

## **A Commentary on Recent Cases and Relevant Legal Issues**

---

### **1. Announcements - Gary Gibbs Listed in National Post's "Best Lawyers in Canada" Column.**

On May 30, 2007, the *National Post* published its list of the "Best Lawyers in Canada: Real Estate Law and Construction Law". We are very proud to announce that Gary Gibbs was recognized as a leader in the field of Construction Law.

### **2. Breaking News - Engineers - Ontario Court Rules in Favour of PEO on Challenge to New *Building Code* Requirements.**

As you may recall from an earlier edition of *Gibbs Law*, new qualification and registration requirements for "designers" came into force on January 1, 2006. The requirements under the new *Ontario Building Code* provided (amongst other things) that anyone who had not qualified or registered under the Ministry of Municipal Affairs and Housing's regime was prohibited from engaging in building-related design and general review activities.

While the new *Code* recognized the establishment by the Ontario Association of Architects of a parallel qualification and registration system to evaluate their own

members, PEO did not receive the same recognition under the new legislation.

On March 20, 2006, PEO filed a Notice of Application to the Divisional Court of Ontario, challenging the validity of certain amendments, particularly the jurisdictional boundary issues relating to building-related design and general review of construction activities. PEO took the position that the amendments duplicated, contradicted and otherwise interfered with its exclusive statutory role in the licensing, disciplining and regulation of its members.

In a decision released on May 17, 2007, the Divisional Court ruled in favour of PEO and confirmed its exclusive statutory authority to regulate the practice of Ontario's professional engineers and holders of certificates of authorization.

In a unanimous ruling, the Court concluded that Article 2.17 of the new *Code* (which sets out the qualifications and other requirements for designers) conflicts with the exclusive regulatory jurisdiction of PEO and does not apply to any holder of a licence or certificate issued under the *Professional Engineers Act*.

The Divisional Court also ruled in favour of PEO on certain other amendments to the *Code*. A more detailed review of the Divisional Court's ruling and a copy of the

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.



## Gibbs Law Spring 2007 Newsletter

decision are available on PEO's website at [www.peo.on.ca](http://www.peo.on.ca).

### 3. Court Rules in Favour of Engineer in Striking Out Third Party Claim - *Vie Holdings Inc. v. Imperial Oil Limited*.

In an interesting decision released by the Ontario Superior Court of Justice earlier this year, a motions judge struck out a Third Party Claim brought against a consulting engineer.

The Plaintiff had retained a consultant to conduct an environmental assessment on the Plaintiff's property to assess groundwater conditions and to determine whether the property had become contaminated as a result of pollutants emanating from the adjacent property, which was owned by Imperial Oil and operated as a service station. The consultant's report concluded that the groundwater on the Plaintiff's property had been contaminated by a gasoline fuel product from the neighboring property.

As a result, the Plaintiff sued Imperial Oil, claiming damages resulting from the migration of contamination due to a hydrocarbon spill on the service station property.

Imperial Oil defended the main action and commenced a Third Party Claim against the consultant, alleging that the consultant owed Imperial Oil an implied contractual duty and

a duty of care, and that the consultant breached those duties. The Defendant also alleged (amongst other things) that the consultant's report contained a negligent misrepresentation (i.e., Imperial Oil denied that it was the source of the contamination), and that any damages suffered by the Plaintiff were caused by the consultant's wrongful conduct, such that Imperial Oil was entitled to an indemnity from the consultant.

The consultant brought a motion to strike out the Third Party Claim on several grounds. In the result, the motions judge accepted all of the consultant's arguments and struck out Imperial Oil's Third Party Claim on the face of the pleadings (i.e., without hearing any evidence).

In doing so, the Court accepted the consultant's argument that it owed no duty of care to Imperial Oil. The motions judge went on to say that even if he was incorrect in finding no *prima facie* duty of care, there were important policy reasons to negate such a duty. In particular, if the Court were to concern itself with the consultant's liability (when it was neither engaged by Imperial Oil, nor was Imperial Oil a recipient of the report), this would only cloud the real issue before the Court; namely, whether Imperial Oil was liable for contaminating the adjacent property owner's groundwater.

The Court also concluded that there was no reasonable cause of action regarding Imperial Oil's assertion that the report contained a negligent misrepresentation, in

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.



