

A Commentary on Recent Cases and Relevant Legal Issues

1. Ontario Court of Appeal Overrules Lower Court Decision on Ultimate 15-year Limitation Period (*YCC #382 v. JAY-M Holdings*).

On January 29, 2007, the Ontario Court of Appeal issued its highly-anticipated decision in an appeal of a matter reported in our March 2006 newsletter, dealing with important limitation period issues under the *Limitations Act, 2002* (the “*Act*”).

Briefly, the facts are as follows: In May 2004, YCC #382 (“York”) discovered that the condominium building’s demising walls were not fire-rated in accordance with the *Building Code*. One year later, York sued the developer, alleging negligence in the construction of the building, and also sued the City, alleging negligent inspection. The parties agreed that the latest date on which any negligence by the City could have occurred was February 1978.

The *Act* came into force on January 1, 2004, shortly before the claim was discovered in May 2004 and some twenty-six years after the alleged negligence had occurred, raising issues about the new fifteen-year ultimate limitation period provided for in the *Act*.

The City therefore brought a motion to strike out York’s claim on the grounds that it was statute-barred due to the expiry of the limitation period. The motions judge ruled

in favour of the City and struck out York’s claim.

In doing so, the motions judge considered the transitional provisions in the *Act* and found there to be an ambiguity in Section 24(5). That section provides that if a claim was not discovered before January 1, 2004, when the new *Act* was implemented, the *Act* applied as if the negligent act or omission had taken place on January 1, 2004.

The motions judge also found that the ultimate fifteen-year limitation period contained in Section 15 of the *Act* trumped the transitional provisions contained in Section 24. Section 15 provides that even if a limitation period established by any other section of the *Act* has not expired, no proceeding shall be commenced in respect of that claim after the expiry of the ultimate fifteen-year limitation period.

On appeal to the Ontario Court of Appeal, the sole issue before the Court was whether the claim for an alleged act of negligence that had taken place more than fifteen years earlier, but which had only been allegedly discovered in May 2004, was barred under the *Act*.

In its analysis, the Court of Appeal noted that the overall purpose of the *Act* is to balance the right of access to justice against the right to certainty and finality in the organization of one’s affairs. As for the

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ultimate fifteen-year limitation period, its purpose is to address the interests of claimants with undiscovered causes of action while at the same time preventing the indefinite postponement of limitation periods and the associated costs of record-keeping and insurance in the event of continuous exposure to liability.

While the motions judge had considered the purpose of both the *Act* and the ultimate limitation period, the Court of Appeal noted that he had failed to specifically consider the purpose of the transitional provisions; i.e., to set out where the new legislation applies or does not apply, and how it applies to situations that arose before the legislation's enactment.

It was also noted by the Court of Appeal that the motions judge had relied on the interpretation of the ultimate limitation period and its relationship to the discoverability principle in British Columbia and Alberta, failing to take into account significant differences between their legislation and the transitional provisions in Ontario.

The Court of Appeal rejected the motions judge's finding that York's interpretation would lead to an absurd result and found the lower Court's analysis on that issue to be flawed.

In the end result, the Court of Appeal concluded that the transitional rule prescribed by s. 24(5) effectively created a 15-year transition period for undiscovered claims (which started to run on January 1, 2004). The effect of this interpretation was

to allow the twenty-seven-year-old claim to go forward. While such a transition provision might be regarded as generous, the Court interpreted it as part of the *Act's* attempt to ensure that, with respect to pre-existing situations, access to justice was preserved while limiting liability on a go-forward basis.

York's appeal was therefore allowed, and the dismissal of its claim against the City was set aside.

The Court of Appeal's ruling does not affect cases where the alleged negligence occurred prior to January 1, 2004 and where the cause of action has already been "discovered" by that date (i.e., where the claimant knows or ought to know that damage has occurred and that the damage was caused or contributed to by an act or omission of the alleged wrongdoer).

However, for cases where the cause of action has not yet been "discovered" as of January 1, 2004, regardless of how long ago the alleged negligence actually took place, it will be deemed to have occurred on January 1, 2004, such that the ultimate fifteen-year limitation period will start to run on that date.

