ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

NUTS AND BOLTS

Volume 24, No. 3
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Construction Law Section
Section du droit de la construction

In this Issue:

A. Upcoming Events: Mark These Dates In Your Calendar

Please watch for registration notices for these upcoming section events.

Using the *Construction Lien Act* to Your Client's Advantage
March 9, 2010

A focused update for practitioners at all levels of experience on construction lien and related issues, including recent case law, strategic tips and understanding your client's rights and obligations.

Highlights:

- Trust claims and obligations;
- Understanding priority claims;
- When and how to make use of extraordinary remedies;
- Construction liens in the context of BIA and CCAA proceedings;
- Holdback – how to effectively manage holdback obligations; and
- Impact of the new Rules on construction law cases

Chairs: Howard Krupat, Heenan Blaikie LLP
Marcia Oliver, Purser Dooley Cockburn Smith LLP

Date: Tuesday, March 9, 2010

Time: 9:00 a.m.

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

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 **(Register by February, 19th)**

Time: 10:00 a.m.

Location: Alpine Ski Club, Collingwood.

Click here for more information and to register!

Dinner Program – May 6, 2010

Please mark this date in your calendars. There will be an evening program on **ADR** on May 6, 2010 chaired by Ian Houston of Borden Ladner Gervais LLP, and Andrew Heal of Blaney McMurtry LLP.

B. Cases, Summaries and Articles of Interest

1. Supreme Court of Canada Releases decision in *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)* on February 12, 2010

*Markus Rotterdam**

On February 12, 2010, the Supreme Court of Canada released its highly anticipated decision in *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2010 SCC 4, which had been under reserve since March 23, 2009.

Facts

In 2000, the Ministry issued a Request for Expression of Interest ("RFEI") and later a Request for Proposals ("RFP") for the construction of 25 kilometres of highway in British Columbia. Six proponents, including Tercon and its competitor, Brentwood Enterprises Ltd. ("Brentwood") responded to the RFEI. The subsequent RFP stipulated that only the six RFEI proponents could submit proposals, with the contract for the project to be awarded to the lowest bidder.

The RFP contained the following exclusion clause:

> "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim."

Brentwood realized that it could not complete the project alone and approached Emil Anderson Construction Co. ("EAC") to submit a proposal as a joint venture. EAC had not participated in the RFEI. Brentwood and EAC signed a jointly prepared proposal which reflected their equal sharing arrangement, and submitted it in Brentwood's name, with EAC described as a major member of the team.

Brentwood's bid came in at approximately $24 million. Tercon's bid was 2 million higher. The Ministry chose Brentwood as the preferred proponent, but there was some concern that its bid might be ineligible as a joint venture. The Ministry decided that the award would be made in the name of Brentwood alone and any contract B would also be in the Brentwood name. Brentwood and EAC would later conclude a separate agreement to formalize their joint venture.

Tercon brought an action seeking damages arguing that the accepted bid was ineligible and that by accepting that bid, the Ministry had fundamentally breached its Contract A obligations to Tercon.

The Decisions at Trial and on Appeal

The trial judge held that the Ministry breached the express provisions of the tendering contract by accepting a bid from an ineligible bidder. By doing so, the Ministry breached the implied duty of fairness to bidders. The exclusion clause, properly interpreted, did not exclude Tercon's claim for damages, since it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Ministry's unfair dealings with an ineligible bidder.

The British Columbia Court of Appeal allowed the Ministry's appeal and held that the exclusion clause was a complete answer to Tercon's claim.

By a majority of 5:4, the Supreme Court of Canada allowed Tercon's appeal. The ruling was based on two findings:

1. The Ministry accepted a bid from an ineligible entity and breached Contract A.
2. The exclusion clause did not allow the Ministry to do that.

Based on its earlier decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, the court held that there was no doubt that the Ministry was contractually bound to accept bids only from eligible bidders. The court repeated that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, since a bidder must expend effort and incur expense in preparing its bid and must submit bid security and it would make little sense for a bidder to comply with the tender requirements if the owner was allowed to accept a non-compliant bid.

It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. The Ministry argued that there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others, and that this arrangement merely left Brentwood, the original proponent in place and allowed it to enhance its ability to perform the work. The Ministry attempted to rely on a clause in the tender documents that provided that "if in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed ... or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work". The Supreme Court held that the material change provisions in that clause did not permit the addition of an entirely new entity as done by the Ministry.

