

# Nuts & Bolts

CONSTRUCTION LAW SECTION / SECTION DU DROIT DE LA CONSTRUCTION

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## Upcoming Events: Mark these Dates in Your Calendar

### 1. April 20, 2004 - Dinner with the Masters

Chair: **Ken Movat**, Movat Eccleston

This popular program returns to provide you with the opportunity to get the latest practice tips and learn how to avoid the dangerous practice traps in construction lien cases.

Don't delay: fill out the enclosed registration form now.

### 2. May 18, 2004 - Landmark Developments in the Law of Construction Bonds

Co-Chairs:

**Stephen Richard Morrison**, Cassels Brock & Blackwell LLP

**Gregory D. Hersen**, Torkin, Manes, Cohen & Arbus LLP

**This half-day (morning) program will provide:**

- a review of the various kinds of construction bonds, their purpose, and characteristics;
- practical tips and information regarding how to properly claim against various surety bonds, and defences which a surety may raise in response; and

- insight into the scope, implications, and lessons of the *Whitby* Landmark decision, as seen through the eyes of practitioners and surety providers.

### 3. June 16, 2004 - Year End Tour of the Canadian National Institute for the Blind and Dinner at McLean House

*Further Details TBA.*



call on the formation of a tender contract, and one of a growing number of decisions where a tenderer has successfully avoided Contract A obligations and the collateral obligation to enter into Contract B, by reliance upon its own non-compliant tender. The obvious lesson from this case is that owners, consultants and their lawyers must pay careful attention to the drafting of tender documents, since ultimately, tender disputes, as with any other contractual dispute, are decided on the unique facts of each case and in particular, on the terms and conditions of the tender call and the related documents upon which tenders are submitted.

Common sense suggests and the writer's experience in this case and in others confirms, that by complicating the process through the introduction of additional steps and/or mandatory requirements, owners significantly increase the odds that one or more of the tenderers will fail to comply with all of the tender requirements. Further, owners may find that not only are they precluded from recovering damages from a low tenderer seeking to avoid a contract, but that they are subject to challenges by other tenderers who take issue with a contract being awarded to a non-compliant tenderer. In an area that is already ripe with litigation, owners must decide whether the benefits to be derived from such a process outweigh the risks.

\* *Matthew R. Alter, Borden Ladner Gervais LLP.*

## **2. INSTALLATION OF WINDOW BLINDS DOES NOT QUALIFY AS AN IMPROVEMENT UNDER THE CONSTRUCTION LIEN ACT**

*Brendan D. Bowles\**

An often overlooked, but essential, element of any claim for lien or breach of trust claim is the requirement that the services provided by the claimant constitute an "improvement" as defined by the *Construction Lien Act*. While this may seem like an obvious point, the definition of improvement is more restrictive than many contractors and lawyers realize. The result is that services provided by some tradespersons and suppliers do not give rise to a lien, or a claim for breach of trust, notwithstanding that the services and materials supplied may seem, at least in the colloquial sense, to be construction work. The decision of Justice Hoy of the Ontario Superior Court of Justice in *Hunter Douglas Canada Inc. v. Skyline Interiors Corp.*, released January 9, 2004 and now reported at [2004] O.J. No. 80 is an excellent illustration of how the definition of improvement restricts access to the *Act's* lien and trust remedies.

At its heart, *Hunter Douglas* is a section 13 case. The plaintiff was trying to establish personal liability on the part of the sole officer and director of the defendant corporation for the alleged breaches by the corporation of its section 8 trust obligations. To do so, it was necessary for the plaintiff to prove that its services fell within the definition of "improvement" in the *Construction Lien Act*.

The plaintiff, Hunter Douglas, manufactured customized residential and commercial window blinds. It was a major supplier to Skyline Interiors for a number of years. In turn, Skyline supplied blinds, drapes, shutters and upholsteries to residential customers. Skyline ceased operations in 1998, leaving a debt to Hunter Douglas in the amount of \$52,897.97. Hunter Douglas sued, Skyline failed to defend, and default judgment was therefore obtained against Skyline for the full amount of the claim.

Hunter Douglas manufactured blinds to specifications provided by Skyline when placing an order for a residential customer. Hunter Douglas shipped the blinds to Skyline's premises, and did not know the address of the location where the blinds were to be ultimately installed.

