Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #143

June 30, 2017

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Significant Proposed Changes to Ontario's Construction Lien Act

LUC #143 [2017]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
I General
Jurisdiction:
Ontario
Author:
Hannah Arthurs, Goodmans LLP

Consolidation of proposed changes to the CLA:

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Significant Proposed Changes to Ontario's Construction Lien Act[1]

The Ontario government recently released legislation (Bill 142 – An Act to amend the Construction Lien Act) that, when passed, will mean major changes to the Construction Lien Act and the construction industry in Ontario. The draft legislation is the culmination of a review that the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure began over two years ago, in February 2015. Bill 142 received first reading on May 31, 2017. The last major revision to construction lien legislation was the introduction of the current Construction Lien Act in 1983.[2]

Highlights of Proposed Changes

The proposed changes are numerous and include:

- renaming the Construction Lien Act, the "Construction Act".
- changing the monetary thresholds at which a contract is considered "substantially performed" and "completed."
- specifying examples of "minor irregularities" that will not automatically invalidate a certificate, declaration or claim for lien, including a minor error or irregularity in the name of an owner or of a person for whom services or materials were supplied, or a minor error or irregularity in the legal description of a premises.
- making landlords' interests subject to a lien for work on the tenancy to the extent of 10% where the lease agreement provides for payment of all or part of the improvement, effectively making the landlord responsible to retain the holdback out of any tenant improvement allowance.

[1] Much has and will be written about the new Ontario Construction Act which is to wind its way through the legislative process. This summary by Hannah Arthurs of Goodmans LLP, intended for those keeping a watchful eye on the Ontario developments, provides the highlights of the new legislation rather than a detailed analysis.

[2] Derek Freeman of FreemanLaw Barristers has prepared a very helpful consolidation which inputs the new Construction Act provisions into the present Construction Lien Act. He has consented to Legal Updates providing it to its members. It can be accessed through this link: http://cccl.org/Consolidated Construction Act -Bill 142- Version 1.htm or click this link for the MS-Word version: http://cccl.org/Consolidated Construction Act -Bill 142- Version 1.doc

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- making landlords subject to the obligation to provide information under section 39.

- introducing a new system of payment rules intended to give more certainty to parties regarding the timing of payments. As proposed, the owner and the general contractor can agree to a schedule for the general contractor to submit its invoices to the owner. (In the absence of an agreement, the general contractor would be required to submit invoices on a monthly basis.) Once the invoice is received by the owner, payment would have to be made within 28 days and once payment is received by the general contractor, the general contractor would be required to pay its subcontractors who supplied services or materials included in the invoice within 7 days (and so on and so forth until all parties supplying materials or services to the project have been paid). If the owner disputes the amount of the general contractor's invoice, or the quality of the work, within 14 days of receiving the invoice, it can deliver a "notice of non-payment" (and those parties further down the chain can deliver a "notice of non-payment" within 7 days). Mandatory interest would be payable on late payments. This new payment system will only apply to payments made under contracts entered into on or after the amendments come into effect.

- creating new record-keeping requirements for trustees regarding trust funds (and confirming that trust funds for multiple trusts may be deposited into a single bank account, provided that the proper records are maintained for each trust).

- creating a new interim adjudication process to complement the new prompt payment provisions. The adjudication process is commenced by one party delivering a written notice of adjudication. Under this new process, an interim binding decision would be made by an "adjudicator" within approximately 6 weeks of delivery of a notice of adjudication (subject to the parties' agreement for an extension). Adjudicators have to be qualified by a designated entity and listed in a adjudicator registry. The adjudicator's determination will be binding on the parties until the matter is determined by a court or by way of arbitration (leaving open the possibility of a different ultimate result). Amounts ordered to be paid by an adjudicator must be paid within 10 days, or will be subject to interest and a contractor or subcontractor may suspend further work until the principal and any interest are paid. The successful party may also apply to the court for enforcement of the adjudicator's determination. This interim adjudication process will only apply to contracts and subcontracts entered into on or after the amendments come into effect.

- extending the deadline to preserve a construction lien from 45 days to 60 days and to perfect a construction lien from 45 days to 90 days.

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- providing that holdbacks may be retained in the form of a letter of credit or bond, in the prescribed forms, instead of in the form of funds.

- allowing condominium owners to remove/vacate liens that attach to the common elements of the building by posting their proportionate share of the common elements as opposed to having to post security for the full value of the lien.

- requiring holdback funds to be paid as soon as the time for registering construction liens has expired or all liens have been satisfied, discharged or otherwise provided for under the Act (unless a notice is published within a particular period of time specifying the amount of the holdback that the payer refuses to pay) and permitting the payment of accrued holdback on an annual or phased basis, where certain conditions are met (including certain contractual provisions).

