

A Commentary on Recent Cases and Relevant Legal Issues

1. *YCC #382 v. Jay-M Holdings* *- Limitations Act, 2002*

On January 20, 2006, Mr. Justice Ground of the Ontario Superior Court of Justice issued a decision dealing with important limitation period issues under the new *Limitations Act, 2002* (the “Act”).

In *YCC #382 v. Jay-M Holdings et al*, a Condominium Corporation sued a builder for deficiencies, and the City of Toronto for negligently failing to detect those deficiencies. It was agreed that the latest date on which any negligence by the City could have occurred was February 1978. The new *Act* came into force on January 1, 2004. As a result, any alleged negligence occurred more than fifteen years prior to the *Act* coming into force, raising issues about the new fifteen-year ultimate limitation period. The Condominium Corporation did not discover the alleged deficiencies until May 2004, and they commenced their action in June 2005.

The Court considered the transitional provisions in the *Act* and found that there was an ambiguity in Section 24(5). That section essentially indicates that if a claim was not discovered before January 1, 2004, when the new *Act* was implemented, the *Act* applies as if the act or omission had taken place on January 1, 2004. Justice Ground rejected YCC’s submissions that the Court must give the words in subparagraph 24(5) their plain meaning; i.e. that all provisions

of the new *Act* would apply as if the act or omission had occurred on January 1, 2004. If accepted, this would have meant that the fifteen-year ultimate limitation period would only start from that date.

Justice Ground instead found that the ultimate fifteen-year limitation period contained in Section 15 of the *Act* overrides the transitional provisions contained in Section 24. Section 15 specifies 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 fifteen-year ultimate limitation period. He rejected YCC’s submission that Section 24(5) does not establish a limitation period, but rather only provides a method for determining when the limitation period starts to run. As a result, any transitional limitation periods were trumped by the ultimate fifteen-year limitation period.

At the end of the day, Justice Ground therefore found that the ultimate fifteen-year limitation period acted as a bar to the Plaintiff’s action, and he dismissed the action as against the City of Toronto.

This decision is under appeal to the Court of Appeal. The progress of the appeal will be monitored and reported on in future Newsletters.

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2. *Active Fire Protection 2000* *v. B.W.K. Construction Co.* **- Insurance and Indemnity Clauses**

In a 2005 decision, the Ontario Court of Appeal dismissed the appeal of a contractor and ruled that a subcontractor was not liable for damages when the contractor had failed to purchase insurance as required by the contract that would have covered the damages. The failure to obtain the required insurance proved fatal to the contractor.

In *Active Fire Protection 2000 Ltd. v. B.W.K. Construction Co.*, B.W.K. had contracted with the Town of Whitby to renovate and construct an addition to the Town's centennial building. The contractor was obliged pursuant to the contract to obtain, at its expense, all-risks property insurance. B.W.K. then entered into a contract with a subcontractor, Active Fire, to provide a fire protection system for the building.

The subcontract contained a standard indemnity provision whereby the subcontractor agreed to indemnify the contractor in respect of damages relating to its performance. The subcontract also required the contractor to maintain fire insurance, which B.W.K. failed to do. The subcontractor obtained its own insurance package.

A flood occurred during the course of the project that was caused by the subcontractor's negligence. The subcontractor argued that it was not liable

for the damages. The lower court judge agreed and dismissed the contractor's claim.

On appeal by the contractor, the Court of Appeal dismissed the appeal and ruled that there was no liability on the part of the subcontractor on the basis that if the contractor had purchased the insurance required, this would have covered the damages caused by the flood.

The Court of Appeal also found that the contractor's commitment to procure insurance constituted a voluntary assumption of risk of loss caused by the perils for which it had contracted to obtain insurance. This became a contractual covenant in favour of the subcontractor. If the subcontractor were to be found liable, this would have the effect of depriving it of the insurance that the contractor should have procured on its behalf in the first place.

The lesson to be taken from this case is that a party to a contract must pay close attention to any contractual provisions requiring it to obtain insurance, and it must then place and maintain that insurance for the duration of the project. A party who fails to do so may bear the risk of any loss and may lose the ability to enforce indemnity clauses against another party or to claim over against that party.

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3. Professional Engineers Ontario (PEO) – Recent Changes to the Complaints Process

In November 2005, PEO introduced an Alternative Dispute Resolution (“ADR”) mechanism to the complaints process.

Complaints are now screened for their eligibility to be placed in the ADR stream. Cases such as those involving allegations of incompetence, public safety issues or violence, incidents involving serious injury or death, or the catastrophic collapse of a structure will not be eligible.

Where a case is determined to be eligible for ADR, the complainant will be given an opportunity to request mediation. If the PEO member agrees to participate, mediation is possible after the member has submitted a response to the letter of complaint. At any time, PEO has the right to remove the complaint from the ADR stream if any of the issues raised by the parties indicates to PEO that the matter is no longer an appropriate one for ADR.

This initiative presents a creative alternative, where appropriate, to the more formal and expensive complaints and discipline process. It should assist in resolving minor matters in a timely and economical fashion.

4. PEO – Recent Changes to the Discipline Hearings Process

Discipline Hearings before PEO are heard by a panel comprised of five professional engineers, who are all members of the

Discipline Committee. The members of the panel are charged with the responsibility of hearing evidence, assessing it and adjudicating allegations of professional misconduct and incompetence against licence and Certificate of Authorization holders.

The vast majority of matters coming before the Discipline Committee are dealt with by way of a negotiated plea agreement entered into by PEO and the member. This generally entails entering into an agreed statement of facts, the member making a voluntary guilty plea to professional misconduct and/or incompetence, and a joint submission on penalty.

PEO has recently implemented a new operating policy that will allow matters to be heard before a panel comprised of only one member of the Discipline Committee in circumstances where the member has entered into a voluntary plea and a joint submission on penalty with PEO.

The benefits sought to be achieved by PEO with this recent operational change include creating greater flexibility in scheduling Discipline Hearings, expediting the issuance of Decisions (because one-member panels eliminate the necessity of circulating draft decisions amongst five members), and reducing the cost of hearings.

PEO will only establish a one-member panel if the member who is the subject of the allegations of professional misconduct and/or incompetence agrees. If the member does not agree, then the full five-member panel will deal with the matter. The choice should be carefully reviewed with your

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solicitor if you are ever invited by PEO to opt for a one-member panel.

5. PEO's Mandate on the Use of the Professional Engineer's Seal

In 2005, PEO issued a new Guideline on the proper use of the professional engineer's seal. The Guideline is to be read in conjunction with the minimum statutory requirements for the use of the seal, set out in the *Professional Engineers Act* (section 53, Regulation 941). It also provides new policies and procedures regarding the use of seals on electronic documents to address the new reality that electronic submissions are often preferred to hard copies.

The Guideline applies to professional engineers, temporary licence holders, provisional licence holders and limited licence holders. If you do not have a copy of the 2005 Guideline, please contact our office or download it directly from PEO's Web Site.

PEO treats as a serious matter any omission to apply a seal where it is required. Every engineer should be familiar with the new Guideline and the mandatory requirement that every final drawing, specification, plan, report, or other document prepared or checked by a holder should be sealed before it is issued.

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