The Supreme Court held that the exclusion clause did not cover the Ministry's breaches in this case because the clause only applied to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders was not the process called for by the RFP and being part of that other process was not in any meaningful sense "participating in this RFP". The words of this exclusion clause were not effective to limit liability for breach of the Province's implied duty of fairness to bidders.

The minority of the Supreme Court agreed that the Ministry had breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a joint venture. However, the minority agreed with the B.C. Court of Appeal that the exclusion clause was clear and unambiguous and that no legal ground or rule of law permitted the court to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term.

While the minority's decision to enforce a strong exclusion clause might have reduced litigation in this area, the majority's decision appears to be in line with the Supreme Court's earlier tendering decisions that held that while an exclusion clause gives the owner the right to take a more nuanced approach to cost, i.e. a right to award based on criteria other than price, such a clause does not give the owner the right to accept non-compliant bids.

There seems to have been a trend recently to allow bids that had at least a hint of non-compliance attached to them. In the most recent Supreme Court decision on the law of tenders before *Tercon, Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, the majority of the Court upheld an owner's decision to accept a bid that the minority held to be clearly non-compliant. In the recent Ontario Court of Appeal decision in *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, [2009] O.J. No. 5309, the court upheld a tender award that the Divisional Court had held to be clearly non-compliant. By unanimously stating that Brentwood's joint venture bid was non-compliant, the decision in *Tercon* might assist in reaffirming the statement that non-compliant bids ought not to be accepted, even in the face of a very strongly worded privilege clause.

**Markus Rotterdam, Glaholt LLP*

2. New *Rules* Reflect Guiding Principles of the *Construction Lien Act*

*Karen B. Groulx & Sophie Petrillo**

Since being enacted in 1983, one of the goals of the *Construction Lien Act* c. C.30 (the "*Act*") has been to provide a legislative framework within which parties in the construction industry can resolve disputes in an expeditious and summary manner. This principle is set out in section 67(1) of the *Act* which states that "the procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question". To achieve this goal, the *Act* imposes special cost consequences against a party where the least expensive course of action is not taken (section 86(2)), requires leave of the Court before many interlocutory steps may be taken (section 67(2)), and does not provide litigants with an automatic right to documentary and oral discoveries.

On January 1, 2010 a number of changes to Ontario's *Rules of Civil Procedure* came into effect which, if implemented successfully, will help to streamline the litigation process and make it less expensive. These changes will also impact the manner in which a lien action is conducted. The two areas where the impact of the Rule changes is most evident are the discovery rules and motions for summary judgment.

Limiting Oral and Documentary Discovery

As stated above, the *Act* does not contain any provisions dealing with oral or documentary discovery. However, section 67(3) of the *Act* provides that the Rules of court apply to actions commenced under the *Act* except where the Rules of court are inconsistent with the *Act*. In most construction cases, some type of discovery is usually required and parties frequently obtain an Order "for production and discoveries in accordance with the *Rules of Civil Procedure*". The significant changes to the discovery process which came into effect in January will impact construction lien actions where the parties have agreed to exchange productions and conduct oral examinations and an Order for production of documents and examinations for discovery has been made.

The amended *Rules* introduce a concept of "proportionality" to the discovery process. The expectation of these Rule changes is that judges will use the proportionality concept to place limitations on questions from counsel and requests for production of documents. The objective of these Rule changes is to limit the length and scope of the discovery process and thereby reduce the costs of the litigation. The changes to the discovery process which will help serve to limit the length and scope of the discovery process include:

1. A limitation on the length of examinations to seven hours per party, unless the parties consent to longer examinations or obtain a court Order;

2. An amendment of the old semblance of relevance test requiring the parties to disclose documents "related to any matter in issue" to the requirement to disclose all relevant documents, namely, those documents "relevant to any matter in issue" [emphasis added].

3. A requirement that the parties agree to a Discovery Plan which will require the parties to set out in writing dates by which certain steps in the discovery process are to occur, including the service of the Affidavit of Documents and the dates for oral or written examinations. The Discovery Plan should set out the scope of documentary discovery, taking into account

relevance, costs, and importance and complexity of the issues. The Rules also specifically incorporate "The Sedona Canada Principles Addressing Electronic Discovery" into discovery plans.

4. The new Rule 29.2 which introduces the concept of proportionality into the discovery process and provides that in determining whether a question must be answered or a document produced, the court must consider whether:

    a) the time required would be unreasonable;
    b) the expense would be unjustified;
    c) it would cause undue prejudice;
    d) it would unduly interfere with the orderly progress of the action; and
    e) the information is available elsewhere.

