

# [Brick Warehouse Corp. v. B. Gottardo Construction Ltd., \[2010\] O.J. No. 393](#)

Ontario Judgments

Ontario Superior Court of Justice

M.F. Brown J.

Heard: September 16, 2009.

Judgment: January 29, 2010.

Court File No. CV-06-080823-00

[2010] O.J. No. 393 | 2010 ONSC 741 | 81 C.C.L.I. (4th) 69 | 184 A.C.W.S. (3d) 640 | 2010 CarswellOnt 526

RE: The Brick Warehouse Corporation, Plaintiff/Applicant, and B. Gottardo Construction Ltd., the City of Vaughan, et al, Defendants/Respondents

(13 paras.)

## **Case Summary**

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**Civil litigation — Civil procedure — Discovery — Examination for discovery — Range of examination — Objections and compelling answers — Privilege — Motion by the plaintiff for an order compelling answers to questions allowed in part — The plaintiff sought damages for an alleged mudslide from a mound of earth — There was no basis for an assertion of litigation privilege over the investigation by the insurer and any privilege was waived by the disclosure of the investigation's results — There was no special relationship between the defendant City of Vaughan and the consulting engineer which would give rise to the modeling program being within the possession, control or power of the City.**

## **Counsel**

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***Angelo Sciacca***, for the Plaintiff/Applicant.

Gosia Bawolska, for the Defendants/Respondents, B. Gottardo Construction Ltd. and The City of Vaughan.

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### **ENDORSEMENT**

**M.F. BROWN J.**

1 The plaintiff/applicant, The Brick Warehouse Corporation, brings a motion for an order to compel answers to questions improperly refused by the defendants/respondents B. Gottardo Construction Ltd. and the City of Vaughan.

#### **I. BACKGROUND**

**2** This subrogated action arises out of a severe thunderstorm that occurred in the Greater Toronto Area on or about August 19, 2005. Prior to this date, the respondents had erected a large mound of earth adjacent to the applicant's place of business in Vaughan, Ontario, called the Home Show, which was to be used in the construction of a bridge in the area.

**3** The applicant alleges that the aforementioned thunderstorm caused the mound of earth located at the construction site to turn into a mudslide of silt which subsequently entered the sewers located on the applicant's business premises. As a result, the applicant alleges it sustained a sewage and drainage backup that caused substantial and extensive damage to the applicant's premises, stock and contents. In addition to this damage, the applicant was forced to temporarily close the business to repair these damages.

## **II. ISSUES**

**4** Although there were a number of outstanding undertakings and refusals when this motion was first brought on September 9, 2009, by the time this matter was argued before me on September 16, 2009 there were only two outstanding issues remaining between the parties. The first issue relates to the results of an investigation carried out by Lombard Canada Ltd. ("Lombard"), the insurer for the respondent B. Gottardo Construction Ltd. and the second issue relates to a computer storm water management modelling program known as "OTTHYMO" used by the engineering consultant of the respondent the City of Vaughan. I will deal with each issue separately.

### **(a) Lombard Investigation**

**5** The applicant seeks to have produced the detailed investigation carried out by Lombard as referenced in Wayne Wettlaufer's letter dated November 15, 2005. Counsel for the respondents submits that she has not received a copy of any investigation report from Lombard and cannot say whether a report even exists. Counsel for the respondents further submits that even if she were to receive such an investigation report, or information pertaining to such an investigation, such information may be subject to solicitor-client privilege.

**6** A detailed investigation was undertaken by Lombard with respect to the incident that is the subject of this litigation. On November 15, 2005, Lombard advised the applicant that their investigation revealed that catch basins were not connected to the applicant's store, and therefore "any silt which may have washed into the catch basins as a result of a severe rain storm did not cause the water damage". In my view, all information gleaned from this investigation is relevant and should be produced.

**7** The burden of showing that a document is connected to anticipated litigation properly lies on the party asserting privilege. Although this matter was first raised on the discovery of May 26, 2009, as of September 16, 2009 when this issue was argued before me there was no factual or legal basis established by either of the respondents to assert a claim of litigation privilege. Moreover, if such a claim were asserted, in my view, it could not be sustained on the basis of waiver.

**8** If any litigation privilege did exist it was waived by Lombard by disclosing the results of its investigation to counsel for the applicant in the letter of Mr. Wettlaufer dated November 15, 2005. In these circumstances, fairness requires

that having disclosed the results of the investigation, all information gleaned from the investigation, including any report prepared, should also be produced.

**(b) Computer Storm Water Management Program "OTTHYMO"**

**9** The respondent the City of Vaughan, commissioned a report from its consulting engineer G.M. Sernas and Associates dated September 1985. It was commissioned by the respondent to advise and instruct the respondent on how to handle an event such as a 100 year storm. A second updated report was produced dated December 1989. These reports were prepared in part by the use of a computer storm water management modeling program known as OTTHYMO. Accordingly, the applicant submits that the modeling program is relevant and should be produced.

**10** In my view, there is no special relationship that exists between the respondent the City of Vaughan and its engineering consultant G.M Sernas and Associates which would give rise to the computer storm water management modeling program being within the possession, control or power of the respondent the City of Vaughan. In my view, therefore such a program is not producible and I decline to order that the modelling program known as OTTHYMO be produced.

**(c) Costs**

**11** In relation to the issue of costs for the appearance of counsel on September 9, 2009, I am of the view that each side should bear its own costs. While an adjournment of the motion was granted to September 16, 2009, much work was done in the interim by both parties in reducing the outstanding issues to be resolved. Accordingly, I am not persuaded an order of costs should be made for the appearance on September 9, 2009. With respect to the issue of costs regarding the appearance on September 16, 2009, given the divided success on the motion, I am of the view that each side should bear its own costs of the motion for that day as well.

**III. CONCLUSION**

**12** For the reasons I have indicated, I order that within 30 days of today's date, the respondents will provide to the applicant all information gleaned from the investigation referred to in the letter of Mr. Wayne Wettlaufer of Lombard Canada Ltd. dated November 15, 2005, including any report prepared.

**13** There will be no order as to costs for the appearances of either September 9, 2009 or September 16, 2009.

M.F. BROWN J.

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