KOSKIE MINSKY
JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Section 39 of the Construction Lien Act – More Information Necessary?

Section 39 of the *Construction Lien Act* provides for the right to make requests for an accounting of payments made on a project. In the case of *Comstock Canada Ltd. v. Durr Systems, Inc. et al.* 85 O.R. (3d) 355, Justice Ferguson of the Ontario Superior Court of Justice found there to be a new interpretation of the disclosure requirements.

The plaintiff subcontractor (Comstock Canada Ltd.) commenced a construction lien action against the defendant general contractor (Durr Systems, Inc.), on a project owned by General Motors, who was not a party to the action. Pursuant to Section 39, the plaintiff made a demand to the general contractor for information setting out the state of accounts between it and the owner. The contractor had posted security for the full amount of the claim and costs, and refused to comply with the demand. The plaintiff brought a motion pursuant to Section 39(6) of the Act for an order compelling the contractor to provide the requested information.

The defendant raised a number of arguments in support of its position that no order should have been made.

First, the defendant argued that since security had been posted, the claim was against the security and therefore the state of accounts was irrelevant.

Second, the defendant argued that the section should be limited as suggested in the Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act [page 359] which was delivered on April 8, 1982 to the then Attorney General. That report said, in part:

> We suggest that the Act should require disclosure of only that information which is pertinent to the decision of whether or not to preserve a lien claim or to pursue a lien action.

Third, the defendant further argued that the information is not relevant to the plaintiff's claim.

Justice Ferguson dismissed all of the defendant's arguments. He stated that the defendant's position overlooked "the distinction between the source of the recovery and the merits of the claim." The information requested may not be relevant to the source of the recovery, but could be very relevant to the merits of the claim.

In granting the motion, Justice Ferguson ordered that very detailed information be provided by the owner including: the total amount the general billed, the total amount the owner paid, the dates of all invoices the general submitted relating to the work that the subcontractor did, and the dates and amounts of all payments from the owner.

To illustrate the breadth of what may be required in terms of disclosure, Justice Ferguson noted that, "Depending on the facts of the case and the degree to which defendants' bills can be related to the plaintiff's claim, I can foresee a court ordering more detailed information. For instance, if the lien dispute focuses on a particular extra then it would seem reasonable that the information about that extra should be broken down."

Typically the answers that a responding party gives to a Section 39 request are short, concise and cover the basic information required by Section 39. In light of *Comstock* is this sufficient? If *Comstock* stands, the typical succinct answer to a Section 39 may become insufficient. *Comstock* could create a greater obligation on the responding party to provide fuller and more detailed disclosure early in the proceeding.

Comstock Canada Ltd. v. Durr Systems Inc., 2007 CanLII 8921 (ON SC)

National Mobility for Letters Rogatory and Enforcement of Foreign Judgments in Canada

It seems to be a widely held misconception that lawyers must be called to the Bar of a particular province before they can practice in that province. In fact, thanks to the National Mobility Agreement as between the various provincial law societies, lawyers in Canada have the benefit of inter-provincial mobility throughout the common law jurisdictions for up to 100 days per year as well as the ability to practice in Quebec with some additional restrictions.

In reliance upon this Agreement, lawyers from our firm have litigated on numerous matters from Newfoundland to British Columbia. In the context of enforcing Letters Rogatory or other Foreign Orders/Judgments in Canada, we have acted in Ontario, BC and the Maritimes.

Koskie Minsky has an affiliation with British Columbia law firm Koskie Glavin Gordon, as well as strategic contacts in firms throughout the country. This makes us particularly well-suited to assist with foreign

enforcement matters throughout Canada, especially in cases requiring our firm to act in multiple jurisdictions concurrently.

Please contact **Daniel Resnick** or **Jeff Van Bakel** if you have any questions with respect to Letters Rogatory, Letters of International Judicial assistance and enforcement of foreign judgments.

Toronto Courthouse Makes it Easier for Parties to Get Before a Judge

For years, the Toronto civil courts have had to deal with limited resources in the face of increasing caseloads. As a result, the Courts are always trying to figure out streamlined processes in order to maximize the use of the Court's resources, while still enabling parties to move towards resolution in a cost-effective and timely manner. A glaring problem has been the absence of short appointments or "walk-ins" before judges to deal with simple or uncontested matters. While much of the procedural oversight of the litigation process is left to the Masters, who are frequently accessible on short notice to deal with simple or uncontested matters, many types of procedural orders or other relief can only be granted by judges (for example, judgment against a defendant who was noted in default).

