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DEVELOPMENTS IN THE LAW OF PROFESSIONAL LIABILITY

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DEVELOPMENTS IN THE LAW OF PROFESSIONAL LIABILITY

This paper will cover recent developments of the law of professional liability with a particular emphasis on British Columbia. It will cover the definition of “professional” and “professional services”, parties to whom professionals can be held liable, the basis upon which professionals can be held liable (e.g., contract, tort and equity) and the requirement for some professionals to issue “Letters of Assurance.”

A. WHO IS A “PROFESSIONAL”

Asked to define a “professional”, the occupations of doctor, lawyer, accountant, engineer and architect usually come to mind. However, over time the definition of professionals has expanded to include occupations that have not traditionally been included in the list. For example, Canadian Courts have held that social workers, real estate brokers, journalists and investment advisors may constitute “professionals”.¹ Various criteria have also evolved through the Courts to aid in determining who qualifies as a professional. In *Law Society of Upper Canada v. Barrie (City)*² the Court approved of the definition of “profession” from *Black’s Law Dictionary*:

A vocation or occupation requiring special, usually advanced, education, knowledge, and skill; e.g., law or medical professions. The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.

The Court went on to say that professions are often self-regulating and self-licensing and members of the profession must conform to standards of professional conduct and technical skill.

Three criteria that the courts consider in determining whether an occupation is a profession or not were outlined by Champion and Dimmer in their leading text, *Professional Liability in Canada*:³

1. the work being performed is skilled and specialized, derived from training and experience, and it is generally accepted that a substantial part of the work is mental or intellectual rather than manual;

¹ Champion & Dimmer, *Professional Liability in Canada*, looseleaf, (Toronto: Carswell, 2005).

² 2000 CarswellOnt 16 (Ont. S.C.J.).

³ *Supra*, at 1-2.

2. persons engaged in the profession are expected to be committed to certain high standards of service and principles not only for the benefit of the client but for the community as a whole; and
3. persons practicing in the profession are members of associations, which regulate admission and standards for the profession.

Once it is established that a particular occupation is a profession another issue arises. Was the professional engaged in “professional services” such that they are covered under an E & O policy or such that the activity is excluded under a Commercial General Liability (“CGL”) policy? In order to make this determination one must examine the definition of “professional services.”

B. PROFESSIONAL SERVICES

Generally, insuring agreements are broadly construed and exclusions are narrowly construed. However, Canadian Courts have upheld the following definition of “professional services” both in the context of insuring agreements in E & O policies and exclusion clauses in CGL policies:

A ‘professional’ act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labour or skill, and the labour or skill involved is predominantly mental or intellectual, rather than physical or manual.⁴

In *Chemetics International Ltd. v. Commercial Union Assurance Co. of Canada*⁵ the B.C. Supreme Court considered what constituted a “professional service”. In that case, a professional firm designed and supplied a pulp leaching plant for a U.S.-based customer. After construction was completed, the insured kept a supervisor on site to train the operators and it also provided a training manual to the owner. The tower of the pulp bleaching plant was damaged when the operator failed to react properly to a pump failure. The owner successfully sued the insured in the United States having alleged that the insured had failed to warn it about pump failure and how to handle such a situation. The insured then brought an action in Canada against its general liability insurer. The policy excluded:

⁴ *Rotating Equipment Services Inc. v. Continental Insurance Co.*, 2004 ABQB 703; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, [2003] I.L.R. I-4247 (Ont. S.C.); *Chemetics International Ltd. v. Commercial Union Assurance Co. of Canada* (1981), 31 B.C.L.R. 273 (S.C.).

⁵ *Supra*, note 4.

...liability for claims...for damage to...property caused directly or indirectly by...errors or omissions in the rendering of professional services.

The B.C. Supreme Court first addressed what activities fell within the meaning of the words “professional services”. The Court said:

I adopt, as part of my concept of a professional service, the principle enunciated in the Marx case, where it was said...:In determining whether a particular act or omission is of a professional nature the act or omission itself must be looked at and not the title or character of the party who performs or fails to perform the act.