The court is also required to consider whether an Order for production would result in an "excessive volume of documents" being produced.

The rationale behind these changes is to provide the courts with the flexibility needed to reduce the opportunity for litigants to abuse the system through overly broad examinations and documentary production demands.

Summary Judgment Motions

While motions for summary judgment are not provided for in the *Act*, a party in a construction lien action may ask for leave of the Court to bring an interlocutory motion for this relief in accordance with section 67(3) of the *Act*. Once leave has been obtained, the test that must be met to be successful on a summary judgment motion is set out in Rule 20 of the *Rules of Civil Procedure*.

Under the new *Rules*, a judge's powers will be broadened substantially and it is expected that summary judgment motions will become more commonplace, given the higher likelihood of a matter being decided on such a motion. Changes to the *Rules* include:

- Judges hearing summary judgment motions will be permitted to make assessments of credibility and weigh evidence;

- Judges hearing summary judgment motions can conduct a "mini-trial" and obtain oral evidence to supplement the affidavit material used on the motion;

- Cost consequences have been softened: unless the motion is brought unreasonably or in bad faith, costs will be awarded to a successful litigant on a "partial indemnity" basis rather than on a "substantial indemnity basis".

Overall, the new *Rules* reflect the general principal of proportionality. Simply put, the time and expense devoted to a case must reflect what is actually at stake in the proceedings. The proportionality principal mirrors the overriding objective of the *Act* as set out in section 67(1).

**Karen B. Groulx and Sophie Petrillo, Pallett Valo LLP*

3. Homeowners Liable to Contractor in Construction Lien Proceedings but not Indemnified by their Property Insurer for Additional Costs Under the Guaranteed Replacement Cost Endorsement of their Policy

*Peter R. Braund**

Introduction

In the recently reported decision in *TGA General Contracting v. Cirillo*,[1] Mr. Justice DiTomaso of the Ontario Superior Court of Justice gave judgment to a contractor in construction lien proceedings for unpaid work and materials and, concurrently dismissed the homeowners' claim against their property insurer for the unpaid work and materials pursuant to the guaranteed replacement cost endorsement of their homeowner's policy following fire damage to their home.

Of interest to property insurers was the court's acceptance of industry practices in dealing with multiple quotations obtained by the insured and the insurer to repair a fire damaged home, and the limiting of the insurer's liability for indemnity payments under the guaranteed replacement cost endorsement of a property policy.

There were two actions arising out of the fire loss. In the first action, the plaintiff TGA General Contracting ("TGA") commenced construction lien proceedings for unpaid work and materials in the amount of $153,000, together with a claim for unjust enrichment.

In the second action, the Cirillos/homeowners sued their property insurer, Wawanesa Mutual Insurance Company ("Wawanesa") for any money found owing to TGA regarding the repairs to their home.

Background Facts

The fire at the Cirillos' home in Woodbridge, Ontario occurred on March 7, 2004. The fire originated in the basement near a wood stove and destroyed the main floor and living room above. There was smoke damage to the rest of the home.

A number of quotations with respect to repairs were obtained by both the Cirillos and Wawanesa. The insureds obtained a quotation through National Fire Adjustment ("NFA") for $235,000. The Cirillos later terminated their relationship with NFA and retained TGA who initially quoted $282,454.

Wawanesa obtained quotations from two reputable contractors including Bachly Construction for $175,000 and, Leda Restoration for $203,000.

After an initial teardown, further smoke damage was discovered and a revised quotation was obtained by the Cirillos from TGA in the amount of $351,000 which was later adjusted to extract work items done by others, leaving a revised final estimate of $302,206.

Bachly Construction's revised quotation provided to Wawanesa was for $280,886, which was the amount that Bachly proposed in order to complete the job using similar kind and quality materials. Leda Restoration's revised quotation was for $319,377.

The policy limit for the dwelling was $219,000. However, because of the Guaranteed Replacement Cost Endorsement in the Wawanesa policy, the Cirillos were entitled to an increased cost of replacement or repair irrespective of the policy limit.

In the end, the Cirillos were paid $295,392 by Wawanesa under the policy for the building claim.

Issues at Trial

The court identified the following issues to be determined at trial:

a) What were the contractual relationships between the parties?

b) If money was owed by the Cirillos to TGA, what was the amount owed and, as between the Cirillos and Wawanesa, who should pay it?

c) As between the Cirillos and Wawanesa, were the Cirillos fully indemnified or were they entitled to further payment? Had Wawanesa settled the building coverage claim with the Cirillos? Was there a breach of Statutory Condition 1 for material misrepresentation by the Cirillos regarding the undisclosed heating of their home by two wood stoves?

