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MANUAL OF CONSTRUCTION LAW

Howard M. Wise

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This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparation stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Release 2026-9 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 1 (The Construction Team), Chapter 2 (The Tendering Process), Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), and Chapter 5 (Construction Liens).

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Highlights:

Recent case law introduced with this release include the following:

Construction Team—Responsibility of Design Professional—Structural Engineer—Participating in Events Following Termination of Contract—Engineer's Litigation Reports Not Helpful—Engineer Qualifying as Participant Expert—Where there was a dispute whether the as-built foundation and footings complied with the approved permit drawings, and the owner sought to qualify as an expert, a structural engineer who participated in the events occurring after the contractor was terminated, the engineer's litigation reports did not qualify as opinion evidence as they were not logically relevant and necessary to assist the court in deciding the case; however, he qualified as a participant expert due to his direct observations and involvement during the construction project. In this case, the parties were involved in construction lien dispute related to the construction of a building following termination of the contract by the corporate owner. The owner sought to call a structural engineer as an expert witness. The builder objected, asserting that the engineer did not meet the requirements under R. 53.03 of the *Rules of Civil Procedure*. The builder sought a ruling that the engineer could only testify as a fact witness, striking his trial affidavits, and barring his reports from being admitted into evidence. The owner sought a ruling that the engineer be permitted to testify as a Rule 53.03 expert or, in the alternative, as a participant expert. There was no dispute that the engineer was directly involved in assessing and advancing the underlying construction project after the builder's contract was terminated by the owner. A determination was made on the admissibility of the expert evidence. The engineer did not meet the R. 53.03 requirements, but could still testify as participant expert due to his direct observations and involvement during the construction project. The engineer's litigation reports did not comply with R. 53.03(2.1).

There was a distinction between the engineer being asked to opine on whether the as-built foundation and footings complied with the approved permit drawings and being asked to opine on something broader, such as whether the design and construction of the foundation and footings was structurally sound and in compliance with both building requirements and best practices for construction. The court was not satisfied that the engineer's litigation reports complied with Rule 53.03. The court was unable to find that his opinions on the Revision 4 drawings and professional standards were logically relevant and necessary to assist the court in deciding the case. Having not met the requirements for a Rule 53.03 expert, the engineer could not testify in that capacity and his two litigation reports would accordingly not be admitted. However, the court was satisfied that he appeared to meet the requirements for a participant expert. The content of his affidavit sworn January 15, 2025 and the opinions set out in his 2022 reports all appeared to stem from his personal observations and investigations of the foundation and footings. He was a participant in events occurring after the

builder was terminated, which were relevant to the owner's defence and counterclaim positions on the design and construction of the foundation and footings. The engineer was a structural engineer who appeared to have been exercising his ordinary expertise during his role on the project in 2022 and 2023. The engineer's involvement was subject to a qualification *voir dire* to define scope of his evidence: *Chang Xin Construction v. 2049390 Ontario Inc.,* 2025 CarswellOnt 2733, 2025 ONSC 1503 (Ont. S.C.J.).

Tendering Process—Legal Implications of Bidding Process—Awarding Contract to Successful Subcontractor—Contractor as Successful Bidder—Contractor Listing Wrong Subcontractor—Owner Approving Substitution of Subcontractor With Lowest Price—Claim by Named Subcontractor for Damages Dismissed—Tender Documents Permitting Substitution—Named Subcontractor' Bid Being Non-Compliant—Where the general contractor was the successful bidder for a School Board project, but mistakenly listed the wrong masonry subcontractor instead of the subcontractor that submitted the lowest price, the named subcontractor did not have a claim against the general contractor as the School Board approved the substitution of the correct subcontractor, and the named subcontractor's bid was non-compliant as it was expressly conditional and not final. In this case, in 2019, the school board was preparing for renovations and the construction of an addition to a secondary school (the "project"). MA Inc., an architecture firm, was retained as the project manager. On April 15, 2019, the School Board issued a call for tenders which had been prepared by the project manager. Bids were to be submitted to the School Board by May 8, 2019. Feltz Inc., a general contractor, was included on a list of pre-qualified contractors who were permitted to bid to become the general contractor on the project. School Board's call for tenders required general contractors to name their subcontractors. Feltz Inc. submitted a bid for the project on May 8, 2019, and was the successful bidder, but mistakenly listed the wrong masonry subcontractor, Core Tec, on its tender form instead of the masonry subcontractor that submitted the lower bid, Con-Tact. The School Board and Feltz Inc. entered into a contract on May 28, 2019. On June 5, 2019, Feltz Inc. issued a purchase order to Con-Tact for the masonry work on the project. On June 25, 2019, Feltz Inc. submitted its contact list for the project to the project manager. The contact information for each subcontractor was included, and Con-Tact was listed as the masonry subcontractor. Feltz Inc. never communicated with Core Tec. Core Tec learned it had been named on the tender form months later, then brought claim against Feltz Inc., seeking damages for lost profits. Core Tec's claim was dismissed.

