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Construction Law Section
Section du droit de la construction

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A. Upcoming Events: Mark These Dates In Your Calendar

Please watch for registration notices for these upcoming section events.

BIM Modeling and Integrated Project Delivery February 4, 2010

Make sure to attend this interesting dinner program that will focus on the impact of Building Information Modeling technology on the construction industry both now and in the future, and what it will mean for construction law. As BIM is used more and more in this country, it is bound to have a significant effect on our practices, as it has had in other jurisdictions such as the United States.

Speakers: Richard Ziegler, Richard Ziegler Architects
Tom Strong, EllisDon
Jody Becker, EllisDon
Marcia Oliver, Oliver, Marcia J. Law Office

Chairs: Glenn Ackerley, WeirFoulds LLP
Charles Wiebe, Glaholt LLP

Date: Thursday, February 4, 2010

Time: 5:30 p.m. Registration and cash bar
6:00 p.m. Dinner
7:00 p.m. Presentations followed by question and answer period

Location: OBA Conference Centre, 200 – 20 Toronto Street, Toronto

Editors: [Janice Quigg](#)
[Brendan Bowles](#)

OBA Editor: [Cheryl Crocker](#)

Ski Day – February 26, 2010

The OBA Construction Law Section will be holding its annual ski day at Collingwood's Alpine Ski Club on Friday, February 26, 2010. This is a great opportunity to meet and socialize with your fellow section members in a more informal setting, and enjoy some pretty good skiing.

Chair: Jeffrey Armel, Goldman Sloan Nash & Haber LLP

Date: Friday, February 26, 2010

Time: 10:00 a.m.

Location: Alpine Ski Club, Collingwood.

B. Cases, Summaries and Articles of Interest

1. When is a General Lien Just an Excessive Lien?

*Charles Wiebe**

Overview

On May 20, 2009 Master Albert issued a ruling in a section 47 motion brought by various parties to discharge two claims for lien of a subcontractor registered on two lots of a subdivision. The case was *Brian T. Fletcher Construction Co. v. 1707583 Ontario Inc.* On November 23, 2009, the Master released her ruling as to the costs of the motion. Both rulings raised interesting issues on the following points: the distinction between general liens and excessive ones; the security ordered to be posted for grossly excessive liens; the costs to be ordered in motions to discharge grossly excessive liens; whether and when costs should be ordered against a lawyer for the lien claimant.

Excessive Lien

Here are the key facts in the *Fletcher* case. Brian T. Fletcher Construction Co. ("Fletcher") provided site supervision to the general contractor, Willis Homes Limited ("Willis"), in relation to the construction of a residential subdivision. There were several contracts and several owners concerning this subdivision: (a) concerning Lot 12, the owner was 1707583 Ontario Inc. ("170") and it contracted with Willis for the construction of its house which in turn contracted with Fletcher for the provision of the site supervision on that lot; (b) concerning Lot 33, the owner was one Noel Neelands who contracted with Willis for the construction and directly with Fletcher for the site supervision on that lot; (c) concerning the other lots, the owners were one limited partnership and it contracted with Willis for the construction which in turn contracted with Fletcher for the provision of the site supervision for those lots.

On March 25, 2008 Fletcher registered a \$90,780.97 claim for lien on Lot 1, and settled the claim for \$20,000 registering a discharge of the lien on May 15, 2008. Ten days later, on May 25, 2008, Fletcher

registered a claim for lien on each of Lots 12 and 33 and each in the exact same amount of \$357,804.20. Fletcher later admitted that only \$95,222.87 was owed for work on Lot 12 and that only \$57,031.25 was owed for work on Lot 33. The rest of the \$357,804.20 Fletcher admitted concerned unpaid work he had done on Lot 1 and the other lots other than Lots 12 and 33. It justified its conduct on the grounds that its lien was a general lien.

Willis, 170, Neelands and a mortgagee brought a motion before Master Albert seeking an order discharging the Fletcher claim for lien under section 47 of the *Construction Lien Act* asserting that this claim for lien was clearly not a general lien. Such motions are comparable to summary judgment motions where the test is whether there is a genuine issue for trial.

Master Albert dealt first with the question of whether this was a “general lien” under section 20 of the *Construction Lien Act*. She stated that there were three criteria for a general lien: (a) all of the lots had to be owned by the same person at the time of supply; (b) all of the work had to be done under a single general contract; and (c) there could be no clause in the general contract stating that liens arose and expired on a lot-by-lot basis.