Positions of the Parties

TGA submitted that its contract for fire restorative services was between it and the Cirillos – not with Wawanesa, and the payment to TGA under this contract was not contingent upon receiving any payment of insurance proceeds from Wawanesa to the Cirillos. TGA completed the job – the Cirillos were pleased with and accepted the work and there was no dispute between TGA and the Cirillos in respect of any deficiencies or quality of workmanship or delays on the part of TGA. TGA was not paid for all of the work it did perform – thus it commenced the lien action claiming that it was still owed approximately $153,000.

The Cirillos contended that Wawanesa's estimates from Bachly Construction and Leda Restoration were wrong – they were undervalued – both the scope of the work and the pricing of that work.

The Cirillos did not dispute that TGA did good work – there was no dispute regarding deficiencies, quality of work or delay. Their ultimate position was that if any money was owed to TGA, then Wawanesa, and not the Cirillos should be obliged to pay any outstanding TGA accounts.

Wawanesa's position was that the Cirillos had breached Statutory Condition 1 of the policy – a material misrepresentation – because they failed to disclose that their home was heated by two wood stoves and that the cause of the fire related to the operation of one of those stoves.

While Wawanesa acknowledged that because of the Guaranteed Replacement Cost Endorsement in its policy the Cirillos would be entitled to an increased cost of replacement or repair to their home

irrespective of the policy limits which in this case were $219,000, it said that the Cirillos had already been fully indemnified under the policy.

Wawanesa was not a party to the TGA contract. There was no connection between TGA and Wawanesa and that TGA was the Cirillos' contractor. Wawanesa was not obliged to pay TGA – just the Cirillos.

The central defence of Wawanesa was that the Cirillos knew and agreed that they were entitled to receive payment based on the lowest estimate which in this case was the estimate of Bachly Construction. Wawanesa denied that the Bachly estimate was wrong or undervalued.

Court's Decision in the Lien Action

The court accepted TGA's evidence and arguments that the work was done by TGA and the Cirillos were satisfied with the work. It found that the payments to TGA by the Cirillos were not contingent on payments by Wawanesa to the Cirillos, and that the Cirillos understood that their responsibility to pay TGA was not contingent upon funding from Wawanesa .[2]

The court awarded judgment in favour of TGA against the Cirillos in the lien action for $140,892 plus $12,049 for unjust enrichment, plus interest and costs.

Court's Interpretation of the Guaranteed Replacement Cost Endorsement in the Indemnity Action

The court dismissed the Cirillos' claim against Wawanesa. It held that the Cirillos had the onus to establish that they were entitled to additional benefits for payments under the policy. Their policy however only entitled them to the cost of repairing the premises with materials of similar kind and quality – it did not require Wawanesa to pay whatever TGA charged to the Cirillos to repair the premises which was the position advanced by the Cirillos supported by their mistaken interpretation of the Guaranteed Replacement Cost Endorsement. [3]

In approving standard industry practices in these types of cases Justice DiTomaso said:

> If the insured decides to retain his own contractor (as was the case with the Cirillos) the insurance coverage still remains the lowest estimate. Coverage is contingent on the insureds repairing the premises and typically the insureds as with the Cirillos would be paid in stages as the restoration and repair progressed. Were additional damages discovered as in this case, the insurer asked the contractors Bachly and Leda to re attend, inspect the damage and provide revised estimates based on the expanded scope of repair. The lowest estimate on the expanded scope from either Bachly or Leda would become the insureds' limit of insurance. [4]

In rejecting the Cirillos' claim that the Bachly estimates were inappropriate, the court said that there was no incentive on the part of Bachly to come in with undervalued estimates of repair or scope of work because their revised estimate would have been the contract price had the Cirillos retained Bachly. The Cirillos however did not retain Bachly but retained TGA. In addition the Cirillos were told that Wawanesa would pay the lowest estimate – which was Bachly's. The court said:

> The two Bachly estimates specifically set out the scope of the work and pricing to carry out restorative work. I find they were neither undervalued estimates nor were they flawed because they missed work to be done. The revised Bachly estimate fairly describes the additional scope of work and cost of repairs. The Cirillos had decided to retain TGA to carry out repairs prior to and irrespective of Bachly's revised estimate. [5]

The court also dismissed Cirillos' claim against Wawanesa on the basis that the claim had been settled. Wawanesa's last cheques were expressly tendered as "final". The court found that at no time did the insured's representative dispute the amount of the final payment.