## Gibbs Law Spring 2007 Newsletter

that the representation was not made to Imperial Oil nor did Imperial Oil rely upon it.

The consultant also took the position that it was immune from liability on the basis of witness immunity. The consultant had been engaged by a lawyer to prepare the environmental assessment, and the statements contained in the report were made for the purpose of gathering evidence for litigation, which was contemplated at that time. Since the preparation of the report was a prerequisite for giving oral testimony at trial, the consultant's report was protected by witness immunity. The motions judge agreed with the consultant's argument, demonstrating that the retainer by a lawyer for litigation purposes can provide important protections to a consultant.

In the result, the motions judge ruled in favour of the consultant and struck out each and every cause of action relied upon by Imperial Oil.

This decision should be viewed as welcome news for consultants who are often called upon to comment not only on a particular subject property but also on conditions that may exist on, or be caused by, adjacent properties. It is noteworthy that if the Court had come to the opposite result and concluded that the consultant did in fact owe a duty of care to the adjacent property owner, this could have had wide-reaching implications for consultants.

As this case is a lower Court decision, it is not binding in Ontario. However, it is a

well-reasoned, sound decision that will likely have persuasive and precedential value, when the issue is next brought before the Courts.

### **4. Insurance - Faulty Design Exclusion - Court of Appeal Overturns \$31 Million Judgment Against Insurer.**

In late March 2007, the Court of Appeal released its decision in *Canadian National Railway Company v. Royal and Sun Alliance Company of Canada* ("R&SA").

In the early 1990s, CNR undertook the construction of a new railway tunnel under the St. Clair River between Sarnia, Ontario and Port Huron, Michigan. An experienced tunnel equipment manufacturer was retained to construct a custom-designed tunnel boring machine (the "TBM") for the project.

The TBM commenced boring in November 1993. Two months later, the machine broke, when the protective seal system on the outer shell failed to prevent soil and other contaminants from entering the TBM's main bearing. This resulted in damage to the TBM and a 229-day delay in the opening of the tunnel.

At the relevant time, CNR held a builders' risk insurance policy issued by R&SA, insuring it (subject to the limitations, exclusions, terms and conditions of the policy) for "...ALL RISKS of direct physical loss or damage,...including all real and personal property of every kind and

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.



## Gibbs Law Spring 2007 Newsletter

quality, including but not limited to the [TBM]....”

When CNR sought indemnity under the policy, coverage was denied on the basis of the exclusion for “the cost of making good...faulty or improper design” and “inherent vice”. CNR sued R&SA for recovery under the policy.

At trial, the trial judge concluded that the cause of the failure of the TBM was excess differential deflection between components which the TBM was not capable of withstanding. The ensuing damage to the sealing system and resulting contamination of the main bearing was not a foreseeable risk. Therefore, the exclusion did not apply.

As a result, the trial judge found in favour of CNR and held R&SA liable under the policy for damages in the sum of just over \$30 million (inclusive of interest and costs).

On appeal by R&SA, the Court of Appeal allowed the Insurer’s appeal and concluded that the trial judge had erred in finding that the faulty or improper design exclusion did not apply. The Court, however, saw no error in the trial judge’s conclusion that the “inherent vice” exclusion was not engaged in this case.

The Court of Appeal held that although the trial judge had adopted the proper standard of foreseeability requiring that the design in question provide for all foreseeable risks, he erred in applying the evidence adduced at trial to this standard.

In particular, the lead representative of the project had testified at trial that the manufacturer of the TBM had turned its mind to the prospect that differential deflection could occur that would damage the sealing system. However, the trial judge ignored that evidence. He therefore erred by failing to consider the importance of this evidence on this fundamental issue. In essence, the Court of Appeal found that the damage occurred due to a foreseeable design issue, which was excluded from coverage.

The Court of Appeal recognized that an “all risks” policy of property insurance represents an agreed allocation between an Insurer and an Insured of those risks that the Insurer is prepared to underwrite and those to be borne by the Insured. Insurance policies of this type provide broad coverage for losses and damage to property, but they do not provide coverage against all conceivable perils. The policy was not found to be a warranty.

### **5. Construction Lien Claims - Two-Year Limitation for Setting Action Down for Trial.**

In *310 Waste Ltd. v. Casboro Industries*, the Plaintiff claimed a lien of over \$1.6 million for the removal of tires from Casboro’s lands and premises pursuant to a governmental order. Casboro moved to discharge the lien on the basis that an environmental clean-up of this kind was “not lienable”. Casboro was unsuccessful

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.