...In other words, a professional service must embrace both a mental or intellectual exercise within a recognized discipline and the application of special skill, knowledge and training to the particular function in question.

The Court determined that the exclusion did not apply because providing a warning about pump failure did not require a specialized skill. The Court said:

In my opinion, the function of giving warning of the risk which gave rise to this liability would not necessarily be a professional service. The person giving the warning would simply be telling experienced pulp operators that, if there is a temporary interruption in the removal of pulp stock from the tower but fresh pulp stock continues to enter the tower, dewatering will occur and a crust will form. He would also say that seal water entering the tower at the bottom would raise the plug, and care would have to be taken to ensure that the encrusted top of the plug, which they knew or ought to have known might not be level, did not rise enough to bear upon the roof. Such a warning required no special skill, learning, experience or training. It could have been given by a salesman, a tradesman or a technician, and it amounted to nothing more than ordinary common sense...

The Court’s decision was upheld on appeal. The B.C. Court of Appeal dismissed the insurer’s argument that the services in question had to be “professional” in nature because the individual who had supervised the writing of the manual was himself a professional engineer. The Court of Appeal said:

In the insurer's submissions, there is much emphasis upon the fact that Mr. Axen, the employee of Chemetics who supervised the writing of the manual and the provision of services called for in cl. 1.3, had the qualifications to be a professional engineer. He had qualified as such in his native Sweden and, after the completion of the Chesapeake project, qualified as a professional engineer in British Columbia but, at the time he was working on that project, was not formally qualified in either British Columbia or Virginia. I cannot agree that the fact that Chemetics, in providing services to Chesapeake, availed itself of the services of a person with professional qualifications is determinative of the question whether the services provided by Chemetics were professional services.

Thus in determining whether a particular activity constitutes a "professional service" the focus should be on the nature of the act itself not on the title of the person performing the activity. In other words, a "professional" can provide both "professional services" and "non-professional services."

Of course the overriding consideration will be what the policy says. Many professional liability policies expressly identify the type of "professional services" for which coverage is provided and, in the context of a CGL policy, the "professional services" that are excluded.

The new CGL Form recently adopted by the Insurance Bureau of Canada contains a Professional Services Exclusion that defines "professional services" as follows:

"24. "Professional services" shall include but not be limited to:

- a. Medical, surgical, dental, x-ray or nursing service or treatment, or the furnishing of food or beverages in connection therewith;
- b. Any professional service or treatment conducive to health;
- c. Professional services of a pharmacist;
- d. The furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances;
- e. The handling or treatment of deceased human bodies
including autopsies, organ donations or other procedures;

- f. Any cosmetic, body piercing, tonsorial, massage, physiotherapy, chiropody, hearing aid, optical or optometrical services or treatments;
- g. The preparation or approval of maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications;
- h. Supervisory, inspection, architectural, design or engineering services;
- i. Accountant's, advertiser's, notary's (Quebec), public notary's, paralegal's, lawyer's, real estate broker's or agent's, insurance broker's or agent's, travel agent's, financial institution's, or consultant's professional advices or activities;
- j. Any computer programming or re-programming, consulting, advisory or related services; or
- k. Claim, investigation, adjustment, appraisal, survey or audit services.

This new and broadly worded Professional Services Exclusion will restrict coverage to insureds that engage in semi-professional services beyond the ambit of the traditional professional callings such as an architect, engineer, lawyer, doctor and accountant. Given that the broadly worded exclusion clause will likely be adopted by more and more insurers, it is important for individuals who can be characterized as professionals providing professional services to assess whether they need to obtain additional liability coverage.

C. TO WHOM CAN A PROFESSIONAL BE LIABLE

Professionals can be held liable to various parties. The first that comes to mind is the client, because there is normally a contractual relationship between professionals and their clients. However, there are many other individuals to whom a professional may be liable depending on whether or not the professional owed them a duty of care and whether a breach of that duty was the proximate cause of the loss and not too remote.

