

COURT OF APPEAL FOR ONTARIO

CITATION: Huether v. Sharpe, 2025 ONCA 140

DATE: 20250225

DOCKET: COA-24-CV-0493

Fairburn A.C.J.O., Copeland and Monahan JJ.A.

BETWEEN

William Huether and Emily Huether

Plaintiffs

(Respondents)

and

Jacki Danielle Sharpe, Kayley Spalding, Rebecca Jeffrey,
Coldwell Banker Thompson Real Estate Brokerage and
The Corporation of the Township of McMurrich Monteith*

Defendants

(Appellant*)

Daniel Zacks, John Lloyd and Ryan Wycherley, for the appellant

Peter Reinitzer and David A. Morin, for the respondents

Paul E.F. Martin, for the interveners, Ontario Building Officials Association and
Ontario Large Municipalities Chief Building Officials

Heard: January 29, 2025

On appeal from the order of Justice Mary E. Vallee of the Superior Court of Justice,
dated April 4, 2024, with reasons reported at 2024 ONSC 1987.

Monahan J.A.:

OVERVIEW

[1] This appeal raises the issue of what constitutes a “continuous act or omission” under s. 15(6)(a) of the *Limitations Act, 2002*, S.O. 2002 c. 24, Sched. B (the “Act”) sufficient to toll the running of the 15-year ultimate limitation period in s. 15(2).

[2] The respondents allege that the appellant, the Corporation of the Township of McMurrich Monteith (the “Township”), failed to properly supervise the construction of a dwelling (the “Dwelling”) that was built on a residential property in the Township between 1986 and 1987. The respondents purchased the property in October 2021 and shortly thereafter discovered significant defects in the Dwelling’s foundation. In February 2022, the respondents commenced an action against the Township, arguing that these defects had resulted from the Township’s negligence in supervising the Dwelling’s construction and failing to conduct further inspections, among other things.

[3] The Township moved for summary judgement on the basis that it issued the building permit for the Dwelling (the “Permit”) in 1986 and construction was completed in 1987. The Township argued that any alleged negligence on its part occurred more than three decades ago and thus the respondents’ claim was barred by the ultimate limitation period in s. 15(2) of the *Act*.

[4] The motion judge dismissed the Township’s motion for summary judgement, finding that the Township’s negligence was ongoing and continuous and, therefore, the ultimate limitation period had not yet expired by virtue of s. 15(6)(a) of the *Act*.

[5] I would allow the appeal and set aside the motion judge’s order. Respectfully, the motion judge made two legal errors in coming to her conclusion that the respondents’ claim was not statute barred.

[6] First, the motion judge failed to properly interpret the meaning of a “continuous act or omission” and therefore incorrectly concluded that the ultimate limitation period in s. 15(2) had never commenced running in respect of the respondents’ claim. As I explain below, the ultimate limitation period had expired on January 1, 2019, and the motion judge ought therefore to have granted the Township’s motion for summary judgement dismissing the proceeding as statute barred.

[7] While this finding is sufficient to resolve the appeal, the motion judge also erred in finding that the Township owed a duty of care to “monitor” open building permit files without conducting the necessary duty of care analysis. It is unnecessary in the context of this proceeding to determine whether such a novel duty should be recognized. Nevertheless, I set out the relevant legal and factual determinations that would necessarily need to be made in the event that such a claim arises in the future.

BACKGROUND FACTS

[8] On May 9, 1986, a Township building inspector issued the Permit to Blair Attwood (“Attwood”), an owner/builder who proposed to construct the Dwelling. Attwood is now deceased, as is the building inspector who issued the Permit.

[9] Cliff Helka (“Helka”), who was then the Township’s Chief Building Official, conducted a number of inspections of the Dwelling during its construction. On one such inspection in late July 1986, he noted various deficiencies, including in the floor support beam and crawl space. On August 8, 1986, he issued an order to comply regarding several violations (the “Order to Comply”). A handwritten note on the Order to Comply, written at some unknown later time, states “all complied with”. It is unclear who wrote that note or the basis for it.

[10] According to the Township’s then-Clerk and Treasurer, Richard Gibb (“Gibb”), who is now 84 years old and retired, in the 1980s the Township did not issue any document or formal declaration that a building permit was closed. Instead, Gibb’s evidence is that a building permit could be closed in one of two ways.

[11] First, if a final inspection confirmed that the construction complied with applicable laws and regulations, the inspector would note the final inspection on the building permit. This notation meant the building permit was closed.