## Gibbs Law Spring 2007 Newsletter

on its motion and launched an appeal to the Divisional Court.

While the “lienability” decision was under reserve, the second anniversary of the issuance of the Statement of Claim in the lien action passed without the Plaintiff setting it down for trial.

Casboro therefore moved for a dismissal and a declaration that the lien had expired by reason of the lapse of the two-year limitation period for setting the action down for trial, as prescribed by s. 37(1) of the *Construction Lien Act* (the “Act”). Casboro was successful, and the action was dismissed. On appeal, the Divisional Court upheld the dismissal of the Plaintiff’s action.

On further appeal by the Plaintiff, the Court of Appeal dismissed the appeal and once again upheld the dismissal of the action due to the Plaintiff’s failure to set the action down for trial within the two-year mandatory limitation period prescribed by the *Act*.

In doing so, the Court of Appeal pointed out that a reserve judgment did not suspend the operation of the mandatory timelines prescribed by sections 37 and 46 of the *Act*. Moreover, even if the Court were in a position to exercise discretion to “relax” the periods, there was no justification for doing so on the facts of this case. In particular, the failure to set the action down for trial was not due to circumstances beyond the Plaintiff’s control, but was due to the Plaintiff’s inaction.

This case highlights the necessity of adhering to the mandatory timelines prescribed by the *Construction Lien Act*. A failure to set a construction lien case down for trial within the two-year limitation period will generally result in a dismissal of the action.

For further information about construction liens, please contact Kris Hutton at (416) 361-0024, ext. 226.

### **6. Employment Matters: Can Performance Reviews Form the Basis for a Constructive Dismissal Claim?**

As an employer, you may have questions regarding performance evaluations of your staff and whether your organization could be held liable for the criticisms contained in your performance reviews.

In a recent decision released by the Ontario Superior Court of Justice (*Ata-Ayi v. Pepsi*), a longstanding employee sued his employer for constructive dismissal, alleging (amongst other things) that a negative performance review forced him to retire early and was tantamount to being fired.

The Court disagreed with the employee and dismissed the action against his employer for constructive dismissal. The latter involves a unilateral change to a fundamental term of the employment contract (e.g., duties and responsibilities, standing within the company, and/or remuneration), such that the employee is in

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.



## Gibbs Law Spring 2007 Newsletter

essence no longer employed in the same position.

In dismissing the claim, the judge observed that criticisms made through a performance review would not result in a constructive dismissal provided the criticism was made in good faith and in the interests of improving the employee's performance. In the circumstances of this case, the Court held that the employer was justified in bringing forward its concerns regarding the employee and did so in good faith.

The Court also noted that, notwithstanding the employee's perception that he was a victim of racism and was subjected to a "poisonous work environment" (allegedly condoned by his employer), his perceptions were not enough. This was made clear by the Ontario Court of Appeal in *Smith v. Viking Helicopter Ltd.*, wherein the Court of Appeal ruled that:

...a damage action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by this employee. The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or unilateral change of a significant term of that employment.

While every case must be decided on its own unique facts, employers should take comfort that negative performance

evaluations will not lay the foundation for a constructive dismissal claim if the criticisms are constructive and made in good faith, with a view to improving the employee's performance in the workplace.

**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](http://www.gibbslaw.ca)**

**To contact one of our lawyers:**

**Gary Gibbs, ext. 222  
[ggibbs@gibbslaw.ca](mailto:ggibbs@gibbslaw.ca)**

**Michelle Brodey, ext. 223,  
[mbrodey@gibbslaw.ca](mailto:mbrodey@gibbslaw.ca)**

**Peter Mitchell, ext. 224  
[pmitchell@gibbslaw.ca](mailto:pmitchell@gibbslaw.ca)**

**Jennifer Roberts-Logan, ext. 225  
[jroberts-logan@gibbslaw.ca](mailto:jroberts-logan@gibbslaw.ca)**

**Kris Hutton, ext. 226  
[khutton@gibbslaw.ca](mailto:khutton@gibbslaw.ca)**

The information contained in this Newsletter is published by Gibbs & Associates for informational purposes only. It is general in nature, does not constitute legal advice, and should not be acted or relied upon without the advice of a lawyer.