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Actions under the Construction Lien Act - Discovery Planning will Cost you Less

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Actions under the *Construction Lien Act* (the "CLA") involve three distinct stages: pleadings, discovery (in various forms) and trial. It is generally at the interim phase of discovery that the majority of the expense and time is spent in the proceeding. Oral and documentary discovery are not automatic. However, lien claimants have statutory rights under the CLA to certain information such as the right to demand certain information from owners, contractors, subcontractors, mortgagees and/or unpaid vendors (section 39). There is also the statutory right for any person who has verified a preserved claim to be cross-examined at any time (section 40).

A CLA action is intended to be summary in nature. Therefore, interim phases of litigation such as discoveries or even an affidavit of documents are not necessarily automatic as the CLA states that the parties need to seek leave of the court before engaging in certain costly interlocutory procedures that are not particularized in the statute.

Discovery planning is now required in all actions under Rule 29.1 of the *Rules of Civil Procedure* (the "Rules"). This requirement will also apply in lien actions if permission is granted by the Court for discovery. In general, the purpose of the discovery plan is intended to permit the parties to map out the most efficient and effective way to organize production and discovery needs. An effective discovery plan will outline the particular action, the issues in dispute and the amounts at stake. The discovery plan is a timetable that the parties agree to which includes the scope of discovery, timing for delivery of each party's affidavit of documents, information with respect to the costs and manner for production, the names of the people who will be produced and any other information that will facilitate an expeditious, cost-effective discovery. Once a discovery plan has been agreed to, the parties have the continued obligation to keep it updated.

In the recent case of *Lecompte Electric Inc. v. Doran (Residential) Contractors Ltd.*, 2010 ONSC 6290, Master MacLeod outlines the importance of discovery planning in relation to construction lien actions, and offers some guidance on how to do this successfully. Rule 29.1 requires counsel to co-operate in a non-adversarial fashion to create a discovery plan at an early stage in litigation. In CLA actions, because all parties may have the same records, there is often an unnecessary and inefficient duplication of documents, as well as overproduction of documentation that is not relevant to the heart of the legal dispute. Thus, Master MacLeod states the discovery planning process is a key tool that can be used to agree upon common methodology for the identification and numbering of productions, such as electronic production and the use of searchable databases. If these kinds of methodologies are agreed upon, both parties will have more efficient access to each others' documents which will assist in lowering disbursement costs.

A strict adversarial approach in CLA actions may lead to undesired consequences. For example, the court may impose a discovery plan if one is not agreed to. Although the Rules do not specifically require the court to do this, Master MacLeod found that the court has the authority to impose a comprehensive discovery plan that contains a complete set of all procedural orders that apply to the action. Further, the failure to voluntarily agree on a discovery plan in accordance with the Rules could have consequences later in the litigation process. For example, if one party initiates a discovery related motion that implies the other party is in breach of the Rules, the court may refuse to grant the relief sought and/or order costs to be paid by the moving party, if there is no discovery plan in place. Master Macleod warns of the possibility that this result can occur to parties who do not agree to a discovery plan in compliance with the Rules.

Although discovery planning may appear to be an additional step in the construction litigation process, it may have more advantages than disadvantages in terms of resolving matters in a more timely and efficient fashion. Although discovery planning became mandatory in all actions in January 2010, in CLA actions, leave of the court is still required to have oral and documentary discovery. Planning ahead, and having a meeting or a conference is still advisable. The three "C's" of litigation process and planning as espoused by former Justice J. Farley should be part of discovery planning: "communication, co-operation and common sense". However, it remains unclear how the courts dealing with CLA actions will treat any non-compliance. At present, it is advisable to err on the side of caution by voluntarily agreeing to a discovery plan in a timely manner so that your matter does not become the example. ■