Feltz Inc. advised the School Board of its mistake and of its intention to have named Con-Tact. In response to having received this information, the School Board approved of the use of Con-Tact as the masonry subcontractor on the project. A substitution of subcontractors was permitted with the Board's approval under the tender documents, and this was all that the contract required. Moreover, Core Tec's bid was

materially non-compliant with the tender requirements in several respects. First, its bid was expressly subject to Core Tec's "Review of Final Working Drawings". In other words, Core Tec's bid was expressly conditional, not final. Furthermore, Core Tec's bid included a list of 26 exclusions. Its bid indicated that it was excluding from its quoted price the work required to be done on items included in the masonry scope of work. In other words, Core Tec was saying that there were portions of the scope of work that it did not intend to complete. Non-compliant bids did not create Contract A, as only compliant bidders have legal remedies arising from the procurement process. As no contract was formed, Feltz Inc. could not have breached a contract with Core Tec. Even if a contract existed, Feltz Inc. evaluated the bids and selected Con-Tact based on price and exclusions, fulfilling any obligations under a hypothetical Contract A.

Core Tec estimated that its "direct costs" if awarded the masonry work on the project would be $641,047 and that its administration costs would be $128,209, which was calculated at 20% of its total costs. Core Tec failed to prove it suffered any damages. The alleged damages for lost profit were based on administration costs, which included fixed operational costs and salaries, not solely profit. The evidence showed Core Tec could not specify what portion of administration costs would have been profit. Moreover, Core Tec mitigated its losses by securing four other projects in 2019, earning profits nearly equal to the damages claimed. Core Tec's mitigation efforts and inability to quantify profit meant no damages were established: *1114136 Ontario Inc. v. Feltz Design Build Inc.,* 2026 CarswellOnt 3836, 2026 ONSC 1512 (Ont. S.C.J.).

Contracts—Breach of Contract—Contractor—Failure to Complete—Subcontractor Providing Inspection Services for Pipeline Project—Subcontractor Failing to Provide Daily Inspection Reports (DIRs)—Failure of Reporting Not Fundamental Breach—Subcontractor Entitled to Payment of Invoices—Contractor Entitled to Set-off Expenses in Reconstructing Missing Data—Where the general contractor retained the subcontractor to provide inspection services in respect of the coating of pipes in a pipeline project, and the subcontractor failed to provide daily inspection reports (DIRs) as required under their agreement, the subcontractor was entitled to payment of its invoices as this was not a fundamental breach, but the general contractor was entitled to set off its expenses for a workaround it had to do to reconstruct the missing data. In this case, the general contractor retained the subcontractor to provide inspection services in respect of the coating of pipes to ensure the work was done in accordance with specifications for the building of the pipeline. The coating was a critical element for the safe and effective operation of the pipeline as the coating protected the pipes from corrosive factors. The general contractor alleged the subcontractor fundamentally breached their agreement by failing to provide daily inspection reports (DIRs) for some 268 inspections in respect of its outstanding invoices. The general contractor further alleged that any work done was of no value because the failure to provide DIRs deprived it of substantially the whole benefit

that it contracted for. The subcontractor brought an action for payment of its unpaid invoices of $239,540 plus $8,436 for extras. The general contractor counterclaimed for $83,399 in damages for breach of contract, being the expenses incurred as part of a workaround it had to do because of the subcontractor's missing DIRs. The subcontractor's action was allowed; the general contractor's counterclaim was allowed.

