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RECENT CASE LAW AND ONTARIO'S NEW BUILDING CODE

Andrew J. Heal,
B.A. (Hons.), J.D., LL.M.*

Blaney McMurtry LLP
416.593.3934
aheal@blaney.com

* Andrew is a partner and with the law firm of Blaney McMurtry LLP and a member of the Law Society of Upper Canada. The views expressed herein are those of the author and relate to the laws as they apply to Ontario. The author gratefully acknowledges the input, in prior versions of this paper, of colleagues Diana Dimmer and Susan Ungar of the City of Toronto's Legal Division. The assistance of Christopher McClland in updating and assisting with this paper and presentation is also gratefully acknowledged. Any errors or omissions in this paper are those of the author alone.

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Introduction

In Ontario and elsewhere across Canada, qualified and experienced public officials engage in site plan review, building permit application review, plan examination, and building inspection, of all sorts of construction projects to ensure a safely built form.

In Ontario, the legislative scheme and standards relevant to building inspectors are set out in the *Building Code Act*¹ (*BCA*). Under the *BCA*, each municipality is responsible for the enforcement of the Act in its municipality. The Act provides that the Council of each municipality shall appoint a chief building official and such inspectors as are necessary for the enforcement of the Act in the areas in which the municipality has jurisdiction.²

The standards for construction are contained in a regulation passed pursuant to the *BCA*, commonly known as the “Code” (Building Code).³ The Building Code sets out criteria governing design and construction methods and materials to be used in the construction of all buildings falling within the Act.

Pursuant to the *BCA*, no person shall construct or demolish a building unless a permit has been issued therefore by the chief building official;⁴ further, the chief building official is required to issue the permit unless the proposed building, construction, or demolition will contravene the *BCA* or the Building Code or any other applicable law.⁵

¹ *Building Code Act, 1992*, S.O. 1992, c. 23, as amended [*BCA*]. The *BCA* establishes the regulatory structure and includes a number of provisions relating to inspection matters, including: the responsibility to enforce the Act (s. 3); the requirement of an inspection prior to occupancy of a building or part thereof (s. 11); an inspector’s legal right to enter a building or property “at any reasonable time without a warrant” where a building permit application has been made (s. 12(1)); the power of an inspector to issue orders to comply (s. 12(2)) and to issue orders prohibiting the covering or enclosing of any part of a building until such time as an inspector has had an opportunity to inspect (s. 13(1)).

Breaches of the *BCA* constitute an offence, and persons breaching the Act are liable to be prosecuted under the *Provincial Offences Act* attracting significant fines of up to \$50,000 (in the case of a corporation).

² *Ibid.* s. 3.

³ O.Reg. 350/06, formerly O. Reg. 403/97 made under the *Building Code Act, 1992* [Building Code].

⁴ *BCA*, *supra* note 2, s. 8.

⁵ *BCA*, *supra* note 2, s. 8(2).

The *BCA* regime lists certain mandatory inspections that must be carried out by the municipality. There is also a list of discretionary inspections. The case law provides that once a municipality decides to carry out an inspection, it must do so in a non-negligent manner.⁶

What Are the New Changes?

Overview

The province conducted a major review of the building area and enacted Bill 124⁷ which contained significant amendments to the *BCA*. The province developed extensive regulations in conjunction with the new legislation and has recently brought in a new December 31, 2006 Building Code, effectively in force as of January 2007.⁸

Some of the significant changes under the new regime include:

- (i) allowing municipalities to outsource plan review and construction inspection functions to Registered Code Agencies (RCAs);
- (ii) limiting building permit fees to the reasonable costs of the municipality in administering and enforcing the Act in its jurisdiction;
- (iii) new provisions setting out the role of designers and the role of builders;
- (iv) provisions setting out the role of the chief building official and the role of inspectors;
- (v) requiring municipalities to establish and enforce a code of conduct for the chief building official and inspectors;
- (vi) providing that the chief building official, municipal inspectors and designers must meet the qualifications and requirements in the building code (these are set out in the

⁶ *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 [*Manolakos*]; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 [*Ingles*].

⁷ *Building Code Statute Law Amendment Act, 2002*, S.O. 2002, c. 9 [Bill 124].