Fletcher failed to meet the first two criteria. Concerning (a) he argued that the common ownership was that of Willis, the general contractor, as it had an ownership interest in all of the lots. In support of that position Fletcher stated that Willis had told him that Willis had an interest in the partnership and that Neelands and Willis told Fletcher to supervise the construction on Lots 12 and 33 on behalf of the partnership, evidence that was vehemently denied by Willis, Neelands and the partnership. Master Albert was unimpressed with this evidence, calling it uncorroborated hearsay, “devoid of merit,” “speculation,” and at one point even comparing a trial of that issue to a trial about whether pigs could fly. Concerning (b), Fletcher appears to have presented no evidence of a single general contract leaving the Master with the inference that Fletcher knew all along that there was no single general contract. She found as a result that there was no general lien.

Master Albert then discussed the issue of whether any part of the Fletcher lien could be salvaged. She discussed the authority as to whether a general lien could be amended under section 6 of the *Construction Lien Act* to be individual liens on each lot (i.e. *Leo Abrams & Sons Ltd. v. MacDonald Homes Inc.*; *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*). This authority established that such an “amendment” could not be done. Master Albert, however, distinguished this authority from the *Fletcher* case by stating that the court needed first to determine whether there had been a genuine attempt or intention to register a general lien. If there had been such an attempt or intention, the remedy was as outlined in the *Gillies* case, namely an order vacating the claim for lien. If there was no such attempt or intention, the issue really was one of excessive lienage with the remedy being damages under section 35 of the *Act*.

Master Albert applied this logic to the *Fletcher* case and found no indicia of a *bona fide* intention or attempt by Fletcher to register a general lien. She stated that there was no reference in the Fletcher claim for lien to work done on the other lots. There was no expressed reference either in the claim for lien or the statement of claim to the lien being a general one. Fletcher simply registered two claims for lien on two lots for the same grossly excessive amounts. The Master therefore concluded that this was a case of an excessive lien.

Remedy

Therefore, the logical remedy was section 35 of the *Act*, the provision that allows the court to find a “person” liable for damages resulting from the registration of what that person knew or should have known to be an excessive lien. This remedy does not contemplate a removal of the claim for lien from title.

Clearly, this result troubled Master Albert. By showing none of the indicia of a genuine intention to register a general lien, the lien claimant escaped the result of an improperly registered general lien as outlined in the *Gillies* line of authority, namely an order declaring the entire lien expired and vacating the registration of the claim for lien. The logical result instead was an order reducing the quantum of the “excessive liens” on each lot thereby leaving the claim for lien as an encumbrance on title and leaving to the court the difficult question under section 35 of whether there was any damage caused by the excessive nature of the claim for lien. Damages caused by excessive liening are more difficult to determine if there is some validity to the underlying lien that encumbered title. Such a result would therefore diminish deterrence against the practice of improperly registering apparently general liens as long as the lien claimants took the care or conversely were sloppy enough not to call them general liens.

The Master called this potential result a “curious conundrum.” She stated that it would send the wrong message to the construction industry, namely that the kind of obtuse “general liening” that was done by Fletcher in this case would be tolerated by the court with only a slap on the wrist.

Master Albert therefore decided to exercise her discretion under section 47. She ordered that the Fletcher claims for lien be reduced to the amounts they should have been on each of Lots 12 and 33 and that they then be vacated from title without security. She expressly stated that “the liens are not discharged, leaving the remedies available under the *Construction Lien Act* for the trial judge to determine.” She stated therefore that the trial judge could determine whether any damages should be ordered under section 35.

The result was largely the same as if Fletcher had made a genuine but wrongful attempt to register a general lien (i.e. as in *Gillies*), namely an order vacating the claim for lien from title without security. Therefore, the “curious conundrum” identified by Master Albert was dealt with. Those purporting to register general liens without showing the indicia of a genuine choice of the general lien remedy, thereby rendering their liens merely excessive ones, would be treated no differently than those who genuinely choose a general lien but do so improperly.

Costs

As to the issue of costs, two of the moving parties sought large orders for recovery of costs. The general contractor, Willis, sought substantial indemnity costs of \$86,454, and the one owner, Neelands, sought substantial indemnity costs of \$57,704. They also sought an order that the lawyer for Fletcher be found liable for the costs pursuant to section 86 of the *Construction Lien Act*.

