SUPREME COURT OF NOVA SCOTIA

Citation*: Gem Health Care Group Limited v. Amherst (Town)*, 2021 NSSC 194

Date: 20210603
Docket: Hfx No. 452615
Registry: Halifax

Between:

Gem Health Care Group Limited

Plaintiff

v.

The Town of Amherst

Defendant

v.

Mahon Architects Limited, Denis Mahon, Booth Engineering Limited, James Theakston Jr., J.R. Maskell, Beasy, Nicoll Engineering Limited

Third Parties

D E C I S I O N

Hearing Judge:	The Honourable the Late Justice M. Heather Robertson
Assigned Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	December 7, 2020, in Halifax, Nova Scotia
Assigned:	March 2, 2021
Counsel:	Joey D. Palov and Andrew Sowerby, for the plaintiff David Graves Q.C. and Michael Ng, for the defendant Selina Bath and Hilary Angrove, Articled Clerk, for Beasy, Nicoll Engineering Limited

Moir J.:

Introduction

[1] In December of 2020, the late Justice Robertson heard a motion by the plaintiff to join one of the third parties as a defendant. The judge prepared part of a draft decision in late January and early February, 2021, but she died on February 11, 2021.

[2] Acting under Rule 82.19(1), the Chief Justice requested that I complete Justice Robertson's work on the motion. I am satisfied that I can rely on the record to give a decision and to grant an order under Rule 82.19(2).

[3] The paragraphs of this decision after the subheading "Facts" and before the subheading "Determination" are, with a few minor corrections, the writing of Justice Robertson. I adopt that as part of my own reasoning.

Facts

[4] The plaintiff asks the court to join the third party, Beasy, Nicoll Engineering Limited, as a defendant.

[5] Gem seeks to recover damages resulting from a flood at Gem's residential care facility, Centennial Villa, located at 258 Church Street in Amherst. The flood occurred on or about June 22, 2015, allegedly because a stormwater drainage system failed to adequately drain stormwater from the property after the storm.

[6] Gem brought action on June 20, 2016, against Amherst, stating at para. 12:

> Amherst was negligent in:
>
> (a) Approving construction of Centennial Villa at its present elevation and on the Property as presently graded;
>
> (b) Failing to properly design, construct, operated, maintain, repair and remedy the stormwater system and defects in the stormwater system;
>
> (c) Failing to properly design, construct, operate, maintain and report the culvert adjacent to Centennial Villa, which resulted in a culvert that Amherst knew or should have known was of inadequate size for its purposes;
>
> (d) Approving the extension of the culvert adjacent to Centennial Villa;

> (e) Making changes to the stormwater system that increased stormwater flow to the culvert adjacent to Centennial Villa when Amherst knew or should have known the consequence would be flooding of the Property and damage to Centennial Villa.
>
> (f) Failing to make appropriate changes to the culvert adjacent to Centennial Villa in conjunction with changes to the rest of the stormwater system to address the increased stormwater flow to the culvert adjacent to Centennial Villa; and
>
> (g) Such other negligence as my appear.

[7] In response, Amherst issued a demand for particulars, demanding particulars and date of the building permits issued for 258 Church Street, form of approvals granted, and further particulars of the culvert that the plaintiff asserts damaged the property, as well as details of extensions to the culvert with approval dates. Amherst also sought any changes made to the stormwater system, dates, and location. Gem described the culvert under 258 Church Street. Amherst filed its defence on April 13, 2017.