Thankfully, the court has now opened up chambers appointments with judges on short notice to deal with scheduling, consent, or urgent matters that will take less than 15 minutes. A similar method has existed on the Commercial List (which deals with complex commercial and corporate litigation) for years with great success.

In order to obtain a chambers appointment before a Judge, a party needs to fill out the appropriate form, depending on if the appointment deals with a motion, or an action that is expected to result in a short trial or long trial, and send the form to the appropriate co-ordinator, proposing several available dates. The co-ordinator will then confirm a date and time for the appointment (usually 9 or 9:30 am), and the parties will be able to attend to speak to the matter.

Given the Courts' direction for parties to move actions along more quickly, it is a welcome relief to have access to judges on short notice for simple matters. We are hopeful the new chambers appointments should go a long way towards a more efficient and timely litigation process in Toronto.

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Superior Court confirms "relevance" and "not otherwise attainable" requirements in enforcing letters rogatory.

In *Intelsat USA Sales LLC v. Hyde and Majic*, Justice Faieta refused to enforce letters rogatory directed against the former in-house counsel of the defendant company, which company was based in Ontario. The basis for Justice Faieta's decision was that the former in-house counsel's evidence was not necessary for trial and the evidence to be elicited was otherwise obtainable from other witnesses.

By way of background, Intelsat USA Sales LLC ("Intelsat") brought an action in the United States District Court for the District of Columbia ("USDC") against Juch-Tech, Inc. ("Juch-Tech"), an Ontario based company, for $30 million. The action involved unpaid invoices relating to Juch-Tech's leasing of satellite capacity from Intelsat on two satellites. Juch-Tech alleged in its defence that the contracts should be rescinded due to misrepresentations made by Intelsat.

Intelsat obtained letters rogatory to compel the examination of Juch-Tech's former in-house counsel, its former CFO and its former COO. Intelsat then brought an application in Ontario to enforce the letters rogatory against the former in-house counsel and the former CFO but not the former COO. The former CFO consented to the enforcement of the letters rogatory but the former in-house counsel opposed the application. Justice Faieta confirmed that Intelsat tendered contradictory evidence on the application and that while the former in-house's counsel's evidence may be relevant, it was not demonstrated that she was a necessary witness.

Justice Faieta found the applicant failed to tender evidence in support of the bald assertion that the former in-house counsel had knowledge with respect to the alleged misrepresentations. Additionally, Intelsat's affiant stated there was no other person who could provide evidence on the issue but for the former in-house counsel. This bald assertion was contradicted by earlier affidavits which confirmed the CFO and COO had the most specific and relevant evidence to provide.

As a result, Justice Faieta refused to enforce the letters rogatory against the former in-house counsel and found that the guideposts and the tests set out in the Court of Appeal in *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Limited* had not been satisfied.

As a result, when obtaining letters rogatory you should carefully ensure they are not overly broad nor seek too many deponents. In addition, bald assertions without evidentiary foundation are insufficient to enforce letters rogatory. Careful consideration must therefore be given to the evidence tendered in support of the application as the Court has confirmed letters rogatory will not be "rubber-stamped" and the court will not permit "fishing expeditions" without a proper evidentiary foundation.

Intelsat USA Sales LLC v Hyde and Majic, 2015 ONSC 5680 (CanLII)

Divisional Court Restores Mature Action

In *Kupets v. Bonavista Pools Limited*, Swinton J. sitting as a single judge of the Divisional Court allowed the appeal of Master Abram's Order dismissing this mature action at a status hearing.

By way of background, on May 8, 2009, the Appellants instituted a claim against the Respondent, Bonavista Pools Limited, for alleged damages to the Appellants' residential property during an acid wash cleaning of their swimming pool. Settlement negotiations between the parties took place from 2007 through 2010, during which time the Respondent's insurance adjuster inspected the property and had ample opportunity to preserve its evidence for trial.

The action was administratively dismissed on two occasions because the Respondent had not defended the action while settlement negotiations were ongoing. On both occasions, the action was restored without opposition. Subsequently, a status notice was issued by the Court on May 5, 2014 and the Respondent, for the first time, expressed concerns regarding litigation delay and requested a dismissal of the action. By this time, the action was mature in that productions had been exchanged, discoveries were complete, and the action was ready to be set down for trial after mediation.

On a status hearing, the Plaintiff is required to adequately explain the litigation delay since the action was defended and demonstrate that the Defendant would suffer no significant non-compensable actual prejudice caused by the litigation delay.