- allowing the referral of construction lien claims under $25,000 to the Small Claims Court.

- generally bringing the procedure to prosecute a lien action in line with the prosecution of other types of actions under the Rules of Civil Procedure, while maintaining the prescription that lien actions shall be as far as possible summary in nature. For example, leave to issue a third party claim would no longer be required and the provisions regarding carriage of a lien action and settlement meetings would be deleted.

- increasing the amount required to be posted as security for costs to vacate a claim for lien (from the lesser of $50,000 or 25% of the amount claimed in the claim for lien to the lesser of $250,000 or 25% of the amount claimed in the claim for lien).

- providing that contractors in a "public contract" (defined as a contract with the Crown, a municipality or a broader public sector organization) over a threshold contract price are required to provide a labour and material payment bond and a performance bond.

For the most part, the non-substantive (procedural) amendments will come into force on the day the Bill receives Royal Assent. The substantive amendments will come into force on proclamation of the Lieutenant General. The Attorney General has indicated that the legislation should come into effect in 2018.

Over the past 35 years, we have seen many changes in the construction industry, including the emergence of large infrastructure projects and private-public partnerships. At the same time, the number of contractual claims have increased as have issues relating to payment for the labour, services

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and materials supplied by contractors and subcontractors. The proposed legislation is intended to address many of these issues and to provide a revised framework in which these issues can be dealt with by both the parties involved in construction and the Courts.

Consolidated Construction Act as per Footnote 2:
http://cccl.org/Consolidated Construction Act -Bill 142- Version 1.htm or click this link for the MS-Word version: http://cccl.org/Consolidated Construction Act -Bill 142- Version 1.doc

Instructions to Bidders to be assessed objectively – Owner cannot dispense with requirement for a schedule in accepting non-compliant bid.

Maglio Installations Ltd. v. Castlegar (City)
2017 BCSC 870

LUC #143 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
British Columbia
Author:
Mike Demers, Jenkins Marzban Logan LLP

CanLII Reference:

BCSC Decision

British Columbia

The British Columbia Supreme Court recently dealt with a novel defence in a tendering case, wherein the Owner, facing an allegation that it accepted a non-compliant bid, took the position that the milestone dates it set in its instructions to bidders were so general or indefinite that no bidder could have complied with the requirement to provide a proposed construction schedule with the bid.

The Columbia River flows through the City of Castlegar. The City wanted to construct three pools on the banks of the river for public use and recreation. The plaintiff, Maglio, was the lowest compliant bidder. Marwest Industries Ltd., a local Castlegar contractor, was ultimately awarded the contract by the City. Maglio alleged that Marwest's bid was materially non-compliant, and the City's acceptance breached Maglio's Contract A.

The City's invitation to tender required two things:

i) each bidder was required to confirm that it would comply with the milestone dates stipulated by the City; and

ii) each bidder was required to prepare a Gantt chart form of proposed construction schedule indicating each of the major items of work and the time within which the bidder intended to complete those items.

The Court noted that the tender package provided a blank construction schedule that occupied an entire page in an appendix. Instead of providing a proposed schedule, Marwest inserted this into the blank schedule: "To be submitted after final dates are confirmed and optional items are chosen."

The plaintiff's position at trial was straight forward – the tender package required that a completed construction schedule be provided as part of a compliant bid, Marwest failed to do so, the schedule was material and, accordingly, the City breached Contract A when awarding the project to Marwest.

For its part, the City founded its defence to the claim on the discretion clause: "The City reserves the right to reject any or all tenders, to waive defects in any bidder tender documents and to accept any tender or offer which it may consider to be in the best interest of the City." The City relied on two factors that it said brought it within the operation of the discretion clause.

First, it took the position that the proposed schedule it had asked for was not a material element of the bid because the bid document required the bidder to promise and undertake to comply with the milestone dates; since Marwest made that promise by submitting the bid, it satisfied the essential

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element of the scheduling requirement. The second basis, incredibly, was that the City's own milestone dates were defined in such general terms that no bidder could have sensibly completed a construction schedule: "In essence, the defendant submits that the final version of the milestone dates were so imprecise as to render the requirement to provide a PCS impossible to satisfy."

The parties were agreed that the discretion clause only allowed the owner to forgive minor irregularities or non-material defects, the compliance of the bid had to be measured objectively and that measurement had to be as of the time the bid was submitted. The Court confirmed the two part test for material non-compliance:

1. whether the defect was as to an important or essential element of the invitation to tender and,
2. on an objective basis, whether there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select.

