

**SUPREME COURT OF CANADA**

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| **Citation :** Aecon Buildings *v.* Stephenson Engineering Ltd.,  2011 SCC 33, [2011] 2 S.C.R. 560 | **Date** : 20110623  **Docket** : 34112 |

Between:

Aecon Buildings, A Division of Aecon Construction Group Inc.

Applicant/Applicant on motion

and

Stephenson Engineering Limited

Respondent/Respondent on motion

**Coram** : Binnie, Abella and Rothstein JJ.

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| **Reasons for Judgment** :  (motion to adduce fresh evidence)  (paras. 1 to 10) | Binnie J. (Abella and Rothstein JJ. concurring) |

Aecon Buildings *v*. Stephenson Engineering Ltd., 2011 SCC 33, [2011] 2 S.C.R. 560

Aecon Buildings, A Division of

Aecon Construction Group Inc. *Applicant/Applicant on motion*

*v.*

Stephenson Engineering Limited *Respondent/Respondent on motion*

**Indexed as:  Aecon Buildings v. Stephenson Engineering Ltd.**

**2011 SCC 33**

File No.:  34112.

2011:  June 23.

Present:  Binnie, Abella and Rothstein JJ.

motion to adduce fresh evidence

*Courts ― Supreme Court of Canada ― Motion to adduce fresh evidence ― Applicant requests 11 publications annexed to an affidavit be added to leave application ― Factors guiding exercise of Court’s discretion to adduce fresh evidence.*

Generally speaking, the question whether a legal issue is of public importance within the meaning of s. 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, is not a matter on which affidavit evidence is helpful. The practice is not invariable however. In some cases it may not be apparent from the rest of the leave materials why, for example, the decision sought to be appealed is alleged to establish a precedent that is unworkable in practice, or otherwise is likely to have a problematic impact or jurisprudential importance not apparent on its face. Here, however, the issues are straightforward. The material sought to be added to the leave application does not identify any good reasons, policy or jurisprudential, not readily apparent from the material already filed, for finding that the application raises a legal issue of public importance. The leave panel can determine whether the leave application raises a legal question of public importance on the existing record. The material sought to be filed will be of no additional assistance. The application to adduce fresh evidence on the leave application is therefore denied.

**Cases Cited**

**Referred to:** *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725; *Laudon v. Roberts*, 2009 ONCA 383, 66 C.C.L.T. (3d) 207.

**Statutes and Regulations Cited**

*Rules of the Supreme Court of Canada*,SOR/2002-156, rr. 25, 47(1)(*b*), 92.1.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 43.

**Authors Cited**

Aikins, John. “Disclosure of Litigation Agreements Must be ‘Immediate’”, Canadian Bar Association (Ontario), *Insurance Law Section Newsletter*, vol. 21, No. 2, March 2011 (online: http://www.oba.org/En/Insurance/newsletter\_en/v21n2.aspx#Article\_3).

Caplan, Jessica. “Failure to Disclose Mary Carter-type Agreements Can Have Devastating Consequences — The Ontario Court of Appeal takes a Firm Position”, Canadian Bar Association (Ontario), *Construction Law Section Newsletter*, vol. 25, No. 3, April 2011 (online: http://www.oba.org/En/Construction/Cons\_newsletter/v25n3.aspx#Article\_3).

Squires, Robin. “Partial Settlement Agreements Must Be Immediately Disclosed”, Borden Ladner Gervais, *Canadian Insurance Law Newsletter*, Spring 2011, (online: http://www.blg.com/en/home/publications/Documents/publication\_1846.pdf).

MOTION to adduce fresh evidence to be added to leave to appeal. Motion denied.

Written submissions by Peter W. *G. Carey*, for the applicant/applicant on motion.

Written submissions by James A. LeBer, for the respondent/respondent on motion.