⁸ Most of the requirements of the new 2006 Building Code came into force on December 31, 2006.

regulations and generally require persons to pass certain examinations and be registered with the Ministry);

- (vii) the building code contains insurance requirements for certain persons involved in the building industry;
- (viii) under the plan examination process, the chief building official or a RCA may allow the use of materials, systems and building designs that are not authorized in the building code if, in their opinion these alternatives will achieve the level of performance required by the Code;
- (ix) providing that at certain stages of construction specified in the building code, the prescribed person must notify the chief building official or the RCA that the construction is ready to be inspected;
- (x) after the notice is received an inspector must carry out the inspection required by the building code within the prescribed period; and
- (xi) the 2006 Building Code is written in an objective-based format to promote innovation and flexibility in design and construction.

Time will tell whether the legislative reforms will be a positive development for municipalities. Some of the positive aspects are that the reforms impose statutory roles on others involved in the building industry; impose insurance requirements on others; require builders to notify municipalities that a certain stage of construction is ready to be inspected; and set out the stages of construction that need to be inspected by municipalities.

Examining the New Building Permit and Inspection Processes

Role of Various Persons

One of the important new provisions is section 1.1 of the *BCA* that identifies the role of various persons involved in the building process. Subsection 1.1(1) of the Act provides that:

[i]t is the role of every person who causes a building to be constructed,

- (a) to cause the building to be constructed in accordance with this Act and the building code and with any permit issued under this Act for the building;
- (b) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official; and
- (c) to ensure that the construction is carried out only by persons with the qualifications and insurance, if any, required by this Act and the building code.⁹

This subsection imposes an obligation on owners to ensure that a building is constructed in accordance with the Building Code and the permit that has been issued.

Section 1.1 of the *BCA* also identifies the different roles for designers, builders, registered code agencies, chief building officials and inspectors. The builder is required to ensure that construction does not proceed without a permit, to construct the building in accordance with the permit, to use appropriate building techniques and, when site conditions affect compliance, to notify the designer, an inspector or the registered code agency, as appropriate. The designer is required to provide designs which are in accordance with the *BCA* and Building Code and which are sufficiently detailed to permit the design to be assessed, to provide only those designs for which the designer is qualified, and to conduct general reviews of matters for which the designer is qualified.

The chief building official is expected to establish operational policies for the enforcement of the *BCA* and the Building Code, to coordinate and oversee the enforcement of the *BCA* and the Building Code and to exercise powers and perform duties in accordance with the standards established by the Code of Conduct. An inspector is expected to exercise the powers and perform the duties under the *BCA* and the Building Code in connection with reviewing plans, inspecting construction and issuing orders in accordance with the *BCA* and the Building Code. An inspector must also only exercise those powers and duties in respect of which he or she has the qualifications to do so and to exercise powers and perform duties in accordance with the

⁹ *BCA*, *supra* note 1, s. 1.1(1).

standards established by the applicable Code of Conduct. The major benefit to municipalities of this section is that there are positive statutory duties imposed on others involved in the building industry, other than simply the municipality and its staff.

Qualifications

The new legislative regime establishes qualifications for the Chief Building Official, inspectors, Registered Code Agencies and designers. The province has set up an examination system, along with a registration system.¹⁰ From a liability perspective, municipalities should be able to defend against general allegations relating to qualifications and competence of inspectors in claims advanced against the municipality if the employees involved have the required qualifications. Municipalities have now gone through this demanding exercise which applies to all inspectors.

The Ontario Divisional Court recently dealt with the question of the qualifications under the Building Code regime of otherwise qualified architects and engineers. In the *APEO v. Ontario (Minister of Municipal Affairs and Housing)* (2007) 225 O.A.C. 287, 2007 CarswellOnt 3162 (Divisional Court) the court held that professional engineers and architects were excluded from the competing regulatory scheme of the *BCA* and Building Code which, it found, attempted a parallel regulation of competence and character control. Such regulation would be competent legislation, but was impermissible in the subordinate form of regulations passed by orders in council. The Ontario Association of Architects (“OAA”) which had reached a temporary accommodation with the Ministry, intervened to support the Association of Professional Engineers of Ontario (“APEO”).