2. Engineer Named on Firm's Certificate of Authorization Wins Motion to Dismiss Action against him Personally.

In December 2006, our firm successfully argued a summary judgment motion and

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persuaded the Ontario Superior Court of Justice to dismiss an action as against an engineer personally, arising from his firm's alleged negligence in the preparation of a Master Drainage Study.

The engineer had no involvement whatsoever 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 developer who sued the engineer and his firm took the position that there was a duty on each of the engineers named in the Certificate of Authorization to personally supervise each project handled by the firm.

The motions judge disagreed with the developer's position and concluded that the purpose of the legislative requirement for engineering firms to designate the person(s) supervising and assuming responsibility for the firm's services was to protect the public at large by ensuring that the PEO's disciplinary process extended to engineers offering their engineering services to the public through a corporation or a firm.

The motions judge agreed with our position on behalf of the engineer 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.

The Court recognized that there were sound policy reasons for not imposing such a duty.

In particular, imposing a duty of care upon the designated individuals could result in virtually unlimited liability. It could also lead to the bizarre result that each of them would be personally obligated to supervise each and every project undertaken by the firm, which would be a physically impossible task to perform.

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

While this decision may not impact on the personal liability that engineers can attract when engaged in specific projects on behalf of their firms, the Court's conclusion that "designated" engineers do not face personal liability merely by virtue of their inclusion on a Certificate of Authorization should nonetheless be seen as one small victory for the engineering profession.

For further information about this decision, please contact Peter Mitchell at (416) 361-0024, ext. 224, who successfully argued the motion on behalf of the engineer.

3. Engineering - Ontario Court Permits Foreign Engineer to Testify as Expert Witness at Trial.

In the December 15, 2006 decision of *Quattrocchi v. Chiquita*, the Superior Court of Justice allowed a Defendant to call an

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American engineer to give expert evidence at trial on the origins and cause of a warehouse fire.

The Plaintiff objected to the calling of the proposed expert on the basis that he was not properly qualified to give opinion evidence. In particular, he was not licensed in Ontario, and his testimony would be tantamount to carrying on the practice of engineering contrary to the *Professional Engineers Act*. With respect to the latter, the Plaintiff relied on section 12 of the *Act*, which provides that “no person shall engage in the practice of professional engineering...unless the person is the holder of a license, a temporary license, a provisional license or a limited license.”

The trial judge dismissed the Plaintiff’s objection and ruled that licensure in Ontario was not a prerequisite to admitting the expert’s evidence.

The proper question to consider was whether the individual had the necessary expertise (i.e., knowledge, skill, experience, training and education) to assist the Court in a particular field or matter. The mere fact that the individual was not licensed in a particular jurisdiction did not necessarily impact upon his competency, although the lack of licence could be a consideration as to the weight that the Court should attach to the opinion evidence.

The Plaintiff also objected to the evidence on the basis that the expert’s testimony would fall within section 1 of the *Act*, such that he would be engaging in the “practice of professional engineering” without a licence.

Section 1 defines the “practice of professional engineering” as:

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 but does not include practising as a natural scientist.

The trial judge noted that this was a liability trial arising from a private dispute between the owner/lessee of a tractor trailer and the owner of a warehouse in respect of a fire loss. The proposed evidence related to the origin and cause of the fire. While that evidence would likely involve the application of engineering principles, it was doubtful whether the proposed evidence would involve the “safeguarding of life, health, property or the public welfare”.

There being no evidence that the proposed evidence would fall within s. 1 of the *Act*, the Court dismissed the Plaintiff’s objection to the evidence on this basis as well. In so doing, the trial judge distinguished the facts in the present case from the 2003 decision of *Weslee Mann-Tattersal v. City of Hamilton*, which came to the opposite conclusion.

In the *Weslee* decision, the Court upheld the very same objection regarding a proposed expert and ruled that the expert was not qualified to give evidence because he was not licensed in Ontario and did not hold a certificate as required under the *Act*.