[8] Amherst pleads that the losses were caused *inter alia* by negligence of Gem or professionals engaged by Gem, with respect to the design, installation, or extension of culverts adjacent to Centennial Villa. In particular they plead:

> 7. With specific regard to paragraph 5 of the Statement of Claim:
>
> (a) At the time of Centennial Villa's construction there was no requirement for the Town to inspect or approve Centennial Villa's grading or elevations.
>
> (b) The grading and elevation designs and details of Centennial Villa were the responsibility of GEM and/or the professionals engaged by GEM with respect to the design and/or construction of Centennial Villa.
>
> (c) If the grading, elevation or any other design or construction detail of Centennial Villa was improper and/or caused or contributed to GEM's alleged losses, liability for same lies with GEM itself and/or the professionals engaged by GEM with respect to the design and/or construction of Centennial Villa.
>
> 8. With specific regard to paragraph 6 of the Statement of Claim:
>
> (a) The Town did approve a request, by GEM, for permission to infill an open ditch and install 150 feet of 24 inch diameter culvert along Church Street, Amherst, adjacent to Centennial Villa. The diameter culvert approved by the Town was

> reasonable and appropriate based upon the Town's storm water system planning policies and practices.
>
> (b) There was no requirement for the Town to, and the Town in fact did not, perform or inspect any of the work associated with the installation or extension of any culvert adjacent to Centennial Villa.
>
> (c) The work, and the inspection of the work, associated with the installation and/or extension of any culvert adjacent to Centennial Villa was the sole responsibility of GEM and/or the professionals engaged by GEM.
>
> (d) If the work, or the inspection of the work, associated with the installation and/or extension of any culvert adjacent to Centennial Villa was improper and/or caused or contributed to GEM's alleged losses, which is denied, liability for same lies with GEM and/or the professionals engaged by GEM.

[9] On April 18, 2017, Amherst commenced third party proceedings against an architect and several engineers. Beasy Nicoll is the only third party still participating in the proceeding. It entered a defence as a third party on February 20, 2018, issuing a denial of the claim.

[10] Disclosure by the plaintiff, defendant and third party, took place from August to November 2017. Discoveries ensued in 2018.

[11] The affidavit of Colin Gale, one of the solicitors for the plaintiff, outlines the particulars of document disclosure and discovery proceedings, leading to the plaintiff's knowledge of Beasy Nicoll's role in the construction of Centennial Villa.

[12] Syed Hossain, the owner of Gem, testified in his discovery evidence that he had lost many relevant documents relating to the construction and maintenance of Centennial Villa in the flood of June 2015. He also stated he was unaware of whether Beasy Nicoll had any involvement in the decision to install a culvert adjacent to Centennial Villa or divert stormwater.

[13] Mr. Patterson, Amherst's town engineer, gave evidence about who "would have decided what size of culvert was required, and approved its installation."

[14] Gem relies on Mr. Murray Nicoll's discovery evidence on December 29, 2018, at which he admitted that it was his decision that the culvert adjacent to Centennial Villa should be 24 inches in diameter.

[15] Given this discovery evidence, Gem asks the court that Beasy Nicoll be joined as a defendant and Gem be allowed to amend its pleadings and further particularize its claim against it.

Issue

[16] Has the limitation period against Beasy Nicoll expired?

Law and Argument

[17] The plaintiff, relies on the concept of "discoverability" saying the action was initiated after the new *Limitation of Actions Act* ("*LAA*") came into force on September 1, 2015, therefore the new *LAA* applies with its transitional provisions of s. 23:

> (1) In this Section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.

[18] Gem argues the loss having occurred on June 22, 2015, and no action having been started by September 1, 2015, s. 23(2) stipulates s. 23(3) applies to this claim.

[19] If the limitation period has not expired, Gem says they should be allowed to amend their pleadings pursuant to Rule 83 in concert with Rule 35.

> 83.01 Scope of Rule 83
>
> (1) This Rule allows a party to amend certain documents the party files.
>
> (2) This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.

(3) A party may amend a court document filed by the party, in accordance with this Rule.

83.02 Amendment of notice in an action

(1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.

(2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.

83.11 Amendment by judge

(1) A judge may give permission to amend a court document at any time.

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

(3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:

(a) the material facts supporting the cause are pleaded;

(b) the amendment merely identifies, or better describes, the cause.

35.08 Judge joining party

(1) A judge may join a person as a party in a proceeding at any stage of the proceeding.