In finding that the building coverage claim was settled prior to the commencement of the action, the court said:

> I find that the evidence is overwhelming in support of Wawanesa's position that there never was any dispute or issue raised by the Cirillos with Wawanesa throughout this entire claim. (Wawanesa's witness) testified that after the issuance of the final payment she considered the matter closed. The Cirillos had been explained the extent of their coverage and were provided with detailed breakdown of payments under that coverage and they accepted those payments. They were complimentary towards the manner in which they were treated by Wawanesa … in a professional, courteous and competent manner. [6]

Because of the findings in favour of Wawanesa regarding indemnification and settlement issues, the court did not consider it necessary to determine whether the policy was void for material misrepresentation.

If one reads the Reasons for Judgment in this case, it is quite apparent that the court was impressed with the detailed and accurate concurrent recordkeeping of the contractors' and the insurer's employees. On credibility issues, the court accepted the contractor's and insurer's witnesses' evidence on every major point of disagreement, in preference to that of the Cirillos' witnesses.

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

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[1] [2010] I.L.R. I – 4907 (Ontario Superior Court of Justice)
[2] *Ibid* at paragraph 59.
[3] *Ibid* at paragraph 113.
[4] *Ibid* at paragraph 115. And see paragraphs 118 and 125.
[5] *Ibid* at paragraph 144.
[6] *Ibid* at paragraph 161. Also see *Decelle v. Lloyds*, [1973] S.J. No. 276 and P*ulla v. Simcoe and Erie General Insurance Company*, [1984] O.J. No. 1067 regarding whether a "final" payment actually "settled" the claim.

4. Ontario's New OHSA Provisions Requiring Violence and Harassment Prevention Programs

*Cheryl A. Edwards and Jeremy Warning**

Statutory provisions requiring "kinder, gentler" workplaces, including the construction project workplaces of your clients, have been recently passed in Ontario. On December 15, 2009 Bill 168, the Ontario government's detailed proposal to amend the Ontario Occupational Health and Safety Act (OHSA) to require worker protection from violence and harassment, and establish new specific worker rights relating to violence, received Royal Assent. As such, Ontario workplaces will have until June 15, 2010 to ready their workplaces, policies, programs and practices to ensure compliance with these provisions. Bill 168 received robust debate, and was amended slightly before passage. This article provides highlights of new employer obligations and worker rights as they were amended and passed into law. The amendments contain seven key areas -- mandatory new employer policies, required programs, required training, required risk assessments, worker rights, obligations to respond to domestic violence in the workplace, and employer reporting requirements -- each of which is detailed in turn below.

1. Employer Obligation To Prepare Written Violence And Harassment Policies

Where more than five workers are regularly employed at a workplace, Ontario employers will now be required to prepare and post a workplace violence policy. The specific definition of "workplace violence" under the OHSA for purposes of employer obligations and exercise of worker rights means:

a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to a worker;
c) a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

With the passage of Bill 168 the OHSA will also require employers to prepare and post a written policy respecting workplace harassment at every workplace where more than five workers are regularly employed. "Workplace harassment" is defined to mean "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome". While interestingly these provisions do not specifically apply to a constructor, i.e. the general contractor who has undertaken a construction project for an owner, it must be remembered that constructors employing workers are also employers to whom these obligations will apply.

2. Workplace Violence and Workplace Harassment Programs

Employers are to develop and maintain programs to implement both the workplace violence policy and the workplace harassment policy. Employers need to be aware that the specific and detailed requirements to prepare violence prevention programs and workplace harassment programs differ significantly under Bill 168.

Workplace violence programs require the following:

- measures and procedures to control risks identified in a violence risk assessment (discussed below);
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
- measures and procedures for workers to report incidents of workplace violence to the employer or supervisor; and
- the means by which the employer will investigate and deal with incidents or complaints of workplace violence.

The program required to protect workers from workplace harassment may be more limited. Minimum mandatory requirements are that the program:

- include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; and
- set out the means by which the employer will investigate and deal with incidents and complaints of workplace harassment.

3. Risk Assessments for Potential Workplace Violence

Bill 168 requires that employers assess risks of workplace violence that may arise from the nature of the workplace, the type of work, or the conditions of work. No assessment is specifically required under the OHSA for risks of workplace harassment. The employer's risk assessment is required to take into account:

- circumstances that would be common to similar workplaces; and
- circumstances specific to the workplace.

