
A Commentary on Recent Cases and Relevant Legal Issues

1. Rudeness Can Constitute Professional Misconduct – Court Upholds PEO Discipline Panel

It may come as a surprise to some that rudeness can constitute professional misconduct. In a decision released May 25, 2006, the Ontario Divisional Court upheld the decision of a PEO Discipline panel, which concluded that an engineer had acted “unprofessionally” in harshly criticizing a fellow engineering firm.

In August 1995, an award-winning and longstanding member of the profession (“the Engineer”) was retained by a municipal client to assess a proposal put forward by another engineering firm for the expansion of the client’s lagoon system.

In a letter to the client, the Engineer attacked the proposal in harsh language, questioning the other firm’s professional integrity and suggesting the possibility of a conflict of interest. The Engineer’s comments included: “Your engineer has either not done his homework well, which translates into a poor job, or they are deliberately misleading you”. “To spend \$200,000 on this exercise is a wanton misuse of taxpayers’ money.”

The impugned firm complained to PEO in September 1995. The Engineer was not notified of the complaint until December

1997 (two years later). The matter was ultimately referred to Discipline. In a written decision delivered in March 2005 (ten years after the impugned comments were made), the panel did not find the Engineer’s conduct to be “disgraceful” or “dishonourable”. However, the panel did find that it was “unprofessional” and constituted professional misconduct.

The penalty imposed by the panel consisted of a public reprimand, a costs sanction against the Engineer, a requirement that he pass two examinations and that his designation of consulting engineer be revoked pending successful completion of the two examinations.

The Engineer appealed to the Divisional Court, seeking to overturn the finding or, in the alternative, to vary the penalty imposed by the Discipline panel.

The Divisional Court agreed with the panel’s finding that the Engineer’s harsh criticisms constituted professional misconduct. However, the court did not agree with the penalty imposed and substituted it for a lesser penalty.

In reviewing the penalty issue, the court considered a number of factors, including the Engineer’s longstanding contributions to the profession, the fact that his unprofessional comments were isolated and had been made approximately ten years

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earlier, and the fact that his recommendations to the client were correct and were ultimately adopted over those of the other engineering firm. The court also noted that, although the Engineer's comments were disrespectful to a fellow member of the profession, the public did in fact benefit from those criticisms by avoiding a large financial expenditure to correct a municipal sewer problem.

The Divisional Court concluded that the sanctions imposed by the Discipline panel were unreasonable and struck them down, with the exception of the oral reprimand to be recorded on PEO's Register and publication of the decision (identifying the names of the Engineer and his firm).

It is noteworthy that one of the judges on the three-member panel of the Divisional Court disagreed with the majority and would have allowed the Engineer's appeal, on both the finding of guilt and the penalty. The dissenting judge concluded that the sending of the letter did not reasonably meet the definition of professional misconduct. The fact that other engineers may have chosen to use less provocative language was simply a matter of personal preference or abundant caution. The judge also found the penalties to be excessive. Instead, he would have substituted a private, unrecorded reprimand.

Assessing the recommendations and/or work carried out by others is a key component to the engineering profession. That being said, engineers (and other professionals) would be wise to carefully consider the tone and language of their comments. When

identifying technical deficiencies and errors or the existence of other more practical or cost-effective alternatives, this exercise can and should be carried out without attacking the integrity or competence of the other professional.

It will be interesting to see whether this decision will open up the "floodgates" at PEO and result in more "rudeness" complaints lodged by members of the profession against their fellow peers. However, given that the PEO complaints process is a confidential one, it will be impossible to track such complaints with any accuracy, unless they are referred to Discipline and become matters of public record.

2. Sources of Civil Liability for Engineers and other Professionals – Fiduciary Duty

When an engineer or other professional is faced with a lawsuit arising from his or her professional services, the engineer's obligations can arise in contract, tort (e.g. negligence), and/or fiduciary duty. The focus of this article is on fiduciary duty only. However, the inter-relationship between contract, tort and fiduciary duty is a complex subject that certainly merits further discussion to be addressed in a future edition of Gibbs Law.

The hallmark of a fiduciary relationship is where one of the parties (the "beneficiary") is in a position of dependency and

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vulnerability and is essentially at the “mercy” of the other party (the “fiduciary”). Some examples of fiduciary relationships include doctor/patient, lawyer/client, broker/client relationships etc. However, whether or not a specific relationship is fiduciary in nature will depend on the actual relationship between the parties and the individual factual circumstances.

Engineers and architects have not often been found to stand in a fiduciary relationship to their clients¹. However, a fiduciary duty could be found to exist where the scope of the engineer’s retainer allows him to exercise unilateral discretion or power, so as to affect the client’s legal or practical interests. The client’s level of sophistication and degree of trust and reliance upon the engineer are also factors that would be assessed in determining whether or not a fiduciary relationship exists in any given situation.

