
A Commentary on Recent Cases and Relevant Legal Issues

1. What the End of Mandatory Retirement Means to You and Your Organization

For those of you nearing the age of 65 or employing staff approaching that age, you should know that, as of December 12, 2006, employers will be prohibited from making their staff retire merely because they are 65 or older. The only exception to that general rule will be where the employer can establish a *bona fide* occupational requirement that the position be filled by a younger employee due to the specific nature of the job.

Since there will be no statutory obligation to provide disability benefits to employees who are 65 or older, many employers may be considering making changes to their benefit plans to remove disability benefits for those employees.

Employers do not have the right to change a significant term of the employment contract (such as taking away disability benefits) without employee consent. Such a unilateral move could constitute constructive dismissal, unless the employer gives reasonable notice of the impending change.

As an employer, you can take steps to insulate your organization from potential claims for constructive dismissal by providing all current employees with reasonable written notice of any proposed

change to the organization's disability policies. What constitutes reasonable notice in any given case will depend on a number of factors, including but not limited to an employee's length of service. For most employees, providing reasonable notice of a change to your organization's disability policies will be a non-issue. However, for employees nearing the age of 65, their situations may be more problematic and should be individually reviewed.

With respect to new hires, all employees should be specifically apprised - at the time of hiring - of the organization's policies regarding the termination of disability benefits at the age of 65.

For more information about mandatory retirement and other employment-related issues affecting you or your organization, please contact Michelle Brodey.

2. Production of Documents Outlining Expert Witnesses' Findings

In our April 2006 edition of Gibbs Law, we commented on the subject of letters of instruction to experts and the need for taking great care in preparing such letters, given the very real prospect that they may be producible in a lawsuit.

In a decision released earlier this month, the Ontario Court of Appeal addressed the issue

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of production of a lawyer's memorandum, which transcribed the details of a lengthy conversation with an expert retained on behalf of a defendant in a lawsuit arising from the supply of allegedly defective pesticide (*Conceicao Farms Inc. v. Zeneca Corp.*)

The memorandum only came to light after the claim had been dismissed at trial, when the Defendant produced dockets and other materials in support of its submissions for costs. The Plaintiffs immediately brought a motion before the trial judge for production of the memorandum. That motion was dismissed. On appeal before a single judge of the Court of Appeal, the judge ruled that the memorandum was producible and did not form part of the lawyer's work product.

The matter subsequently came before a three-member panel of the Court of Appeal. On September 20, 2006, the panel set aside the order of their colleague, ruling that the document did not have to be produced. A lawyer's memorandum was work product and was not producible even if it contained the foundation for an expert's findings and conclusions (i.e., foundational information).

The Court of Appeal agreed that, on discovery, the Plaintiffs would have been entitled to the foundational information contained in the lawyer's memorandum. However, the Plaintiffs were too late and were not entitled to the information at this late stage of the action (after trial).

This case reinforces the importance for parties to exercise their discovery rights,

including the right to disclosure of the findings, opinions and conclusions of experts engaged on behalf of opposing parties.

Doing so, well before trial, may offer valuable insight into the basis for the expert's opinion. It may also highlight any errors in assumptions and provide powerful ammunition for cross-examination at trial. Equally important, fully exploring the expert's foundations may assist the parties in re-assessing the strength of their respective cases and in determining whether they should proceed to trial or set their sights on resolution.

3. Insurance – Is Post-Judgment Interest Included or Excluded from Policy Limits?

When a party obtains a judgment at trial, post-judgment interest accrues automatically unless the court exercises its discretion under the *Courts of Justice Act* to disallow it, which is a rare event.

Having said that, what happens when an insurance policy is silent on whether post-judgment interest is included or excluded from policy limits? The answer can have a tremendous impact on insurers and insureds alike.

For example, as suggested by one application judge, if post-judgment interest were included in the policy limit, and judgment was granted in an amount equal to or greater than the policy limit, "the insurer could (theoretically) delay payment with

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virtual impunity by, for example, prosecuting an unmeritorious appeal, since its exposure to its insured would be capped at the policy limit.” Meanwhile, post-judgment interest would continue to accrue and, in that scenario, responsibility for payment of that interest would lie with the insured and not with the insurer.

