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March 2019

Greetings!

Welcome to COCA's monthly Newsletter. Unless noted otherwise, all articles written by COCA President, Ian Cunningham.

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## Ontario Superior Court Decision Favours Contractors

*Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd* . is the latest in a string of court cases to consider the interaction of the federal *Bankruptcy and Insolvency Act* and provincial statutes such as Ontario's *Construction Act* . This recent decision by the Ontario Court of Appeal should be of interest to all who participate in the construction industry. Here's a very simplified Reader's Digest version:

A1 Asphalt went bankrupt. The City of Hamilton and the Region of Halton paid the trustee in bankruptcy \$675,372.27 in respect of work done by A-1 Asphalt and its subcontractors before the bankruptcy. The issue in the case was how the money was to be distributed. Three groups of creditors had a claim on the money. First, there was RBC, who was a secured creditor of A-1 Asphalt. Next, there was the Guarantee Company of North America, the bonding company that had paid out money to various subcontractors and suppliers and then taken over their claims against A1 Asphalt. Lastly, there were two unions representing claims by the employees of A1 Asphalt.

At first instance, Madam Justice Conway awarded all of the money to the RBC. Her decision was in keeping with the outcome in a previous case called *Atlas Block* . The Guarantee Company of North America appealed Justice Conway's decision to the Ontario Court of Appeal.

The Ontario Court of Appeal granted the appeal. At the risk of oversimplifying, the Court of Appeal ruled that the statutory trust in the *Construction Act* also created a common law trust over the funds received by the trustee in bankruptcy. The effect of the ruling was to overturn the *Atlas Block* decision and give to the subcontractors, suppliers, and employees priority over the trust funds.

It's anticipated that Royal Bank of Canada will appeal this decision to the Supreme Court of Canada and has until mid-March to do so. So stay tuned.

## Infrastructure Minister Opens 2019 OCS Conference

In his opening keynote address at the Ontario Construction Secretariat's 2019 State of the Industry Conference, Infrastructure Minister Monte McNaughton made the following points:

- Ontario has total debt in the amount of \$917B
- The upcoming Ontario budget (on April 11<sup>th</sup>) will provide a road map to balance in a responsible way
- Education and health care will be protected
- There are 25 projects with a total value of \$18B currently under construction
- There are several more valued at \$7B in the planning stages
- The P3 model delivers projects on time and on budget but there may be room for improvements to the model
- A market sounding initiative is currently underway to find ways to attract more interest and more (foreign) competition for public projects
- The government is challenged with competing fiscal priorities (read – the need to reduce and eliminate the deficit versus the need for public infrastructure development and expansion)
- Infrastructure is not just bricks and mortar, it includes such things as broadband and there is an initiative currently underway to expand broadband in Ontario

## Ontario Budget Date Announced

On March 7<sup>th</sup>, Ontario Minister of Finance, Vic Fideli announced that he will deliver the provincial budget on April 11<sup>th</sup>. Fideli said about his financial road map "It will also outline how we will create and protect jobs for Ontario workers, and put the people at the centre of everything we do in government."

Here's what we expect:

- The budget will present a path to balance but probably not within the four year term of this government
- While eliminating the \$12.3B or \$13.5B deficit (whichever number you believe at this point in time really doesn't matter) will be a difficult challenge without making job cuts or increasing taxes, the government has promised that no front line jobs will be cut so look for some new revenue streams ("front line" jobs is a new qualifier; previously Premier Ford promised flat out that "no one will lose their job")
- The government has promised to protect health care and education but has not mentioned social services so there could be cuts to social services
- The budget Bill may include amendments to the Fiscal Transparency Act to ease government financial reporting requirements

## Bank Chief Economist Opines on Ontario's Future

Doug Porter, Chief Economist with the Bank of Montreal Financial Group, made the following comments in his remarks to the Ontario Construction Secretariat's recent 2019 State of the Industry Conference:

- There was a global slowdown at the end of 2018 and Canada was captured in that slowdown; there was no growth in the Canadian economy in the fourth quarter of 2018
- BMO is projecting 1.5% Canadian GDP growth in 2019 and sluggish, below average growth in 2020

- The US economy has had some strength resulting from tax cuts and defence spending which took the national debt to over \$1T but is showing signs of slowing down and will cool off in 2020
- The jobless rate is at a 40 year low, 5.7% in Ontario
- Despite low unemployment, wages have remained low; the average wage increase in 2018 was 2.5%
- Inflation of 2% is the Bank of Canada's target and 2% inflation is a safe assumption for the mid-term
- The Toronto area was in a housing bubble that was calmed and stabilized by various policy interventions
- Canada's population grew by 1.5% in 2018 adding 500,000 people; Ontario's population grew by 2%
- Construction activity has been at near record levels but with little growth over the last two years
- Ontario's economy will benefit from a fast growing population and a favourable C\$ - US\$ exchange rate but these factors will be offset by a cooling in the auto sector (Ontario's # 1 industry), provincial government spending restraint, high electricity prices and high minimum wage; Ontario will lead all Canadian provinces with 1.7% GDP growth in 2019
- The federal budget on March 19<sup>th</sup> will be a classic pre-election budget and the federal government will finally get some of their promised infrastructure funds translated into construction projects before the fall election
- The C\$ is caught in a zone at around \$US 0.74; the long run/fair value of the C\$ is \$US 0.80; it could strengthen against the greenback if oil prices pick up
- About 200,000 housing units are built in Canada year after year although the mix of housing types may not be ideal
- Ontario's debt to GDP ratio is approaching 45% and the government will likely target a healthier level around 30%