[12] If construction was not in compliance, the inspector would issue a work order. When the inspector confirmed satisfaction of the work order, the inspector would note compliance on the work order. This notation meant the building permit was closed.

[13] Helka is now deceased and thus could not provide evidence as to whether he had carried out a final inspection of the Dwelling. Nor do we have his evidence as to what was meant by the notation “all complied with” or whether such notation was intended to close to Permit.

[14] Attwood sold the property to third parties (the “1987 Purchasers”) in March 1987. The 1987 Purchasers, in turn, sold the property to other third parties (the “1988 Purchasers”) in February 1988.

[15] The 1988 Purchasers requested a treasurer’s certificate which, according to Gibb, was an official representation of taxes owing, outstanding building permits and work orders, and applicable zoning. On February 22, 1988, Gibb issued a certificate in respect of the property (the “1988 Certificate”), which stated as follows:

1. Occupancy Permits not used or issued in this municipality.
2. There are no outstanding work orders against this property or building.
3. No zoning affects this property.
4. No local improvement charges are planned.

[16] Gibb stated that when he issued the Certificate, he believed that Helka had closed the Permit. If, however, Helka had not done so, Gibb believed that the issuance of the 1988 Certificate had the effect of closing the Permit. However, on cross-examination he acknowledged that he had no authority for his statement that a treasurer's certificate could close a building permit. Therefore, the Permit may not have been closed. Nevertheless, Gibb's understanding is that after the issuance of the 1988 Certificate, the Township regarded the Permit as being closed and was no longer concerned with the construction of the Dwelling.

[17] There is no evidence that Attwood undertook any further construction pursuant to the Permit after the issuance of the 1988 Certificate. Although the property was sold to various third parties on a number of occasions between 1988 and October 2021 (when it was purchased by the respondents), none of the subsequent owners of the property, including the 1987 Purchasers or the 1988 Purchasers, applied for fresh building permits to undertake or complete any construction of the Dwelling.

MOTION JUDGE'S REASONS

[18] The focus of the motion judge's analysis was on whether the Permit had been properly closed. According to the motion judge, the Permit could be closed only when all necessary inspections had been carried out and the conditions for occupancy had been met. Although Attwood may have ceased construction of the

Dwelling, there is no evidence that he provided notice of such completion to the Township, or that Helka had carried out all the inspections contemplated by the *Ontario Building Code*, O. Reg. 583/83.¹ The motion judge also noted that Gibb did not have authority to close a building permit. Therefore, in her view, the Permit could not have been closed and, in fact, was still open.

[19] The motion judge relied on this court's decision in *Breen v. Lake of Bays (Township)*, 2022 ONCA 626, 31 M.P.L.R. (6th), in which Harvison Young J.A. stated that when a municipality makes a policy decision to inspect construction projects, it owed a duty of care to persons who might be injured by the negligent exercise of its inspection powers. On this basis, the motion judge found that the Township had a duty to "monitor" open construction files. Because the *Oxford English Dictionary*² defines "monitor" as "observe and check over a period of time; maintain regular surveillance over", the motion judge found that a municipality has a duty to "continuously monitor its open permit file and to follow up with the permit holder regarding the state of construction." If the permit holder refused to respond, the Township had remedies, including revoking the permit.

[20] The motion judge further held that this "duty to monitor" continues until such time as the municipality determines that the building is substantially complete and

¹ This is the version of the Building Code in effect in 1987.

² *Concise Oxford English Dictionary*, 11th ed. revised (Oxford: Oxford University Press, 2008), at p. 922.

that it satisfied the conditions for occupancy. Because Helka had not taken these steps in relation to Dwelling and the Permit has never been closed, the Township's duty to monitor remained in effect.

[21] The motion judge recognized that s. 15(2) of the *Act* establishes an ultimate limitation period of 15 years. However, she also noted that s. 15(6)(a) of the *Act* provides that in the case of "a continuous act or omission", the ultimate limitation period does not commence until the day on which the act or omission ceases. Because the Township continued to be under a duty to monitor the Permit file, the Township's negligence had never ceased, and the ultimate limitation period had not yet expired.

[22] The motion judge also acknowledged that in *Wong v. Lui*, 2023 ONCA 272, 167 O.R. (3d) 92, this court held that s. 15(2) of the *Act* barred claims involving allegedly defective construction carried out pursuant to certain building permits that have been issued in 1987. The motion judge distinguished *Wong* on the basis that in that case the municipality had closed the building permits. Because the Township had not closed the Permit in this case, *Wong* had no application.