The general contractor was obligated to pay the outstanding invoices, but it was entitled to set off its damages claim in respect of work it had to do because of the subcontractor's breach. The general contractor did not waive the requirement for the DIRs, and promissory estoppel did not apply. The provision of the DIRs was a term of the agreement, but it was not a precondition to payment. Although the subcontractor breached its agreement with the general contractor by failing to provide the applicable DIRs, this was not a fundamental breach. Even if it was, the general contractor did not accept the alleged repudiation. In fact, it affirmed the agreement, continuing to use the subcontractor for a further nine months after not receiving the DIRs. The time that the subcontractor said it worked was adequately verified on a balance of probabilities. The subcontractor was entitled to the payment claimed, minus the counterclaim as claimed, or $164,578. The counterclaim was based on the workaround costs incurred by the general contractor to reconstruct the missing data for turnover of the project to the owner. This included hiring a former inspector of the subcontractor, using internal staff, and extending facility rentals: *Heywood Innovative Solutions Inc. v. The State Group Inc.,* 2025 CarswellOnt 4108, 2025 ONSC 1927 (Ont. S.C.J.), additional reasons 2025 ONSC 813 (Ont. S.C.J.).

Construction Liens—Mortgage Priority Issues—Prior Registered Mortgage—Mortgage Not Building Mortgage—Issue Whether Mortgagees Receiving Written Notice of Prior Lien—Claimant Allegedly Providing Services Prior to Registration of Mortgage—That Claimant and Subsequent Lien Claimants Having Potential Priority if Notice Received Prior to Mortgage Advance—Although a mortgage loan was advanced and registered prior to construction liens being registered, and the mortgage was not a building mortgage but was for refinancing purposes, there was a genuine issue whether subsequent construction lien claimants providing management and planning services had priority as the evidence was unclear whether the mortgagees received written notice of a prior lien for architectural and planning services, which formed part of the same improvement, and were performed before registration of the mortgage. In this case, the subject property was owned by related companies that intended to redevelop the site into a mixed-use condominium project. On October 31, 2023, the initial mortgagee advanced a $9 million loan secured by a mortgage later assigned to the assignee mortgagee. The loan was used to repay existing encumbrances, and fund a partnership buyout. S Ltd. and BD Ltd. subsequently provided development management and planning services for the proposed redevelopment. In September 2025, they registered liens for unpaid accounts, and perfected those liens. The mortgagees argued that the mortgage was not a building mortgage, and

that the advance was entitled to priority because no written notice of the liens had been received, and no lien had been preserved or perfected before the mortgage advance. During the court hearing, evidence emerged that architectural and planning services had been undertaken before the mortgage was registered, raising the issue of whether liens had arisen on the improvement prior to the mortgage advance. The mortgagees brought a motion under s. 47 of the *Construction Act* for a declaration that their mortgage had priority over the construction liens, and for orders discharging the lien claims. Their motion was dismissed; their request to discharge the lien claims was refused.

A motion under s. 47 of *Act* was akin to a motion for summary judgment. The onus was on the mortgagees to prove that there was no triable issue. The evidence established that the loan was advanced to refinance existing obligations, and fund a partnership buyout, not to finance construction. However, the mortgagees could not establish priority under sections 78(3) and (4) of the *Construction Act* because the lien rights had arisen before the mortgage was registered. Where a mortgage was registered after the first lien arose on the improvement, all liens respecting the improvement had priority over the mortgage to extent of any deficiency in the owner's holdback obligation. The lien claimants could nevertheless gain full priority for any advance if, prior to the advance, the lender received written notice of a lien. The architectural and planning services performed before October 31, 2023 formed part of the same improvement as the later work performed by S Ltd. and BD Ltd. Accordingly, the mortgage was a subsequent mortgage governed by subsections 78(5) and (6) of the *Act*. To obtain priority, the mortgagees needed to prove that they received no written notice of a lien and that no claim for lien was preserved or perfected prior to the mortgage registration on October 31, 2023. The only evidence that the mortgagees provided was a hearsay statement. There might have been written notice of the lien given to the mortgagees prior to the mortgage registration. The mortgagees did not meet the onus of proving no triable issue as to whether they received written notice of a lien prior to registration of the mortgage: *Svecgroup Limited v. 2765 Lakeshore GP Inc.,* 2026 CarswellOnt 8352, 2026 ONSC 3036 (Ont. S.C.J.), additional reasons 2026 ONSC 3328 (Ont. S.C.J.).