## Call for Applications – Authorized Nominating Authority

Further to its recent Request for Expressions of Interest, which is rumoured to have attracted between 12 and 18 submissions from parties in Canada, other Canadian jurisdictions and from other countries, the Ministry of the Attorney General has issued the following Call for Applications from interested parties to serve as the Authorized Nominating Authority under the Construction Act:

The Ministry of the Attorney General (the "Ministry") wishes to inform you of an upcoming Call for Applications to select an entity to act as Authorized Nominating Authority (the "Authority") under Part II.1 of the Construction Act (the "Act") and Ontario Regulation 306/18 (the "Regulations").

The Authority will be an arm's-length designee of the Minister, and will be responsible for training, qualifying, appointing, and overseeing a roster of qualified adjudicators to perform statutory interim dispute adjudication for construction disputes across Ontario. The upcoming Call for Applications will identify a candidate to be designated to act as the Authority by the Minister in accordance with section 13.2 of the Act and section 2 of the Regulations.

Some of the key services the Authority must provide include:

- developing and overseeing training programs for adjudicators;
- qualifying persons who meet the prescribed requirements as adjudicators;
- appointing adjudicators to conduct adjudications;
- establishing a code of conduct for adjudicators; and
- publishing an annual report containing aggregated information regarding adjudication in Ontario.

The setup, administration of adjudication and the operational costs of the Authority are to be entirely self-funded. The Act provides that the Authority may, subject to the Regulations, set fees, costs or other charges related to the administration of adjudication, including fees, costs or charges for the training and qualification of persons as adjudicators or for the appointment of adjudicators, and require their payment.

The application process will be administered on an arm's-length basis by Ernst and Young ("EY") acting as independent due diligence provider, responsible for intake, review, verification, clarification, and assessment of applications in accordance with criteria specified in the application form. Having received and evaluated the applications, EY will provide an impartial recommendation to the Minister as to which applicant is best qualified according to the criteria.

The Ministry has retained Dentons Canada LLP to act as independent fairness reviewer for the Authority selection process.

The Call for Applications will be posted online on March 15, 2019. Interested parties may register as Applicants before the Call for Applications is posted by contacting the Application Administrator by e-mail at [ANAApplication@ca.ey.com](mailto:ANAApplication@ca.ey.com).

Only registered applicants will be provided access to download and respond to the Call for Applications.

The Ministry encourages recipients of this communication to forward it to other parties that may have an interest in responding to the Call for Applications. Joint applications from multiple entities will be accepted.

**APPLICATION ARE DUE NOT LATER THAN APRIL 5, 2019**

Ministry of the Attorney General  
[www.ontario.ca/attorneygeneral](http://www.ontario.ca/attorneygeneral)

## **COCA at Queen's Park for Industry Lobby Day**

About 40 COCA members will land at Queen's Park on March 18<sup>th</sup> for the 2019 edition of COCA's Construction Day at Queen's Park, our industry's provincial lobby day.

As a result of the June 7, 2018 Ontario general election, there are 74 brand new MPP's sitting in the Ontario legislature who may never have given much thought to our industry (approximately 500,000 workers and more than 6% of the provincial GDP), never heard of COCA and who are unaware that the payment and adjudication provisions of the Construction Act are scheduled to come into force on October 1, 2019.

We will be meeting with many of the new MPPs, some of whom are cabinet ministers, to acquaint them with the industry and COCA and to look for their support for the introduction of the payment regime and the adjudication system as scheduled on October 1st.

## **Dragodos SVP Provides Details of Gordie Howe Bridge**

In his address to the Ontario Construction Secretariat's recent 2019 State of the Industry Conference, Dragodos Senior Vice President of Business Development, Tom Middlebrook made the following comments:

- The ultimate owner of the Gordie Howe International Bridge is the Windsor-Detroit Bridge Authority
- The consortium that will oversee the project, called Bridging North America, is made up of ACS, Aecon and Fluor

- It consists of four projects: 1) the bridge itself which is valued at 30% of the total; 2) the Canadian Port of Entry; 3) the US Port of Entry; (these three are design-build-finance and maintain projects); and 4) the US I-75 Interchange (which is a design-build project)
- The total value of the fixed price package is \$5.7B of which \$3.8B is design-build and \$1.9B operate and maintain
- The bridge is an elegant cable stay design; nothing will be in the water; the towers will stand 220m tall; the span pier to pier will be 853m; it will be the largest in North America
- The consortium will build the bridge and the POEs and the I-75 interchange will be subbed out
- About \$250M is earmarked for Windsor area labour and suppliers
- The bridge, the Canadian POE and the I-75 interchange will be completed in 2023; the completion of the US POE will be delayed because of land assembly complications
- The bridge will be operational in 2024

