

A Commentary on Recent Cases and Relevant Legal Issues

1. S.C.C. Releases its Decision on Social Host Liability

On May 5, 2006, the Supreme Court of Canada released its decision in *Childs v. Desormeaux*, a test case dealing with “social host” liability. The Court concluded that there was no duty of care on the part of social hosts to monitor their guests’ alcohol intake or to take steps to stop them from getting behind the wheel. Simply holding a party for people to meet, visit and drink alcohol (whether served on the premises or supplied by the guest) was not enough to create a duty on the host.

The Court did not rule out the possibility of future liability in situations where hosts serve alcohol to extremely intoxicated persons. However, the Court did not have to specifically address that scenario because of the specific facts in this case. In particular, there was no evidence that the hosts knew of their guest’s intoxication before he left their gathering and smashed his car head-on into another vehicle, killing the Plaintiff’s boyfriend and leaving the 17-year-old Plaintiff paralyzed from the waist down.

With the summer barbeque season fast-approaching, homeowners and their insurers alike may be relieved by the outcome in the *Childs v. Desormeaux* case. Nevertheless, the case is clearly very fact-specific, and the Court specifically left the door open for future liability depending upon the circumstances. In short, this decision should

not be seen as a licence for irresponsible behaviour on the part of social hosts. Knowing that a visibly intoxicated person is leaving your home, and is about to drive, could still result in potential liability where a host fails to make any efforts to prevent that guest from driving.

2. CGL Insurance – Absolute Pollution Exclusion – Duty to Defend Claims for Negligent Installation of Underground Storage Tank

In *Davis Petroleum Equipment Ltd. v. Lombard General Insurance Company*, the Ontario Court of Appeal recently dismissed an appeal by an insurer and upheld a lower Court ruling that the insurer had a duty to defend its Insured under a CGL policy, and could not deny coverage on the basis of the pollution exclusion, for two underlying actions brought against the Insured for negligent installation of an underground petroleum storage tank.

In November 2000, Davis Petroleum (“DP”) was retained by the owner and operator of a service station to install a new underground petroleum storage tank and associated piping. During excavation by a subcontractor, the backhoe shovel struck the piping running between an existing super gas tank and the gas pump adjacent to the excavation area. DP inspected the supply line and determined that it had not been damaged.

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Following complaints from public works and nearby residents, DP performed pressure testing and did not identify a leak. However, upon subsequent excavation, it was discovered that some of the elbows of the suction line struck by the backhoe were in fact leaking. As a result, DP was sued by the service station owner and, in a separate action, by residents of a neighbouring property.

Lombard denied coverage on the basis of the pollution exclusion, relying, *inter alia*, on the clause that excluded coverage for the escape of pollutants taking place "at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any Insured". Lombard also relied upon the clauses in the pollution exclusion dealing with pollutants "brought" on site by the Insured and where the Insured's operations involved "testing" for pollutants.

The applications judge concluded that the insurer could not deny coverage on the basis that the Insured was an "occupier" of the premises. On the contrary, DP was hired to install a fuel tank at a specific location on the property, but did not have physical possession of the entire property. The damage that caused the contamination was not the result of DP's occupation of the lands on which they were situated but was caused by the negligence of a subcontractor who infringed on a part of the property that was adjacent to the excavation and installation site.

The applications judge also concluded that DP did not "bring" the pollutants to the

premises, such that coverage could not be excluded on that basis. Furthermore, coverage could not be excluded because of the "testing" performed by DP because any testing was incidental to its primary retainer, which was the installation of the petroleum storage tank.

The applications judge went on to say that the broad interpretation of the pollution exclusion suggested by Lombard would nullify the coverage provided by the CGL and thwart the reasonable expectations of the Insured, which expected liability coverage for its business whose main activity involved installation, repair and testing of petroleum storage equipment. The Court found the pollution exclusion to be ambiguous, having regard to the nature of the Insured's business, but did not provide reasons for the finding of ambiguity *per se*.

On appeal, the key issue was whether the escape of pollutants took place "at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any Insured". The Court of Appeal concluded that the mere presence of the Insured for a limited purpose on property, occupied and controlled by others, did not take the claims outside of coverage. Although the Court of Appeal did not issue detailed reasons, the decision can be seen as good news for contractors, consultants and others who, by the very nature of their business, perform work on lands and premises owned and controlled by others.

To summarize, the fact that someone attends at a construction site to carry out a specific and limited retainer does not necessarily

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make him an “occupant” within the meaning of a CGL policy or automatically exclude him from coverage under the “occupier” clause in the event of a contamination claim.

3. PEO Seeks Clarification of requirements under New Ontario Building Code

Earlier this year, new qualification and registration requirements for designers under Regulation 305/03 of the *Building Code Statute Law Amendment Act, 2002* (the “Act”) came into force. The requirements, which came into effect on January 1, 2006, provide, *inter alia*, that anyone who has not qualified (by passing technical examinations administered by the Ministry of Municipal Affairs and Housing) or registered with the Director under the Act is prohibited from engaging in building-related design and general review activities.

The new qualification and registration requirements were originally to have been implemented by July 1, 2005. However, due to concerns that some building officials and designers would not be able to meet the new requirements within the prescribed timelines, the implementation period was extended to January 1, 2006.

While the new *Ontario Building Code* (“OBC”) recognizes the establishment by the Ontario Association of Architects of a parallel qualification and registration system to evaluate their members’ OBC knowledge (O. Reg. 145/05), no such parallel system exists for professional engineers. Accordingly, engineers and engineering

firms are subject to the qualification and registration requirements of the OBC, whereas architects are not.

