



The Law Society of
Upper Canada

Barreau
du Haut-Canada

errors and Omissions

November 1994, Vol 4, No 2

a periodic update from the Lawyers' Professional Indemnity Company

Uncertainty about Construction Lien Act two-year expiry resolved

The uncertainty relating to the two-year expiry period contained in the *Construction Lien Act* (Section 37) has now been resolved on two fronts.

On March 1, 1994, the Ontario Divisional Court held that subsections (a) and (b) of section 37(1) of the Act provide for two alternate routes for the trial of the action in which a lien may be realized, and that it is sufficient if a lien claimant pursues only one of those routes within the stipulated two-year time period: see *Forest Carpentry Ltd v. Shoppers Trust Company et al* and *Sayers & Associates Limited v. United Centre Inc. et al* (1994) 17 O.R. (3d) 47. A subsequent motion for leave to appeal to the Ontario Court of Appeal was dismissed.

While the *Forest Carpentry* and *Sayers* cases were working their way through the courts, the problem relating to the interpretation of section 37 of the *Construction Lien Act* came to the attention of Ontario's Attorney General. On June 6, 1994, the Ontario Legislature gave First Reading to Bill 175 (*Statute Law Amendment Act (Government Management Services) 1994*). Section 42 of the Bill purported to repeat section 37(1) of the *Construction Lien Act* and to sub-

stitute it with the following:

"(1) A perfected lien expires immediately after the second anniversary of the commencement of the action that perfected the lien, unless one of the following occurs on or before that anniversary:

1. An order is made for the trial of an action in which the lien may be enforced.

2. An action in which the lien may be enforced is set down for trial."

The Bill also provides that the foregoing revision is retroactive to April 2, 1983 (the date the Act was originally proclaimed in force), but "does not affect any rights acquired by a person under a judgment or court order before this Act receives Royal Assent".

According to the Explanatory

Case Comment Update

The September 1994 issue of the *Errors and Omissions Bulletin* detailed the results of a case involving the failure on the part of a solicitor to properly communicate notice extending the time period for the completion of the Agreement of Purchase and Sale of developments lands.

Subsequent to the initial reasons for judgement released during August, an amendment was made by the trial judge awarding damages in the amount of \$85,242 for loss of interest on the deposit monies, together with a further amount

of \$33,667.22 for legal fees incurred in an attempt to mitigate the damages. The initial award was a nominal \$10,000 amount.

The trial judge awarded the additional damages following submissions made by counsel for the Claimant within the context of the costs argument phase of the trial. The amended damages decision released during October 1994 still awarded an amount which was significantly less than the amount claimed. The claimant has appealed the trial judge's decision and LPIC is filing a cross appeal.



Notes which introduce the Bill, the amendment "clarifies the intended meaning of subsection 37(1) of the Act".

After First Reading of the Bill, the Legislature adjourned for its summer recess. The Bill has not yet received Second and Third Reading.

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