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We wish to point out that the decision in *Quattrocchi v. Chiquita* is a lower court decision and is therefore not binding on future decisions in the Superior Court of Justice. Consequently, while the engineer was permitted to testify in that case, it may still be possible for parties to successfully argue – depending upon the specific facts – that a non-Ontario engineer is precluded from giving expert evidence pursuant to section 12 of the *Act*.

Nevertheless, the decision contains a useful analysis as to the criteria that the Court must evaluate in considering the admissibility of expert testimony and provides a sound rationale for the argument that licensure should only go to the weight of the expert evidence and not whether the expert should be permitted to testify in the first place.

4. Construction Liens – Distinguishing between “Construction Managers” and “Contractors”.

In a recent construction lien decision, the Plaintiff (Centrum Renovations) was claiming monies paid or owing to subcontractors and suppliers in relation to an industrial construction project undertaken on behalf of the Defendants (Cult Iron Works et al.). For their part, the Defendants challenged the lien claim on the basis that Centrum was only a “construction manager” and not a “contractor” as defined in s. 1 of the *Construction Lien Act*, such that it was not entitled to the benefits of the *Act*. The Defendants also argued that the lien was filed out of time.

Cult was in the business of metal fabrication and had subcontracted to Centrum on a number of previous projects in which Centrum had acted as the general contractor (“GC”). In 2002, Cult decided to build a new facility for its own operations. Because of their previous relationship, Cult engaged Centrum on the project, but did not reduce the terms of their relationship to writing.

During the course of the project, subcontractor A was retained to excavate the site, fill it with compacted material, pave, and install curbs, sidewalks and a septic system. A.’s proposal was submitted directly to Centrum. As it turned out, A. underestimated its quote by almost \$50,000.00 because more than expected unsatisfactory earth had to be removed from the site and replaced with engineered fill. This upset Cult, who then refused to pay an interim billing submitted by Centrum.

Despite this and other problems, Centrum continued to deal with subcontractors in furtherance of the project and was never advised by anyone at Cult that its involvement had been terminated. This remained the case until Centrum learned on June 19, 2003 that Cult had proposed to deal directly with a supplier of pre-cast concrete (to the exclusion of Centrum). At that point, Centrum viewed its contract with Cult to be at an end and ceased further work on the project. Centrum’s lien was registered on July 28, 2003. At trial, there being no evidence that Centrum had abandoned the project before June 19, 2003, the Court concluded that the lien was filed on time.

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With respect to Cult's position that Centrum was not engaged as the GC, but was engaged only to "manage" the construction steps on behalf of Cult, the trial judge disagreed entirely and was satisfied that Centrum qualified as a contractor within the meaning of the *Act*. In arriving at this conclusion, the Court considered the following evidence: (i) the Plaintiff had always acted as a GC in its past dealings with Cult; (ii) it had negotiated with virtually all sub-trades in the manner of a GC; (iii) the vast majority of subcontractors had submitted their quotes directly to Centrum; (iv) Cult had specifically asked Centrum to pay A.'s account; and (v) Centrum paid A. \$96,300.00 on account of its work for excavation and fill.

In the result, Centrum obtained judgment against the Defendants. Although the case deals with additional factual and legal issues other than those described above, including whether A. was subject to a fixed price contract and the quantification of damages, this case emphasizes the importance of reducing contractual terms to writing. If the parties had done so in this case, their roles would have been clearly articulated, and the scope of their dispute would have been greatly reduced.

For more information about this Newsletter, please contact:

**Michelle Brodey
Gibbs & Associates
Suite 1810, 150 York Street
Toronto, ON M5H 3S5
Tel: (416) 361-0024 Fax: (416) 361-1992
www.gibbslaw.ca**

To contact one of our lawyers:

**Gary Gibbs, ext. 222
ggibbs@gibbslaw.ca**

**Michelle Brodey, ext. 223,
mbrodey@gibbslaw.ca**

**Peter Mitchell, ext. 224
pmitchell@gibbslaw.ca**

**Jennifer Roberts-Logan, ext. 225
jroberts-logan@gibbslaw.ca**

**Kris Hutton, ext. 226
khutton@gibbslaw.ca**

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