(5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[20] Lastly, Gem argues that even if the limitation period has expired Gem should be permitted to amend its pleadings to name Beasy Nicoll as a defendant pursuant to s. 22 of the *LAA* and Rule 3.11(3) because Beasy Nicoll is already a party to the litigation and further that the material facts supporting the cause are pleaded and the amendment merely identifies or better describes the cause. They rely on s. 22 (a)(b)(c):

> Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim
>
> > (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
> >
> > (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or
> >
> > (c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

[21] Further, they say s.22(a) does not change the parties' capacity as this section they say does not distinguish between a defendant and a third party defendant, or in any event they say Beasy Nicoll would not be prejudiced.

[22] The third party Beasy Nicoll opposes this motion and argues that pursuant to Rule 35.08(5):

> (5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[23] *Civil Procedure Rule* 35 must be read in conjunction with Rule 83 which provides in Rule 83.04:

> (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> > (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

(b) the expiry precludes the claim;

(c) the person protected by the limitation period is entitled to enforce it.

and

83.11 Amendment by judge

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

[24] Beasy Nicoll relies on *Automattic Inc. v. Trout Point Lodge Ltd*., 2017 NSCA 52:

> [38] The Rules are clear and do not require elaboration – simply put, you cannot add a person as a party to the proceeding when a limitation period or extended limitation period has expired. It follows that a motions judge must determine the applicable limitation period before adding a party.
>
> [39] I agree with the comments of Bourgeois, J. (as she was then) in *Sweeney-Cummingham v. I.B.G. Canada Ltd*., 2013 NSSC 415, where she held that the new Rules specifically direct motions judges to consider limitation issues on motions to add parties:
>
> > [44] In her oral submission, counsel for the Plaintiffs submit that even if the Court finds that a limitation period and extended limitation has passed, the Court still retains a general discretion to amend the pleadings. With respect, I disagree. The new Rules specifically direct the Court to consider limitation issues on motions to add a party. The wording in Rules 35.08(5) and 83.04(2) are clear and in my view constitute a mandatory direction to the Court. Pursuant to Rule 2.03(3), the Court's general discretion cannot be used to override such a provision.
>
> [Emphasis added]
>
> [40] Although Bourgeois, J. was referring to Rule 83.04(2) which requires that a judge must set aside an amendment or part of an amendment against a new party where a limitation period has expired, her analysis applies equally to Rule 83.11(2) which prevents a judge from adding a party to a proceeding where the limitation period has expired.
>
> [41] Wood, J. following Sweeney in *Thornton v. RBC General Insurance Company*, 2014 NSSC 215 puts it succinctly:
>
> > [59] ... With a motion to amend the proceeding to add a new defendant under Civil Procedure Rule 35.08, the Court must consider whether the limitation period has expired as of the date of the motion. ...
>
> [42] The motions judge failed to ascertain the applicable limitation period and by failing to do so, she erred in allowing Ryan Markel to be added as a party. The

> Rules are mandatory and do not leave any residual discretion in a motions judge to add defendants without making that inquiry.

What is the Applicable Limitation Period?

[25] General Limitation Periods – *LLA*:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

[26] Beasy Nicoll also rely on *Butler v. Southam Inc.*, 2001 NSCA 121 Cromwell JA (as he then was) writing at paras. 127-129:

> [127] The main purposes of limitation periods are to provide certainty and finality and to help assure the cogency of evidence on which matters will be judged: see generally Graeme Mew, *The Law of Limitations* (1991) at 7- 8. These purposes were well expressed by the Ontario Law Reform Commission in its **Report on Limitation of Actions** (1969) at page 9:
>
> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. ... Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter ... Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace."
>
> [128] The degree to which these purposes are relevant may vary depending on the particular limitation period in issue and on the circumstances of a particular case. For example, in the case of a fairly long time limit such as the six year period for contract actions, the cogency of evidence objective is obviously very much a secondary consideration. While the existence of even this lengthy period will facilitate the preservation of relevant records, the time limit permits an action to be commenced long after the events giving rise to it occurred. The passage of time permitted by such a lengthy limitation period will likely adversely affect witnesses' availability and memory of the relevant events. However, where the time limit is shorter, assuring that cogent evidence is available is likely to be a more important legislative objective. In addition to this general legislative purpose, assuring the cogency of evidence may be a significant consideration on the facts of particular cases. For example, it may be clear in some cases that important evidence has been