Beginning its analysis by noting that the invitation to tender was clear that the bidder had to provide the preliminary construction schedule and that there was nothing optional about that requirement, the Court also noted that the invitation to tender set out in several places that time would be of the essence. In concluding that the provision of the proposed construction schedule was an important and essential element of the bid, the Court noted:

> "A construction schedule is, by definition, a description of what things will be done within what time frame. A defendant who says in its invitation to tender that time is of the essence, cannot in the same breath assert that the time frame for construction is somehow a minor or unimportant detail."

The first stage of the test being satisfied, the Court moved to the second stage. The Court found that it was not clear whether the City actually turned its mind to the schedule deficiency when it made its decision to award the contract to Marwest. Indeed, Marwest's schedule omission was not brought to the attention of the defendant's city councillors when they voted to award the construction contract to Marwest. The City's representative swore an affidavit which offered various reasons for not giving much weight to the proposed construction schedules in the bids that were received. He noted that the tender package used very general terms to set the milestone dates required to be met by the contractor:

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- Bulk earth moving, compaction and sub-surface installation may commence in the Fall, 2013, final dates to be confirmed.
- All Earth works and structures adjacent or on the Columbia River must be completed in the fall of 2013, final dates to be confirmed.
- Substantial completion in the fall/winter 2013, final dates to be confirmed.

Total Performance in the fall/spring 2013, final dates to be confirmed.

The position of the City was that the dates it had set were so general that it was impossible for a bidder to satisfy the City's stated requirement for bidders to provide a proposed construction schedule and that what really mattered was the bidder promised to meet the dates, whatever they might be. The Court found that the evidence of the City's representative could not be given any weight because it was "clearly the product of *post hoc* thinking."

The Court found that the construction schedule was important and the bid selection process of any reasonable owner in the defendant's position would certainly be informed by the bidder's proposed construction schedule, and that there was a substantial likelihood that the provision of a proposed construction schedule was, on an objective basis, an element that would have been a significant factor in an owner's deliberation on which bid to accept. The Court concluded:

> "It is of no help to the defendant that, as I find that it did, it simply did not turn its mind to Marwest's complete failure to provide a PCS and that it now offers subjective evidence in support of its decision."

The significance of the decision is re-affirmation that the owner's conduct will be judged on an objective basis despite the self-serving subjective evidence that an owner may lead when its decision is challenged. It also provides a useful practice point: a defence based on "impossibility of compliance" is probably not going to succeed against a compliant bidder!

CLAIMS MADE IN WRITING AND DEFERENCE TO ARBITRATORS

Ledore Investments Limited (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd., 2017 ONCA 518

LUC #143 [2017]

Primary Topic:
I General
Secondary Topic:
III Building Contract
Jurisdiction:
Ontario
Author:
Markus Rotterdam, Director of Research, Glaholt LLP, Toronto

CanLII Reference:

Court of Appeal

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In this recent Ontario Court of Appeal decision, the respondent Ellis-Don was the general contractor and Ledore was a subcontractor supplying steel to a major bridge project in southwestern Ontario. The project was delayed, and Ellis-Don wrote a letter to Ledore stating that:

> In addition to impacting the schedule, Ross Steel also forced Ellis-Don to expend substantial monies to accelerate the work in an effort to recover the schedule. We are currently assessing the financial impact that Ross Steel's slippages have had on Ellis-Don and we intend to recover the costs from you.

The contract contained the following clause:

> 15.1 As of the date of the final certificate for payment of the prime contract, the contractor expressly waives and releases the subcontractor from all claims against the subcontractor, including without limitation those that might arise from the negligence or breach of this agreement by the subcontractor, except one or more of the following:
>
> > (a) **those made in writing prior to the date of the final certificate for payment of the prime contract and still unsettled**; [Emphasis added.]

The question submitted to the arbitrator was whether the letter quoted above satisfied the requirement of clause 15.1(a), i.e. whether Ellis-Don had made a claim in writing to exclude the delay claim from the general application of clause 15.1. The arbitrator held that it had not, finding that while Ellis-Don might have contemplated a delay claim, the intention to claim was not the same as a claim. In so finding, the arbitrator distinguished case law such as *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (C.A.), a leading decision on the sufficiency of notices of claim. The arbitrator held that clause 15.1 did not require a notice of claim, but a claim made in writing. That claim had not been made and, as a result, Ellis-Don had waived its right to recover. Ellis-Don's appeal from the arbitral decision was allowed by the Ontario Superior Court of Justice, where J.N. Morissette J. held as follows:

> 18 *Doyle*, provides legal authority for the general proposition that provisions requiring claims to be made in writing should be treated as provisions requiring written notice of claims, contrary to the approach taken by the arbitrator.