This in itself is a significant fact. Although Hunter Douglas' claim was not explicitly analyzed in this way by the Court, the lack of direct supply to a project and lack of intent to supply to a specific project are relevant considerations in determining entitlement to making a *Construction Lien Act* claim. In this respect, Justice Hoy's decision is consistent with cases such as *Central Supply [1972] Company Limited v. Modern Tile Supply Company Limited et al.*, (2001) 55 O.R. (3d) 783 (C.A.), where it was found that a retailer who sold tile to a tile supplier in "bulk", without project specific invoicing or regard to the ultimate use of the materials, did not meet the threshold test for entitlement to a *Construction Lien Act* remedy.

Generally speaking, retailers, such as "Home Depot" type stores, are not entitled to lien or make a breach of trust claim. Such general suppliers sell on their customers' credit and do not look to a specific piece of improved property as security for their customers' debts. Often it is impossible to trace where the materials are ultimately used, because the contractor or supplier buys materials in bulk from the retailer, and the invoices do not reference a specific project. On the facts as recited by Justice Hoy, Hunter Douglas' position seems to be closer to that of a retailer than a project specific supplier. On this level of analysis, the decision is likely correct.

Justice Hoy also considered the process of installing the window blinds. The installation process took a grand total of about ten minutes for a typical blind. Brackets were mounted on a wall, window trim or ceiling by two screws. The blind was then “snapped into place with a simple motion”. A similarly simple, straightforward process was used to remove the blinds and brackets. Presumably, the blinds and brackets could then be re-used at a different location.

Justice Hoy also found that Hunter Douglas’ invoices, which required full payment within 30 days, were inconsistent with the scheme of the *Act*, as was Hunter Douglas’ standard term that they retained title in the blinds until paid.

At trial, Hunter Douglas sought recovery of \$46,710.96 from Mr. Libenstein, the sole officer and director of Skyline. Hunter Douglas argued that its services constituted an “improvement” as defined by the *Act*, the trust provisions of the *Act* applied to monies owed by Skyline to Hunter Douglas, and that Mr. Libenstein, as the sole officer and director of Skyline, was personally liable for Skyline’s breach of trust pursuant to section 13 of the *Act*.

The threshold issue to establish personal liability, therefore, was whether the services provided by Hunter Douglas met the definition of “improvement”, thereby giving the plaintiff standing to seek a trust remedy. Both the *Act* lien section (Section 14), and the trust section (Section 8), use the term “improvement” in defining the remedy.

The *Act* defines “improvement” as follows:

- (a) any alteration, addition or repair to, or
- (b) any construction, erection or installation on,

any land, and includes the demolition or removal of any building, structure or works or part thereof, and “improved” has a corresponding meaning

Justice Hoy considered some of the leading cases that have considered the definition of improvement in the context of determining a plaintiff’s standing to claim a *Construction Lien Act* remedy.

Justice Hoy found that in Ontario, the decision of *Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc. et al.* (1993) 16 O.R. (3d) 324, overturned on other grounds at (1996) 30 O.R. (3d) 159 stands for the proposition that to be an “improvement”, the material must become part of or incorporated into the building. Justice Hoy found

that this interpretation is consistent with the “overall scheme of construction lien legislation”.

Hunter Douglas argued that the window blinds were an installation within the building because they were “installed” within the ordinary meaning of the word. They argued that the window blinds are an integral part of the building because virtually every building has them. Finally, they argued that because the blinds were custom manufactured to fit the windows in the premises, they were likely to remain attached to the premises for a long time, thereby providing a degree of permanence required by some of the cases.

Ultimately, Justice Hoy was not persuaded by these arguments. She agreed with the defendant’s submission that the blinds were not permanent because they could be easily removed and replaced by the home owner. The blinds were for the convenience of the occupant and not an enhancement to the value of the building. Further, and perhaps most importantly, extending lien rights to suppliers of window blinds and drapes would require the purchaser of the blinds and drapes to hold back a portion of the price in order to comply with the *Act* and their obligations to the manufacturer. The Court was not prepared to make this significant extension to the scope of lien legislation and the jurisprudence.

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### **3. WHITBY LANDMARK: PERFORMANCE BOND COVERS MORE THAN “BRICKS AND MORTAR” BUT OWNER’S DELAY NEGATES CLAIM**

*Roger J. Gillott\**

*A recent Ontario Court of Appeal decision indicates that the courts may hold sureties liable for the collateral obligations of principals beyond the physical construction of the work - and will likely cause bonding companies to revise the standard-form performance bond to avoid such liability. It will also encourage owners to enforce their contractual rights against contractors in a timely manner, and to bring a claim under the performance bond quickly if the contractor does not comply.*

Conventional wisdom suggested that performance bonds guaranteed only the physical construction of the project, and not the other contractual obligations of a general contractor. However, the recent Ontario Court of Appeal decision in *Whitby*