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Blaneys on Building

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This newsletter is designed to highlight new issues of importance to the development and construction industry. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the heads of our Architectural/ Construction/Engineering Services or Real Estate Groups:

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CONTAMINATION IS RISKY BUSINESS FOR RESTRUCTURING COMPANIES AND THEIR DIRECTORS AND OFFICERS

Varoujan Arman

In October 2013, the Ontario Court of Appeal released its decisions in *Nortel Networks Corporation (Re)* and *Northstar Aerospace Inc. (Re)*. These decisions throw yet another wrench into the gears for owners and past owners of contaminated properties and the directors and officers of corporations owning such properties.

Background to *Nortel*

In *Nortel*, the insolvent corporation was undergoing restructuring under the *Companies' Creditors Arrangement Act (CCAA)*. Under the terms of the court order granting *Nortel* protection from its creditors, it was granted relief from remediation obligations imposed by the Minister of the Environment (MOE). The lower court found that the MOE order was tantamount to a financial obligation of *Nortel*, because to comply with the clean up order would have required the expenditure of money that would escape the reach of creditors. As a result, the claim was stayed during the insolvency just like any other creditor's claim. The MOE succeeded on appeal, as explained below.

When Clean-Up Orders Will Trump, and When They Won't

In coming to its decision, the Court of Appeal referred to the Supreme Court of Canada decision in *AbitibiBowater*, where remediation orders were found to be subject to the insolvency process, but the circumstances were unique - the court found that the province would perform the remediation work itself and only then seek reimbursement. The MOE became a creditor of the insolvent corporation so its claim was stayed.

In *Nortel*, the Court of Appeal distinguished *AbitibiBowater* because it was *not* clear enough that the MOE's sole option was to perform the remediation itself and then seek reimbursement. Accordingly, the MOE orders in *Nortel* were not found to constitute orders to pay and therefore they should not be stayed by the insolvency proceeding. By virtue of the corporation having to comply with the orders during the restructuring process, the MOE was effectively granted priority over the claims of creditors.

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At the same time, the Court of Appeal released its decision in *Northstar*. In that case, the *CCAA* court had initially reached the same conclusion: that the MOE's claim was a financial obligation claim just like all other monetary claims of creditors and should be stayed. Unlike in *Nortel*, the Court of Appeal upheld the decision staying the MOE's claim because the MOE had *already* begun remediation efforts following Northstar's bankruptcy. The central factor appeared to be the point in time when the clean-up order crystalizes into a financial obligation of either the corporation or the taxpayer.

Impact for Owners or Former Owners of Land and for Restructuring Corporations

Purchasers of potentially contaminated sites such as builders, developers and landlords will want to consider the impact of cases like *Nortel* and *Northstar*, particularly where property is purchased from a vendor undergoing insolvency proceedings. The impacts can be significant, so the ability to limit or reduce exposure to possible liability should be carefully considered. For struggling corporations who may be contemplating restructuring, the *Nortel* and *Northstar* decisions may have a significant impact on the conduct of insolvency proceedings. In some situations, there may be strategic reasons why a *CCAA* proceeding will no longer be the preferred approach. It is important therefore for the corporation to seek legal advice at an early stage to assess the various options.

Personal Liability of Directors and Officers

In another recent case in *Baker v. Director (MOE)*, directors and officers of a corporation, including some whose appointment postdated the contamination and who appeared to have no specific role or responsibility in relation to environmental matters, were *personally* named in a $15 million MOE remediation order. These directors/officers appealed the orders to the Environmental Review Tribunal. Shortly before the appeal was scheduled to be heard, an out-of-court settlement was reached, which included payment by eight of the directors and officers of $4.75 million to the MOE. This was is in addition to payment of legal fees plus interim remediation costs, which they were compelled to pay even while the appeal was pending. It is important to underline that because of the settlement, no determination was made regarding the liability of these directors and officers. Accordingly, prospective and current directors and officers of corporations that own, owned or are considering the purchase of a contaminated site are encouraged to first seek legal advice to give careful consideration to any potential risks such as those raised by the *Baker* settlement.