[23] The motion judge also recognized that a defendant is sometimes prejudiced by the passage of time, given the fact that witnesses pass away or their memories fade, and evidence become stale. But in her view no such evidentiary difficulties

arose in this case because the Permit file was preserved in a filing cabinet and the documents spoke for themselves.

[24] Accordingly, the Township's motion for summary judgement was dismissed.

STANDARD OF REVIEW

[25] The interpretation of the ultimate limitation period in s. 15 of the *Act* is a question of law subject to review on a standard of correctness: *Wong*, at para. 16.

GOVERNING LEGAL PRINCIPLES

(1) Relevant statutory provisions

[26] Section 4 of the *Act* sets out a "basic" limitation period of two years after discovery of a claim. However, this basic limitation period is subject to the "ultimate limitation period" set out in s. 15(2), which provides as follows:

(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.

[27] Section 15(6)(a) further provides that in the case of a "continuous act or omission", the act or omission takes place "on the day on which the act or omission ceases".

[28] Accordingly, if the alleged negligence of the Township is a "continuous act or omission" which has not yet ceased (as the respondents contend), then the act or omission on which the respondents' claim is based has not yet occurred, and the limitation period in s. 15(2) has not yet commenced running.

[29] If, on the other hand, the alleged negligence was not a “continuous act or omission” then the limitation period in s. 15(2) would have commenced running on January 1, 2004 and expired 15 years later, on January 1, 2019. This results from the transitional provision in s. 24(5)1 of the *Act*, which provides that if the “former limitation period”³ had not expired by January 1, 2004 and the claim was not discovered before that date, then “the *Act* applies as if the act or omission had taken place on that date.”

[30] In short, this appeal turns on whether the Township’s alleged negligence constitutes a “continuous act or omission” within the meaning of s. 15(6)(a) of the *Act*.

(2) The modern rule of statutory interpretation

[31] The modern rule of statutory interpretation requires that the words of a statute 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”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. The goal of the interpretive exercise “is to find harmony between the words of the statute and the intended object”: *R. v. Breault*,

³ Under s. 24(1) of the *Act*, the “former limitation period” is defined as the limitation period that applied in respect of the claim before January 1, 2004. Prior to January 1, 2004, the *Act* did not contain any limitation period in respect of latent building defects, such as the defects in the Dwelling.

2023 SCC 9, 481 D.L.R. (4th) 195, at para. 26, quoting *MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39.

(3) The purpose of the ultimate limitation period in s. 15(2)

[32] Ontario’s comprehensive reform of the law of limitations, which came into force in 2004, sought to create “a clear and cohesive scheme for addressing limitation issues, one that balances the plaintiff’s right to sue with the defendant’s need for certainty and finality”: *Canaccord Capital Corp. v. Roscoe*, 2013 ONCA 378, 115 O.R. (3d) 641, at para. 17.

[33] Thus, on the one hand, the basic limitation period was derived from the common law “discoverability principle”, such that the limitation period would generally only run once a person became aware (or ought reasonably to have become aware) of their claim.

[34] At the same time, the enactment of an ultimate limitation period was seen as necessary to avoid a situation where a legal proceeding could be brought in respect of hidden defects that that were only discovered many decades later. In introducing the legislation, Attorney General Bryant expressly justified the ultimate limitation period as necessary to prevent such untimely legal proceedings in respect of latent building defects:

Does it make sense that architects and engineers can be sued 50 years after building a home? Of course not.

Interestingly, that is the current state of affairs, which does not make much sense at all.⁴

[35] The ultimate limitation period in s. 15(2) of the *Act* was intended to address this mischief. Its purposes include avoiding costs related to record-keeping and insurance due to continuous exposure to liability; addressing evidentiary concerns arising from deceased or missing witnesses or records that might have been destroyed by fires, floods, or other intervening events; recognizing that memories fade and even where a witness is available their ability to recall events that took place many decades in the past will be limited; and serving the public interest in bringing an end to litigation and the revisiting of past errors: *York Condominium Corp. No. 380 v. Jay-M Holdings Ltd.*, 2007 ONCA 49, 84 O.R. (3d) 414, at paras. 30-34, leave to appeal refused, [2007] S.C.C.A. No. 154; *Wong*, at paras. 23-25.