The “practice of professional engineering” is a defined term under the *Professional Engineers Act* and means “any act of designing, composing, evaluating, advising, reporting, directing or supervising, wherein the safeguarding of life, health, property or the public welfare is concerned and that requires the application of engineering principles”. A significant component of the practice of professional engineering relates to building design and general review of those buildings during construction. Both “design” and “general review” are terms of art and are

¹⁰ See the Ministry’s website at www.obc.mah.gov.on.ca regarding the new regime.

defined in the *Professional Engineers Act*. A “general review” assesses general conformity of the construction to the design is not *per se*, an evaluation of a structure’s conformity to the Building Code.

APEO licence holders share with architects the exclusive right to design and conduct general reviews of buildings. A Joint Practice Board helps to avoid confusion and conflicts between the two professions. In the history leading to the enactment of Bill 124, the Trow Report and BRAGG reports had as a major theme streamlining the building approval process and neither report identified significant concerns in the participation of engineers and architects in that process.

Ultimately for the court, the overlay of the new Building Code qualification system did little to advance public safety, and appeared to intrude, by regulation and not legislation, on the exclusive mandate of the APEO and OAA to qualify, govern and discipline their respective members. Most interestingly the court said: “If truth be told, the [new] Building Code is a professional regulatory act in search of a profession”.

Registered Code Agencies

Under the new legislation, municipalities may outsource certain building code functions to Registered Code Agencies (“RCA”). Pursuant to section 4.1 of the *BCA*, a municipality may enter into agreements with RCA’s to perform functions set out in the agreement. Municipalities may want to consider using this discretionary option, where the municipality itself does not have the necessary resources. As a result of concerns raised, the government amended the provisions which would have allowed certain classes of applicants for permits to appoint their own RCA.

Application Form for Permits

The Province has also introduced a common application form for a permit to construct or demolish. All municipalities are to use the form which is available on the Ministry’s website. The form includes a requirement to attach documents dealing with “applicable law” (see discussion below) and schedules for designer information and sewage system installer information.

Analyzing New Risk Areas

Applicable Law

The regulations now contain an expansive definition of “applicable law” for the purposes of section 8 of the *BCA*. The regulation lists numerous sections contained in other provincial acts, which the chief building official should review to determine whether the proposal complies with applicable law. The intent of this change is to provide clarity as to the meaning of applicable law.¹¹ The Ministry has indicated that the list of applicable law will continue to be reviewed on an ongoing basis.

For the purpose of considering the issuance of a permit, applicable law expressly includes, amongst other things:

- (i) section 33 of the *Ontario Heritage Act*, with respect to the consent of the Council of a municipality for the alteration of a property;
- (ii) section 34 of the *Ontario Heritage Act*, with respect to the consent of the Council of a municipality for the demolition of a building;¹²
- (iii) section 41 of the *Planning Act*, with respect to the approval by the Council of the municipality or the Municipal Board of plans and drawings (dealing with site plan approval);
- (iv) by-laws made under section 34 (Zoning By-laws) or 38 (Interim Control By-laws) of the *Planning Act*.

The expanded definition should eliminate some of the legal challenges that have gone on in the past over what constitutes “applicable law”. One example was the somewhat conflicting

¹¹ See former section 1.1.3.3 of Ontario Regulation 403/97, as amended, now superceded by Ontario Regulation 350/06, section 1.4.1.3.

¹² There was support in the case law under the old regime that applicable law included the provisions under the *Ontario Heritage Act*. See *Roman Catholic Episcopal Corp. for the Diocese of Peterborough v. Cobourg (Town)* (1998), 40 O.R. (3d) 187 (Ont. Ct. Gen. Div.).

decisions dealing with the issue of site plan approval, which should be clarified by the expanded definition of applicable law.¹³

There is still a positive obligation on the chief building official to issue a permit unless the proposed construction will contravene the *BCA*, the Building Code, or other applicable law.¹⁴

Municipalities have successfully relied upon subsection 8(2) of the *BCA* in defending actions wherein plaintiffs have alleged that the issuance of a building permit resulted in a nuisance being created which detrimentally affected their property. In these circumstances the courts have consistently found that common law nuisance is not a ground upon which a municipality can refuse to issue a permit and therefore a municipality cannot be found liable for granting a permit.¹⁵ This issue should remain unchanged under the new regime.