For more information and for legal inquiries regarding bankruptcy and insolvency please contact Lou Brzezinski at 416.593.2952 or John Polyzogopoulos at 416.593.2953, and for legal inquiries regarding environmental issues please contact Janet Bobechko at 416.596.2877 or Ralph Cuervo-Lorens at 416.593.2990. ■

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"The Solutions Report recommends significant changes... particularly in the areas of increased consumer education and awareness, licencing of condominium property managers, establishing a condominium registry, dispute resolution and increased internal financial controls..."

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FURTHER UPDATE ON CONDOMINIUM ACT REVIEW

Tammy A. Evans

In a previous issue, we reported on the efforts by the Province of Ontario, facilitated through the Public Policy Forum not for profit organization to undertake a comprehensive 3 stage public consultation process to update the *Condominium Act, 1998*.

Stage 1 involved public information sessions as well as industry stakeholder group and residents' group discussions to identify specific areas of concern and for potential amendment, culminating in a Findings Report issued out in early 2013 that was made available to the public and various stakeholder groups for comment.

Stage 2 saw the Province set up five working groups made up of those involved in the condominium sector such as developers, condominium managers, lawyers, condominium board members as well as residents, to review the Stage 1 Findings Report and develop potential solutions for the main areas of concern that came out of Stage 1: consumer protection; financial management; dispute resolution, governance and management. These working groups reviewed and discussed the areas of concern and came up with potential solutions and recommendations for action in their respective reports to the Province. From there, a panel of experts from the industry, selected by the Province, reviewed the submissions of the five working groups from a policy and high level perspective. Stage 2 ends with a Solutions Report that was released in September, 2013. The Solutions Report recommends significant changes to the *Condominium Act, 1998*, particularly in the areas of increased consumer education and awareness, licencing of condominium property managers, establishing a condominium registry, dispute resolution and increased internal financial controls - all potentially to be overseen by a somewhat arm's length industry funded organization called the "Condo Office."

Stage 3 is now in play. The Province is receiving comments on the Stage 2 Solutions Report from the various stakeholder groups by November 8, 2013 from which Ministry staff is to draft an action plan proposing to implement certain recommendations. This action plan will then be made available for public review and comment. It is anticipated that completion of Stage 3 will occur early 2014.

It is important to note here that this is a *consultation* process - a very comprehensive and transparent one, in my opinion. The Province has made great effort to provide the public with opportunity to be heard, to get involved and to keep the process organized and moving forward. That said, at the end of the day, it is the Ministry that holds the power to decide what recommendations will be implemented, so it is important for those impacted by these

"Both the 2013 CCDC 14 and 2013 CCDC 15 have increased the minimum insurance coverage that design builders and consultants must carry."

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potential changes to stay informed, get involved and/or submit your concerns/comments either directly or through one of the stakeholder groups. The author has been actively involved in working group discussions, collecting and making recommendations both on behalf of clients as well as from the legal practice perspective and will continue to do so throughout the process. Readers are welcome to contact the writer to discuss how this initiative may impact your condominium development. ■

NEW CCDC DESIGN-BUILD CONTRACTS

Tammy A. Evans and Aaron Grossman

In July 2013, the Canadian Construction Documents Committee (the "CCDC") released new versions of its CCDC 14 and CCDC 15 standard form contracts, the "Design-Build Stipulated Price Contract" and the "Design-Builder/Consultant Contract" respectively.

The new templates are specifically for contracts between an owner and a design build contractor. CCDC 14 governs the relationship between the contractor and the owner while CCDC 15 is intended to outline the obligations as between a consultant and the design-builder (often referred to as the prime contractor). CCDC 15 is not intended to be a stand-alone contract, but rather is in addition to the use of CCDC 14 where the project contemplates overlapping timeline for both design and construction, there is a single supplier for both design and construction, and a consultant who will have obligations to the design-builder. The 2013 CCDC 14 is substantively similar to the previous version released in 2000, but has some significant changes some of which are outlined in this article. The 2013 CCDC 15 has been greatly revised and is based upon other standard form contracts published by the Royal Architects Institute of Canada and the Association of Consulting Engineers of Canada.