The existence of a duty is a question of law to be decided by a Court. However, in this section I will outline the concepts that will enable the reader to determine whether a professional owes another person a duty of care, such that they may be liable to that person if the duty is breached.

The neighbour principle espoused by the House of Lords in the well-known case of *Donoghue v. Stevenson*⁶ held that a duty of care arose wherever some harm was reasonably foreseeable, unless good policy reasons exist for denying such a duty. This principle was expanded by the Supreme Court of Canada in *Kamloops v. Nielsen*⁷ where Madam Justice Wilson particularized it to a degree:

(1) is there a sufficiently close relationship between the parties... so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

This test has been consistently followed in other Supreme Court of Canada cases.⁸

In *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*⁹ an apartment building's original owner and developer sold it to a subsequent purchaser who was not in contractual privity with the general contractor who built the building. Later, after a large slab fell from the building, the purchaser had to replace its entire exterior cladding. The purchaser sued the contractor for negligence, claiming the costs to repair the entire exterior cladding. The motions judge dismissed the contractor's application to strike out the claim as disclosing no cause of action, or alternatively for summary judgment. The Manitoba Court of Appeal struck the claim on the former ground, ruling that damages for economic loss were not recoverable in the circumstances. The purchaser appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada concluded that a duty of care in tort can arise coextensively with a contractual duty. They held a general contractor overseeing the construction of a building may be held tortiously liable to a subsequent purchaser, even one not in contractual privity with the contractor, for the cost of repairs to the building which, if left unattended, may in time pose a real and substantial danger to the health and safety of its occupants.

In essence, this case stands for the proposition that all future owners of a building may have a cause of action in tort against professionals who negligently build a building which poses a danger to health and safety.

⁶ [1932] A.C. 562.

⁷ [1984] 2 S.C.R. at 10.

⁸ Linden, Allen A, *Canadian Tort Law*, (Toronto: Butterworths, 1997).

⁹ 1995 CarswellMan 19 (S.C.C.).

In *Cook v. Bowen Island Realty Ltd.*¹⁰ the plaintiffs sued a developer, two public health inspectors, and an engineer after it was discovered that the property they purchased from the developer contained sewage and water systems that were both unlawful and unsanitary. The developer was sued for negligence, breach of contract and deceit, while the remaining defendants were sued only for negligence. The plaintiffs also sued the engineer who designed and built the systems, for negligence.

The evidence established that the developer hired the engineer to design and build the sewage system. The plans submitted to the health inspectors by the engineer did not conform to statutory requirements. Notwithstanding the problems, the two inspectors issued a construction permit for the system.

Further, the health inspectors failed to carry out a required inspection of the property before giving their final approval. Instead, they relied on a certificate from the engineer that the sewage system complied with statutory requirements. The evidence also established that the health inspectors were informed by the engineer of changes from the original plans before they gave their final approval.

With respect to the water system, the evidence established that, although a formal application was never made to the health inspectors, they were informed of plans for a well in the property which they knew would not comply with statutory requirements. The evidence also established that the developer lied to a municipal building inspector about the source of the water in order to obtain an occupancy permit for the property. He also lied to the plaintiff about the water quality.

The Court held that engineers who participate in the construction and design of a building or system owe a duty in tort to subsequent purchasers. In this case, the engineer prepared a sewage system design that was seriously at fault. He was also negligent in his supervisory duties in certifying that the system had been built in accordance with the conditions of the building permit.

The public health inspectors were also liable for the water system. The Court held that once a policy decision had been made by a government to inspect building plans and construction, a duty of care is owed to all who might be injured by the negligent exercise of those powers. In this case, the inspectors were negligent in granting a construction permit based on a sewage system plan which did not meet statutory requirements. They were further negligent in failing to inspect the construction of the work prior to giving it final approval. The inspectors were also liable for the unlawful well, even though they never received a formal application for its approval – their duty

¹⁰ 1997 CarswellBC 2187 (B.C.S.C.).

to enforce compliance with statutory requirements arose upon being informed that the well was being installed.