New 2006 Building Code

As noted above, there are further significant changes brought about through the introduction of the new 2006 Building Code. The Province has indicated that the new code accomplishes the following:

- (i) sets out new energy-efficient requirements (these requirements are phased in under the code);
- (ii) establishes new construction standards that will make buildings more accessible to people with disabilities;
- (iii) facilitates the building of small care homes;

¹³ See e.g., *Quay West v. Toronto (City)* (1989), 47 M.P.L.R. 109 (Ont. H.C.J. Div. Ct.), leave to appeal to Ont. C.A. dismissed at 111; *1063590 Ontario Ltd. v. Etobicoke (City) Chief Building Official* (1994), 24 M.P.L.R. (2d) 90 (Ont. Ct. J. (Gen. Div.)); *Forster v. Waterloo (City)* (1993), 14 M.P.L.R. (2d) 164 (Ont. Ct. J. (Gen. Div.)); *Revenue Properties Co. v. Toronto (City)* (1984), 26 M.P.L.R. 165 (Ont. Co. Ct.); *Polla v. Toronto (City) Chief Building Official*, (2000) 15 M.P.L.R. (3d) 103 (Ont. S.C.J.); *Philpott v. Innisfil (Town)* (2007), 32 M.P.L.R. (4th) 60, 2007 CarswellOnt 1777 (Ont. S.C.J. (Div. Ct.)).

¹⁴ *Mayhew v. Hamilton (Township) Chief Building Official* (2002), 30 M.P.L.R. (3d) 219 (Sup. Ct.); *1562850 Ontario Ltd. V. Toronto (City) Chief Building Official* [2004] O.J. No. 1555 (Ont. S.C.J.); *Ayerswood Development Corp. v. London (City)* [2005] O.J. No. 356 (Ont. S.C.J.), rev'd on other grounds [2006] O.J. No. 2213 (Ont. S.C.J. (Div. Ct.)).

¹⁵ See e.g., *Alaimo v. York (City) (Chief Building Official)* (1995), 26 M.P.L.R. (2d) 69 (Ont. Ct. J. (Gen. Div.)); *Stanoulis v. City of Toronto*, 1995 CarswellOnt 2789 (Ont. Gen. Div.), leave to appeal refused by 1996 CarswellOnt 716 (Ont. C.A.); *Seymour's Men's Wear Ltd. v. Beaches Holdings and City of Toronto*, unreported decision of MacFarland J. dated June 10, 1999.

- (iv) makes constructing small residential buildings easier;
- (v) contains a new format that allows more creativity and building design while maintaining public safety;
- (vi) boosts Ontario's building industry by encouraging innovation in building design and products.

These latter two items substantially add to the responsibilities and therefore potential risks faced by municipalities. The 2006 Building Code is written in an objective-based format. This means that in addition to including prescriptive requirements, the new code contains objectives explaining the rationale behind the requirements. Builders and designers will now be able to propose alternative designs and building materials that comply with the objectives of the Code. The Ministry's website contains the following description:

Existing Codes are prescriptive – they describe “what” you have to do. The new objective-based Code adds the desired result or “why”. For continuity, the objective-based Code continues to contain prescriptive requirements known as “acceptable solutions” but these are linked to the higher “objectives” of the Code. Designs and proposals that meet the objectives are considered “alternate solutions”.

Arguably, the ability of designers and builders to use materials, systems and building designs, not expressly set out in the Code is not completely new as since 1993, Chief Building Officials have had discretionary authority to allow the use of “equivalents” to the requirements of the building code if, in the Chief Building Official's opinion, the proposed equivalent would achieve the level of performance required by the code.¹⁶

The new 2006 Building Code however, expands all of this by allowing designers and builders to use alternative technical solutions to the prescriptive and performance-based technical requirements. This imposes new obligations on municipalities to try and evaluate innovative proposals with the inherent difficulties and risks that flow from this added responsibility. At the

¹⁶ See Section 9 of the *Building Code Act*, 1992, as amended. The Act also gives powers to the Building Materials Evaluation Commission (B.M.E.C.) (s. 28) and to the Minister (s. 29) to authorize the use of any innovative material, system or building design.

trial division level in *Strata Plan NW 3341 v. Canlan Ice Sports Corp.*¹⁷ the court noted this additional difficulty:

The standards for larger more complicated structures are commonly expressed as design objectives. A designer will propose to meet the design objective by an individual plan. This allows professional designers the flexibility to employ custom methods or materials to suit the requirements of a specific building while meeting the objective.

