

CONSTRUCTION LAW *update*

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MESSAGE FROM THE EDITOR:

This month's issue contains an article on the effective management of electronic information on construction projects and in the face of construction litigation by Susan Nickle and Sandra Smith of Wortzman Nickle Professional Corporation, e-discovery and litigation management counsel. The article was drafted at my request with the specific needs of our readers in mind and I am very grateful to Susan and Sandra for their contribution to our publication.

In addition, the issue contains an article by Lowell Westersund Q.C. commenting on the decision of the Northwest Territories Court of Appeal in *Fallowka v. Royal Oak Ventures* restating the essential test for causation in cases involving claims for negligence.

In an ongoing effort to provide timely and relevant information to our readers, we invite your comments on this and any issue of the Bulletin. In addition, if there is a particular issue or case that you would like to see evaluated in an upcoming issue, please do not hesitate to contact me at 416 486-6454 or sheabunston@rogers.com

UPCOMING ISSUES: FALL 2008:

Early in 2008, the Canadian Construction Documents Committee released a new form of CCDC-2 Stipulated Price Contract, replacing the 1994 version of the CCDC contract. The allocation of known risks as between parties to a construction contract may be greatly impacted in circumstances where a new form of contract is introduced and mandated for use between the parties.

As of July 1st, 2008, the Canadian Construction Documents Committee ended the issuance of seals for use with the old form of 1994 CCDC-2 Stipulated Price Contract and so it is important for participants in the Canadian construction industry to have an understanding of the changes as between the old and new forms of contract as quickly as possible.

With this in mind, beginning in our September 2008 issue we will be running a series of articles which highlight and explain the prominent changes contained in the CCDC-2 2008 form of Stipulated Price Contract as well as detailing strategies for dealing with those changes from the points of view of Owners, Contractors, Subcontractors and Consultants.

Shea Bunston



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INSIDE THIS ISSUE:

Message from the Editor.....1

The Construction Of Litigation
Readiness.....2

Fallowka v. Royal Oak
Ventures 2008 Nwtca 4.....4

THE CONSTRUCTION OF LITIGATION READINESS

By:

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and
Sandra Smith
Wortzman Nickle Professional Corporation**

The vast majority of all new information created today is created and stored in electronic form, creating numerous challenges for all Canadian businesses. The construction industry is no exception. As construction projects increase in value and complexity, so does the need for construction companies and their counsel to understand how to manage their electronic information, particularly in the face of litigation.

Canadian discovery rules require that upon reasonable anticipation of litigation, litigants must immediately identify and preserve all potentially relevant information, both paper and electronic format. Computers have exponentially increased the volumes of electronic information that exist in most organizations, making these obligations potentially onerous, costly and time-consuming. Therefore, it is essential that the e-discovery process (the identification, preservation, review and ultimate production of records) be well managed.

To avoid inadvertent destruction of electronic records, the initial identification and preservation phases should be as broad as possible. A legal hold must be issued at the earliest opportunity to ensure that potentially relevant information scheduled for destruction is preserved. These phases may be quite complex. Consider the potentially large number of electronic sources potentially giving rise to relevant information in a construction dispute:

- Email
- Servers
- Voicemail systems
- Office and home computers

- Blackberries and handheld computers
- Fax machines

Further consider the types of records to be produced, which may include:

- RFP/bid/tender documents and information
- CAD drawings and site plans
- Financial information
- Scheduling documents
- Project communications
- Payroll records
- Change order details.

It is easy to see why e-discovery in the construction context may become a veritable minefield for the unprepared. Accordingly, it is essential that construction litigants and their counsel have a good understanding of all potential sources of information and how that information is stored. This information will assist the company in ensuring that the disruption and cost of preserving and producing all potentially relevant information are kept to a minimum. The most effective way to ensure that all applicable information is appropriately preserved is the development, implementation and use of a records management policy.

Records management policies allow organizations to classify, store and destroy records on a pre-determined schedule. The benefits of a records management policy are numerous and include:

- a) organizational records are classified allowing easy access to information;
- b) the segregation of privileged or confidential information, thereby minimizing both the risk of unauthorized access to these records and the corresponding risk of inadvertent disclosure;
- c) storage costs are reduced;
- d) e-discovery costs may be significantly lowered:
 - i) due to regular, appropriate destruction, the organization will not have excessive volumes

of information to preserve, search, review and produce in litigation; this may reduce fees for forensic or other e-discovery vendors, lawyers and other costs related to the processing, production, and review of electronically stored information;

- ii) claims of spoliation (inadvertent or wilful destruction of relevant evidence in litigation¹) can be defended through an ability to demonstrate to the court that only documents slated for regular destruction (well prior to the reasonable anticipation of litigation) were destroyed;
- iii) the organization may rely on its reasonable records management policy when applying to the court for a cost-shifting order when facing an e-discovery request; this may be particularly applicable in a construction dispute if the plaintiff is an individual with few documents who is suing a company with a significant volume of records;
- iv) relevant active data will be available for production, avoiding the need to restore (at tremendous expense) back up tapes and other disaster recovery storage.

In Canada, the development and implementation of a reasonable document management policy is unanimously endorsed by the Sedona Canada Principles, the Ontario E-discovery Guidelines, and the judiciary.