If a fiduciary duty is found to exist, the engineer will be held to the highest standard of conduct, to act selflessly and in the best interests of the client. This includes avoiding conflicts of interest and maintaining the utmost client confidentiality.

The *Professional Engineer’s Act* (“PEA”) recognizes the possibility of such relationships in section 20, which states, amongst other things, that a corporation that

holds a certificate of authorization is subject to the same obligations in respect of fiduciary, confidential and ethical relationships with each of its clients as between an individual engineer and his client.

The *PEA* and the regulations promulgated thereunder also impose statutory duties upon members of the engineering profession in Ontario, including the duty to act with fairness and loyalty to clients. Some plaintiffs in Ontario may argue – as they have in other jurisdictions – that those statutory duties impose fiduciary obligations upon engineers. This very argument was made, albeit unsuccessfully, in the Alberta case of *Terra Energy Ltd. v. Kilborn Engineering*.

In that case, the Plaintiff asserted that a fiduciary relationship existed by virtue of the legislation and *Code of Ethics* governing members of the Association of Professional Engineers, Geologists and Geophysicists of Alberta. The sections relied upon by the Plaintiff provided that members would act for their clients as faithful agents or trustees, always acting independently and with fairness and justice to all parties, and that they would not engage in activities that might create a conflict of interest with their clients without their clients’ knowledge and consent.

The lower court disagreed with the Plaintiff and concluded that there was no fiduciary relationship between the client and the engineer. The Alberta Court of Appeal

¹ *Central Investments & Development Corp. v. Miller*, [1987] P.E.I.J. No. 144, affirmed by P.E.I. Court of Appeal [1992] P.E.I. J. No. 153.

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upheld that finding, stating that while the relationship between a professional engineer and a client could in certain factual contexts give rise to a fiduciary relationship, the legislation and *Code* governing the engineer's conduct did not, in and of themselves, impose a fiduciary relationship upon a professional engineer².

While not binding in Ontario, the Court of Appeal's analysis in *Terra Energy Ltd. v. Kilborn Engineering* may be very helpful to engineers in Ontario if faced with similar arguments from clients who are attempting to assert the existence of a fiduciary relationship.

The Court of Appeal's decision in that case was specifically referred to in the 2002 decision of the Ontario Divisional Court in *Canadian Transit Co. v. Girdhar*. In that case, an engineer was involved in separate bridge projects and was retained to study two different road systems for two different clients. One of the clients brought an application for an injunction, declaring that the engineer was acting in a conflict of interest. The application failed, and the client appealed to the Divisional Court.

The lower court decision was upheld by the Divisional Court, which concluded that there was no fiduciary relationship between the engineer and his client. Moreover, the skills acquired during the performance for one project could be used in service to other

clients as long as the engineer did not make use of confidential information.

The mere existence of a fiduciary relationship does not give rise to liability unless the fiduciary's duties toward the beneficiary have been breached. A breach of fiduciary duty is not akin to negligence. Some courts have mistaken the distinction in the past, but the Supreme Court of Canada has made it clear that it takes much more than negligence to amount to a breach of fiduciary duty. Such conduct includes a betrayal of trust, intentional acts of dishonesty or disloyalty, and the fiduciary putting his own interests ahead of those of the beneficiary.

It is far more common for plaintiffs to sue in negligence and breach of contract than breach of fiduciary duty. However, some plaintiffs will make the argument nonetheless. Previously, one of the advantages to suing on the basis of a breach of fiduciary duty was that it allowed a plaintiff who delayed in bringing a claim to get around a limitations defence (because there was no limitation period in Ontario for breach of fiduciary duty). However, this is no longer the case because under the *Limitations Act, 2002* (which came into force on January 1, 2004), such claims are now subject to the same basic two-year limitation period as claims for negligence and breach of contract.

² [1999] A.J. No. 221 (Alberta Court of Appeal), at para. 36-40.

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3. Update on “Standstill Agreements” – Following the Progress of *Bill 14 (Limitations Act, 2002)*

For those of you who are tracking the progress of Bill 14, you may recall our April 2006 article on “standstill agreements”. These are agreements which allow parties to a potential lawsuit to agree to suspend the limitation period pending a reasonable opportunity to investigate and potentially resolve a conflict without resorting to litigation.

With the enactment of the *Limitations Act, 2002* (the “*Act*”) in January 2004, these agreements are no longer permissible (although the *Act* does not affect agreements entered into before January 1, 2004).

Recognizing that the prohibition against “standstill agreements” was creating unnecessary litigation, the Ontario government introduced Bill 14/06, which would permit agreements to lengthen or suspend statutory limitation periods. If enacted, the legislation would enable businesses, insurers, adjusters and others to resume their previous practice of postponing litigation, in appropriate circumstances, while exploring practical solutions with a view to avoiding formal litigation.

