IADC Committee Newsletter

PROFESSIONAL LIABILITY

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IN THIS ISSUE

Howard Borlack and Laurie Murphy provide a Canadian perspective on recent developments and emerging issues concerning the design professional in the areas of limitations, e-discovery, electronic record retention and jurisdiction.

A Canadian Perspective: Recent Developments and Emerging Issues Concerning the Design Professional

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The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership and the insurance industry.

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Limitations

A primary concern for the design professional has always been the length of time during which claims can be brought in respect of work performed. In some cases, including those involving latent defects, proceedings are commenced long after the work in issue has been completed.

In 2004, the Ontario limitations legislation underwent a major reform. The *Limitations Act, 2002*[1] came into force on January 1, 2004. Section 4 establishes a basic limitation period of two years from the day on which the claim was discovered. Section 5 defines the concept of discoverability. Essentially, a claim is discovered on the earlier of the day on which the person with the claim discovered, or ought to have discovered, the claim.

Grey Condominium Corporation No. 27 v. *Blue Mountain Resorts Limited*[2] is an example of the discoverability principle in a construction defect case involving multiple deficiencies manifested over a period of time. The Ontario Court of Appeal confirmed that independently discoverable construction defects caused by a single act of negligence may give rise to separate causes of action (and therefore separate limitation periods for each deficiency) however the deficiencies should be clearly "independently discoverable". The Court held that "given the inherently latent nature of construction defects, and given that they will often be discovered over a period of time, it is neither logical nor fair to deny innocent victims an opportunity to seek redress for the wrongs done to them, based solely on the single cause of action paradigm."[3]

Section 15 of the Act establishes a new 15 year ultimate limitation period after which no proceeding may be commenced even if the limitation period established by any other section has not expired (i.e. even if the claim has not been discovered). This is subject to some exceptions including some types of claims for which there is no limitation period, including environmental claims, and some limited exceptions involving mental incapacity, minors and willful concealment. In *York Condominium Corporation No. 382* v. *Jay-M Holdings Limited*,[4] the Ontario Court of Appeal confirmed that if the act or omission took place before January 1, 2004 and the claim was not discovered before January 1, 2004, the ultimate limitation period starts to run as if the act or omission took place on January 1, 2004. In this case, the result was to allow a 27 year old construction defect claim that was not discovered until shortly after the new Act had come into force to go forward. While the Court recognized that the transition rule effectively created a generous 15-year transition period for undiscovered claims, it stated "[i]t cannot be said to be an absurd result particularly when one recalls that, prior to the passage of the new Act, there was unlimited liability for as-yet undiscovered claims (i.e. there was no ultimate limitation period)" and "it is part of the Act's attempt to ensure that, with respect to pre-existing situations, access to justice be preserved while limiting liability on a go-forward basis."[5] The Court referred to some cases in British Columbia and Alberta where the ultimate limitation period applied from the

[1] S.O. 2002, c.24, Sch. B.
[2] (2008), 90 O.R. (3d) 321 (C.A.), 2008 ONCA 384 (CanLII) [*Grey Condominium*].
[3] *Grey Condominium*, *ibid*. at para. 71.
[4] (2007), 84 O.R. (3d) 414 (C.A.), 2007 ONCA 49 (CanLII), appl'n for leave to appeal to S.C.C. dismissed [*York Condominium*].
[5] *York Condominium*, *ibid*. at para. 39.

date the damage occurred where the limitations statutes in question did not contain similar transition rules.

Amendments to section 22 of the Act in 2006 reintroduced provisions allowing parties to suspend, extend, shorten or exclude limitation periods through the use of tolling and standstill agreements. Prior to these amendments, the Act as originally enacted in 2004 prohibited contracting out of limitation periods. Section 11 of the Act also provides a method for extending the limitation period by having an independent third party assist in resolving disputes.

Electronic Document Discovery and Electronic Record Retention

In today's ever increasing technological society, design professionals are relying on electronic means to communicate, exchange and store documents and information. Electronically stored information has created new challenges for the discovery process in the event of litigation. In light of the increased exposure for professionals and the possibility of late claims, it is critical that design professionals ensure that required documents are preserved and retrievable and that electronic documents will comply with the legal tests for proper records set out in recently enacted legislation and new national standards in order to be admissible in legal proceedings. The failure to do so may result in legally ineffective electronic documents, the unavailability of evidence, the drawing of an adverse inference and the inability to advance or defend the professional's case.

