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## **A Commentary on Recent Cases and Relevant Legal Issues**

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### **1. Announcements – Michelle Brodey Added to List of “Best Lawyers in Canada”.**

We are proud to announce that Michelle Brodey has been selected by her peers to be included in the 2008 edition of *The Best Lawyers in Canada* in the specialty of Health Care Law.

### **2. Engineers - Court of Appeal Upholds Dismissal Against Engineer Named on Firm’s Certificate of Authorization.**

As you may recall from a previous edition of Gibbs Law, our firm was successful on a motion to dismiss an action against an engineer personally, arising from his firm’s alleged negligence in the preparation of a Master Drainage Study.

The engineer had no direct involvement in the project, but was sued personally by the developer on the basis that he was a designated supervising engineer named in his firm’s Certificate of Authorization.

The motions judge agreed with our position that no private law duty of care was created by the relevant provisions of the *Professional Engineers Act* (and Regulations), and that liability could not be imposed upon a designated supervising

engineer merely by virtue of his inclusion on the firm’s Certificate of Authorization.

In the result, the motions judge concluded that there was no genuine issue for trial with respect to the engineer’s personal liability and dismissed the action as against him, awarding significant costs of the motion.

The developer subsequently appealed the motion judge’s decision to the Ontario Court of Appeal. The appeal was heard in September 2007 and was dismissed, with costs again awarded in favour of the engineer. In a brief endorsement, the Court of Appeal agreed with the motions judge that neither the *Professional Engineers Act* nor the Regulations created a private duty of care.

This decision will not impact on the personal liability that engineers can potentially attract when specifically engaged on a project on behalf of their firms. However, the Court of Appeal’s confirmation that designated engineers do not face personal liability merely by virtue of their inclusion on a Certificate of Authorization should be seen as a small, but final, victory for the engineering profession.

For more information regarding this decision, please contact Peter Mitchell.



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### 3. Homeowners Resist *Arbitration Act Stay* – *Radewych v. Brookfield Homes.*

In October 2007, our firm successfully argued an appeal on behalf of two homeowners before the Ontario Court of Appeal.

The Plaintiff homeowners had sued their residential builder for damages allegedly caused by the deficient exterior insulation finish system installed in their new home. Also named in the action were the architect and the subcontractor who installed the system.

The builder brought a motion to stay the Plaintiffs' action on the basis that their claims were subject to arbitration under s. 17(4) of the *Ontario New Home Warranties Plan Act* (the "Act").

In dismissing the builder's motion, the motions judge concluded that the *Act* dealt only with warranty and deposit refund claims but not with other causes of action that extended beyond the agreement of purchase and sale between the Plaintiffs and the builder. In addition to claiming for breach of warranty, the Plaintiffs had also made claims in negligence as against the builder, the architect, and the cladding subcontractor. The motions judge found that these claims were not encompassed by the provisions of the *Act* providing for mandatory arbitration.

As there were parts of the Plaintiffs' claim that did arise under the agreement of purchase and sale and would therefore be subject to the arbitration clause provided for in the *Act*, the Court could have granted a partial stay in respect of those claims under s. 7 of the *Arbitration Act*. However, the motions judge declined to grant that relief to the builder, stating that a partial stay could potentially delay resolution of the entire matter. It could also lead to a significant duplication of resources and could result in inconsistent findings. On that basis, the Court concluded that it was preferable to allow all of the Plaintiffs' claims to be determined in one proceeding, being a civil action.

The builder subsequently appealed the decision to the Ontario Court of Appeal, but was unsuccessful in its bid to stay the Plaintiffs' claim. In dismissing the builder's appeal, the Court of Appeal substantially agreed with the motion judge's interpretation of the arbitration clause under the *Act*, confirming that it does not necessarily encompass claims in negligence against the builder.

The Court of Appeal also pointed out that, in any event, because the homeowners' claim involved other parties in respect of whom the arbitration clause did not apply (e.g., the architect and subcontractor), the motions judge was entitled to order the entire claim to proceed to trial in the ordinary course pursuant to his discretion under s. 7(5) of the *Arbitration Act*. Further, the Court held that the judge's decision in that regard was not

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appealable pursuant to s. 7(6) of the *Arbitration Act*.

This decision now puts to rest the argument that claims by homeowners against new home builders must of necessity proceed by way of arbitration rather than by way of civil action.

For more information regarding this decision, please contact Peter Mitchell.

#### **4. Disciplinary Matters – The Role of Independent Counsel.**

In August 2007, the Divisional Court set aside findings of professional misconduct made by the Discipline Committee of the Ontario Association of Architects (OAA).<sup>1</sup>

The architect had been found guilty of professional misconduct for soliciting work with respect to the design of a student residence for a post-secondary institution, when he knew that another member or holder had been engaged for the same purpose by the same client.