One of the first preliminary issues was whether Master Albert had jurisdiction to determine the issue of costs. The argument was made by the lawyer’s counsel that the costs of interlocutory motions under the *Construction Lien Act* had to be deferred to the trial judge. Master Albert rejected this argument stating that under both section 86 of the *Act* and Rule 57 a master had jurisdiction to order such costs.

The Master then dealt with some other matters, namely whether the moving parties were entitled to costs and, if so, on what scale. Not surprisingly, she found that they were entitled to costs and on a substantial indemnity scale. Her decision on the issue of the scale of costs focused on Fletcher's unreasonable conduct – it had registered an excessive lien and had then refused to take any steps to reduce it, opposing the motion to discharge throughout without any offers.

Master Albert then turned to the issue of whether Fletcher's lawyer should pay costs under section 86. The lawyer's counsel argued first a jurisdictional point, namely that, based on its wording, section 86 allowed such motions to be brought only at the time of the preservation and perfection of the lien or at trial. The Master rejected this argument stating that the within motion in fact arose from improper preservation and perfection, and that section 86 in any event worked in harmony with Rule 57 which expressly allowed for costs orders against lawyers at any stage of a proceeding.

The Master then turned to the issue of whether Fletcher's lawyer should be made liable for costs. She explored the nature of a lawyer's role under the *Construction Lien Act*. She stated that with such a unilateral power to encumber title as exists in a construction lien, the Legislature decided to impose a "gatekeeping" duty on lien claimants' lawyers through section 86. The section states that a party's representation (i.e. lawyer) may be held personally liable for substantial indemnity costs if he or she "knowingly" participates in preserving and perfecting claims for lien in "grossly excessive" amounts. However, the Master was mindful of the competing obligation such lawyers are under, namely the obligation to fully advance and protect their client's position. Imposing cost awards on lawyers, she acknowledged, would have a chilling effect on their ability to fully represent their clients.

In the end, Master Albert found that for a lawyer to be found personally liable for costs under section 86 and Rule 57, there had to be evidence of "bad faith, negligence or improper purpose." To hold otherwise, she stated, would undermine the solicitor client relationship and put lawyers in an impossible conflict of interest with their clients.

The Master then refused to make an order of costs against Fletcher's lawyer stating that there was insufficient evidence to justify such an order. She clearly struggled with this issue because she noted expressly that Fletcher's lawyer had not only registered the grossly excessive liens, but had taken no steps to concede the error and correct it even after the motion was brought. However, what was telling was that there was no evidence that these decisions had not originated from the client, namely that they were the lawyer's mistakes. She could not, therefore, find that the lawyer had acted in bad faith or was negligent. She distinguished the result in the seminal case of *Pineau v. Kretschmar* on this basis, as in that case, she stated, the court found that the lawyers had made mistakes. She could not do so here.

Master Albert finally dealt with the issue of quantum. She went through many of the factors specified in Rule 57 to be considered in determining quantum, namely the complexity and importance of the issues, conduct that unnecessarily lengthened the motion, Fletcher's negligence or mistake, the result, duplication of services and the reasonable expectation of the parties. What was most interesting in this part of the decision was the use of the proportionality principle. The Master noted with favour to the moving parties that their costs requests were in the range of 22 to 29% of the amounts by which they succeeded in getting the Fletcher lien reduced. Furthermore, she considered the provision in section 86 that requires the court to consider whether there was a less costly alternative available to the moving party and to limit the costs of the party to the costs of that alternative. Fletcher's lawyer argued that the

matter of the general lien should have been left to the trial judge as a four day trial had been set to take place shortly after the motion. The motion caused the trial to be adjourned. Master Albert rejected this submission stating that disposing of the issue of the general lien before trial would significantly reduce trial time and was therefore reasonable.

The one area where Master Albert was critical of the moving parties on the issue of quantum was the reasonableness of the hours claimed to have been spent on the motion. She reduced Willis' entitlement to \$60,000 and Neelands' to \$36,000.

Summary

The first ruling by Master Albert raises a distinction between general and excessive liens that has not been identified in the cases to date. It remains to be seen whether future cases will agree with the Master's identification of intention as a distinguishing factor. The second ruling on costs gives helpful guidance to lawyers practicing in the construction law area as to their "gatekeeping" responsibility. This discussion alone makes the Fletcher case an important decision.