The developer was also liable for fraudulent misrepresentation. He lied to the building inspector in order to obtain an occupancy permit that was necessary for the completion of the transaction with the plaintiffs. He also induced the purchasers to buy the property by lying about the water quality.

This case demonstrates how liability can arise against professionals such as engineers and building inspectors when there is no privity of contract between the plaintiff and professional but there is a *sufficiently close relationship between the parties... so that, in the reasonable contemplation of the [professional], carelessness on its part might cause damage to that person.*

D. TYPES OF CLAIMS AGAINST PROFESSIONALS

The Supreme Court of Canada in *Central Trust v. Rafuse*¹¹ held that professionals can be sued in contract, tort and equity, concurrently. Thus, a person can commence an action against a professional for negligence, breach of contract and breach of fiduciary duty at the same time and the professional could be held liable for any or all of these breaches. However, one must remember that contracts between professionals and their clients usually contain provisions that limit the availability of proceeding in this way.

i. Contract

Today, most professionals such as lawyers, engineers and architects enter into a contract with clients whereby they agree to provide professional services for a fee. These agreements are the basis for a claim in contract by the client.

The terms of a contract may be reduced to writing or may also entail verbal representations. Terms may also be implied into a contract. An example, of an implied term with respect to professional contracts is that the professional will act with the degree of skill, care and diligence of a reasonably competent professional in that area of practice.¹² In order to be successful in a breach of contract case, the client must prove that the professional failed to perform a contractual obligation either express or implied. For example, if a lawyer fails to file a document in Court by a deadline or if a doctor performs surgery to the left knee instead of the right knee.

¹¹ [1988] 1 S.C.R. 1206.

¹² Ibid.

To sue on the basis of a contract, the parties must normally be privy to the contract. For example "C" cannot sue on the basis of a contract between "A" and "B". However, the doctrine of privity of contract is not absolute. The Supreme Court of Canada recognized a "principled exception" to privity of contract. It is now the law that a third party beneficiary to a contract may enforce the contract if such enforcement would be the intention of the contracting parties.¹³

In *Fraser River*,¹⁴ the Court set out two "critical and cumulative factors" to be used in determining the parties' intent that the contract should be enforceable by the third party beneficiary:

- (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
- (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

In the *Fraser River* case a third party had chartered a barge from Fraser River that sunk as a result of the third party's negligence. The third party was able to rely on a provision in the contract of insurance between Fraser River and its insurer which prevented the insurer from starting a subrogated action against a "charterer".

ii. Tort

The term tort derives from a Latin word, *tortus*, which means twisted or crooked. The word evolved through the English language and is synonymous with the word "wrong". A tort is a civil wrong not including breaches of contract or breaches of equitable duties. Liability for a tort is found when it is determined that a professional breached a duty of care it owed to another. This section will deal with the tort of negligence and negligent misrepresentation.

To establish liability in negligence, the plaintiff must show that:

1. the professional owed a duty of care to the plaintiff;

¹³ *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108

¹⁴ *Supra*, at 32.

2. the professional breached that duty of care, such that the professional fell below the standard of care required of him or her;
3. damages were suffered by the plaintiff as a result of the breach; and
4. the damages suffered were reasonably foreseeable as arising from the professional's conduct.