> lost since the expiry of the limitation period thus making the cogency of evidence objective highly relevant in the particular situation.
>
> [129] The notice and limitation periods under the **Defamation Act** in issue on this appeal are very short: three and six months respectively. It is reasonable to conclude, therefore, that assuring the cogency of evidence is an important statutory objective. The learned chambers judge, in a passage of his reasons with which I completely agree, referred to the special importance of this as follows:
>
> As well, it is undoubtedly directed to enabling the newspaper to prepare a defence to a claim when the sources of the information, including people interviewed, informants, notes, tapes and other materials are still available and the subject matter is fresh. It is obvious that masses of information are fed into the input side of a daily newspaper to support what is actually published and equally obvious that there is little archival space to retain this information for lengthy periods.
>
> (Emphasis added)

[27] Beasy Nicoll's counsel points out that the *LAA* in *Butler* was replaced in Nova Scotia in 2014 and upon its introduction the Honourable Lena Diab, spoke to the proposed bill:

> HON. LENA DIAB: Madam Speaker, I move that Bill No. 64, Limitation of Actions Act be now read a second time. It is my pleasure to rise this afternoon and give the honourable members of this House as well as the general public a few of the reasons why this Act needs to be amended at this time. The current legislation is not only archaic, it is outdated and it is confusing. It hasn't been amended probably since its inception, so we are talking over 100-plus years ago.
>
> It sets out various time limits to bring actions forward, depending on the basis of the claim. I am not going to bore everybody in the House with various time limits that are set out for each and every claim, but there are a number of them, depending on which action a person wishes to launch.
>
> The current legislation is creating uncertainty and confusion on both sides and can lead to complex and costly litigation. This is true for lawyers. It's true for self-represented litigants, so these are people who are representing themselves in court, and for companies that are operating in multiple jurisdictions where the legislation may be different across various provinces in Canada.
>
> Madam Speaker, the new bill proposes standard limitation periods for all claims. Specifically, it establishes a two-year, basic limitation period for most civil claims, such as those that involve personal injury, breach of contract, et cetera. What that means is you have got two years to start an action from the date a person discovers that they have a legal action. **It also creates an ultimate limitation period of 15 years for legal claims which may not be discovered right away. What that means is, 15 years from the day on which the act or the omission, which the act is based upon, has occurred. That is the ultimate limitation period.** [Emphasis added]

> This is in line with what is happening in many other jurisdictions. It's also in line with the model put forward by a national law reform body called The Uniform Law Conference of Canada, that proposes a more modern model for all jurisdictions. New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have already adopted modern limitation legislation. We want to develop a consistent approach to limitations law across the country.
>
> Perhaps most importantly, Madam Speaker, this bill does not impose time limits for victims of sexual assault and domestic violence who want to file law suits. There is one exception in the bill where time limits will not apply. The existing Act gives a one-year limitation period for sexual assault claims. There are a variety of exceptions that could suspend the limitation period, but they are difficult to understand and to apply. So I'm pleased that we are able to put forward a bill that better protects and respects the rights of victims in this case.
>
> In addition to eliminating time limits for victims of sexual assault and domestic violence, the bill also does not set limits for assaults involving dependants or people in intimate relationships. As in the current Act, there will be no time limits for any claims involving children. This means limitation periods are suspended until children turn the age of 19. Time periods also don't run while a claimant is incapacitated, so the ultimate limitation period is suspended if there is willful concealment of a wrong. That is the case at the moment, as well.
>
> Finally, Madam Speaker, I want to highlight the benefits for small businesses and professionals who may be involved in lawsuits. I want to say that if someone has done something wrong, they should be held accountable. **However, the law should also set limits so that people cannot be sued into infinity. That is where the 15-year ultimate limitation period comes in. This will allow businesses and professionals to have more certainty and long-term stability.** [Emphasis added]
>
> The new bill strikes a fair balance that respects the rights of everyone involved. It will also support internal trade and labour mobility among provinces by making our laws similar to other jurisdictions. Again, as I said, our closest neighbour, New Brunswick, has already adopted this more modern legislation.
>
> To summarize, this legislation is about creating laws that are more consistent and clear. These are laws that will better support vulnerable Nova Scotians, small business owners and professionals. Thank you very much, Madam Speaker. I look forward to comments from my colleagues in the House.