In the construction law context, e-discovery obligations are best met when litigants are well-prepared with a reasonable records management policy. These policies enable construction litigants to more efficiently and cost-effectively identify, preserve and produce all potentially relevant information. The discovery obligations imposed by the Rules and the courts are onerous. The expectations of the courts are that parties will work diligently and in good faith to meet these obligations. Through proper planning and communication, the discovery process will not be a reactive one. Clients and counsel will work proactively to ensure that they

maintain control of the e-discovery process and protect their interests throughout the litigation. ■

¹ Spoliation may result in serious sanctions which include: costs, adverse inferences, or the dismissal of the offending party's pleading.

Wortzman Nickle Professional Corporation are e-discovery and litigation management counsel addressing a gap which presently exists in Canada between corporations and traditional law firms which engage in litigation. It advises Canadian corporations, government organizations, and their legal counsel on all aspects of e-discovery and litigation management. They may be contacted at:

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TO COMMENT ON ANY
OF THE ARTICLES
IN THIS
NEWSLETTER.

FULLOWKA v. ROYAL OAK VENTURES 2008 NWTCA 4.

Negligence - Duty of Care - Inappropriate to Impose a Duty of Care on One Person for the Intentional Torts of Another - Discussion of “But For” and “Material Contribution” Tests of Causation and Damages - Application to Complex Construction Litigation Cases

By:
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Full-text:

<http://www.canlii.org/en/nt/ntca/doc/2008/2008nwtca4/2008nwtca4.html>

Recent comments by the Northwest Territories Court of Appeal in Fullowka v. Royal Oak Ventures 2008 NWTCA 4 may assist in working through complex causation questions in construction cases where there are potentially multiple contributors to a plaintiff's damages.

Fullowka involved the infamous 1992 Giant Mine strike in Yellowknife which resulted in the death of nine replacement workers and a mountain of litigation. Roger Warren was convicted of nine counts of second degree murder and actions were commenced by the families of the deceased against the owners of the mine, the union representing the striking workers, the security firm employed by the mine, the government of the Northwest Territories, and several individuals. At trial, all of these defendants were found to have owed a duty of care to the plaintiffs and, by their acts or omissions, materially contributed to the murders.

On appeal, the Court of Appeal overturned the findings of negligence. Central to the Court of Appeal's decision was the conclusion that it is generally inappropriate to impose a duty of care on one person to prevent the

intentional torts of another. While the case turned largely on the duty of care question, the Court also commented on the test for causation relied on by the trial judge.

The trial judge did not have the benefit of the Supreme Court of Canada's decision in Hanke v. Resurface Corp. 2007 SCC 7, [2007] 1 S.C.R. 333 where the Supreme Court re iterated that the essential test for causation is the “but for” test. This test mandates

UPCOMING EVENTS

EDMONTON

Building Envelope Solutions Conference

October 22, 2008

Westin Edmonton Hotel

www.buildingenvelopeforum.com

Construction Law Primer

Construction Risk Management 2008:

Contracts, Tendering, & Claims

October 23, 2008

Westin Edmonton Hotel

www.lawtalk.ca

TORONTO

Construction Law Update: Tendering & Contracts

October 29, 2008

Crowne Plaza Toronto Don Valley

www.lawtalk.ca

that the plaintiff bears the burden of proof to show his or her injury would not have occurred but for the defendant's negligent act or omission. Prior to the decision in Hanke courts had grappled with earlier Supreme Court jurisprudence suggesting a possible shift to the lighter burden of a "material contribution" test. The NWT Court of Appeal clarified that it is only in "exceptional circumstances" that the test would shift from "but for" to "material contribution". The Court said at paragraph 195:

"In exceptional circumstances, the "but for" test may be unworkable, even though evidence supports the inference that the defendant's conduct materially contributed to the plaintiff's injury. If it is impossible to prove, due to factors outside the plaintiff's control, that the defendant's negligence caused the plaintiff's injury on a "but for" basis, and it is clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of the kind of injury suffered by the plaintiff, then liability may be imposed, according to basic notions of fairness and justice. For example, where the limits of science make it impossible to prove on a balance of probabilities that the defendant's negligence was a necessary cause of injury, it may be appropriate to

resort to the more easily satisfied "material contribution" test. When interpreted in that way, the test significantly lowers the proof requirement for causation."

While the Court opened the door somewhat to the "material contribution" test, they were clear that every effort must first be made to apply the "but for" test. The Court found that the trial judge had failed to make adequate attempts to apply the "but for" analysis. This was found to be a fundamental error in approach.

Plaintiffs in future cases, such as those involving complex construction projects with multiple parties, will be required to make every attempt to show that their damages would not have occurred but for the specific actions of each individual defendant. Only where this proves virtually impossible from an evidentiary standpoint, will the plaintiff be able to look at the cumulative effect of defendant's actions and show that a defendant materially contributed to their damages. ■

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Construction Law Update is a summary of current legal issues of concern to people involved in the construction industry. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their own particular circumstances.

If you would like additional information or have questions on the matters discussed in the news bulletin, please contact the author or Shea Bunston, Editor of the Construction Law Update News Bulletin, at sheabunston@rogers.com

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