Electronic Discovery

While the development of guidelines and rules for e-discovery has been slower in Canada than in the United States, there have been a number of recent initiatives in Canada including the development of provincial guidelines and practice directions, national guidelines and impending e-discovery amendments to the rules of civil procedure. E-discovery issues are not limited to complex, commercial, large document cases but are a factor in all types and sizes of Canadian civil litigation cases.

Under the Ontario *Rules of Civil Procedure*,[6] electronically stored information is producible on discovery. A "document" includes "data and information in electronic form".[7] Examples are disks, hard drives, CDs, DVDs, email messages and data stored on blackberries or cell phones. This information may be stored on hand-held devices, in the office, at satellite offices or at home offices. Similar but not identical discovery rules are in place in almost all jurisdictions across Canada. However, the rules of civil procedure provide little guidance on how to deal with the new challenges presented by the discovery of electronic documents in practice.

In 2005, a subcommittee of the Ontario Task Force on the Discovery Process released Guidelines for the Discovery of Electronic Documents in Ontario.[8] These are 13 guidelines which were intended to be best practices in order to assist lawyers, parties and judges with the e-discovery process. Courts in other provinces, including the Supreme Court of British Columbia and the Court of Queen's Bench of Alberta, have issued practice directions with respect to e-discovery.

Recognizing that national guidelines were necessary and drawing upon the work of the

[6] R.R.O. 1990, Reg. 194.
[7] Rule 30.01(1)(a).
[8] Available at www.oba.org/en/pdf_newsletter/E-discoveryGuidelines.pdf

Sedona Conference and the U.S. experience, a Canadian working group published the Sedona Canada Principles: Addressing Electronic Discovery.[9] The Sedona Canada Principles, a set of national guidelines for e-discovery, are intended to be compatible with the discovery rules across Canada and to be updated over time. Both the Ontario Guidelines and the Sedona Canada Principles have been cited in the case law.

Upcoming amendments to Ontario's *Rules of Civil Procedure* on January 1, 2010 include a new requirement on parties to prepare a written discovery plan including a new requirement that the parties must consult and have regard to "The Sedona Canada Principles Addressing Electronic Discovery".[10] This is the first time in Ontario that e-discovery guidelines have been incorporated in the *Rules of Civil Procedure*. Several other provinces are proposing amendments to their rules of civil procedure.

The Ontario E-Discovery Implementation Committee, a joint committee established by the Ontario Bar Association and The Advocates' Society and composed of litigation lawyers and judges, recently released eight model e-discovery precedents as well as additional e-discovery best practices documents.[11] The model precedents include an e-discovery checklist, discovery agreement, preservation agreement, sample memoranda to be sent to corporate and individual clients regarding documentary discovery, preservation letters and a preservation order. These are meant to complement and implement the Sedona Canada Principles.

In 2008, the Canadian Judicial Council published two protocols for the use of technology in civil litigation: National Model Practice Direction for the Use of Technology in Civil Litigation and National Generic Protocol for use with the National Model Practice Direction for the Use of Technology in Civil Litigation.[12] The National Model Practice Direction provides best practices for trial judges and lawyers for exchanging productions in electronic form and handling paperless trials.

A Canadian court recently decided a case involving cross-border production of electronically stored information in Canada. In *eBay Canada Ltd.* v. *Canada (National Revenue),*[13] the Federal Court of Appeal affirmed a Federal Court decision authorizing Revenue Canada to require eBay Canada to produce electronic information about its high-volume sellers, including names, contact information and sales records. The information was stored in electronic form on servers in the United States. The information was accessible to and regularly used by eBay Canada for use in its business but was not printed or downloaded onto its computers. The central issue was whether the information sought was foreign-based because it was "available or located" outside Canada. In the Court's view "it is formalistic in the extreme for the appellants to say that, until this simple operation is performed [downloading], the information which they lawfully retrieve in

[9] Available at www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf
[10] O. Reg. 438/08, Rules 29.1.03(1) and (4).
[11] Available at http://oba.org/en/publicaffairs_en/e-discovery/model_precendents.aspx.
[12] Available at http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Model%20Practic(1).pdf and http://www.cjc-ccm.gc.ca/cmslib/general/JTAC%20National%20Generic%20Proto(1).pdf
[13] [2009] 2 C.T.C 141 (F.C.A.), 2008 FCA 348 (CanLII), appl'n for leave to appeal to S.C.C. discontinued [*eBay*].