Bill 14 passed second reading by the Legislature on April 11, 2006. The Bill has since been presented to the Standing Committee on Justice Policy and will likely be considered by the Committee during the

summer session. The earliest the Committee would send the Bill back to the Legislature for third reading (with any amendments) would be September 2006, when the Legislature re-opens for the fall session.

Please look for our next update on the progress of Bill 14 in our October or November 2006 edition of Gibbs Law.

4. The Risk of Doing Business Abroad – The Test for Recognizing and Enforcing Foreign Judgments in Ontario

In an expanding global economy, engineering firms and other businesses are now engaged in projects on the international stage more than ever. Previously, some businesses opted to ignore foreign civil actions (and not even defend them) because Canadian courts were reluctant to recognize judgments issued outside of Canada. However, it is clear from recent case law in Ontario and elsewhere in Canada that this is no longer the case.

On June 9, 2006, the Ontario Court of Appeal released a decision which may be of particular importance to engineering and other firms operating abroad, *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*

In 2005, Oakwell Engineering (“Oakwell”) brought a successful application to an Ontario court to enforce a judgment issued by the High Court of Singapore against

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Enernorth Industries (“Enernorth”). Enernorth appealed the decision to the Ontario Court of Appeal on the grounds that the Singapore judgment was granted by a corrupt legal system and should not be recognized in Ontario.

The Singapore proceedings arose out of Oakwell’s successful tender in 1995 for a contract to build and operate power generation facilities in India. The project evolved into a joint venture between Oakwell and Enernorth to finance, construct and operate the facilities. A dispute arose, which was subsequently resolved by way of written settlement agreement. The agreement stated, amongst other things, that any further disputes would be subject to Singapore law and the jurisdiction of the Singapore courts.

Under the settlement agreement, Oakwell sold its interest in the joint venture to Enernorth for a stated sum to be paid upon successful financing of the project. This did not occur. Thereafter, Enernorth, without informing Oakwell, divested its interest in the venture to a third party. As a result, Oakwell successfully sued Enernorth for repudiating its obligations under the settlement agreement and obtained a judgment in Singapore.

Oakwell then sought to enforce the judgment in Ontario (and to seize Enernorth’s assets to satisfy the judgment under Canadian law). In recognizing the foreign judgment, the applications judge relied on a leading case from the Supreme Court of Canada, *Beals v. Saldanha* [2003] 3

S.C.R. 416, which sets out the test for enforcing foreign judgments in Canada.

The test requires that the court must first consider whether the foreign court properly assumed jurisdiction by applying the “real and substantial connection test” (i.e., there must be a significant connection between the cause of action and the foreign court). This connection could be based on a contract whereby the parties agree to be subject to the jurisdiction of the foreign court. If the “substantial connection” test is met, the court must then look at whether there are any defences that would preclude recognition of the foreign judgment.

A domestic defendant has three main defences available when asking a Canadian court to refuse to enforce a foreign judgment; namely, (i) fraud, (ii) violation of public policy, and (iii) denial of natural justice.

With respect to (i), where a foreign judgment was obtained by fraudulent means (which are proven in Ontario), the judgment will not be enforceable here.

As for (ii), if the foreign law is contrary to our views of basic morality or is rendered by a foreign court which is proven to be corrupt or biased, the judgment will also not be enforced.

Finally, with regard to (iii), where the defendant has had no notice of the claim or has been deprived of the right to make full answer and defence, this would fall into the category of a denial of natural justice, so as

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to preclude enforcement of the foreign judgment in Ontario.

In this case, Oakwell had no difficulty proving a “substantial connection” because of the settlement agreement with Enernorth, which provided that the parties agreed to be subject to the laws and courts of Singapore.

Having established a “substantial connection”, the only remaining issue was whether any of the above-noted defences applied so as to preclude enforcement of the judgment against Enernorth in Ontario. The applications judge in Ontario found no evidence of any of these factors and concluded that the foreign judgment should be enforced. The Ontario Court of Appeal agreed with this finding, upholding the lower court’s decision.

To summarize, absent actual proof of fraud, bias, denial of due process, or a violation of Canadian public policy, foreign judgments will be enforceable in Ontario where there is a substantial connection between the cause of action forming the subject matter of the judgment and the jurisdiction of the foreign court delivering the judgment.

Ignoring a foreign lawsuit may be at your peril. One should never assume that a judgment will not be enforced in Ontario or that there will be an opportunity to re-litigate the case on its merits in Ontario. Failing to defend foreign proceedings could have devastating consequences and could expose your business’ assets to seizure in Canada. If you are operating abroad and are faced with a foreign civil action, your

options should be very carefully considered with the benefit of legal advice.

**Please look out for our next edition of
Gibbs Law in September 2006.**

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