On appeal to the Divisional Court, the architect advanced several arguments. One of those was that independent counsel retained by the Discipline Committee to give advice during the hearing went far beyond the role of counsel advising the Committee.

The Divisional Court agreed with the architect and concluded that, while the

Discipline Committee was permitted to obtain legal advice during the hearing, it could not allow that counsel take over the conduct of the hearing, which occurred in this case.

From the transcripts of the hearing, the Divisional Court identified numerous instances when counsel to the Committee interrupted the submissions of the architect's counsel and purported to speak for the Committee (lending the appearance of being its chairperson). There were several other occasions when the Committee's counsel engaged in heated arguments with the architect's counsel.

The Divisional Court reiterated its views articulated in a previous case on similar facts:

In our view, it is intolerable that a man faced with a disciplinary hearing should have to face not only the Discipline Committee that has been provided for by the Legislature but, in addition, counsel hired by it who runs the hearing, makes decisions for the Committee, and makes those decisions without even consulting the Committee. A person facing such a hearing would not know whether he has been tried by the Committee appointed under the *Act* or by someone hired to assist it.

In the result, the Divisional Court concluded that due to the conduct of counsel for the Discipline Committee, the architect did not

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<sup>1</sup> *Yallowega v. OAA*, 2007 Can LII 37762 (ON S.C.D.C.).

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receive a fair hearing. The findings of guilt were therefore set aside, and the matter was returned for a hearing before a differently-constituted Committee.

This case demonstrates that while professional regulatory bodies have the right to judge their own members on issues of professional conduct, they must do so in accordance with the principles of natural justice by affording due process and a fair hearing.

### **5. Settlements - Court of Appeal Upholds Full and Final Release Obtained by Employer.**

In August 2007, the Ontario Court of Appeal overturned a trial decision and upheld a full and final release obtained by an employer in the context of a termination<sup>2</sup>.

The employee was a corporate in-house lawyer and was employed for a period of eighteen months before he was terminated. His employer offered a severance package of three months' pay in lieu of notice, provided that he sign a release, a typical request made by many employers. The employee accepted the offer and signed the release on the spot.

Two weeks later, the employee obtained employment in a lesser paying position. Shortly thereafter, he sued his former employer, alleging that the settlement and

release were unconscionable. He also pleaded undue influence and duress.

At trial, the Court found in favour of the employee and set aside the release. On appeal, however, the Court of Appeal overturned the trial judge's findings. In doing so, the Court of Appeal noted that a party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle because, while a transaction might later turn out to be foolhardy, burdensome or improvident for one of the parties, this is not enough to "cast the mantle of unconscionability over the shoulders of the other party<sup>3</sup>."

The Court of Appeal noted that the following four elements are generally necessary in order to find a transaction unconscionable:

1. The transaction was grossly unfair and improvident; and
2. The victim did not have independent legal advice or suitable advice; and
3. There was an overwhelming imbalance of bargaining power caused by the victim's ignorance of business, blindness, deafness, illness, senility or similar disability; and

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<sup>2</sup> *Titus v. Cooke Enterprises Inc.*, 2007 ONCA 573 (Can LII).

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<sup>3</sup> *Fridman, The Law of Contract in Canada* (Fifth Edition), p. 320.

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4. The other party knowingly took advantage of that vulnerability.<sup>4</sup>

The Court of Appeal concluded that the employee had failed to bring himself within any of the four elements described above. In particular, the offer of three months' pay was not grossly unfair having regard to his eighteen-month tenure, nor was linking the settlement offer to the release. Further, the employee was a senior lawyer with extensive experience in contract and employment law. He neither wanted nor needed legal advice.

With respect to the imbalance in bargaining power (which the employee argued was created due to the death of his father three weeks before termination and his high debt load), the Court of Appeal concluded that those aspects did not rise to the level of creating an overwhelming power imbalance. Moreover, while recognizing that there exists an inherent imbalance in bargaining power as between employers and employees in all termination situations, this was diminished in this particular case by the fact that the employee was a senior lawyer, well-versed in employment law.

Finally, the Court of Appeal concluded that the employer did not take advantage of the employee's vulnerability. The employer had sought legal advice regarding an appropriate termination package. The offer was not unreasonable, and there was nothing

unprofessional or unlawful about the manner in which the termination was handled.

In the result, the Court of Appeal rejected the employee's arguments, upheld the full and final release, and dismissed the action against the employer.

While this case arose specifically in the context of employment, the principles relating to unconscionability articulated by the Court of Appeal apply equally to a host of other situations and transactions, including settlements between insurers and claimants, agreements of purchase and sale, and construction contracts. However, it will be rare that an unrepresented party is a lawyer (as was the case here), who was undoubtedly held to a higher standard than a lay person would have been in similar circumstances.

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<sup>4</sup> *Cain v. Clarica Life Insurance Co.* 2005 (Alta. C.A.).

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