

### Canada's Specialty Insurance Law Firm

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#### “Construction Law Newsletter”

***This special edition of our newsletter focusses on construction litigation practice, including two case briefs which will be of interest for adjusters and insurers working in this area.***

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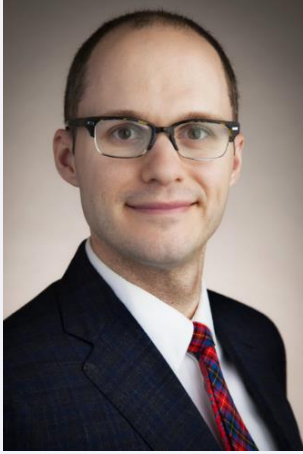
### ***More Than Vague Allegations are Needed for a Sophisticated Litigant to Defeat a Limitations Defence***

By **Robert Smith**, Dolden Toronto

In *Bhoola v. City of Vaughan*, the Ontario Superior Court of Justice granted summary judgment dismissing the claim brought against the City of Vaughan for damage sustained in 2017 that was contributed to by a building permit that was allegedly improperly issued in 1981. The court found that the claim violated the two-year and ultimate fifteen-year limitation periods found in the Ontario *Limitations Act, 2002*.

The plaintiff, an owner of a large property development company, purchased his house on a hill in the late 1980s. The house was originally built in 1981 pursuant to a municipal building permit. The land on which the house was built sloped down sharply towards a stream. The plaintiff was warned at several points that the slope was unstable. He was warned by the relevant conservation authority in 1992 that his construction activities may destabilize the slope. He was also warned by an engineer in 2013 after some of the soil subsided and damaged his house.

In April and May 2017, the plaintiff's property suffered severe damage after heavy rain caused the slope to collapse. The plaintiff, being a property



developer, came to the conclusion by December 2017 that the City might be liable for allowing the house to be built on unstable soil. In spite of this, he did not commence his lawsuit until February 2020.

*The Two Year Limitation Period Applied Because of the Plaintiff's Knowledge*

The decision turned on what the plaintiff knew and when. The court noted that the plaintiff had extensive knowledge about the construction of homes and about permits, given his years of experience in a senior role as a land developer that had built over 3,000 houses.

The plaintiff admitted to the City's insurance adjuster in December 2017 that he thought the City had liability because it allowed the house to be built on unsuitable soil. The court also held that the plaintiff knew that the soil was unstable as early as 2013, and the 2017 damage should have come as no surprise to him.

The plaintiff only provided vague hearsay evidence to resist summary judgment. He alleged that some unidentified employees of the City assured him they would "take care of him" with respect to his claim. The court rejected this defense. It held that the plaintiff was a sophisticated businessman who needed to provide more than vague and ambiguous allegations to prevent the running of a limitation period.

*No Evidence of a Cover-up to Defeat the Fifteen Year Limitation Period*

Section 15 of the *Limitations Act* provides for an ultimate 15-year limitation period from the date of the act or omission that causes the damage. There is no element of discoverability.

The plaintiff attempted to resist the City's argument that this limitation period applied by arguing that the City willfully concealed the defects in the building permit process from him because it did not search its files in 2013 to check that the original permits were issued properly.

The court rejected this argument. It, again, held that the plaintiff was making vague and unsubstantiated allegations. The court held that a much more fulsome record was needed for the plaintiff to turn his allegations into a genuine issue that required a trial.

*Takeaways*

Many limitations defences are not cut-and-dry. Instead, they exist on a spectrum. On the one end, there are the situations where the plaintiff had the necessary information, but failed to sue within the two-year limitation period. These situations typically involve contracts between the plaintiff and the potential defendant. On the other end of the spectrum are cases where the plaintiff only knew that damage occurred but did not know who committed the acts or omissions that caused the damage. These types of cases come down to the facts and level of sophistication of the plaintiff.

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***The Risk of Compensable Construction Delays***

By [Chris Stribopoulos](#), Dolden Toronto and [Elka Dadmand](#), Dolden Toronto



In *Walsh Construction v Toronto Transit Commission et al.*, 2024 ONSC 2782, the Ontario Superior Court of Justice considered a number of issues that form the hallmarks of complex construction litigation, including design issues, liquidated damages, scope changes, flow through subcontractor claims, contract misadministration, and more. The trial took 161 days, and the court produced a decision totalling nearly 850 paragraphs. This case comment focuses strictly on the court's analysis of compensable delays.

*Factual Matrix*

The Toronto Transit Commission ("TTC") and Walsh Construction Company Canada ("Walsh") entered into a contract for the construction of the Steeles West Subway Station. The contract was for \$165,925,000 inclusive of taxes. Due to a number of issues, Walsh achieved contract completion 1,372 days beyond the original, agreed upon, completion date. By the time the contract was completed, the contract price had increased by \$57,300,000. Walsh sued the TTC for its additional work and what it argued was the unpaid contract amount.

*Responsibility for the Contract Delays*

The court held that the project was plagued by delays. The court had "no doubt" that the TTC was responsible for much of the delays. Its design was not ready for tender, it issued constant design changes, it failed to provide



Walsh with exclusive possession of the entire jobsite, and it did not prepare for what would later be unforeseen utilities issues. The court concluded that Walsh was entitled to 1,047 compensable days of delay.

### *Expert Analysis of the Compensable Delays*

The court admitted that it was not in a position to determine the amount of compensable delay on its own, and required the input of experts to quantify the 23 heads of damages. In considering the evidence of the experts, the court recognized that the pool of experts in construction cases is often small. However, so long as the experts could maintain their independence, the project familiarity was not a hindrance.

Having considered all the expert evidence, the court favoured the evidence of the Walsh expert because he was the only expert who actually did a delay impact analysis and who provided an actual opinion as to the compensable time extension to which Walsh was entitled. While the TTC expert took issue with the methodology, it failed to provide its own delay impact analysis, and its arguments were not compelling to the court. The court ultimately awarded Walsh damages of \$58,000,000.

### *Takeaways*

This case highlights the risks of delays in construction projects. Delays can come with a hefty price tag, and the court's admitted limited knowledge in calculating compensable damages may come down to choosing between competing experts. It is crucial for an expert to not simply criticize the opposing expert's methodology, but to put forward its own assessment/opinion of the cost of the delay.

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