**Charles Wiebe, Glaholt LLP*

2. Form Over Substance: Cost Recovery for Environmental Damages under the *Building Code*

*David Debenham**

Your client's warehouse burns down, or blows up, and debris is spewing everywhere. What do you do? In a recent case it appears that you let the City do all the heavy lifting at its own expense to every extent possible.

Stratford, City of v. 1353837 Ontario Inc. is an unreported decision of Justice Granger of the Ontario Superior Court of Justice rendered on July 19, 2009. The case involved an Application pursuant to s. 17(8) of the *Building Code Act* (the "*Code*"), to recover the City's costs in investigating the fallout from the fire of a local building owned by the respondent corporation. The large building in question was formerly used for industrial purposes. The Chief Building Official ("CBO") went to the fire site on the day of the fire and determined that during the course of the fire, ash and debris were deposited on properties downwind from the fire, and that the ash and debris contained asbestos. He also believed that containers of plastic had been consumed in the fire and he had a public health concern about asbestos and chemical residues. After the fire, there was concern that walls left standing might collapse. The CBO engaged structural engineers NA Engineering Associates Inc., ("NA"), to evaluate the potential dangers from the walls and steel structure in the area of the fire as well as to determine the potential effects of the fire on the remaining parts of the building. As a result of concerns relating to possible asbestos and chemical contamination, NA engaged Golder Associates Ltd., ("Golder"), environmental engineering consultants and experts in the field of testing and evaluating potential environmental hazards, to report on any environmental contamination arising from the fire. As a result of receiving the preliminary report of NA and a verbal report that the site was potentially hazardous as a result of potential for asbestos and chemical contamination arising from the debris on the site the CBO issued an

emergency order to demolish the building pursuant to what was s. 17 of the *Code* – now s. 15.7 – which states:

17. (1) **Emergency Order.** If upon inspection of a building an inspector is satisfied that the building poses an immediate danger to the health or safety of any person, the chief building official may make an order containing particulars of the dangerous conditions and requiring remedial repairs or other work to be carried out immediately to terminate the danger.

(7) **Application to Court.** As soon as practicable after subsections (5) and (6) have been complied with, the chief building official shall apply to a judge of the Ontario Court (General Division) for an order confirming the order made under subsection (1) and the judge shall hold a hearing for that purpose.

(8) **Powers of Judge.** The judge in disposing of an application under subsection (7) shall

- a. confirm, modify or rescind the order; and
- b. determine whether the amount spent on measures to terminate the danger may be recovered in whole, in part or not at all.

As a result of the CBO's safety concerns, the City of Stratford engaged Securitas Canada Limited, ("Securitas"), from October 17, 2003 to January 6, 2004 to secure the site. Securitas submitted accounts to the City of Stratford for its services in the total amount of \$39,514.70. The accounts submitted by NA Engineering Associates which included the accounts of Golder and others totaled \$114,489.54. Pursuant to the provisions of s. 17(8) of the *Code* the City of Stratford sought to recover the sum of \$154,004.24 (\$39,514.70 + \$114,489.54) from 1353837 Ontario Inc. as the costs it alleges it incurred as a result of the fire, by way of an Application to:

- Confirm the Emergency Order dated the 14th day of October, 2003;
- Determine whether the amounts spent on measures to terminate the danger may be recovered in whole, in part, or not at all;
- That any amount determined to be recoverable in accordance with the foregoing be a lien on the land and have priority lien status as described in section 1 of the *Municipal Act 2001*; and,
- Costs of the application on a substantial indemnity basis.

The court found that the legislative regime, the expertise of the chief building official, and the nature of the question support deference. While the requirement for an application by the chief building official weighs somewhat against deference, it remains clear that deference should be shown to the chief building official and that the appropriate standard of judicial review is reasonableness. The owner failed to successfully argue that the CBO's actions were unreasonable.