Risk assessments will be required, then, for construction project workplaces, taking into account the type of risks of physical violence or threatened violence reasonably expected, or that has occurred in past, at such workplaces. Once complete, the employer must advise the joint health and safety committee, health and safety representative, or workers directly (if there is no committee or representative) of the results of the assessment and provide a copy of the assessment if in writing. Workplaces must be reassessed for risks of workplace violence as often as necessary to ensure that the policy and program continue to protect workers from workplace violence.

4. Required Worker Training Respecting Violence and Harassment

The amendments require that employers train workers in the contents of workplace violence and workplace harassment policies.

The employer's obligation to provide information and training under section 25 OHSA and a supervisor's duty to advise workers of any potential hazard under section 27 OHSA will also include a new and rather controversial obligation. The amendments will require the employer and supervisor to provide information, including personal information, related to risks of workplace violence from a person with a "history of violent behaviour" (for example a customer or another worker) if the worker can be expected to encounter that person during the course of their work, and there is a risk of violence likely

to expose the worker to physical injury. Disclosure of personal information must be limited to that information reasonably necessary to protect the worker from physical injury.

5. New Worker Rights To Refuse Work for Workplace Violence

The amendments contained in Bill 168 clarify the right to refuse work for conditions in the workplace that constitute "workplace violence". Historically, it has not been entirely clear that a worker may refuse work for workplace violence. The OHSA is now amended to permit a worker to refuse work if "workplace violence is likely to endanger himself or herself", in addition to other grounds upon which a worker may refuse work. Given that some confusion may exist about this new right to refuse, construction employers will be well advised to ensure that guidance and training is provided to workers on the definition of violence that can give rise to a proper refusal that requires investigation and possible remedial action -- threatened or actual physical violence. There is no amendment to the OHSA to permit a worker to refuse work where they believe that workplace harassment is likely to endanger the worker.

Notably, Bill 168 changes the obligation of a worker to remain near his or her workstation until an investigation is completed. On June 15, 2010, the work refusal provisions in the OHSA will require that the refusing worker remain in a safe place "that is as near as reasonably possible to his or her workstation and available to the employer or supervisor for the purposes of the investigation". As such, this change will apply to all work refusals, not just those exercised on the new ground of workplace violence. This change was not amended from the April 2009, introduction of Bill 168.

Bill 168 does not alter the limited right to refuse work for those employed in certain occupations such as police officers, firefighters, health care workers and workers in correctional institutions.

6. Employer Obligations To Respond to Domestic Violence

The most novel and controversial provisions of the proposed Bill 168 amendments to the Ontario OHSA are those related to domestic violence. The original proposals in the Bill 168 from April, 2009, have passed without amendment. The OHSA will now require an employer to take every precaution reasonable in the circumstances for the protection of a worker if the employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace. Ontario will be the only jurisdiction in Canada to have OHSA provisions specifically requiring that the employer react to domestic violence. No specific reasonable precautions have been outlined. Ordinarily the obligation to take every precaution reasonable in the circumstances requires that the employer have regard to available standards, guidance from public organizations, and engage in creative solutions to protect workers from novel or complex workplace risks.

7. Reporting Workplace Violence to Ontario Ministry of Labour

The amendments now require that employers prepare a notice under section 52 OHSA in the event that a worker is disabled from their regular duties, or requires medical attention, as a result of workplace violence. These provisions are added to section 52 of the OHSA.

**Cheryl A. Edwards, Heenan Blaikie LLP and Jeremy Warning, Heenan Blaikie LLP*

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!

Seven Habits of Highly Effective Pre-Trial Judges:

For this issue, we are very fortunate to have with the permission of Mr. Justice Di Tomasso a reproduction of his presentation given at the OBA's Barrie program on Construction and Insolvency Law held in Barrie on November 30, 2009: Seven Tips for Highly Effective Pre-Trials. The paper was originally presented and prepared by Master MacLeod and Justice Nolan. We thank Mr. Justice Di Tomasso for giving us permission to reproduce this paper here, and we also thank Marcia Oliver for her assistance in obtaining this useful summary.