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Primary Topic:
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Court of Appeal

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Method Specification Contract Absolves Contractor From Consequences of Road Failure

> 19 In this Court's view, the arbitrator erred in finding that 'claims made in writing" should not be treated as provisions requiring written notice of a claim.
>
> 20 As indicated above, not only was there legal authority for that general proposition, but also authority suggesting an approach precisely opposite to that taken by the arbitrator. In doing so, the arbitrator misapplied the general principles and considerations established by *Doyle* to reach his conclusion that Article 15.1 (a) had been satisfied but instead fashioned and applied his own test in that regard, contrary to the applied legal principles established.
>
> 21 For all of these reasons, the arbitrator's decision on the ground of appeal on which leave was granted, is set aside. Ellis-Don's letters and in particular the letter of January 18, 1999, did constitute an "unsettled claim made in writing" satisfying the provisions of Article 15.1 of the parties' agreement.

A further appeal to the Court of Appeal was allowed and the arbitrator's decision reinstated.

To begin with, the Ontario Court of Appeal once again stressed that deference is owed by courts when reviewing arbitral awards, reaffirming its two 2016 decisions in *Popack v Lipszyc* ("*Popack*") and *Ottawa (City) v Coliseum Inc.* ("*Coliseum*") to the same effect. The court held that the test for reasonableness, with respect to both tribunal and arbitral decisions, is a highly deferential one, encompassed in the still leading case, *Dunsmuir v. New Brunswick*, 2008 SCC 9. A decision by a tribunal or arbitrator will not be set aside as long as it falls within a range of possible, acceptable outcomes which are defensible in respect of the fact and law[1].

In applying that standard, the court held that the arbitrator's interpretation of clause 15.1 was "eminently reasonable". With regard to the application of *Doyle*, not only was the arbitrator's decision not inconsistent with it, but the dichotomy he applied between the "intention to make a claim" and "an actual claim" was held to be similar to the distinction in *Doyle* between mere grumblings in meeting minutes and the making of an actual claim.

The arbitrator's decision was therefore reinstated.

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[1] Editor's note –After this case was released and this comment was written, the S.C.C. released its decision in *Teal Cedar Products Ltd. V British Columbia 2017 SCC 32* where the Court again discussed the reasonableness standard of review for commercial arbitration awards. Anyone considering the question will want to consider the S.C.C. decision as the latest word on the subject.

Court of Appeal Affirms Onus on Breach of Trust Defendants

Airex Inc.
v. Ben Air Systems Inc.
2017 ONCA 390

LUC #143 [2017]

Primary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Brendan D. Bowles, Glaholt LLP

CanLII Reference:

Court of Appeal

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The Ontario Court of Appeal has recently affirmed the power of the *Construction Lien Act* trust remedy, and the inherent risks to which people who run construction businesses are exposed to when suppliers and subcontractors are unpaid. It is well known that section 13 of the Ontario *Construction Lien Act* provides a statutory basis for "piercing the corporate veil" in breach of trust cases. Imposition of personal liability is not automatic, it must be established that the individual:

> (a) is either an officer and director of the corporation or a person who had effective control of a corporation or its activities; and,
>
> (b) assented to or acquiesced in conduct that he or she reasonably ought to know amounts to a breach of trust by the corporation in the circumstances.

Note that liability under this section is vicarious; individual defendants are liable for a breach of trust committed by a corporation, not in their own right. The focus of the inquiry therefore is always on the corporation's conduct, and the quality of the evidence on the corporation's handling of trust funds. Where the individual defendants are officers and directors of a corporation, and therefore *prima facie* at risk of liability under this section, the court must first determine whether the corporation has breached trust at all. The plaintiff cannot simply gloss over this important evidentiary burden. This was affirmed by the Ontario Court of Appeal in *Belmont Concrete Finishing Co. Limited v Marshall, 2012 ONCA 586*[1].

However, the case law has established over the years that the burden on the plaintiff to demonstrate a breach of trust by the corporation is not terribly onerous. In *Airex Inc. v. Ben Air Systems Inc., 2017 ONCA 390*, the Ontario Court of Appeal reviewed the relevant authorities[2] and affirmed that the plaintiff need only show that it:

a) was a supplier of services or materials on the project in question;

b) supplied services and materials to the defendant on that project; and,

c) the defendant received monies on account of the plaintiff's supply on the project.