On the subject of cost recovery, the court found that while subsection 17(8) of the *Code* specifically refers to "the amount spent on measures to terminate the danger", in the court's view, a plain reading of the language suggests that an amount to determine whether there is a danger is different than an

amount spent to terminate that danger. Thus, an amount to determine whether there is a danger is not an amount that can be recovered under s. 17(8). The CBO does not have authority to take measures to terminate the danger until an order is made under subsection 17(1). By virtue of subsection 17(1), the chief building official cannot make that order until “an inspector is satisfied that the building poses an immediate danger to the health or safety of any person.” Since the chief building official cannot take measures to terminate the danger until after an inspector is satisfied that the building poses an immediate danger, measures to determine whether there is an immediate danger cannot be considered measures to terminate the danger within the meaning of the Code. Justice Granger noted in his decision that prior judicial consideration of the predecessors to section 17 suggests that it is a taxing statute and should thus be strictly construed and therefore held that “the recovery provisions as set out in section 17(8) should be considered in the same manner as a “taxing statute” and given a strict interpretation. If the Legislature wanted to allow recovery of the cost of determining whether a danger existed, it needed to make that intent clear in the *Building Code Act*. Not having done so, recovery for costs incurred in determining if a danger exists is not permitted.”

As for the engagement of NA, Golder, and others, this was done for the purpose of determining if there was a danger to the public as a result of the fire. These companies were not engaged to address any identified danger, but rather to identify any danger. Accordingly, given the court’s interpretation of section 17 (8) of the *Code*, the City was not entitled to be reimbursed for the accounts of its consultants. Moreover, since Securitas was hired by the City of Stratford to monitor the perimeter of the building site and to note whom was entering or exiting the property, its services were not for the purpose of determining if there was a danger or for the purpose of terminating the danger. Accordingly, the City of Stratford was not entitled to recover the monies which it paid to Securitas Canada Limited from 1353837 Ontario Inc. pursuant to section 17(8) of the *Code*.

The Court’s strict interpretation approach can be answered quickly. Taxing statutes are no longer seen as penal, and the courts abandon the earlier approach of applying a strict literal approach to the interpretation of a taxing statute in order to interpret it according to its spirit, intent and purpose just like any other statute. See for example *Zimmer v. Edenwold (Rural Municipality No. 158)*, 1994 CanLII 3886 (SK C.A.); and *Québec (Communauté urbaine) et autres v. Corporation Notre Dame de Bon-Secours*, [1994] 171 N.R. 161.

Nonetheless, even using a strict interpretation approach, the court would be performing a “Denningesque” pas-de-deux in order to find the owner liable to the City using the *Code*. The fact is that the City brought the wrong tools to the task at hand. Claims in public nuisance and for damages for breach of the *Environmental Protection Act* under Part X of that legislation may have been the proper tools to match the cause of action with the damage. However each cause of action has its own particular defence, and while we continue to eschew the form over substance of the days of Maitland and the technical rules of pleading, this case is a reminder that we cannot simply rely on the supposed justice of our case and the judicial penchant to do what is right to overcome the language of the legislature. While the case appears to suggest that an owner should simply stand by and let the City do all the heavy lifting in the aftermath of an environmental disaster, there are a sufficient number of other legal tools that can be used by the public and public officials to make that reading of this case the incorrect one.

*David Debenham, Lang Michener LLP

3. Be Aware: The Effect of Being Noted in Default Under the *Construction Lien Act* is Different than Under the *Rules*

*Catherine DiMarco**

Lawyers should be aware of the different test to set aside a default judgment and noting in default under the *Construction Lien Act*, R.S.O. 1990 C. C30 (the “*Act*”). The test is more restrictive than under the *Rules of Civil Procedure* (the “*Rules*”).

A defendant has twenty days under the *Act* to deliver a Statement of Defence to a lien claim. If that person fails to deliver a defence, they may be noted in default.

Under the *Rules*, the Court has discretion to set aside the noting in default on such terms as are just. Under the *Act*, the Court must be satisfied that there is evidence to support a defence, section 54(3).

The effect of being noted in default is that the defendant is not permitted to contest the claim or to file a Statement of Defence, except with leave of the Court. Leave will only be given where the Court is satisfied that the motion was brought promptly and there is evidence to support a defence.

In *MJ Dixon Construction Limited v. Hakim Optical et. al.*, 2009 CanLII 14046 (Ont. S.C.J.), Master Polika reviewed the requirements for bringing a motion to set aside a default judgment and a noting in default in a lien action commenced under the *Act*. The claimant had advanced both a claim for lien and a claim for breach of contract. A number of the defendants had been noted in default and a default judgment was awarded.