The latter form of regulation, stipulating a design objective, provides challenges to Municipal Inspectors. It is easier to assure compliance with criteria or a minimum stipulation than to be satisfied that a design objective has been met. This sort of inspection is inherently more difficult....¹⁸

It is foreseeable that difficulties will arise when a municipality does not have the resources or expertise to properly assess or evaluate an objective based design. Is there an obligation to review the permit application in these circumstances? In *Craft-Bilt Materials Ltd. v. Toronto (City)* (2006), 28 M.P.L.R. (4th) 274, 2006 CanLII 39465 (Ont. S.C.J.) (including corrigendum released April 16, 2007), currently under appeal, the court was dealing with a *BCA* appeal regarding refusal to issue a building permit for sunroom panels. The Chief Building Official said she was unable to evaluate the structural sufficiency, on the evidence on the permit application, of the sandwich panels. There was some evidence, it would appear, the panels had been in use for 20 years (without ‘H’ stiffeners), and thus not an innovation, and that other municipalities had approved the same materials. It was common ground that the Building Code required under Part 4 that structural members must have sufficient capacity and integrity to resist safely all loads. The issue was the sufficiency of evaluation as to whether these panels did. The design was sealed by a professional engineer. The court said that: “The Chief Building Official cannot choose to disregard [section 4.1.1.4] of the Code because it requires her officials to exercise more judgment in processing applications for building permits. It cannot be rendered nugatory by the chief building official’s discretion in subsection 9(1) [the equivalent section in the *Building Code Act*]. We will have to see how the new regime is dealt with by the parties in

¹⁷ (2001), 22 M.P.L.R. (3d) 173 (B.C.S.C.), affirmed (2002), 5 B.C.L.R. (4th) 250 (B.C.C.A.)

¹⁸ *Ibid* at para. 48, 49.

the industry, municipalities and the courts, where arguably the new Code introduces more discretion.¹⁹

Successful Strategies for Dealing With Your Local Municipality

Risk management considerations--the desire to avoid injury to persons or property, and lawsuits against the municipality resulting from construction that does not conform to the applicable building codes--require that inspection functions be carried out with the required standard of care to protect the interest of all classes of persons to whom a duty of care might be owed, regardless of the negligence of an owner-builder.

Standard of Care

Municipalities owe a duty of care not only to owner-builders (and negligent owner-builders), but also to other classes of persons who could suffer damage from construction defects, including subsequent purchasers, visitors, neighbours, and mortgagees.²⁰

In order to avoid liability for negligent inspection, a municipality must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector faced with the same circumstances. The measure of what constitutes a “reasonable” inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, and whether the inspector had a chance or opportunity to discover the harm, but through action or inaction failed to do so.

In administering inspection regimes, municipalities are not insurers of the construction work produced. They are not required to discover every variance from applicable building standards, nor discover every hidden defect in construction work. The cases reflect that a municipality can only be held liable for those defects which the municipal inspector could reasonably have been

¹⁹ In *Craft Bilt*, the Divisional Court is expected to hear the appeal this December 11, 2007. The arguments also involve whether under the old Building Code the sandwich panels in question were not proscribed, and therefore the Chief Building Official was not qualified or required to evaluate them. *Craft Bilt* argued they were proscribed under the Code, and in the alternative evidence from US expert engineering analysis they said demonstrated the suitability of the panels for the loads in question, together with a local engineer’s certificate as to the design.

²⁰ *Ingles*, *supra* note 6.

expected to detect, and had the power to have ordered to be remedied. Whether an inspection has met the standard of care is a question of fact in a particular case.

The risks for municipalities are increased due to joint and several liability. In most provinces where the negligence of two or more defendants is found to have contributed to the damages suffered by a plaintiff, the responsibility to pay for the loss will be apportioned by the court among defendants on the basis of joint and several liability. From this point, the defendants bear the risk of non-recovery *inter se*, which, in practice, means that a solvent defendant (usually an insured municipality) at fault may get “stuck with the bill” where there is an uninsured or insolvent contractor.