In a decision released earlier this year (*Solway v. Lloyd's Underwriters*), the Ontario Court of Appeal agreed with the above-noted application judge's analysis on that particular point. Specifically, the Court of Appeal agreed that post-judgment interest should not be included in the policy limit (where the policy is silent on the issue), rejecting the insurer's submission that it was not required to pay post-judgment interest on the judgment to the extent that such interest exceeded the \$500,000.00 policy limit in that case.

This decision should come as good news to insureds covered by liability policies that are silent on the question of post-judgment interest. However, it also serves as a powerful reminder to insurers to carefully review their policy provisions regarding policy limits, particularly when it comes to the issue of post-judgment interest.

4. The Duty of Fairness in Regulatory Matters – Complaints Committees

Many professions in Ontario are self-regulated. Whether they are healthcare providers subject to the *Regulated Health*

Professions Act, 1991, engineers regulated by Professional Engineers Ontario (PEO), or other professionals, they all face the possibility of receiving a professional practice complaint at some point during their careers.

While the governing legislation may differ from one regulatory body to another, the statutory set-up of most regulators provides for a Complaints Committee whose role is to investigate and assess complaints to determine whether further action is necessary, including whether a referral to a disciplinary panel may be required.

Complaints Committees owe a duty of fairness to their members who are the subject of a complaint. This includes the right to notice of a complaint and the right to make responding submissions. Natural justice also requires that members are entitled to have complaints disposed of in a timely manner. In some cases, that right is enshrined in statute. For example, physicians, dentists, and other regulated health professionals theoretically have the right to have their complaints disposed of within 120 days, although this may soon change if the Ministry of Health and Long-Term Care accepts recent recommendations made by the Health Professions Regulatory Advisory Council.

When a member is deprived of notice and is unable to assert his right to require a complaint against him to be dealt with in a timely manner, this constitutes a breach of natural justice. Depending on the length of the delay or other circumstances, it may

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even result in a prohibition against the regulator proceeding with the complaint (*McIntosh v. College of Physicians and Surgeons of Ontario*).

In order to respond to a complaint in a meaningful way, members must be provided with adequate disclosure. The level of disclosure varies from regulator to regulator. Disclosure does not necessarily mean that the member will be given an actual copy of the complaint letter, as long as he or she receives a detailed summary of the complaint. Furthermore, at the complaints stage, the member may not receive copies of statements received from witnesses (the disclosure of which could compromise the investigation or impact on the witnesses' willingness to come forward) or expert opinions obtained to assist the Committee in assessing the complaint.

In a 2006 decision of the Ontario Divisional Court (*Silverthorne v. Ontario College of Social Workers and Social Service Workers*), a social worker had been "cautioned" by the Complaints Committee of her College following an investigation into a complaint made against her. During the course of the investigation, the social worker received a copy of the original complaint, a summary of the allegations and over 200 pages of disclosure documentation.

The social worker subsequently brought an application for judicial review on the basis that the College had breached its duty of procedural fairness by failing to provide her with certain documents contained in the investigation file.

The Divisional Court confirmed that the Committee owed a duty of procedural fairness to the member, but concluded that the duty had been discharged because the social worker was given reasonable information, including all of the information that was relevant to the sole basis upon which the Committee's decision was made.

For more information regarding regulatory complaints and disciplinary matters, please contact Gary Gibbs or Michelle Brodey.

5. Construction Liens - Time Limits for Registering and Enforcing Lien Claims

For those of you involved in the construction industry, you may be familiar with the process of registering and enforcing lien claims for materials and services you provide to a project. While contractors have known about and enforced their lien rights for many years, some engineers are only recently turning to liens in an effort to get overdue fees paid.

It is important to remember that lien rights can be lost if claimants do not meet the strict timelines prescribed by the *Construction Lien Act* for registering a lien against the title to the subject property and perfecting the claim by issuing a court action.

Registering a lien against title must take place within 45 days of the earliest of three events; namely, the issuance of a certificate of substantial performance; the date of contract completion in the case of a contractor; or the last supply of materials or

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services or certification of completion in the case of a subcontractor.

The next important deadline involves issuing a court action before the end of the following 45-day period. That period starts to run after the last day on which the lien could have been registered. In other words, lien claimants have 90 days from the last supply of materials or services to commence a court action.

Finally, the action must be set down for trial within two years of starting the action. A failure to do so could have grave consequences for lien claimants and would render lien rights void and unenforceable.

For more information about construction liens, please contact Kris Hutton.

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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