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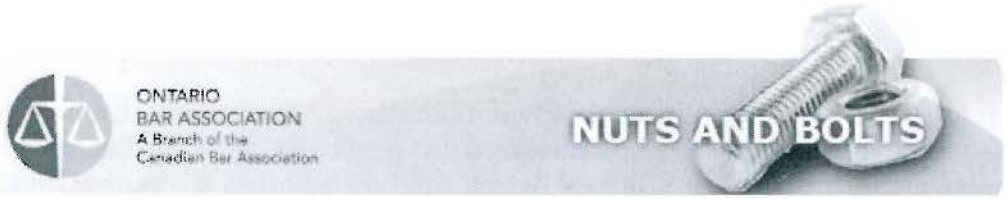

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Construction Law Section
Section du droit de la construction

Printer friendly	Upcoming Program(s)	Program Materials	Section Executive	

Upcoming Events - Mark These Dates in Your Calendar!

Please watch for registration notices for:

Performance Anxiety and the Use of Proper Contract Security to Prevent Unfortunate Mishaps
Dinner Program
Thursday, April 7, 2011

learn more >>

Case Summaries and Articles of Interest

Green Building Litigation: Toronto Condo Action Shows we are in on the Action

Brendan D. Bowles and Angela Khoury

According to a report by Harvard Law School, green building is generally referred to as "an effort to apply principles of environmental sustainability to every aspect of the construction of buildings." However, there is no universal consensus as to the standard by which this "greenness" is to be measured.

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Failure to Disclose Mary Carter-type Agreements Can Have Devastating Consequences – The Ontario Court of Appeal takes a Firm Position

Jessica Caplan

Mary Carter-type agreements can be powerful settlement tools, especially with complex multi-party litigation becoming increasingly common. These types of agreements deal with situations where the parties agree amongst themselves to limit liability during litigation. By such agreements, parties apparently opposite work together in an attempt to satisfy joint interests.

various parties to the litigation and are not immediately disclosed. While it is open to parties to enter into such agreements, the obligation upon entering such an agreement is to immediately inform all other parties to the litigation as well as to the court…The reason for this is obvious. Such agreements change entirely the landscape of the litigation.

The Court of Appeal went on to conclude that failure to immediately disclose the agreement is indeed an abuse of process worthy of the most severe consequences:

…the absence of prejudice does not excuse the late disclosure of this agreement. The obligation of immediate disclosure is clear and unequivocal. It is not optional. Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party. Where, as here, the failure amounts to abuse of process, the only remedy to redress the wrong is to stay the Third Party proceedings and of course, by necessary implication, the Fourth Party proceedings commenced at the instance of the Third Party. Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit litigation to proceed without disclosure of agreements such as this one in issue renders the process a sham and amounts to a failure of justice.

Conclusion – Disclose, Disclose, Disclose!

The legal principles articulated by the Court of Appeal in the *Aecon* decision are not new. Indeed, in *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725, the first Canadian case to consider Mary Carter agreements, Mr. Justice Ferrier ruled that, in addition to each particular agreement being considered on a case-by-case basis, the agreement (with the exception of dollar amounts and gratuitous and self-serving language) must be disclosed to all parties, and to the Court, as soon as it is made. The *Aecon* decision simply serves as a reminder that immediate disclosure is necessary as a matter of procedural fairness, such to allow the Court to properly control the judicial process. It is with these overarching principles in mind that lawyers must negotiate and advise clients in connection with Mary Carter-type agreements. Leave has been sought to appeal this decision to the Supreme Court of Canada, but for now at least, lawyers are well advised that failing to adhere to the strict disclosure requirements attaching to these types of agreements will likely result in consequences of the most severe kind.

**Jessica Caplan, Goldman Sloan Nash & Haber LLP*