[28] The plaintiff argues that the limitation period is two years from the day on which the claim is discovered and the third party argues that the limitation period is 15 years from the day the act or omission on which the claim is based occurred i.e. the design of the 24-inch culvert and completion of construction of the culvert between 1978-1989, more than 25 years before the plaintiff suffered any damage in a flood in 2015.

[29] Beasy Nicoll argues the longest possible limitation period allowed pursuant to s. 8(1)(b) expired in 2003 and that the plaintiff's reliance on discoverability is misplaced and ignores s. 8(1)(b) of the *Act*.

[30] There are two possible limitation periods; two years from the date the claim was discovered or 15 years from the day on which the act or omission on which the claim is based occurred.

[31] Beasy Nicoll's work relating to this culvert was completed with its design in 1987 and certainly by 1989, when its designed culvert was installed and constructed. Fifteen years from that date would be no later than 2004.

[32] Logically "the earlier of" the two dates means when the first of the two limitations expires, whichever happens first or earliest the claim expires and with it the claimant's opportunity to pursue the claim.

[33] The flood occurred in 2015, more than 25 years after Beasy Nicoll's involvement in the design and construction of the culvert at Centennial Villa.

[34] 2014 is well before the claim was "discovered" and is the earlier of the two dates.

Determination

[35] Following the impetus of the Uniform Law Conference of Canada and legislative reforms in Alberta, Saskatchewan, Ontario, and New Brunswick, our legislature modernized Nova Scotia limitations law.

[36] The *Limitation of Actions Act* S.N.S. 2014, c.35 repealed s.2 to s.9 of the *Limitation of Actions Act* R.S.N.S. 1989, c.258 and turned the old limitations statute into the *Real Property Limitations Act*. The new *Limitation of Actions Act* limiting actions for causes other than in real property was created by a couple of statues that came into force on September 1, 2015: S.N.S. 2014, c.35 and S.N.S. 2015, c.22.

[37] The legislature created two standardized limits. The uniformity commissioners referred to one of these as "basic" and the other as "ultimate": Uniform Law Conference of Canada *Uniform Limitations Act* (2005) p. 3-5. The basic limit incorporates the judicial concept of discoverability formulated under the old limitations legislation. A claim may not be brought after "two years from the day on which the claim is discovered": s.8(1)(a). The ultimate limit applies no matter whether the claim is discovered, "fifteen years from the day on which the act or

omission on which the claim is based occurred": s.8(1)(b). (There are, of course, exceptions for children, incapacity, taxes and fines, sexual assault, and dependency: s.18, 19, 10 and 11. And, provision is made for special circumstances sometimes recognized in the old law: s.12, 13, 14, 15, 16, 17, 20, and 21.)

[38] This court has interpreted the new *Limitation of Actions Act* several times. Two decisions that deal specifically with s.23 provide guidance for the present issue. They are Justice Hood's decision in *Mattatall Estate v. Whitehead*, 2016 NSSC 334 and Justice Chipman's decision in *Dyack v. Lincoln*, 2017 NSSC 187.

[39] Jason Whitehead killed James Mattatall in a fight outside a tavern on Agricola Street. Mr. Mattatall's parents sued Whitehead and the company that owned the tavern. Mr. Whitehead brought a third party claim against one Daniel Mattatall. More than four years after the fight, the tavern sought to also claim against Daniel Mattatall as a third party.