Belmont reminded us that the plaintiff cannot skip past these minimal requirements, but as a practical matter it is not difficult to imagine that most

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[1] This case was commented on in Legal Update 104, issued January 30, 2012.

[2] *St. Mary's Cement Corp. v. Construc Ltd.* (1997), 32 O.R. (3d) 595 (Gen.Div.) at pp. 600-601; *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* 2010 ONCA 198,101 O.R. 3d 285, at paras. 83-84

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plaintiffs in a typical case will be able to clear these evidentiary hurdles. Specifically, the *Construction Lien Act* provides simple, written pre-trial discovery rights in the form of section 39 demands information requiring an owner or lender is required to disclose, within three weeks' time of receipt of such a demand, all amounts disbursed to the trustee on account of the project. Simply put, the plaintiff need not rely on the cooperation of the defaulting payer to provide the information they need to meet their minimal trust onus, it is readily available elsewhere.

Once a plaintiff armed with section 39 information clears its minimal evidentiary burden, the onus then shifts in a fundamental way of particular concern for officers and directors who are by definition at personal risk of such claims. Such defendants must lead evidence in the face of breach of trust that the trust monies the corporation received were either retained or disbursed strictly in accordance with the requirements of Part II of the *Construction Lien Act*, or risk losing. In *Airex*, the Court of Appeal was unimpressed with quality of evidence led by defence counsel on the underlying summary judgment motion which was filed late and which the Court characterized as contradictory and lacking in documentary support. The insufficient evidence led by the defendants in *Airex* was fatal given well established authority that the defendant was required to prove that trust monies had been properly applied.

Notably, *Airex* was decided at first instance on a summary judgment motion. Judgment was upheld against both the corporation and the section 13 defendants. *Airex* therefore serves as a cautionary tale that the financial risks to people running a construction company are real. Where breach of trust is apparent the onus shifts to the defendants, including officers and directors, to "lead trump or risk losing" by leading evidence which shows that trust funds were handled in accordance with the requirements of Part II. *Airex* reminds us that where the plaintiff can meet its minimal evidentiary burden, defendants who are unable to produce accounting records that demonstrate compliance with the corporation's trust obligations are almost certain to be found liable. The lessons for counsel are clear. Plaintiffs' counsel should make early section 39 demands for information and if the minimal evidentiary hurdle can be crossed, move early for summary judgment, especially in this post-*Hryniak* world. In the face of such an attack, defence counsel must be mindful of their onus put their client's best foot forward to show no improper use of the trust funds.

Can a Surety Intervene in a Lien Action if the Obligee Fails to Defend a Counterclaim?

Stratum Projects Alberta Inc. v. Aman Building Corporation
2017 ABQB 351

LUC #143 [2017]

Primary Topic:
VIII Bonds and Sureties
Secondary Topic:
IX Construction and Builders' Liens
Jurisdiction:
Alberta
Authors:
Dirk Laudan and Kristen Withers
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CanLII References:

Queen's Bench

ALBERTA

In *Stratum Projects Alberta Inc. v. Aman Building Corporation*, the Alberta Court of Queen's Bench ruled on the circumstances in which a lien bond surety can intervene in a lien action that a contractor, which posted the bond, has failed to defend.

Stratum, the lien claimant, had performed work as a subcontractor on a project in Canmore. Stratum liened for unpaid accounts, but the general contractor counterclaimed for deficiencies and delay. The general contractor posted security in court by way of a lien bond, but then went bankrupt. The trustee would not defend. The surety's lien bond was therefore exposed to a potential claim, without a party to the litigation providing an active defence.

The surety therefore applied to defend the claim as an intervenor. Master Schlosser determined that the surety did not meet the test for an intervenor under the Alberta rules or at common law, but he went on to "look east" (in the court's words) and consider Ontario jurisprudence that allowed a person to intervene as an "added party". Section 53(d) of the *Builders' Lien Act* (Alberta) empowers the court to "make any further order or direction or considers desirable" in builders lien proceeding. Applying that broad wording, the court allowed the surety to step into the shoes of the contractor to defend the lien claim, on the basis that the present state of construction law demanded that the surety be given such a voice, and because the surety's participation would assist the court in coming to a fair result. In coming to this conclusion, the court followed Ontario cases on the point ("I am persuaded that Ontario has shown us the way forward", at para 33).

The Court did, however, limit the Surety to promoting the general contractor's counterclaim only to the extent that the counterclaim provided a set-off. The Court required the surety to assume direct liability for any judgment against the general contractor (rather than awaiting the registrar's call on the bond, as required under the terms of the bond). As a further condition of defending the claim, the surety could be liable for court costs, not limited to the penal sum of the bond.

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