



ERRORS & OMISSIONS

A periodic update from the
Lawyer's Professional Indemnity Company

June 1994 Vol. 3 No. 6

Update on Construction Lien Act

Bruce Barrister and Sharon Solicitor had something in common: both had to notify their professional liability insurer about a serious problem relating to s.37 of the *Construction Lien Act*.

Bruce did not have a "tickler" system in place, and had completely forgotten to take the necessary steps to comply with the statutory two-year "expiration period" contained in s.37. Falling back on an excuse, he stated that the opposing solicitor had caused this problem by requesting numerous adjournments, by refusing to comply with undertakings given on discovery, and by generally interfering with the forward momentum of the lien action. Was it Bruce's fault that he missed, or was prevented from complying with, the two-year deadline?

Sharon, on the other hand, had in fact purported to set her client's lien action down for trial within the two-year period, thereby complying with s.37 (1)(b), but had neglected to obtain a fixed trial date (s.37(1)(a)). Sharon's position was that, for as long as she could remember, lawyers doing construction lien work only had to comply with sub-sections (a) or (b) of s.37(1), but not both. Recently, however, a judge on a motion in another case (*Forest Carpentry Ltd. v. Shoppers Trust Company et al*) held that there must be a compliance with **both** subsections (a) **and** (b). Sharon also realized that the *Forest Carpentry* decision made matters in

her jurisdiction particularly difficult, since the standard procedure there was to set the lien action down for trial, and to speak to the matter at a later date, when it came up in assignment court, at which time the assignment court judge would provide directions.

Well, there's good news and bad news. The bad news is that Bruce was unable to establish a compelling "estoppel" argument, based upon the opposing lawyer's tactics, and his client's lien rights were lost. The judge,

Keeping insurance costs down

Tip #1

In many cases, the first notice a lawyer gets of a problem is service of the statement of claim. When a claim is served, LPIC must retain counsel and commence costly defence proceedings.

Before you commence proceedings, contact the lawyer involved and give that person a chance to respond to the allegations of negligence. In many cases there is a reporting letter or an acknowledgement signed by the client which supports the lawyer's version of events.

If you are unsure, as to whether you should proceed, consult with someone else before you make your final decision.

however, agreed to let the lien action proceed to trial on the basis of the breach of contract claim.

The good news, though, is that the procedure adopted by Sharon (ie., to comply only with sub-section(b) of s.37(1)) was validated on an appeal of the *Forest Carpentry* decision to the Divisional Court.

There is a motion pending for leave to appeal to the

Ontario Court of Appeal. Practitioners will be advised of the outcome.

Harvey J. Kirsh

Cassels, Brock & Blackwell

(Note: There is also proposed legislation to revise s.37(1) of the *Construction Lien Act*. Practitioners will be advised when that legislation is amended.)

Tax treatment of prior support payments

In the October 1993 (Vol. 3, No. 2) edition of the *Errors & Omissions Bulletin*, a problem was identified in the income tax treatment of prior support payments which arose as a result of recent amendments to the *Income Tax Act*.

Briefly stated, where a marriage breakdown had occurred on or before December 31, 1992, but the separation agreement or court order, as the case may be, was put in place on or after January 1, 1993, any support payments made prior to the date of the agreement or order would be neither taxable to the recipient nor deductible to the payer. This was so even where the agreement or court order expressly stated that the support payments were to be both taxable and deductible. (For those who are interested, the problem was with the "coming-into-force" provisions for new subsections 56.1(3) and 60.1(3) of the *Income Tax Act*.)

The Department of Finance has now indicated that the problem will be fixed retroactively to the date

on which the last amendments were made to subsections 56.1(3) and 60.1(3) of the *Income Tax Act*. Bill C-27, a "technical amendments" bill, was introduced into the House of Commons on May 5, 1994. It amends the coming-into-force provisions for new subsections 56.1(3) and 60.1(3) of the Act so that each of them:

applies to amounts [received/paid] under a decree, order or judgment made by a competent tribunal after 1992 or under a written agreement entered into after 1992 other than such a decree, order or judgment, or written agreement, made with respect to a marriage breakdown that occurred before 1993.

Although at the time of this article going to press the fix was only in Bill form, there is no reason not to expect it to be passed and proclaimed in due course.

Barry Corbin,

Torkin, Manes, Cohen & Arbus