

CASE LAW UPDATE

Nicholas Caughey *

Aecon Buildings, a Division of Aecon Construction Group Inc. v. Brampton

[2010] O.J. No. 5630 (C.A.) (Released 24 December 2010)

Civil procedure – Third party procedure – Discovery – Production and inspection of documents – "Mary Carter"-type Settlements – Immediate Disclosure

A dispute between the City of Brampton and Aecon Buildings arose over the construction of the \$46-million Brampton Performing Arts Centre. Aecon claimed damages for breach of contract arising from delays in construction.

Following Aecon's commencement of its action, the two parties came to an agreement. The City of Brampton agreed to advance claims against a third party architect on Aecon's behalf and Aecon agreed to cap its damage claims against the City of Brampton to any amounts the City recovered from the third party architect and its consultants (the "agreement").

A fourth party consultant appealed the decision of its failed motion for summary judgment to have the City of Brampton's third party claim against the architect dismissed on the basis that the agreement is champertous and an abuse of process.

Aecon and the City of Brampton argued, and the Court of Appeal agreed, that the agreement was in substance a legitimate means to cap liability for the City of Brampton. They further argued that there was no abuse of process as there was no prejudice; the agreement was produced before the close of pleadings.

MacFarland J.A., writing for the court, found that there had been an abuse of process. In this case, the agreement was only produced to the other parties several months after its discovery and after specific requests. The lack of timeliness in producing the agreement to the other parties was a significant problem.

MacFarland J.A. held that there is an obligation on the parties to such agreements to disclose them to the other parties. Upon formation, a failure to produce an agreement immediately to other parties constitutes an abuse of process, as such agreements change the landscape of the litigation by altering the relationship amongst the parties. The absence of prejudice is not a consideration.

The consultant's appeal was allowed, with the result that the City of Brampton's third party claim against the architect and the fourth party claim against the consultants were stayed.

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