The leading case on duties of care in tort is *Kamloops (City) v. Nielsen*¹⁵ in which the court set out the test for establishing whether a duty of care is owed to another:

(1) is there a sufficiently close relationship between the parties... so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

Factors that a court considers in determining whether a *sufficiently close relationship* include the relationship between the parties, the physical proximity, assumed or imposed obligations and close causal connection.¹⁶

An excellent example of determining whether a duty of care exists between two parties in a negligent misrepresentation case is the Supreme Court of Canada decision in *Hercules Management Ltd. v. Ernst & Young*.¹⁷

In *Hercules Management*, the Court addressed whether accountants owed a duty of care to shareholders of a corporation who relied on audited financial statements to their detriment. The Court held that for policy reasons the accountants did not owe a duty of care to the shareholders because imposing a duty would result in auditors being exposed to "an indeterminate amount for an indeterminate time to an indeterminate class." The Court stated that:

[t]he fact that audit reports will be relied on by many different people, including shareholders, creditors, and potential shareholders, for a wide variety of purposes, will almost always be reasonably foreseeable to auditors. As those reports are produced by skilled professionals, it will be wholly reasonable for any of those people to rely on them. Therefore, it

¹⁵ *Supra*

¹⁶ *Martel Building Ltd. v. Canada* (2000), 193 D.L.R. (4th) 1 (S.C.C.).

¹⁷ 1997 CarswellMan 199 (S.C.C.).

makes sense, where defendant auditors do not know the identity of the plaintiffs, or where the auditors' statements are not used for a specific purpose or transaction for which they were made, to negate the duty of care owed by auditors in preparation of those reports.

Thus the Court left it open to find that a duty of care exists in situations where the defendant knew the identity of the plaintiffs and where the defendant's statement are used for a specific purpose or transaction for which the statements were made.

In *de la Giroday v. Brough*,¹⁸ the B.C. Court of Appeal dealt with a negligence claim against a doctor. The plaintiff had flu-like symptoms and consulted his family doctor. The defendant doctor sent the plaintiff home with instructions to rest and let the flu run its course. The plaintiff went to the hospital when his condition worsened where he was diagnosed with necrotizing fasciitis. The plaintiff suffered kidney failure and required dialysis. The plaintiff sued the doctor for negligence or medical malpractice.

The trial judge dismissed the action holding that the doctor's assessment of the plaintiff turned on a clinical judgment call. He held that there was a significant body of professional opinion which supported the course the doctor took.

The plaintiff appealed the decision. The Court of Appeal held that the trial judge misapprehended the evidence of expert witnesses. The Court also held that the pleadings were broad enough to encompass an action for breach of contract as well as negligence. The Court held that despite the medical services scheme in force in the province in 1990, at the time of the consultations between the plaintiff and the defendant, the relationship between patient and physician remained contractual. However, because there was conflicting evidence on the breach issue the Court sent the matter down for a retrial.

This case highlights that professionals can be held liable in contract and tort concurrently.

iii. Fiduciary Duties

Generally, claims against professionals include a claim for breach of a fiduciary duty. *Black's Law Dictionary* defines fiduciary duty as:

A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (*e.g.*, trustee, guardian)

¹⁸ 1997 CarswellBC 1132 (B.C.C.A.).

The Supreme Court of Canada described fiduciary relationships as the following:

...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.¹⁹

More recently, the Supreme Court of Canada has held that relationships in which a fiduciary obligation have been imposed possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.²⁰

Lawyers, real estate agents and doctors have been found to be fiduciaries. 3464920 *Canada Inc. v. Strother*,²¹ is a recent British Columbia case that deals with, among other issues, whether a lawyer, Strother, owed a fiduciary duty towards his client, 3464920 *Canada Inc.* (the "Plaintiff").

The Plaintiff carried on business in tax-assisted production services financing ("TAPSF") for the film industry. The Plaintiff retained the defendant solicitor Strother to act as its tax shelter advisor. Written retainer agreements were executed by the Plaintiff and Strother for consecutive one-year terms in 1996 and 1997.

In 1998, the Minister for National Revenue introduced amendments to the *Income Tax Act* (the "Act") to end TAPSF tax shelters. The Plaintiff made inquiries of Strother as to the possibility of continuing to carry on its TAPSF business and Strother advised the Plaintiff that no remedies were available and that tax sheltered financing was at an end. Based on this advice, the Plaintiff decided to cease its business of TAPSF provision.

¹⁹ *Guerin v. R.*, [1984] 2 S.C.R. 335.