Seven Habits of Highly Effective Pre-Trial Judges
Advice for Judges on Making Molehills out of Mountains

1. **Be Prepared:**

- Read the material but do not blindly wade through voluminous material.
- Read with purpose. Consider the nature of the action, the issues and the elements of proof then read the key portions of the materials looking for strengths and weaknesses in the case and clues as to how it may best be resolved.
- Have a general plan for how to approach the pre-trial based on the materials, the issues, the parties, the nature of the litigation, the counsel involved and if there is going to be a self-represented litigant.
- Carefully consider how to deal with a self-represented litigant and whether there should be a reporter present.
- After having developed a good sense of the case, have a game plan going into the pre-trial.
- Make a list of the issues and the order in which you think it would be most helpful to deal with them.
- Also decide if you want to meet with counsel first without the parties as opposed to dealing with counsel and parties together from the beginning.

- Be as prepared for the pre-trial as you expect counsel to be. This means understanding the facts of the case and the relevant documents/reports that have been provided with the pre-trial brief.

- The 9 words that counsel dread hearing at the beginning of pre-trial "counsel, tell me what this case is all about."

- Decide beforehand whether caucusing is an appropriate approach at the particular pre-trial, either in relation to the dynamics between the parties or your comfort level with caucusing.

- If you decide that caucusing is an appropriate strategy in the particular case, make sure everyone involved understands what information is confidential and what you can and cannot share with the other side.

- If any party believes, even erroneously, that there has been a breach in any expectation of confidence, not only is the process of that pre-trial undermined, but also the confidence in the justice system.

2. Be Realistic

- Pre-trials are generally not scheduled for more than an hour. There are many things that can be done but only a limited number that will be done.

- There are some cases that cannot and will not settle at a pre-trial. In those pre-trials where a settlement is not possible, spend some time on trial management and give serious consideration to whether a summary trial is appropriate in the circumstances.

- The readiness for trial can frequently be determined by asking each counsel to tell you the theory of his/her case. If they don't have one yet, their readiness for the trial should be questioned even though they have signed a certificate.

3. Be Just; Be Seen to Be Just:

- Pre-trials are an important part of the justice system and should produce results that are viewed as fair and just.

- The reputation of the system demands that justice not only be done but must be seen to be done.

- Give counsel a thorough and balanced view of where the court is likely to go on substantial issues, including damages. Counsel and parties appreciate that approach, even if they may not agree with your view.

- Institutional defendants should not be "put under the gun" to come up with some money to get the case settled in cases in which a critical analysis of the facts suggests that the plaintiff will not meet the onus.

- Pushing parties to settle at any cost might result in a settlement but it will only be because someone is tired of fighting the system, not because they believe it's a fair result.

- Refuse the temptation to turn a one hour pre-trial into an all day affair, by saying that no one goes home until the case is settled. Even a successful party leaves with the sense that justice has not been done because counsel, at least, is aware that the other side ultimately gave up because they were hungry and tired.

- If the pre-trial judge and counsel believe that an extended pre-trial would be helpful, schedule one for a longer period of time if time is available.

- If the case settles or pre-trial leads to a settlement that can be considered a success ONLY if the parties to the settlement walk away feeling that it is based on the merits of the case and not an unjust result imposed by the pressure of the pre-trial judge or a set of procedural obstacles preventing the case from proceeding to trial.

- It may be necessary to be blunt, pragmatic, assertive and efficient at a pre-trial. It is not, however, necessary to be uncivil, bullying or coercive.

4. Be a Facilitator of Settlement, Not an Imposer of Settlement:

- You are not the person responsible for insuring that there is a settlement. Judges like to hear trials. Parties and counsel should never get the impression that they are being pressured to settle by the pre-trial judge in order to cut down on the backlog or the workload of the court.

5. Be Knowledgeable and Honest:

- Provide the parties with your respectful but frank analysis of their respective positions, strengths, weaknesses and unforeseen problems.

- If you know the area of law well tell the parties

- If the area of law is not as familiar to you, some quick research might assist you as well as speaking to colleagues for examples of similar trials that they have done, how they worked out and what happened with respect to costs.

- There is nothing wrong with pointing out that in a generalist court, the trail judge may be someone who is not familiar with the area of law. That is often the case if the matter is a complex of highly technical matter.

- Help the parties to understand that pre-trial is the last "off ramp on the litigation highway" and a serious opportunity to avoid the costs of continuing the litigation and settling on the day of trial when much of the cost of a trial has been spent.

6. Be Flexible:

- While it is important to have a general plan on how to approach a specific pre-trial, be prepared to change the plan once you meet with counsel and the parties. They may have talked since they prepared their briefs and have resolved one or more of the issues. It is always helpful to ask up front if there is any updated information since the briefs were prepared.