[36] At the same time, in order to avoid unfairness to plaintiffs with undiscovered claims, the legislature provided a number of exceptions to the operation of the ultimate limitation period. One of these exceptions was that set out in s. 15(6)(a) in respect of “continuous acts or omissions”. As the Alberta Law Reform Institute explained in a 1989 report recommending an ultimate limitation period, in situations where wrongful conduct has continued, concerns over stale evidence are mitigated by the fact that “the evidence will have continually renewed itself with the

⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37-3, No. 65A (2 December 2002), at p. 3448 (Michael Bryant).

defendant's repetitive conduct": Alberta Law Reform Institute, *Limitations* (Edmonton: Alberta Law Reform Institute, 1989), at p. 70; *Seidel v. Kerr*, 2003 ABCA 267, 19 Alta. L.R. (4th) 201, at para. 45. Moreover, "[j]ustice does not require giving the defendants repose for wrongful conduct which just stopped." These are relevant and helpful considerations in determining the scope and application of the term "continuous act or omission" in s. 15(6)(a) of the *Act*.

(4) The elements of a "continuing cause of action"

[37] The concept of a "continuing cause of action" is a long-standing principle of procedural and limitations law in Ontario as well as other common law jurisdictions.⁵

[38] Section 117 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 entitles the court to assess damages with respect to a continuing cause of action that arises between the commencement of the action and trial. The predecessors of s. 117 have been in force in Ontario since at least 1919 and the concept of a continuing cause of action dates to the 19th century: *Hamilton v. Quaker Oats Co.* (1919), 46 O.L.R. 309 (H.C.) at para. 10; *Hole v. Chard Union*, [1894] 1 Ch. 293, at pp. 295-96. Equivalent provisions exist in procedural and limitation statutes in a number of other provinces: see e.g., *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.9;

⁵ While s. 15(6)(a) uses the term "continuous act or omission" rather than "continuing cause of action", the relevant considerations underlying the two concepts are broadly similar and thus the jurisprudence in relation to the former is relevant to the interpretation of the latter.

Limitations Act, R.S.A. 2000, c. L-12, s. 3(3)(a); and *Limitations of Actions Act*, S.N.S. 2014, c. 35, s. 8(3)(a). The interpretation of these various provisions has generated a considerable body of law defining a “continuous cause of action”.

[39] In essence, the term is used to describe causes of action that accrue from repeating actionable conduct. Because each repetition of the actionable conduct is identical and occurs continuously, it founds a new and discrete cause of action.

[40] This understanding of the concept of a “continuing cause of action” was adopted by this court in its 1924 decision in *McIntosh v. Parent* (1924), 55 O.L.R. 552 (C.A.), at p. 424, quoting the 1894 English Court of Chancery decision in *Chard Union*, at pp. 295-96:

[W]hat is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought... If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem* [from day to day].

[41] Nuisance and trespass are the most common examples of continuing causes of action, since each day the nuisance or trespass occurs a new and identical cause of action in nuisance or trespass accrues: see e.g., *Smart v. South Saskatchewan Hospital Centre*, 60 D.L.R. (4th) 8 (Sask. C.A.), at para. 46.⁶ In such

⁶ Other examples include false imprisonment, which continues so long as the defendant keeps the plaintiff confined; wrongfully freezing funds, which continues each day the funds remain frozen; and the wrongful exclusion of a tenant from property, which continues every day of the exclusion.

cases, “[the] injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past”: *Roberts v. City of Portage La Prairie*, [1971] S.C.R. 481, at p. 491, quoting *Salmond on Torts*, 15th ed., at p. 791.

[42] Continuing causes of action are uncommon. In *Jalla & Ors v. Shell International Trading and Shipping Company & Anor*, [2021] EWCA Civ 63, at paras. 52-53, the England and Wales Court of Appeal (Civil Division) observed that a cause of action in tort “is usually a single, self-contained package of rights, relating to an act or omission which has caused damage and is actionable in law” while “[a] continuing cause of action is more unusual.”

[43] Thus, actionable conduct is not continuing merely because it can be rectified or because the harm it causes is either continuing or delayed. This principle is illustrated by *Sunset Inns Inc. v. Sioux Lookout (Municipality)*, 2012 ONSC 437, aff'd 2012 ONCA 416, where the defendant municipality installed a sewer line to the plaintiff's building in 1986. There were ongoing problems with flow in the sewer line, which eventually led the plaintiff to commence a proceeding alleging that the municipality installed the line negligently. The defendant municipality brought a motion for summary judgement on the basis that the claim was statute barred, which the plaintiff resisted by arguing, *inter alia*, that the municipality was under an ongoing duty to repair the deficient sewer line and, therefore, the negligence was a “continuous cause of action”.