²⁰ *Frame v. Smith* 1987 CarswellOnt 347 (S.C.C.).

²¹ 3464920 *Canada Inc. v. Strother* 2005 CarswellBC 83 (B.C.C.A.), appeal allowed in part, 2007 SCC 24.

After expiry of written retainer agreements, but while Strother and the defendant law firm were still engaged in the performance of legal work for the Plaintiff, Strother and a former employee of the Plaintiff sought an advance tax ruling on a potential exception to the *Act* amendments which would permit resumption of a form of TAPSF. At no time prior to receipt of the ruling did Strother advise the Plaintiff of his relationship with the former employee or of the application for an advance tax ruling.

The advance tax ruling was favourable and by prior agreement, Strother obtained shares in a company which proceeded to exploit the exception in the *Act* and generate substantial revenues. The Plaintiff was unable to organize in time to exploit the *Act* exception and brought an action for damages, accounting and disgorgement of profits for breach of Strother's fiduciary duty and duty of confidentiality.

The action was dismissed and the Plaintiff appealed. On appeal, the Court held that a solicitor's fiduciary duty to a client is not restricted to the precise terms of any contractual retainer. The duty includes, among other things, an ongoing obligation to disclose any conflict of interest and to obtain the client's consent prior to taking any actions in potential conflict.

In this case, Strother's ongoing obligations to the Plaintiff included disclosure of a personal conflict and his attempt to receive an advance tax ruling. These obligations were particularly clear having regard to the Plaintiff's request for advice as to its ability to continue carrying on the TAPSF business. The Court held that Strother breached his fiduciary duty to the Plaintiff qua client and was liable to account for and disgorge profits obtained as consequence of the breach.

It is obvious that lawyers would owe a fiduciary duty to a client to avoid a conflict of interest and to maintain the confidentiality of his client. One is less likely to find a fiduciary relationship with architects and engineers, however.

For example, in *Welsh Enterprises Ltd. v. M. Milligan & Associates Ltd.*²² the plaintiff was primarily involved in mechanical work for various mining companies. The plaintiff successfully bid on a project to build a building to house machinery that would separate sand from mined mine-tailings. The Plaintiff retained an engineering firm to accurately determine the size, lengths and capacity of the existing steel from the mine, redesign the new building to incorporate these existing steel members and provide a new design for wind/lateral bracing to the building and prepare a new roof truss design.

The building suffered damages due to roof leaks and the plaintiff brought an action against the engineering firm on the basis of breach of contract, breach of fiduciary duty,

²² 2005 CarswellBC 1809 (B.C.S.C.).

negligence and intentional interference with contractual rights, together with damages for inducing breach of contract.

With respect to the fiduciary duty claim, the Court held that:

...fiduciary obligations arise out of a fiduciary relationship and in order to establish the existence of a fiduciary relationship a plaintiff must establish that the plaintiff was particularly vulnerable such that the defendant was in a position of power or control over him. The Court of Appeal characterized a fiduciary relationship as one where a power/dependency dynamic is at work, where one party "gains a position of overriding power or influence over another party". Having obtained that position a fiduciary then has scope for the exercise of some discretion or power and can unilaterally exercise that power so as to affect the beneficiary's legal or practical interests and the beneficiary is at that point particularly at the mercy of the fiduciary. Thereafter the fiduciary is in such a position of trust or power that his advice will be relied upon to the extent that the beneficiary's decision is effectively that of the advisor.

In this case, there was no fiduciary relationship between the plaintiff and the engineering firm because the plaintiff had control over bidding for the project, the price of the contract and the dealings with the mine.

The Court noted that a fiduciary duty may arise out of statute but failed to see how the *Association of Professional Engineers and Geoscientists of B.C. Code of Ethics* created a fiduciary duty absent one party having power and influence over the other with the consequent opportunity to appropriate or misuse the property of the other party.