[40] The *Limitation of Actions Act* came into effect after the suit was started. Justice Hood held that s.23 did not apply. She said, at para. 13 of *Mattatall Estate*:

> Section 23(2) deals with claims where no action has been commenced. Although a third party action may be considered as a separate action brought by a defendant against a third party, it is part of the original action. *Civil Procedure Rule* 4.01(c) refers to a third party claim as being "within an action". [The tavern's] claim against Daniel Mattatall is for contribution and indemnity and can only exist as part of the original action.

[41] Justice Chipman described this as "Justice Hood's broad interpretation of s.23(2)" at para. 34 of *Dyack v. Lincoln*. He applied that broad interpretation at para. 40.

[42] Dr. Dyack underwent surgery three years before the new *Limitation of Actions Act* came into effect. A year before the new statute, he sued for assault based on lack of informed consent. Afterwards, he sought an amendment to include medical malpractice.

[43] As a consequence of the broad interpretation of s.23(2), Justice Chipman held the new statue did not apply. He said at para. 56:

> The amendments proposed by the Plaintiff raise new causes of action. Since a proceeding has already been commenced against the Defendant for acts or omissions relating to his treatment of the Plaintiff, I find that the transition provisions of the new *Limitation of Actions Act* do not apply.

[44] Words matter. The Supreme Court of Canada chose the words-in-context approach of Professor Driedger and rejected the approach of Professor Sullivan in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21. Purpose supplies context. It does not override the legislature's words, even if a judge thinks he knows what the legislator meant to say or the Attorney-General tells the Legislative Assembly what it means to say.

[45] So, the transitional provisions of s.23 do not apply. What does? *Mattatall Estate v. Whitehead* and *Dyack v. Lincoln* apply the old statute. The decisions say only "According to the extended limitation period set out in s.3(6) of the old *Act* is applicable." (*Mattatall Estate*, para. 14) and "Accordingly, I am of the view that the former *Limitation of Actions Act* applies, and I will consider disallowance of the limitations defence pursuant to s.3(2)." Justice Robertson suggested a different conclusion when she wrote para. 30 above: the limitations in the new statute apply in the absence of a transitional provision to the contrary.

[46] Subsection 3(2) of the old limitations statue gave the court a discretion to permit an action to proceed even if it was started after expiry of a limitation period. The judge must have "regard to the degree to which"

> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

[47] Subsection 23(1) of the *Interpretation Act* provides "Where an enactment is repealed, the repeal does not … affect an investigation, legal proceeding or remedy concerning any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment."

[48] In the absence of express transitional provisions applying the new statute to old causes, the new *Limitation of Actions Act* does not retrospectively deprive a claimant of the judicial discretion in the old s.3(2) if it was available to the claimant before September 1, 2015. For a discussion of the difficulties in some cases concerning past operation of repealed statues, see Elmer Driedger Q.C. "Statues: Retroactive, Retrospective Reflections" (1978), 56 C.R. Rev. 264. In cases of this kind, retrospective operation is not applicable. The discretion persists so long as it arose before the effective date and is not covered by the transitional provisions of the new statute.

[49] Gem Health Care established the threshold in s.3(2)(a) and (b). Without my exercise of the discretion, Gem would lose a right to claim against Beasy Nicoll on the very same basis as the parties will go to trial on the municipality's third party claim. Factors in s.3(4) (a), (c), and (f) are applicable. They support joining Beasy Nicoll. As regards (a), Beasy Nicoll's involvement was brought to Gem's knowledge in 2017 and earlier knowledge is not proved. As regards (c), the length of time between the construction and the flood makes evidence "likely to be less cogent". However, that evidence is going to be advanced in any event under the third party claim, and the trial judge will have to assess its cogency. As regards (f), Gem acted promptly once Beasy Nicoll's involvement became clear.

Conclusion

[50] I allow the plaintiff's motion to join Beasy Nicoll as a defendant and to amend the originating pleadings. I have a request about costs and a draft order.

[51] Last January, I resigned as a judge effective June 30, 2021. Subsection 36(2) of the *Judicature Act* allows me eight weeks after retirement to give judgment and grant an order. I request counsel soon deliver to me a draft order with consents as to form and, if there is no agreement on costs, submissions on that subject.

J.