[44] In a judgment upheld on appeal to this court, the plaintiff's argument was rejected on the basis that a continuous act or omission requires a succession or repetition of separate acts of the same character. The allegation that the defendant was under an ongoing duty of care to the plaintiff "does not constitute the type of repetitive and continuing conduct which is the foundation of the continuing cause of action": *Sunset Inns*, at para. 22.

[45] Similarly, in *Bowes v. Edmonton (City of)*, 2007 ABCA 347, 86 Alta. L.R. (4th) 47, a riverbank collapse destroyed the plaintiffs' homes 12 years after their construction. The plaintiff sued the defendant municipality for negligence, alleging a breach of its duty to warn against construction on the riverbank and arguing that the breach was continuous. The Alberta Court of Appeal rejected this argument, reasoning that any alleged negligence had occurred by the time the buildings were constructed and "absolutely nothing happened" thereafter: at para. 169. The court pointed out that "[t]o regard every ancient failure to warn as occurring every day would be a fiction destroying all limitation periods... [since] most cases of delayed harm from a tort could be dressed up as failures to warn, with no limitation period": at paras. 173-174.

ANALYSIS

- (1) **The motion judge erred in concluding that the alleged negligence of the Township was a “continuing act or omission” and that the respondents’ claim was not barred by s. 15(2) of the Act**

[46] As explained above, a “continuing act or omission” requires a succession or repetition of actionable conduct on the part of a defendant. No such successive or repetitive conduct is pleaded or otherwise identified by the respondents in this case. To the contrary, the record is clear that from at least February 1988 onward, the Township treated the Permit as if it were closed and ceased to have any role or involvement with the construction of the Dwelling. Any alleged negligence on the part of the Township had already occurred and was complete by that date and, in the pithy words of the Alberta Court of Appeal in *Bowes*, at para. 169, “absolutely nothing happened” thereafter.

[47] Rather than address this issue directly, the motion judge focused on whether the Permit file was open or closed. Respectfully, nothing turns on this issue. Whether the Permit was actually closed or was merely (mistakenly) regarded as being closed, the key point is that there was no difference in the subsequent behaviour of the Township, which regarded the file as dormant and later placed it into storage.

[48] Nor does the claim that the Township had an “duty to monitor” open permit files constitute a “continuing act or omission” within the meaning of s. 15(6)(a) of

the *Act*. As *Sunset Inns* explains, the mere allegation that the defendant has some generalized ongoing duty to the plaintiff is, in and of itself, insufficient to toll the running of the ultimate limitation period, absent some successive or repeated actionable conduct on the part of the defendant.

[49] This interpretation of a “continuous act or omission” is consistent with the purposes underlying the ultimate limitation period, including the exception in s. 15(6)(a). As Attorney General Bryant explained, a central concern that led to the enactment of s. 15(2) was precisely to avoid litigation over latent defects in buildings constructed decades in the past.⁷

[50] This proceeding is a classic illustration of the difficulties associated with such belated litigation. All the individuals who were directly involved in the construction of the Dwelling are now deceased. Amongst other things, this means that it is impossible for the Township to satisfy the obligation imposed by the motion judge to “follow up” with Attwood, the deceased Permit holder, regarding the status of construction that was completed over 35 years ago. While the motion judge claimed that the documents in the Permit file “speak for themselves”, this is belied by the fact that the source of the handwritten notation on the Order to Comply is

⁷ While courts are mindful of the limits of referencing legislative history, including Hansard evidence, to determine legislative intent, the statements of Ministers and departmental officials introducing the legislation command attention and may be “of particular assistance”: *R. v. Sharma*, 2022 SCC 39, 486 D.L.R. (4th) 579, at para. 90; see also *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 36.

unknown. Moreover, the documents in the file do not tell anywhere near the complete story, including whether Helka believed that he had closed the Permit.

[51] In short, this is not a situation such as that described by the Alberta Law Reform Institute in its 1989 report, where there is repeating actionable conduct that mitigates concerns over stale evidence. Rather, this proceeding exemplifies the observation of the Alberta Court of Appeal in *Bowes*, at para. 122, to the effect that “trying to find and test evidence about events decades old is usually roulette, not a serious exploration of the truth.”

