The Law Society of Upper Canada

Le Barreau du Haut-Canada

ERRORS & OMISSIONS

A periodic update from the Lawyer's Professional Indemnity Company

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Letters From The Profession

In October of 1991 you were invited to correspond with our office on issues which might be of importance to the profession. Here are two responses.

The Lost Discovery

I took over a case a short time ago which has been ongoing for a long time. I contacted the Official Examiner's Office to obtain a transcript of the earlier examination. I was informed that Official Examiners are not required to keep their notes or tapes for any longer than two years. A transcript had never been ordered and the discovery is lost forever.

The authority for the Official Examiner's position is apparently a directive from the Inspector of Legal Offices requiring notes and tapes to be kept for two years only.

I must now attempt to obtain an order for leave to conduct a fresh examination for discovery. Should leave be denied, the solicitor formerly handling the file may be exposed.

It may be negligence to fail to order a transcript of an examination for discovery within the two year period.

The result of this experience, I suggest, is that litigation lawyers must now diarize this two year date, much as a limitation period, to avoid liability for damages flowing to a client as a result of the destruction of records of an examination for discovery.

Roger G. Oatley
OATLEY, PURSER

Appeals and Judicial Review in Refugee and Other Immigration Matters

At present the *Immigration Act* provides that most appeals and judicial review applications can only be brought with leave of the Court, and that there is no appeal from the leave decision.

An application was commenced on December 17, 1991 in the Ontario Court (General Division) seeking to have these leave provisions declared inoperative under sections 7 and 15 of the *Charter* in that they unduly restrict access to the courts by refugees. The application raises serious constitutional questions concerning security of the person.

Evidence in support of the application includes a study by Professor Ian Greene of the Department of Political Science at York University which shows that leave applicants before the Federal Court of Appeal do not have an equal chance of obtaining leave because of the widely different rates (from 9 per cent to 49 per cent) at which individual judges grant leave. Professor Greene concludes that in light of his findings it would be difficult to maintain that all refugee claimants have reasonable access to an appeal or judicial review.

A notice of constitutional question has been served on the Attorneys General of Canada and Ontario. The legal basis for the constitutional question is whether constitutional rights require an appeal as of right at least once to a Court from an adverse determination of a refugee claim and whether the present statutory provisions unduly restrict a refugee claimant's right of access to the Courts.

Members of the Bar ought to be aware of this pending constitutional challenge in advising their clients regarding appellate and judicial review proceedings in refugee and immigration matters, and may wish to consider intervening in the application under rule 13.01 of the Rules of Civil Procedure. The application was commenced in the Weekly Court office at Toronto as number RE2208/91 between Nazir Ahamed, applicant and Her Majesty the Queen in Right of Canada and the Minister of Employment and Immigration, respondents. The hearing of the application has been adjourned sine dine for cross-examination and adducing further evidence, and is to be brought back on 30 days' notice but no earlier than May 4, 1992.

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BARRISTER-AT-LAW