Some New Provisions That May Warrant Specific Attention

Design Copyright Protection

The 2013 CCDC 14 features enhanced copyright protection for the consultants who design the project. It only permits the owner to use copies of the design one time for the specific project being constructed and the owner cannot alter the documents or provide them to a third party. The owner may retain copies of the design and use them only for their "use and occupancy" of the project. The 2000 version on the other hand allowed the owner to use the consultant's drawings "in connection with the [o]wner's design and construction… of the [w]ork" in addition to their use and occupancy.

Termination Before Construction

The 2013 CCDC 14 contains a liquidated damages clause if the owner terminates or suspends the project for more than 20 days before construction commences. The use of

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the term liquidated damages contemplates compensation for all design services performed and damages, including a reasonable profit.

Design Change Orders

Where an owner is considering making a change to the project, it typically requests that the design builder provide a proposal for the change. Where this involves additional design by the consultant and/or design builder , and the owner then elects not to proceed with the proposed change, the 2013 CCDC 14's compensation provision is now expanded such that compensation will be owed to the design builder for expenses incurred in preparing the change proposal, rather than only for the actual design services rendered.

Increased Insurance Coverage

Both the 2013 CCDC 14 and 2013 CCDC 15 have increased the minimum insurance coverage that design builders and consultants must carry. It is worth reminding that CCDC contracts are intended to be a general template for construction contracts. It is anticipated that, as in the past, contract provisions will be amended to suit the specifics of the project through the use of supplementary conditions, in particular where the CCDC 15 is used, as there may be additional exposure for the owner, the contractor and/or the consultant.

Blaney McMurtry's ACES group has in depth experience working with CCA and CCDC contracts. We would be pleased to assist you in understanding how the new 2013 CCDC 14 and 2013 CCDC 15 contracts may impact your business. ■

RECENT DEVELOPMENTS WITH (EXTRA) DEVELOPMENT CHARGES

Marc P. Kemerer

We have previously written on the issue of the unrelenting rise of the rate of development charges in Ontario. Recent actions by a number of municipalities, effectively tracked by the Building Industry and Land Development Association (BILD), confirm that this upward trend continues.

The most notable current increases were adopted by City of Toronto Council at its meeting of 11 October 2013. Subject to any successful appeals of Toronto by-law 1347-2013, development charges in Toronto will rise over the next two years by over 75% for singles and semi-detached houses and will double in the case of multiple units. Coincident with this rise is the proposed rise in the development charges rates by the Toronto Catholic District School Board, where residential rates will increase by 141%. Development charges are also slated to rise, if more modestly, in a number of municipalities from Pickering to Peel Region to Innisfill.

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approvals stage and will now be subject to increased rates at building permit issuance. As these charges are typically downloaded to purchasers, the impact on new housing and condominium prices will be equally detrimental.

What is also extraordinary about this process of downloading the costs of development to the private sector is the leverage a number of municipalities, notably regional municipalities, increasingly have over the sector. In the experience of the writer, developers are increasingly willing to forgo appeals of municipal by-laws, including development charge by-laws, and agree to financing of infrastructure under financing schemes that lie outside of the authority of the *Planning Act*, to ensure that they are not denied access to necessary infrastructure or water/waste water allocation.

Thus land owners and developers have to be vigilant in their review of development and other charges to understand what issues this will create for project and financing costs. They also have to consider the political costs of opposing these municipal schemes. While it may make sense to launch an appeal in Toronto where infrastructure is already existent, it may be a more difficult decision in areas of infrastructure scarcity.

We will continue to monitor these matter and update again in a future issue. Please contact the writer should you require assistance in reviewing and understanding the development charges that may impact your project or in challenging development charges proposed to be imposed by a municipality or school board.

We would be pleased to assist in determining whether Toronto landowners or builders should be appealing the new City of Toronto development charges by-law. It is important to note **the deadline for such appeals is Thursday 21 November 2013**. ■

As we head into the holiday season, lawyers and staff at Blaney McMurtry LLP wish each of you the very best for the holidays and a peaceful and happy new year.

EXPECT THE BEST

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