[52] The practical effect of the motion judge’s reasoning is that there is no limitation period applicable to proceedings in respect of latent defects in the Dwelling. Consider that if the defects in this case had not been discovered until 50 or even 100 years from now, the then-owners could still commence a proceeding because the Township’s failure to satisfy their “duty to monitor” would have constituted a “continuing act or omission” that had not yet ceased. Such a result runs directly contrary to the Legislature’s stated intention to preclude such litigation, and the need to “balance the plaintiff’s right to sue with the defendant’s need for certainty and finality”: *Canaccord*, at para. 24.

[53] The respondents argue that if this proceeding is statute barred, homeowners will not be able to recover damages from a municipality for failure to conduct

inspections or otherwise regulate building construction, contrary to this court's holding in *Breen*.

[54] I do not agree. The issue is not whether a property owner has a right to sue for a municipality's negligence, but for how long. In *Breen*, the municipality was found to have breached its duty of care to the plaintiffs by closing a permit file in 1993 without conducting the necessary inspections. But in *Breen* the action was commenced in February 2014. Thus, although the negligence had taken place in 1993, the ultimate limitation period did not commence running until January 2004, in accordance with s. 24(5)1 of the *Act*, and had not yet expired. *Breen* does not assist the respondents in this case since this proceeding was not commenced until February 2022, after the expiry of the ultimate limitation period on January 1, 2019.

[55] A continuing act or omission requires a repetition of actionable conduct on a continuous basis by a defendant. There is no evidence of any such actionable conduct by the Township after February 1998. Although the Permit may have technically remained open, the Township considered it closed upon the issuance of the 1988 Certificate. Thereafter, the file became dormant and eventually was moved into storage. Even assuming, without deciding, that the Township had a duty to monitor open building permits, the existence of such a duty alone cannot amount to a continuous act or omission on the part of the Township for the purposes of s. 15(6)(a).

[56] I therefore conclude that the respondents' proceeding is barred by s. 15(2) of the *Act* and would allow the appeal on that basis.

(2) The motion judge erred in finding that the Township had a “duty to monitor” open building permit files without undertaking a duty of care analysis

[57] While the above finding is sufficient to dispose of this appeal, in order to provide guidance to future courts who might be called upon to consider a “duty to monitor” open building permits, it is appropriate to clarify the nature of the analysis that would be required before recognizing such a duty.

[58] The duty to monitor recognized by the motion judge was novel. Previous appellate decisions had recognized a duty of care on a municipality to conduct inspections of buildings under construction in a non-negligent manner: see e.g., *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259, at pp. 1266-67; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, 183 D.L.R. (4th) 193, at para. 25. However, the basis of this duty was that “having made the policy decision to inspect, the municipality was bound to implement this decision with the care that would be expected of an ordinary, reasonable and prudent municipality in the same circumstances”: *Breen*, at para. 42.

[59] Although the motion judge in this case did not define the parameters of the “duty to monitor”, it clearly went beyond the existing common law duty regarding the conduct of inspections. According to the motion judge, the duty to monitor

required some form of “regular surveillance” or continuous monitoring of building permit files until such time as the building is substantially complete, the conditions for occupancy are met, and the building permit is closed.

[60] Before recognizing such a novel duty, the court was required to undertake a duty of care analysis, in accordance with the *Anns/Cooper* framework: see *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 30-31. It is well-established that the analysis proceeds in two stages. The first stage requires the recognition of a *prima facie* duty of care through the application of a proximity and foreseeability analysis. The second stage asks whether there are residual policy reasons for why a duty of care should not be recognized in the circumstances of the case: *Charlesfort Developments Limited v. Ottawa (City)*, 2021 ONCA 410, 156 O.R. (3d) 10, at para. 27, leave to appeal refused, [2021] S.C.C.A. No. 302.

[61] I make no comment on whether it would or would not be appropriate to recognize a duty to monitor in a future case, but merely observe that the motion judge erred by recognizing this novel duty without regard to this well-established legal framework.

DISPOSITION

[62] I would allow the appeal, set aside the motion judge's order, and dismiss the respondents' action as against the Township as statute barred by s. 15(2) of the *Act*.

[63] In accordance with the agreement of the parties, the respondents will pay the Township's costs in the amount of \$40,000 on an all-inclusive basis.

Released: February 25, 2025 "J.M.F."

"P.J. Monahan J.A."

"I agree. Fairburn A.C.J.O."

"I agree. J. Copeland J.A."