Non Health and Safety Matters

There is support in some cases that the scope of the duty of care owed by a municipality should be confined to deficiencies that may affect the health and safety of persons. In *Cumiford v. Powell River (District)*,²¹ the court accepted the municipality’s argument that it should not be liable for relatively minor deficiencies that did not seriously impact on health or safety. Similarly, in *Gorscak v. 1138319 Ontario Inc.*²² the court dismissed a claim against a municipality arising out of an owner’s complaint that the developer used a different brick type than had been set out in the specifications between the owner and developer. The court said the municipality’s duty does not cast upon the municipality an obligation to ensure that the building is constructed exactly in accordance with the specifications set out for the developer by the owner.²³ But see *Flynn v. Halifax (Regional Municipality)*,²⁴ where the trial judge rejected the argument that liability against a municipality should be restricted to defects relating to health and safety. The municipality did not appeal the finding against it on liability but did say it did not support the judge’s conclusions that the municipality’s standard of care was not limited to

²¹ (2001), 21 M.P.L.R. (3d) 45 (B.C.S.C.)

²² (2003) 42 M.P.L.R. (3d) 255 (Ont. S.C.J.)

²³ See also *Whaley v. Tam* [2003] O.J. No. 1509 (Ont. S.C.J.) where a landlord was not liable for a minor deviation regarding the height of a building railing.

²⁴ (2003) 8 M.P.L.R. (4th) 189 (N.S.S.C.), appeal partially allowed on other grounds (2005), 8 M.P.L.R. (4th) 151 (N.S.C.A.)

inspecting for matters affecting health and safety. Without deciding the issue, the Nova Scotia Court of Appeal commented that both the national and provincial building codes are said to concern matters of health and safety. “It would follow that the inspections for code compliance conducted by the municipality are intended to address matters of health and safety, broadly interpreted.”²⁵

More recently, in *Shulist v. Waterloo (City)*²⁶ the Ontario Superior Court of Justice found that a municipality cannot be placed in the position of an insurer or guarantor for the quality of work done by a contractor, nor can a municipality ensure that each section of the Building Code is followed. In this case, the plaintiff had ongoing problems with his garage. A professional engineer’s report concluded that the garage’s steel lintel and wood beam were undersized and not in accordance with the Ontario Building Code. The plaintiff brought an action against the municipality for failure to find the problem during the inspection. At trial, the witness for the municipality testified that the lintel had not been specifically inspected, and probably could not have been inspected because stone would have been laid above it. The witness also testified that the municipality did not ensure that the building complied with every detail of the building code. Sloan D.J. dismissed the action against the municipality.

Limitations Periods

Ontario’s new *Limitations Act, 2002* came into force on January 1, 2004. One of the significant changes brought on by the new Act is the establishment of a basic limitation period of two years. This is the applicable limitation period for alleged building inspection negligence. However, the two year limitation period starts to run from the day on which the claim was discovered.²⁷ The common law discoverability rule is that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been

²⁵ (2005) 8 M.P.L.R. (4th) 151 (N.S.C.A.)

²⁶ (2007), 36 M.P.L.R. (4th) 125, 2007 CarswellOnt 4608 (Ont. S.C.J.)

²⁷ *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s.4

discovered by the plaintiff through the exercise of reasonable diligence. The discoverability rule was expressly held to apply to building inspection negligence cases in *Kamloops v. Nielsen*.²⁸

The new *Limitations Act* codifies the discoverability principle providing that the two year limitation period will start on the earlier of

- a) the date when the person first knew that the injury, loss or damage had occurred; that the injury, loss or damage was caused by or contributed to by an act or omission done by the defendant or respondent to the claim; and that a proceeding would be the appropriate means to seek to remedy the injury, loss or damage; and
- b) the date on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to above.²⁹

Section 18 of the new *Limitations Act* addresses the time period for commencing a claim for contribution and indemnity. The two year period applies and starts to run on the day the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought.

Another significant change introduced by the new *Limitations Act* is the provision of an ultimate limitation period of 15 years that runs from “the day on which the act or omission on which the claim is based took place”, as opposed to the day on which the claim was discovered.³⁰ This is a significant improvement for municipalities and other entities involved in the construction industry.