On March 20, 2006, Professional Engineers Ontario (PEO) filed a Notice of Application with the Divisional Court of Ontario, asking the Court to clarify the OBC amendments, particularly the jurisdictional boundary issues relating to building-related design and general review of construction activities. PEO’s position is that the amendments duplicate, contradict and otherwise interfere with PEO’s exclusive statutory role in the licensing, disciplining and regulation of its members.

PEO asserts that the prohibition from engaging in building-related design and general review activities was never intended to apply to PEO licence holders. In its Notice of Application, PEO seeks clarification on this point and others.

We will continue to follow the progress of PEO’s application to the Court and will report on its status in future editions of Gibbs Law.

4. Constructions Liens – What Constitutes an “Improvement” to Property?

In its simplest terms, a construction lien is a statutory right against a property that is granted to suppliers who make an “improvement” to the property.

Section 14 of the *Construction Lien Act* provides that “a person who supplies services or materials to an improvement for

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an owner, contractor, or subcontractor has a lien upon the interest of the owner in the premises improved for the price of those services or materials.” While seemingly straightforward, this section has been the subject of considerable litigation, particularly as it relates to the meaning of “improvement”.

Section 1(1) of the *Act* defines “improvement” as (a) an alteration, addition or repair to, or (b) any construction, erection or installation on, any land, and includes demolition or removal of any building, structure or works or part thereof. Notwithstanding its relatively broad definition, not every service or material supplied to a project will constitute an “improvement” or create a lien right in favour of the supplier. It is not always easy to make that determination.

For example, in Ontario, an engineer’s construction drawings supplied to a property owner have been found to create an “improvement” within the meaning of the *Act*, whether or not the construction actually proceeds (*11246798 Ontario Inc. et al. v. Sterling* [2000] O.J. No. 4261). The rationale is that the plans, drawings and specifications could theoretically be sold with the land, thereby increasing its value.

However, there are many examples of other suppliers who have not been so fortunate, and where their services and materials have not been found to be “improvements” within the meaning of the *Act*:

- (a) Off-site assembly and re-installation of an assembly

- line in an automotive plant (*Kennedy Electric Limited v. Rumble Automation Inc.*);
- (b) Portable school rooms supplied to a school (*Re Inesco Ltd.*);
- (c) Laundry equipment (*Hubert v. Shinder*); and
- (d) A cooling tower supplied to a building (*Baltimore Aircoil*).

In the *Kennedy Electric* example cited above, a lien action was brought by the supplier and, following a trial of the issue and subsequent appeal to the Divisional Court, the Court found there to be no “improvement” to the land and/or buildings because the assembly line could be disassembled and relocated elsewhere. Consequently, after several years of costly litigation, the lien claimant was no further ahead in asserting its rights to recover the value of the services/material supplied to the owner.

The moral of the story is that contractors, consultants and others would be wise to seek legal advice before registering a lien to determine whether the particular services or materials supplied to a property constitute an “improvement” within the meaning of the *Act*. Although this may involve expending nominal legal fees up front, taking this route may avoid the considerable cost and risk associated with registering a claim where ultimately no lien rights may be found to exist.

For lien-related advice, please contact Kris Hutton at (416) 361-0024, ext. 226.

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5. Using Alternative Dispute Resolution (ADR) to Settle Construction Disputes

With the costs and delays involved in litigating often complex, multi-party construction disputes, the industry and its insurers are resorting more and more frequently to various ADR methods as an alternative to traditional litigation.

In the Toronto and Ottawa-Carlton Courts, mediation is mandatory, but the parties are now free to hold the mediation session at a time of their choosing, except that the mediation generally must take place no later than 90 days after the action has been set down for trial. In some cases, such as actions brought under the Simplified Rules (for claims of \$50,000.00 or less), mediation must take place earlier, within 150 days after the close of pleadings.

Mediation is one form of ADR and entails the use of an outside facilitator (mediator) to assist the parties in negotiating and reaching a consensus on their own. This can be a very useful tool when the parties wish to preserve an ongoing business relationship and when they are prepared to compromise.

Arbitration is another alternative to traditional litigation and can be useful where the parties wish to avoid the cost and time involved in a trial, but do not wish to mediate. With arbitration, a final decision will be imposed upon the parties by a neutral third party after listening to the facts and evidence presented by the parties to the dispute. Arbitration may be appropriate in cases where parties do not have an ongoing

business relationship or where there is no possibility that they could come to a consensus on their own.

Mediation has several advantages over traditional litigation and arbitration. First, mediation can take place in a matter of hours or a few days (as compared to several weeks or months of trial or arbitration). Second, in mediation, the parties control the process. While the mediator assists them to reach a deal, he/she has no authority to impose a decision upon the parties or to force them to agree on a particular outcome. If the mediation fails, at the very least the parties can walk away with a clear understanding of the other parties' positions, the evidence they intend to rely upon, and their likely "bottom line" for future negotiations.

Finally, a confidential, face-to-face meeting between the parties and their lawyers allows them to freely explore their respective positions without fear that their frank discussions can be used against them in the future. When the parties are able to arrive at a consensus, this can preserve valuable business relationships and bring about an expedient and economic resolution to even the most complex cases.

While mediation is not mandatory in the early stages of litigation (and in some jurisdictions in Ontario, it is not mandatory at all), parties and their insurers should give careful consideration to early mediation, depending on the individual circumstances of the case. For instance, even where it may be premature to settle an action outright, early mediation can often narrow the issues significantly and act as a useful vehicle for

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the early exchange of factual information between the parties and their experts. Early mediation can also set the tone for an ongoing dialogue that may facilitate settlement down the road.

There is no downside to mediation in the context of construction disputes, other than the cost involved. Having said that, such costs are minimal as compared to the time, expense and delay of traditional litigation and, as a practical matter, should not be considered an impediment to mediation.

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