### **Pollster Nanos Gives Tips and Advice at OCS Lunch**

Renowned and incredibly accurate Canadian pollster, Nik Nanos of Nanos Research, was the keynoter at the Ontario Construction Secretariat's 2019 State of the Industry Conference Luncheon on March 7<sup>th</sup>. In his address he made the following points:

- In jurisdictions around the world there is a fundamental anxiety, even anger, among a significant percent of voters who believe they have done all the right things, gone to school, got an education, got a job and worked hard BUT can't get ahead; they believe the system isn't working for them and they usually look for someone to blame and usually that blame is assigned to foreigners and immigrants
- This fundamental anxiety has caused candidates like Donald Trump in the US, Nigel Farage in the UK, Emmanuel Macron in France, and even Justin Trudeau in Canada and Doug Ford in Ontario to tap into this anxiety and run against the establishment and vow to shake things up
- It doesn't take a big change or "swing" among voters to bring about significant political change
- He had two pieces of advice for candidates seeking election: 1) behave the way people expect you to behave; if you are a Conservative candidate, behave like people would expect a conservative to behave, same for Liberal and NDP candidates; 2) persuade only 1 in 20 voters to vote for you instead of your main competitor which will create a 10% swing
- Another important factor in election campaigns is the "fuzziness" of truth; Politico's fact checking found that only 4% of what Trump said during the US presidential election campaign was absolutely true and only 20% of what Clinton said was absolutely true
- With regard to public procurement, polling shows that 49% of Canadians oppose foreign construction companies winning public construction contracts; 41% favour lowest bid regardless of the nationality of the construction company
- There is a what Nanos called a "nativist" sentiment against foreigners coming into our country to do business
- While Canadians understand the need to address the deficit, they are okay with deficit spending for infrastructure; you can see infrastructure, it's needed and it creates jobs
- Polling shows consumer sentiment is flat and the economy will likely sputter along over the next 90 days
- Canadians are negative about the economy with 2.5 times more saying the economy will decline than improve
- He characterized the current economic circumstances in Canada as "joyless prosperity"
- He recommended that in the fall federal election the Liberals should run on "jobs"
- He said the Liberals will lose seats in every province except Quebec

## Conducting an Effective Workplace Harassment Investigation FULL-DAY INTENSIVE WORKSHOP



In Ontario, as in many other jurisdictions across Canada, an employer is required by law to conduct an investigation in response to an allegation of workplace harassment (for example, in Ontario there is Bill 132 (Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016).

However, how to conduct an effective investigation is rarely straight forward. For more complex or sensitive matters, it is often prudent to retain counsel to investigate and report to management. In other cases, an employer may be well suited to conduct the investigation 'in house'.

A well planned and executed investigation will help management make sound and defensible decisions, enhance employee morale and bolster the credibility of its finding if brought before an adjudicator for review. By contrast, a poorly planned and executed investigation can result in less than optimal decision-making, a finding by an adjudicator the investigation was flawed or unlawful, and attract damages against the employer for acting in bad faith.

This workshop will provide participants with training on how to conduct an effective workplace harassment investigation using real-life scenarios and interactive learning sessions.

A workplace investigation can be an effective, and at times necessary, tool for any employer. An organized and well-planned investigation will bolster the credibility of its finding if brought before an adjudicator for review. By contrast, a poorly planned and executed investigation can result in a finding the investigation was unlawful, and potentially attract damages against the employer for acting in bad faith.

With the advent of Bill 132, employers are increasingly conducting workplace harassment investigations 'in house' in an effort to reduce cost. This one-day workshop will provide training on how to conduct a workplace harassment investigation using real-life scenarios and interactive learning sessions.

### **Dates:**

Workshops are from 9:00am - 3:30 pm  
Thursday, March 28, 2019  
Thursday, April 4, 2019  
Tuesday, April 9, 2019

### **Venue:**

Sherrard Kuzz LLP  
250 Yonge Street, Suite 3300  
Toronto, ON M5B 2L7

### **Cost:**

\$525.00 + HST

### **RSVP:**

As this is a small group workshop, space is extremely limited.

Details, including how to register, can on [our website](#).



## Pinchin Complimentary Sessions

Pinchin Ltd. offers FREE learning opportunities across the province each month. [To see a list click here.](#)

## Upcoming Inspection Blitzes

The Ministry of Labour has published a list of blitzes for early 2018. For the full list [click here.](#)



### Get IHSA training when and where you need it.

To see a list of contacts and the regions they serve c [lick here.](#)



### Eye on ICI Economic Update

To view a copy of the newsletter, [click here.](#)

COCA is the voice of our membership at Queen's Park.

We want to hear from you. All questions, ideas and comments are more than welcome.

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