- While being realistic about judicial resources, if you are making significant progress in a pre-trial, consider offering additional time with you if they think it would be helpful.

- If there are a number of issues to be reviewed at the pre-trial and you appear to be at an impasse on one of them, consider suggesting that that issue be put in the "parking lot" to come back to and then move to another issue. It may well be that if counsel and the parties are able to come to some agreement on the other issues, the issue in the parking lot will have less importance.

- There are many things that can be done at a pre-trial. The ones you do should be the ones that will work best for that case and those parties.

- Consider whether you are prepared to meet with the parties separately and on what terms. If you do, do so purposefully and make sure everyone understands the ground rules.

7. Be Useful:

- Engage the participants in the process by creating an atmosphere where they are open to you, your comments and possible resolution.

- Introduce yourself at the beginning of the pre-trial and outline the process that you propose to follow.

- Ensure that everyone knows that the process is protected by the settlement privilege and that any offers to settle any issue cannot be used at trial if there is no settlement.

- The pre-trial may be the only time the litigants see a judicial officer since 97% of actions settle without a trial. In is an important event, therefore, and may be the only opportunity they have to observe the justice system at work.

- Whatever the outcome of the pre-trial, the litigants should leave feeling that their issues were taken seriously and that the pre-trial moved the matter forward towards resolution or towards adjudication on the real issues in dispute. Although a full settlement has not been achieved, the time and money expended has, nevertheless, been well spent.

- Consider the nature of the dispute which gives rise to the litigation. Is the problem encompassed by the litigation or is the litigation just a symptom of the problem? This is a key to thinking about the wisdom of alternatives to trial list.

- In addition to the facts and legal issues in the case, take a serious look at the procedural issues that may help get the case to trial or to streamline the trial.

- A lot of practical issues can be resolved at a pre-trial conference to save the time and expense of a series of pre-trial motions. If there are steps to be completed, seriously consider setting another pre-trial before yourself, even for 15 minutes to canvass the readiness for trial.

- Even if the case does not settle it may be that some of your suggestions as to how the trial judge may see the evidence will be food for thought for both counsel and the parties that will lead to at least a partial resolution of that issue prior to trial.

- If the case does not settle, the pre-trial will nevertheless be successful if it results in resolving any issues that can reasonably be resolved and streamlines the case to the point where there can be an effective and shortened trial.

Master Calum MacLeod and Justice Mary Jo Nolan

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Construction Liens and Small Claims Court

Thanks also to Joseph Cosentino of Goodmans LLP for the following useful information with respect to liens within the monetary jurisdiction of Small Claims Court.

With the arrival of the increased monetary limit of $25,000 in Small Claims Court, construction law practitioners may be faced with client questions concerning the availability and appropriateness of Small Claims Court to commence and continue with a lien action.

It does not appear that the Small Claims Court forum permits construction lien actions to be commenced and/or properly pursued. Pursuant to Section 23(1) of the *Courts of Justice Act*, the jurisdiction of the Small Claims Court is set out as follows:

23. (1) The Small Claims Court,

a) has jurisdiction in any action for the *payment of money* where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and

b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount. (emphasis added)

Given the fact that lien actions typically request more than a payment of money (e.g. declaration that a lien claimant has a right to a lien; that accounts be taken and directions given etc.) it does not appear that Small Claims Court has the required jurisdiction to hear lien matters and to pronounce judgments on them.

Digging a Deeper Hole – Construction Projects in Financial Trouble

Last but certainly not least, Dante A. Capannelli of Capannelli Law Professional Corporation has provided us with a summary and link to the dinner program on *Construction Projects in Financial Trouble* that he chaired in November, 2009:

In case you missed it, this timely and insightful program is now available online.

Experts Ken Eccleston (*Eccleston LLP*), Ira Smith (*Ira Smith Trustee & Receiver Inc)*, and Joe Latham (*Goodmans LLP*) share their experiences and provide the answers you need to advise construction clients dealing with projects that are knee-deep in financial crisis. Topics discussed:

- Appointing trustees and receiver/managers under the *CLA*, *BIA* and/or *CCAA*
- Lenders concerns and remedies
- Negotiating termination agreements and re-negotiating contracts and sub-contracts
- Resolving claims in the new economic climate
- The interplay between these Acts, the resulting issues and conflicts that may arise, and possible ways of resolving them.

To download the program, click here.

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