The following order was delivered by

1. Binnie J. ― An application is made on behalf of the applicant Aecon Buildings for an order pursuant to Rules 25, 47(1)(*b*) and 92.1 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, permitting 11 publications annexed to an affidavit to be added to its application for leave to appeal. Aecon argues that the articles demonstrate that the application is of public importance and were not available when the leave application was served and filed.
2. The leave application concerns a“*Mary Carter*-type agreement”, i.e. a settlement agreement in multiparty litigation between a plaintiff and defendant wherein the defendant in question ostensibly remains an active party to the litigation while the plaintiff’s claim in fact targets the other parties. The appearance is conveyed that the defendant is defending the cause but the appearance is misleading because of the existence of the partial settlement.
3. In the present case, the Ontario Court of Appeal held that the applicant’s conduct warranted a stay of proceedings for abuse of process because of the fact that it had failed *ever* to volunteer the existence of the agreement to the other parties or to the court, but instead waited for one of the other parties to discover it through other sources and then demand its production (2010 ONCA 898, 328 D.L.R. (4th) 488).
4. Generally speaking, our Court takes the view that the question whether a legal issue is of public importance within the meaning of s. 43 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, is not a matter on which affidavit evidence is helpful. The practice is not invariable however. In some cases it may not be apparent from the rest of the leave materials why, for example, the decision sought to be appealed is alleged to establish a precedent that is unworkable in practice, or otherwise is likely to have a problematic impact or jurisprudential importance not apparent on its face. Here, however, the issues are straightforward. Must the *Mary Carter*-type agreement be disclosed immediately and if it isn’t what are the consequences?
5. The material sought to be filed by the applicant simply illustrates the straightforward nature of the legal issues. The first item, a posting on the website of the Canadian Bar Association (Ontario) (“CBAO”) (J. Aikins, “Disclosure of Litigation Agreements Must be ‘Immediate’”, *Insurance Law Section Newsletter*, vol. 21, No. 2, March 2011 (online)), notes that the decision sought to be appealed restates the consistent rule in Ontario that *Mary Carter*-type agreements must be “disclosed to the parties and to the court as soon as the agreement is made”: *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Gen. Div.), at p. 737. The rule was repeated by the Ontario Court of Appeal as recently as *Laudon* *v. Roberts*, 2009 ONCA 383, 66 C.C.L.T. (3d) 207, where the court said “the existence of such an agreement is to be disclosed, as soon as it is concluded, to the court and to the other parties to the litigation” (para. 39). The CBAO posting does not indicate any conflict in the authorities or suggest that there are good reasons, policy or jurisprudential, not readily apparent from the material already filed, for finding that the application raises a legal issue of public importance. The author merely poses the question of what is meant by “immediate disclosure” and how *Mary Carter*-type agreements were to be “disclosed . . . to the court”. I think “immediate disclosure” is self-explanatory. Its application in a particular case will be fact-dependent. Here, as stated, the applicant never did *volunteer* disclosure of the existence of the agreement to the parties or to the court. The Court of Appeal decided that in the circumstances a stay of proceedings was warranted. The procedural point about how a party goes about disclosing the existence of such an agreement to the court (were they to decide to do so) is not something that raises a legal issue of public importance for this Court.
6. Another posting on the CBAO website by a different author states “[t]he *Aecon* decision simply serves as a reminder that immediate disclosure is necessary as a matter of procedural fairness, such to allow the Court to properly control the judicial process” (J. Caplan, “Failure to Disclose Mary Carter-type Agreements Can Have Devastating Consequences — The Ontario Court of Appeal takes a Firm Position”, *Construction Law Section Newsletter*, vol. 25, No. 3, April 2011 (online)). This too is of no help in resolving the s. 43 question before us.
7. The remaining articles are similarly routine reports of the decision of the Court of Appeal. They generally fall into the “Notice to the Profession” category. Sometimes the author adds a tag line such as “[a]nyone contemplating entering into a partial settlement agreement of any kind should closely review this decision and ensure that immediate disclosure is contemplated and assured upon the completion of the agreement” (R. Squires, “Partial Settlement Agreements Must Be Immediately Disclosed”, Borden Ladner Gervais, *Canadian Insurance Law Newsletter*, Spring 2011 (online)). Nobody expresses any doubt that the rule stated by the Court of Appeal is consistent with its past authority, or suggests that the remedy for abuse of process was not, as a matter of law, available.
8. Whether the rule itself raises a legal question of public importance is for the leave panel to decide. The material sought to be filed is of no additional assistance in this respect.
9. Counsel for the respondent advises the Court that he takes no position on the motion to adduce fresh evidence, presumably because the fresh evidence is neither helpful nor prejudicial.
10. I would deny the application to adduce fresh evidence on the leave application without costs.

*Motion denied.*

*Solicitors* *for* *the applicant/applicant on motion:  Fogler, Rubinoff, Toronto.*

*Solicitors* *for the respondent/respondent on motion:  Advocates, London.*