In that case, solicitor for those defendants wrote to the plaintiff’s solicitors on the date the Statement of Defence was due in order to advise that he expected to be able to deliver a Statement of Defence shortly. The plaintiff’s solicitor, having not seen the previous day’s letter, had already requisitioned the noting in default and default judgment as against the defendants.

In response, defendants’ counsel demanded that plaintiff’s counsel withdraw the default judgment, failing which he would be bringing a motion to set it aside and would be seeking costs on a full indemnity basis. After a series of acrimonious letters, exchange of materials and cross-examinations, the motion was heard.

In his reasons for decision, Master Polika commented on the differences when the action is governed by the *Act* from the provisions of the *Rules*.

Master Polika held that the onus is on the moving party to satisfy three elements:

1. The defendant must show that it has moved promptly once becoming aware of the default judgment;
2. The defendant must show that there is an explanation for the default; and
3. The defendant must show that there is evidence to support a defence.

In dismissing the defendants' motion, the Master noted that defendants' solicitor became aware of the claim on January 5, 2009, yet did not respond until the afternoon of January 12, 2009, the last day on which the Statement of Defence had to be delivered. Furthermore, defence counsel did not fix a date or explain the default in his letter wherein he indicated that he would be delivering a Statement of Defence shortly.

In his analysis, the Master went on to comment that, in the circumstances, granting the defendants' motion would be tantamount to setting aside the express provisions of the *Act* with a consequential deleterious effect on the integrity of the justice system. Any order in the defendants' favour would amount to a reward for ignoring the provisions of the *Act* without explanation.

My own recent experience involved a situation whereby one of the defendants in a lien action commenced under the *Act* failed to deliver a defence within 20 days. The defendant was noted in default. The client defendant and its lawyer were twice warned of the risk of being noted in default. Counsel indicated his intention to deliver a Notice of Intent to Defend and he was advised that no provision for delivery of a Notice of Intent to Defend exists under the *Act*. A motion for judgment was brought and granted.

Four months passed between the time the defendant was noted in default and the first communication from defendants' counsel that the defendant intended to bring a motion to set aside the default judgment and noting in default.

The motion was dismissed for failure to provide an adequate explanation for the delay and failure to provide evidence of a defence. In refusing to set aside the default judgment and noting in default, Madame Justice Miller held that the plaintiff was entitled to rely on compliance with the provisions of the *Act* and should not be faced with a motion to set aside the default judgment, and noting in default without good explanation for the delay.

The jurisprudence is consistent and clear: lawyers should take immediate steps to protect their clients by preventing a noting in default and default judgment in a lien action, and defendants must properly retain and instruct counsel without delay. Every effort should be made to deliver a defence prior to expiry of the 20 day period, unless a clear extension or waiver of defence is given.

**Catherine DiMarco, Blaney McMurtry LLP*

4. Court Rejects Subcontractor's Motion to Refer its Lien Claim to Arbitration Pursuant to the Arbitration Clause in its Subcontract

*Peter R. Braund**

Introduction

In *Tricin Electric Ltd. v. York Region District School Board*, a subcontractor's motion to refer its lien claim to arbitration and for an order appointing an arbitrator under the arbitration clause in its subcontract, was recently dismissed by the Ontario Superior Court of Justice.

Background Facts

Tricin Electric Ltd. ("Tricin") an electrical subcontractor, entered into a subcontract with Aquicon Construction Co. Ltd. ("Aquicon"), the general contractor, for work to be performed for the York Region D.S.B. The subcontract was in CCA S-1 Revised Form ("the CCA Contract"); a clause providing for the inclusion of temporary power and lights was deleted.

The CCA Contract contained a protocol for the negotiation, mediation and arbitration of disputes. Within 30 days after contract award, the parties were to appoint a Project Mediator, or if not, within 15 days of a party's request. In the event of the failure of a finding of the consultant under General Condition 2.2 (Role of the Consultant) to resolve matters, a notice of dispute would invoke the assistance of the Project Mediator to mediate a negotiated resolution. Failing mediation, on notice in writing to the other party not later than 10 working days after the date of termination of the mediated negotiations, either party could refer the dispute to be finally resolved by arbitration under the latest edition of the *Rules of Arbitration* of CCDC 2 Construction Disputes.

