "the availability of evidence to the defendant, the cost of maintaining records, and the cost and availability of insurance against the likelihood of meritorious claims after ten years". Under the heading "Transition" in the consultation paper, the following is found:

> The new scheme would apply to any act or omission that occurred before the effective date of the new legislation provided that the old limitation period had not expired. This will result in the extension of some limitation periods to a maximum of two years and the shortening of others to two years if a longer period would otherwise have applied.

Under the heading, "Summary of recommendations for a New Limitations Act", recommendation 27 suggests that where the application of the new act would shorten the

limitation period that would otherwise apply, the limitation period should be the shorter of the limitation period under the then existing legislation or two years from the coming into force of the new legislation. No mention is made of the ultimate limitation period in that recommendation.

[29] The consultation paper led to the introduction of Bill 99 (*An Act to revise the* Limitations Act, 2nd Sess., 35th Leg., Ontario) in 1992. As recommended in the consultation paper, Bill 99 contained a basic two-year limitation period, codification of the discoverability principle and a thirty-year limitation period with a shorter ultimate limitation period of ten years for some cases. As with Bill 160, Bill 99 did not go beyond first reading.

[30] The next proposed reform came in 2000, with the introduction of Bill 163 (*An Act to revise the* Limitations Act, 1st Sess., 37th Leg., Ontario), which contained a codification of the discoverability principle but which also introduced a general fifteen-year ultimate limitation period. After prorogation of the legislature, Bill 163 was reintroduced in 2001 as Bill 10 (*An Act to revise the* Limitations Act, 2nd Sess., 37th Leg., Ontario) and was later reintroduced in 2002 as Schedule B to Bill 213, the *Justice Statute Law Amendment Act, 2002* (3rd Sess., 37th Leg., Ontario). Bill 213 was an omnibus bill that was introduced on November 26, 2002 and never went to committee for debate. The Bill went through second and third readings with limited debate in the legislature and received Royal Assent as the *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24, on December 9.

[31] An explanatory note respecting the ultimate limitation period contained in Bill 213 simply confirms that the Act establishes an ultimate limitation period of fifteen years. The limitation period runs from the day of the act or omission irrespective of when the claim is discovered. The note adds that the ultimate limitation period does not run in certain circumstances. With respect to s. 24, the note says, "[t]he Act contains a number of general provisions dealing with technical matters (sections 18 to 24)" and "[d]etailed rules are provided for the treatment of claims that arose before the coming into force of the new Act (section 24)". The explanatory note does not form part of the law and, since it does not discuss the effect of the transition rules, does not assist in the interpretation of s. 24(5) Rule 1.

[32] 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 transitional 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.

[33] From the legislative history of the Act one can deduce that the time chosen for the ultimate limitation period, fifteen years, represented a compromise between the thirty-year period proposed for most claims and the ten-year period proposed for others. Interestingly, in Hansard, the Attorney General at the time the Act was passed also suggested that the fifteen-year period was chosen as a compromise, but referred to it as a compromise between ten-year and twenty-year periods that exist for ultimate limitation periods in other jurisdictions. See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Vol. 5, No. 65 (2 December 2002) at 1550 (David Young). The transitional provision furthers that compromise approach. Although the common law rule of discoverability is modified by s. 15, section 24(5) operates to mitigate the effect of the new legislation on pre-existing but undiscovered claims.

[34] The motions judge looked to the interpretation of the ultimate limitation period and its relationship to the discoverability principle in the British Columbia *Limitation Act* passed in 1975, and the decision of *Armstrong v. West Vancouver (District)* (2003), 223 D.L.R. (4th) 102 (B.C.C.A.). That case held that the ultimate limitation period of thirty years applied from the date the damage occurred. The ultimate limitation period did not run from the date the evidence of the negligence in issue was discovered. Further, in *410727 B.C. Ltd. v. Dayhu Investments Ltd.* (2004), 241 D.L.R. (4th) 467 (B.C.C.A.), the court confirmed that the ultimate thirty-year limitation period began to run from the time that the action accrued, whether or not the cause of action was discoverable.

[35] The motions judge accepted the City's submission that the same interpretation the courts arrived at in *Armstrong* and *Dayhu* should be given to section 24(5) Rule 1 here. However, the City's submission ignores the fact that, while the wording of the ultimate limitation provision in s. 15 of Ontario's legislation is similar to the British Columbia statute, the wording of Ontario's transition provisions in s. 24 is significantly different.

[36] The transition provision in the British Columbia statute, s. 14, provides, that if the cause of action arose before the new *Limitations Act* comes into force and the limitation period provided under the former legislation is longer than the limitation period provided under the new Act, the limitation period expires two years after the new Act comes into force or pursuant to the limitation period under the former Act, whichever is shorter. The Alberta *Limitations Act*, R.S.A. 2000 c. L-12, which came into force on March 1, 1999, contains a similarly worded transition provision and a ten-year ultimate limitation period. In *Bowes v. Edmonton (City)* (2005), 386 A.R. 1 (Q.B.), Clarkson J. concluded that the ultimate limitation period was intended to have retrospective effect and, as a result, the

plaintiffs' action against the City of Edmonton was statute-barred because the City's negligent act of issuing building permits to the plaintiffs, notwithstanding the geological reports it had concerning the instability of the land on which their homes were built, occurred more than ten years before the land collapsed in 1999 (after the new Act had come into force).

[37] Neither the British Columbia statute nor the Alberta statute has a transition provision that provides, as does s. 24(5) Rule 1, that "If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date." If the claim was not discovered before the coming into force of the Act, the Act in effect triggers the start of the new fifteen-year ultimate limitation period. Such a provision does not seem to me to do violence to the intention of the legislators or to the policy of the Act.

[38] The motions judge was also concerned that interpreting the transitional provision as submitted by York would lead to an absurd result. As an example, he stated that a proceeding based on an act that occurred in 1978 but discovered in 2003 could not proceed, whereas a proceeding based on the same 1978 act discovered in 2018 could proceed. The example given by the motions judge was flawed. If the 1978 act was discovered in 2003, the claim was discovered before the effective date of the new Act on January 1, 2004, and, pursuant to s. 24(5) Rule 2, the limitation period under the former Act would apply. That limitation period would ordinarily be six years. Thus, the claimant would have until 2009 to bring a claim.

[39] 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 limitations 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.

[40] In view of my conclusion I need not address York's argument on retrospectivity. I also need not comment on the effect of any subsequent amendment.

G. Disposition

[41] For the reasons given, I would allow the appeal and set aside the order dismissing York's action.

H. Costs

[42] The parties may make submissions as to costs. Counsel for York shall deliver a bill of costs together with any submissions, in writing, in support of any requested order for costs within seven (7) days of the release of the decision. Counsel for the City may deliver a response, in writing, within fourteen (14) days of the release of the decision. Counsel for York may deliver a brief reply within seventeen (17) days of the release of the decision. The submissions of the parties should be delivered to the attention of the Senior Legal Officer of the court.

RELEASED: January 29, 2007 ("SEL")

"Karen M. Weiler J.A."
"I agree S. E. Lang J.A."
"I agree Paul Rouleau J.A."