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NEWSLETTER

Borden Ladner Gervais

EDITOR'S INTRODUCTION

Borden Ladner Gervais LLP (BLG) is pleased to present this twenty-first edition of the ***Canadian Insurance Law Newsletter*** for the benefit of our clients and others interested in this constantly evolving area of law. Our objective is to keep you abreast of recent trends and developments of significance on a wide variety of insurance law related topics.

This edition canvasses recent changes to the disclosure obligations in British Columbia actions, recent Ontario cases on the interpretation of pollution exclusions in both the first and third party policy context, and a significant decision on the obligation to disclose partial settlement agreements. This edition also includes a case comment on discoverability of limitation periods and an overview of the Supreme Court of Canada's recent commercial general liability insurance decision in ***Progressive Homes v. Lombard.***

We invite your comments and suggestions with respect to questions, topics or concerns of special interest that you would like to see addressed in future editions.

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IN THIS ISSUE

PARTIAL SETTLEMENT AGREEMENTS MUST BE IMMEDIATELY DISCLOSED

The interesting decision of the Ontario Court of Appeal in *Aecon Buildings v. Stephenson Engineering Limited* was released on December 24, 2010. It has significant repercussions for parties entering into partial settlement agreements, commonly known as Mary Carter or Pierringer agreements.

The action arose out of a dispute over a breach by the City of Brampton of a $46 million dollar contract. The breach alleged by Aecon resulted from delays in the construction of the Brampton Performing Arts Centre.

After the Statement of Claim was issued by Aecon, Aecon and Brampton reached a partial settlement agreement (the Agreement) on how to proceed with the dispute. The Agreement was succinctly described by the Court of Appeal: "Brampton agreed to advance claims against Page + Steele on Aecon's behalf and Aecon agreed to cap its damage claims against Brampton to any amounts Brampton recovered from Page + Steele and its subconsultants."

Brampton added Page + Steele as a third party and Page + Steele in turn added three fourth parties, one of whom was the appellant, Stephenson Engineering Ltd. The Agreement was not disclosed to the parties immediately and was only disclosed a number of months after its existence was revealed to the other parties, after it was specifically requested.

Stephenson moved for summary judgment of the third and fourth party claims on the basis that the Agreement was champertous, any adversity between Aecon and Brampton was a sham, and the Agreement had not been disclosed immediately after it was completed. The motions Judge refused to grant summary judgment, saying that the Agreement:

> [S]imply restricts [the] plaintiff's recovery from the defendant to what the defendant might recover from the third party. In effect, it simply caps the plaintiff's proceeds and resolves that part of the claim for which the defendant might itself be severally liable.

Stephenson appealed.

The Court of Appeal decided that the Agreement was not champertous or the adversity a sham, as both Aecon and Brampton clearly had a financial stake in the outcome of the dispute, and were in no way strangers to the litigation. The Court of Appeal also agreed with the motions Judge's characterization of the Agreement.

Nevertheless, the Court of Appeal allowed the appeal and stayed the third and fourth party claims. The court did so because it was the clear and unequivocal obligation of Aecon and Brampton to immediately disclose the existence of the Agreement and they had failed to do so. Because such agreements immediately alter the landscape of the dispute for all parties,

> . . . failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party . . . To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and amounts to a failure of justice.

Anyone contemplating entering into a partial settlement agreement of any kind should closely review this decision and ensure that immediate disclosure is contemplated and assured upon the completion of the agreement. Of course, the dollar amounts contained within the agreement need not be disclosed as per the prior Ontario decision in *Pettey v. Avis* (1993).

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