The issue as to how the transition provisions apply to the fifteen-year ultimate limitation period was recently addressed by the Ontario Court of Appeal in the case of *York Condominium*

²⁸ [1984] 2 S.C.R. 2; see also *Ordog v. Mission (District)* (1980), 31 B.C.L.R. 371 (B.C.S.C.); *Swagar v. Vek* (1998), 49 M.P.L.R. (2d) 294 (B.C.S.C.); *Mulholland v. Van Zwietering* (1998), 49 M.P.L.R. (2d) 304 (B.C.S.C.)

²⁹ *Limitations Act, 2002, supra*, s.5

³⁰ *Ibid*, s.15

Corporation No. 382 v. Jay-M Holdings Limited and the City of Toronto.³¹ In that case, the plaintiff sued the City for alleged negligent inspection in failing to detect that certain demising walls within the condominium building were not fire rated, and in issuing a building permit for the construction of the building. An occupation permit was issued by the City on February 14, 1978. The plaintiff alleged that it did not discover the damage until May 2004, after the new Act came into effect, and commenced its action on June 22, 2005. The City brought a motion for a determination that section 15 of the new Act, which sets out the fifteen-year ultimate limitation period, was a bar to the action and sought an order that the action be dismissed accordingly.

The transition provisions set out in section 24 establish which limitation period (the former six-year limitation period or the new two-year limitation period) would apply where the act or omission took place before the new Act came into force, but the action was commenced afterwards. The applicable transition provision hinges on whether the claim was discovered before or after the new Act came into force. The issue in this case was whether the transition provision ought to be interpreted such that the fifteen-year ultimate limitation period only starts to run from January 1, 2004, the date that the new Act came into force. The effect of this interpretation is that the fifteen-year ultimate limitation period would not have any impact until January 1, 2019, fifteen years after the new Act came into force.

At the motions level, Justice Ground ruled in favour of the City. On appeal, the Court of Appeal ruled in favour of the plaintiff finding that the transition provisions postpone the starting date for the 15 year ultimate limitation period to January 1, 2004.

Other provinces have enacted ultimate limitation periods that have been applied retrospectively. In British Columbia, there is a 30-year ultimate limitation period. In the buildings case of *Armstrong v. West Vancouver*,³² the British Columbia Court of Appeal upheld the trial judge's decision to dismiss a claim based on the ultimate limitation period of thirty years prescribed in the *British Columbia Limitation Act*. The court said that the scheme of the *Limitation Act* precludes commencement of a fresh cause of action for building damage on a change of

³¹ 30 M.P.L.R. (4th) 161, 2007 CarswellOnt 345 (Ont. C.A.), additional reasons in 31 M.P.L.R. (4th) 218 (C.A.), leave to appeal refused by 2007 CarswellOnt 5635 (S.C.C.).

³² (2003), 223 D.L.R. (4th) 102, 2003 CarswellBC 265 (B.C.C.A.).

ownership. Similarly, in *410727 B.C. Ltd. v. Dayhu Investments Ltd.*³³ the British Columbia Court of Appeal dismissed a claim against the builder and municipality for faulty renovation work done more than 30 years before the claim was commenced. The ultimate limitation period applied despite the fact the plaintiff did not discover the defects until 2002 when the building was destroyed by fire. In both of those cases, the court relied heavily on the policy considerations for having ultimate limitation periods.

410727 B.C. Ltd. was cited in *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.*,³⁴ where the court found that Town negligent in its review of the condo corporation's building plans, and in its inspections of the construction of the buildings, and that their negligence caused or contributed to causing the defects in the building. The corporation had engaged a consultant to inspect their building after their property manager sent them a letter in 1993 advising them to review certain aspects of the building's construction due to problems recently discovered at another project. The consultant's report confirmed the potential defects raised in the letter from the property manager. The corporation commenced an action against the city in 2001. The court found that the cause of action based on defects which had been noted in the letter were outside the applicable limitations period of six years, as they had been given notice of those defects in 1993. However, other causes of action based on defects that were not noted in the letter and that the consultant would not have been able to discover were within the limitations period. The municipality, which had admitted negligence but argued that the claim was out of time, was found liable with respect to those defects.

³³ (2004), 214 (D.L.R. (4th) 467, 2004 CarswellBC 1526 (B.C.C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 422.

³⁴ (2007), 33 M.P.L.R. (4th) 91, 2007 CarswellOnt 1071 (Ont. S.C.J.).