This case illustrates that fiduciary duties do not arise in all professional relationships. One must examine whether the relationship is characterized by a power imbalance, whether the professional is in a position of power or trust such that the plaintiff is relying on the professional. Note that a Code of Ethics does not always give rise to a fiduciary duty unless one already exists. These are all factors to consider when trying to determine whether a fiduciary duty exists.

E. LETTERS OF ASSURANCE

Since the Supreme Court of Canada's decision in *Kamloops v. Nielsen*,²³ municipal governments responsible for regulating construction activities have faced potential

²³ *Supra*

exposure to liability when major post-construction problems are encountered. In *Kamloops v. Nielsen*, a contractor built a house for his father, the defendant Hughes, who was an alderman in the City of Kamloops. The contractor failed to comply with a requirement in the approved plans that the footings be taken down to solid bearing. A City building inspector inspected the foundations and placed a stop work order on the site pending submission of remedial plans. Although such plans were prepared, the contractor continued construction according to the original plans and the stop work order remained in effect.

Hughes purchased the house and, advised by the City solicitor of the structural defect and the stop work order, encouraged the City not to pursue the matter. A strike of city employees broke out at that point and nothing further was done to resolve the problem. Hughes moved into the house, although no occupancy permit was issued, and subsequently sold the house to the plaintiff who was not advised of the defects or of the stop work order.

Approximately one year later, the plaintiff discovered that the foundation had subsided and brought an action against Hughes and the City. At trial, both defendants were found liable in negligence and fault was apportioned 75 percent against Hughes and 25 percent against the City. The appeal to the Supreme Court of Canada was dismissed.

Since this case, municipal authorities in British Columbia have typically required professional certification of building plans and construction activities in certain circumstances, including multi-unit housing developments and difficult soil conditions. This professional certification takes the form of a Letter of Assurance.

In 1990 section 734.2 of the *Municipal Act*,²⁴ (now section 290 of the *Local Government Act*)²⁵ (the “*Act*”) was enacted. It gave municipalities the authority to require a building permit applicant to provide the municipality with “a certification by a professional engineer or architect” that the plans submitted “comply with the then current Provincial building code” and other applicable enactments respecting safety. It is this certification that led to the creation of Letters of Assurance.

In essence, the *Act* purports to absolve a municipality for direct or vicarious liability for any damage, loss or expense caused or contributed to by an error, omission or other neglect in relation to the municipality’s approval of plans or drawings submitted for a building permit. The absolution of municipal liability pursuant to section 290 is contingent on the following:

²⁴ R.S.B.C. 1979, c. 290.

²⁵ R.S.B.C. 1996, c. 323.

1. a qualified professional has certified that the plans submitted for a building permit comply with building code requirements (*i.e.* delivered Letters of Assurance);
2. the municipality indicates in writing prior to or along with building permit issuance its reliance on the professional's certification; and
3. the municipality reduces building permit fees in recognition of the cost savings by not having its own building inspector determine if the plans comply with building code requirements.

In effect, these Letters of Assurance are a representation to the municipality that the work undertaken by the professional is in substantial compliance with the B.C. Building Code.

E. CONCLUSION

As we can see, the law of professional liability is continuing to develop. The occupations that are considered "professions" continues to expand as does the definition of "professional services". Parties to whom professionals owe a duty of care can be broader than initially thought based on whether it is reasonably foreseeable that the party will suffer harm based on the professional's negligence. The issue of whether a duty of care exists is fact driven and must be carefully considered.

Claims against professionals can arise concurrently in contract, tort and equity. Again, the claims under these headings must be carefully analyzed based on the law and particular facts of each case.

Municipalities have enacted legislation in order to avoid liability in the construction context and in so doing, have sought to "off-load" potential liability onto professional architects and engineers by requiring the delivery of Letters of Assurance.

As with any lawsuit, cases involving professional liability are fact specific and it is not within the scope of this paper to fully address all the factors relevant to determining professional liability. We hope that this paper has at least given you enough information to spot the issues and address them with your legal counsel should the need arise.