At the Divisional Court, Justice Swinton allowed the appeal for the following reasons:

(a) the Master failed to consider all of the evidence which demonstrated that the litigation delay was adequately explained from the date the defence was served until the status notice was issued by the Court. Rather, the Master focussed on the Plaintiff's "paucity and (poor) quality of evidence" ignoring material evidence filed by the parties which explained the litigation delay;

(b) the Master erroneously calculated the period of litigation delay at issue. The lower Court required an explanation of the delay commencing in 2007, even though the claim was not issued until May 2009 and the action was not defended until March 2012. The appellate jurisprudence is clear that the correct period of assessment for litigation delay starts from the time the action is defended until the status notice is

generated;

(c) the Master required "cogent", "compelling" and "convincing" evidence to explain the litigation delay when the settled case law simply requires an "adequate" or "passable" explanation; and

(d) the Master ignored undisputed evidence that the Respondent had sustained no prejudice from the litigation delay. As outlined by the Court of Appeal in *Carioca's* **[1]**, the Court must not mechanically apply a presumption of prejudice based merely on the passage of time. The Master ignored the Respondent's conduct which undercut any assertion of actual prejudice. Rather, the Master erroneously relied upon the mere passage of time and bald assertions that defence witnesses "may" not be available without any evidentiary foundation.

In the result, the Divisional Court properly applied the mandated contextual approach and made the just order reinstating the action.

***Kupets v. Bonavista Pools Limited*, 2015 ONSC 7348 (CanLII) (Div. Ct.)**

[1] *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592.

Subsection 53(2) of the Construction Lien Act is habit forming.

Recently, opposing counsel failed to serve their issued claim within 90 days of issuance, in accordance with Subsection 53(2) of the ***Construction Lien Act*** (the "*Act*)". In practice, there are few circumstances where a claim, once issued, does not thereafter get served. The most recent case dealing with Subsection 53(2) is ***MGI Construction Corp. v. 2273865 Ontario Inc and Frank Bosso* ("*MGI*")**.

In *MGI*, the plaintiff issued its Statement of Claim on August 21, 2013. The Statement of Claim was effectively served on March 19, 2015. The Court, in exercising its discretion, refused to allow the plaintiff to extend the time to serve its Statement of Claim. It was held that since the plaintiff failed to serve the Statement of Claim as required by the Act, the lien claim had expired.

The factors considered by the Court in exercising its discretion were as follows:

a) The length of delay and whether the limitation period has expired;

b) The explanation for the delay in serving the statement of claim and in bringing the motion to extend time: are the reasons compelling? and

c) Is the defendant prejudiced by the delay in serving the statement of claim?

MGI could not provide a compelling reason for the one and a half years delay. In making its decision the

Court confirmed that the Act provides a truncated procedural code for construction lien claims that are intended to expedite the resolution of lien actions. The Court stated that "compliance with the 90 day period within which to serve the Statement of Claim is required to meet the objective of the Act to achieve an expedited resolution of the claim." Thus, pursuant to the Act and the finding in MGI, if a Statement of Claim is not served within 90 days of issuance, subject to the above test, the lien claim will be declared expired. If the Statement of Claim is not served within 90 days of issuance, the Plaintiff should immediately bring a motion to seek relief from the Court that the lien be revived and for an extension of time to serve the Statement of Claim. The Court may grant the relief if the plaintiff brings the motion promptly, provides a compelling reason for the delay, and no prejudice has occurred.

On the issue of prejudice, the Court found that the existence of a lien against the property "that requires the owner to post security to clear title is prejudicial to the defendant". This concurs with the earlier case of ***An-Dell Electric Ltd. v. M.J. Dixon Construction Ltd.***, where the mere vacation of a lien was held to be prejudicial. The Court held that since MGI had not offered to pay the cost of borrowing funds to vacate the lien claim that the defendant was prejudiced. The Court in MGI is effectively implying that, if the lien was vacated, that the plaintiff should – by way of undertaking – agree to pay the cost of borrowing funds to vacate the lien if the plaintiff is ultimately unsuccessful at trial.

What do we take away from this? That you should serve the Statement of Claim as soon as it is issued, so as to avoid any potential Subsection 53(2) issues. If proper service was not affected within the required 90 days, then you should promptly bring a motion to extend the time for delivery of our claim, have a compelling explanation for the delay, and provide an undertaking as to damages if the subject lien was vacated.

***MGI Construction Corp. v. 2273865 Ontario Inc.*.. 2015 ONSC 4716**

Daniel Resnick, Associate David Silver, Partner