After publication of the Certificate of Substantial Completion, Tricin commenced a lien action claiming \$177, 509.00, alleging that it had not been paid for providing temporary power and lights as an extra which it failed to bill to Aquicon through an accounting error. This brought into issue the quantum of claim; the timeliness of the lien; and, whether the alleged agreement was binding. The negotiation, mediation and arbitration protocol contained in the CCA Contract was not invoked by either party in any respect at any stage before the commencement of litigation. The first request for arbitration was on January 28, 2009 – approximately three weeks after the lien action commenced.

In addition to the lien action, there were two related actions commenced – one was for breach of trust claims against Aquicon and its officers and against Lombard Insurance under a Labour and Materials Payment Bond ("LMP Bond"). A second action had been commenced against the electrical consultant on the project, for negligence.

Relief Sought

Tricin brought a motion in the lien action seeking leave to bring the motion; for an order referring the matter to arbitration; and for an order appointing an arbitrator. In essence, the motion sought the stay of the lien action in favour of arbitration – under Section 106 of the Ontario *Courts of Justice Act*¹ and Section 7 of the *Ontario Arbitrations Act*.²

Section 106 of the *Courts of Justice Act* provided that the court, on motion by any person, may stay any proceeding in the court on such terms as are considered just.

Section 7 of the *Arbitrations Act* permitted the court to stay a litigation proceeding in favour of arbitration; the wording of the section, however, contemplated that the stay motion would be brought by a party other than the party who instigated the litigation.

Decision of the Court

Judge Mullins of the Ontario Superior Court of Justice dismissed Tricin's motion, with costs payable to York Region.

Analysis and Reasons of the Court

The court followed an earlier decision of the Ontario Superior Court, affirmed by the Ontario Court of Appeal, in *Penn-Co. Construction Canada (2003) Ltd. v. Constance Lake First Nation*.³ It said that:

- a) there had been a full exchange of pleadings in the proceedings;
- b) there were issues which fell outside the arbitration provisions in the CCA Contract including the validity and timeliness of the lien; whether there was a binding agreement outside of the construction contract; entitlements under the LMP Bond; allegations of negligence against the electrical consultant; and allegations of breach of trust against the principals of Aquicon;
- c) it was not clear whether Tricin, as the instigating litigant, had a right to bring this motion under Section 7 of the *Arbitrations Act*;
- d) there had been non-adherence to the ADR protocol under the CCA Contract;
- e) the ADR protocol was intended to be a "real time" ADR mechanism while the parties were actively at work under the CCA Contract;
- f) there had been a considerable lapse of time since substantial completion of the CCA Contract.

Section 106 of the *Courts of Justice Act* favoured allowing the litigation to proceed, rather than imposing a stay in favour of arbitration of only one or two issues in one of the three actions.

**Peter R. Braund, Borden Ladner Gervais LLP*

¹ R.S.O. 1990, c. C.43, as amended.

² R.S.O. 1990, c. A.24, as amended.

³ (2007), 66 C.L.R. (3d) 78 (Ontario Superior Court of Justice); affirmed by the Ontario Court of Appeal, 2008 Carswell Ont. 6679.

C. Points of Practice

Nuts & Bolts should be a forum for lawyers who practice in construction law to share the benefit of experience in dealing with some of the practical day to day issues we all face. The editors offer the following two modest points for your consideration. We would be pleased to reproduce any points of practice of general interest to construction lawyers in this forum, particularly for matters outside of Toronto. Please send your practice points to either Brendan Bowles at bb@glaholt.com or Janice Quigg at jquigg@ecclestonllp.com. There may or may not be a prize for the best one!

- When preparing materials, be careful to vacate the registration of a claim for lien when posting security. Some lawyers have made the mistake of seeking an order discharging the claim for lien instead of vacating the registration of the claim for lien. Once the lien is discharged, it cannot be

revived! When posting security or paying cash into court for a lien, the correct language to be used in the order is to “vacate” the registration of the claim lien (and certificate of action, if applicable).

- When bringing a motion to have security returned once a lien action has been settled, you may bring your motion in Toronto even where the action was commenced outside of Toronto. However, you should include in your Notice of Motion a request for leave to bring the motion in Toronto and some basis for why the motion is best heard in Toronto.
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D. 2009-2010 Section Executive

Chair

James W. MacLellan, Borden Ladner Gervais LLP

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