Canada from the servers, and read on their computer screens in Canada, is not located in Canada."[14]

Electronic Record Retention

Generally, a proper records retention policy should take into consideration specific statutory or regulatory requirements (including any additional requirements based on the type of profession), privacy requirements, business/operational requirements (including contractual obligations), litigation holds and limitation periods.

In Ontario, the *Electronic Commerce Act, 2000* ("ECA") came into force on October 16, 2000.[15] The ECA seeks to make the law "media neutral" (i.e. equally applicable to paper-based and electronic communications) by proposing "functional equivalents" to paper (i.e. methods to serve electronically the policy purposes behind the requirements to use paper). The ECA provides that information shall not be denied legal effect or enforceability solely by reason that it is in electronic form. The ECA then sets out "functional equivalency rules" which provide the standards that electronic information must satisfy in order to be considered functionally equivalent to paper. The criteria include reliability, integrity and accessibility. Subject to important limits on the scope of its application, the ECA generally applies to all legal requirements under Ontario law (but not under other provincial, territorial or federal laws).

In Ontario, electronic record amendments to the *Evidence Act*[16] ("EA") were introduced just prior to the enactment of the ECA. These amendments give electronic records a legal status equal to that of original paper for admissibility in actions (and particularly with respect to the rules relating to authentication and best evidence) where certain tests are satisfied. The EA modifies the best evidence rule, which has traditionally required production of an original document (or the closest thing available), by providing that it is satisfied on proof of the integrity of the electronic record, which may be proved by evidence of the integrity of the electronic records system.

The Canadian General Standards Board has developed, and the Standards Council of Canada has approved, two national standards relating to the use of electronic records as evidence, CAN/CGSB-72.34-2005, *Electronic Records as Documentary Evidence* and CAN/CGSB-72.11-93 (amended to April 2000) *Microfilm and Electronic Images as Documentary Evidence*.[17] These Standards specify the policies, procedures, practices and documentation that organizations need to establish the integrity and authenticity of recorded information as an electronic record in a records management system and to enhance the admissibility and the weight of electronic records as evidence in actions. Although not legally binding, other national standards have received judicial consideration in a wide variety of cases.

Jurisdiction

The Ontario Court of Appeal is considering the possibility of potential changes to the well-established and oft-cited framework for the assumption of jurisdiction over actions involving out-of-province defendants set out

[14] *eBay*, *ibid*. at para. 50.
[15] S.O. 2000, c.17.
[16] R.S.O. 1990, c. E.23, s. 34.1(1)-(11).
[17] Available for purchase from CGSB's website at: www.tpsgc-pwgsc.gc.ca/cgsb/

in its decision in *Muscutt* v. *Courcelles*,[18] the leading case in a quintet of jurisdiction cases released in 2002. In two cases under appeal, the Court advised during its deliberations that as a result of recent developments in the law it requested supplementary facta and a rehearing on whether the Court should continue to follow the *Muscutt* approach or whether it should overrule its own decision – a very rare occurrence under Canadian common law – and provide a new framework for jurisdiction. This issue is of significant interest to those whose professional services could be affected by the need to bring or defend multi-jurisdictional cases.

Referring to a progression of jurisdiction cases from the Supreme Court of Canada, the Court in *Muscutt* described "the reality of modern interprovincial and international commerce and the frequent and rapid movement of people, goods and services across borders".[19] Increasingly, design professionals are taking advantage of opportunities offered by the global marketplace. An important consideration for design professionals supplying professional services on interprovincial or international projects is the issue of the jurisdiction of Ontario courts over out-of-province defendants in any subsequent litigation concerning the work performed.

In *Muscutt*, the Ontario Court of Appeal confirmed that there are three ways in which an Ontario court may assert jurisdiction against an out-of-province defendant: (1) where the defendant is physically present in Ontario (presence-based jurisdiction); (2) where the defendant has submitted or attorned to the jurisdiction of the of the Ontario courts (consent based jurisdiction); or (3) where there is a real and substantial connection between the subject matter of the action and Ontario (assumed jurisdiction).[20] The Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*[21] and *Hunt* v. *T&N plc*[22] held that the principles of order and fairness require limits on the reach of provincial jurisdiction against out-of-province defendants and that jurisdiction can only be asserted against an out-of-province defendant on the basis of a "real and substantial connection".[23] In *Muscutt*, the Court identified eight factors to be considered in determining whether the "real and substantial connection" test has been satisfied. These factors include:

(i) the connection between the forum and the plaintiff's claim;
(ii) the connection between the forum and the defendant;
(iii) unfairness to the defendant in assuming jurisdiction;
(iv) unfairness to the plaintiff in not assuming jurisdiction;
(v) the involvement of other parties to the suit; and
(vi) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

The Court emphasized that none of the factors are determinative and all relevant factors must be considered and weighed together. Once an Ontario court has determined that it can assume jurisdiction, it must then determine whether it should nonetheless exercise its discretion to decline jurisdiction on the basis that another jurisdiction is the more convenient and more appropriate for the pursuit of the action and for securing the ends

[18] (2002), 60 O.R. (3d) 20 (Ont. C.A.), 2002 CanLII 44957 (ON C.A.) [*Muscutt*].
[19] *Muscutt*, *ibid*. at para. 13.
[20] *Muscutt*, *ibid*. at para. 19.
[21] [1990] 3 S.C.R. 1077, 1990 CanLII 29 (S.C.C.).
[22] [1993] 4 S.C.R. 289, 1993 CanLII 43 (S.C.C.).
[23] *Muscutt*, *supra* note 18, at para. 15.

of justice.[24] While many of the *forum non conveniens* factors overlap with the *jurisdiction simpliciter* issues, the two tests remain separate and distinct.

The cases under appeal in which the Ontario Court of Appeal is considering changes to the *Muscutt* framework are *Charron* v. *Bel Air Travel Group Ltd.*[25] and *Van Breda* v. *Village Resorts Limited.*[26] Both cases involved an Ontario tourist who was injured or killed while vacationing at a resort in Cuba. In addition to naming the Ontario tour companies that sold the travel packages to the plaintiffs, the Cuban resort was also added as a defendant. The Cuban resort subsequently brought motions to have the actions against it dismissed based on a lack of jurisdiction in Ontario. In both cases, the motion judge decided that the Ontario courts had jurisdiction to hear the claims being made against the Cuban resort based on the *Muscutt* factors.

In the second appearance, the respondents argued that the test for jurisdiction enunciated by *Muscutt* should be maintained and that there is no reason to overrule or modify it. It was decided with the benefit of and consideration of cases, statutes, rules, treaties and legal scholarship from a number of jurisdictions. It has been applied in numerous cases and the lower courts in Ontario have not expressed any real frustration with the current test in their decisions. A second argument is that the *Muscutt* framework should be retained subject to a couple changes designed to clarify the test. It is suggested that the Court could make clear that the "fairness" factors (unfairness to the defendant in assuming jurisdiction and unfairness to the plaintiff in not assuming jurisdiction) are not to be given priority. Rather, they are simply two factors to be weighed amongst the others. Second, the Court could reemphasize the importance of reasonable foreseeability as a factor in the jurisdiction *simpliciter* analysis.

The appellants argued that the *Muscutt* test should be overruled in favour of a categorical approach. The parties who take this approach rely on legal commentators critical of the *Muscutt* framework stating that it is too complex, lacks uniformity and is too unpredictable. These parties suggest that the Court should look to other countries and provinces for their approach to jurisdiction. In 1994, the Uniform Law Conference of Canada adopted the *Court Jurisdiction and Proceedings Transfer Act*[27] ("CJPTA"), a model (non-binding, non-legislative) act which provides for Canadian courts to follow a uniform set of rules in determining whether they have jurisdiction to hear a case. The CJPTA provides for enumerated grounds and a residual discretion in determining whether jurisdiction should be assumed for other reasons including as a "forum of necessity". The CJPTA has been enacted in some provinces but not in Ontario. The pro-*Muscutt* camp maintains that the tests adopted in other countries and provinces maintain a residual discretion for the judge that runs contrary to the predictability and certainty arguments and will not do away with the need for judicial analysis.

The rehearing in the *Charron* and *Van Breda* appeals was heard on October 6 and 7, 2009 before a five-judge panel. The Court reserved its decision.

[24] *Muscutt*, *supra* note 18, at para. 40.
[25] (2008), 92 O.R. (3d) 608 (S.C.J.), 2008 CanLII 53834 (ON S.C.).
[26] (2008), 60 C.P.C. (6th) 186 (S.C.J.), 2008 CanLII 32309 (ON S.C.).
[27] Available at www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf

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